

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



LAS VIRGENES EDUCATORS ASSOCIATION,

Charging Party,

v.

LAS VIRGENES UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4228-E

PERB Decision No. 1605

February 25, 2004

Appearances: Rothner, Segall & Greenstone by Glenn Rothner, Attorney, for Las Virgenes Educators Association; Parham & Rajcic by Jackson E. Parham, Attorney, for Las Virgenes Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (Board) on exceptions filed by the Las Virgenes Unified School District (District) and cross-exceptions filed by the Las Virgenes Educators Association (Association) to the proposed decision (attached) of an administrative law judge (ALJ). The charge alleged that the District violated the Educational Employment Relations Act (EERA)¹ by transferring Lee Shagin (Shagin), an Association member, because of his protected activities. The ALJ concluded that Shagin's transfer was not based on protected activity and dismissed the complaint and underlying charge.

The Board has reviewed the entire record, including the proposed decision, the District's exceptions and the Association's cross-exceptions. The Board finds the ALJ's

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

findings of fact to be free of prejudicial error and adopts them as the findings of the Board itself. The Board declines to adopt the ALJ's conclusions of law. Instead, the Board dismisses the complaint and underlying charge solely on the grounds discussed below.

DISCUSSION

To demonstrate a violation of EERA section 3543.5(a)², 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 employee because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.) Once the charging party has established its prima facie case, the burden then shifts to the employer to show that it would have taken the adverse action even in the absence of the employee's protected activity. (Novato; Wright Line (1980) 251 NLRB 1083 [105 LRRM 1169].)

Here, the Board finds that even assuming the Association has established a prima facie case of retaliation, the District has met its burden of establishing an affirmative defense that it

²EERA section 3543.5 states, in pertinent part:

It is 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.

would have transferred Shagin absent any protected activity. District Superintendent, John F. Fitzpatrick (Fitzpatrick) provided testimony about an extensive history of problems caused by Shagin's activities which were unrelated to his role as an Association site representation. The ALJ credited Fitzpatrick's testimony that Shagin's transfer resulted from his unprotected activities. The Board has no reason to disturb those findings. Thus, the Board finds that the District would have transferred Shagin even absent any protected activity. Accordingly, the Board dismisses the complaint for this reason only.

ORDER

The unfair practice charge in Case No. LA-CE-4228-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Baker and Whitehead joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



LAS VIRGENES EDUCATORS ASSOCIATION,

Charging Party,

v.

LAS VIRGENES UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-4228-E

PROPOSED DECISION
(3/8/02)

Appearances: Rothner, Segall & Greenstone, by Glenn Rothner, Attorney, for Las Virgenes Educators Association; Parham & Rajcic, by Jackson E. Parham, Attorney, and McCune & Harber, by Dana McCune, Attorney, for Las Virgenes Unified School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an educators association alleges that a school district retaliated against an association site representative, Lee Shagin (Shagin), by transferring him to another school site. The district denies any retaliation.

The Las Virgenes Educators Association (Association) filed an unfair practice charge against the Las Virgenes Unified School District (District) on September 26, 2000. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint on October 30, 2000, to which the District filed an answer on November 21, 2000.

On January 17, 2001, PERB held an informal settlement conference, which was partially successful in settling the case. The PERB complaint originally alleged that the District retaliated against two site representatives, Shagin and Diane McEvoy (McEvoy), by transferring both of them away from Calabasas High School (CHS). At the informal

conference, the Association and the District entered into a settlement agreement providing that McEvoy would return to CHS. The agreement also provided in part:

4. The Association withdraws with prejudice any allegations concerning Ms. McEvoy contained in the Unfair Practice Charge and Complaint No. LA-CE-4228-E. The Association withdraws the grievance concerning Ms. McEvoy with prejudice.

5. Nothing herein shall be considered as an admission of any breach of contract, violation of law or any other unlawful conduct by the District. Further, this Settlement Agreement shall not be considered as a concession by either party as to the merits of the PERB charge referenced herein.

6. This Settlement Agreement represents a complete and final settlement of all disputes concerning Ms. McEvoy arising out of the above-entitled action.

PERB gave formal notice on January 18, 2001, that the allegations concerning McEvoy had been withdrawn.

PERB held a formal hearing on the remaining allegations (concerning Shagin) on May 21-24 and June 4-5, 2001. With the receipt of the final post-hearing brief on September 19, 2001, the case was submitted for decision.

FINDINGS OF FACT

The District is a public school employer under the Educational Employment Relations Act (EERA).¹ The Association is an employee organization and exclusive representative under EERA, and Shagin is an employee under EERA. Until his allegedly retaliatory transfer in August 2000, Shagin had taught American Government and European History at CHS for over 20 years.

¹ EERA is codified at Government Code section 3540 and following.

On the CHS campus, Shagin had been a big man in every sense of the word. He had been a popular teacher and an effective Association activist. He had tended to dominate faculty meetings, and he and his friends (including McEvoy and some other Association activists) had tended to dominate discussions in the faculty lounge.

Unfortunately, Shagin had also been perceived as a bully, as someone who used his size, status, eloquence and aggressiveness to attack and intimidate others. Administrators believed that other teachers remained silent at faculty meetings rather than dare to disagree with Shagin. Some teachers avoided the faculty lounge in order to avoid a negative atmosphere that Shagin seemed to generate. Two principals in two years left CHS at least in part because of that same negative atmosphere.

Article 5 (Grievances) of the most recent collective bargaining agreement between the Association and the District states in relevant part, at section 5.4.9:

No reprisals of any kind shall be taken by the District or the Association against the aggrieved person or other participant in the grievance procedure by reasons of such participation or non-participation.

The agreement does not otherwise explicitly prohibit retaliation. Article 8 (Transfers) states in relevant part:

8.3 District Initiated Transfer

8.3.1 Principal or Supervisor Initiated Transfer

8.3.1.1 A principal or supervisor may request the transfer of an employee for performance reasons by submitting a written request to the personnel office [emphasis added].

8.3.1.2 Prior to making such request for transfer, the perceived performance problem will be specifically identified in a timely

manner; the principal's or supervisor's recommendations for improvement and the assistance in recommendation [sic] shall be given. The employee shall be given an opportunity to improve.

8.3.2 Transfers due to changes in enrollment, program changes, school closures and similar occasions.

8.3.2.1 Whenever changes in enrollment, program, school closure and/or similar occurrences necessitate employee transfers between schools, the criteria of 8.3.2.2 shall apply.

8.3.2.2 Criteria to be applied: . . .

8.3.3 District Office Initiated Transfer:

8.3.3.1 The District may transfer no more than 2% of the employees in any given year for reasons other than those contained in 8.3.1 and 8.3.2 [emphasis added]. In no event shall a District Office initiated transfer be made for arbitrary or capricious reasons.

The agreement does not define the term "for performance reasons" as used in section 8.3.1, but the District's performance evaluation form for teachers includes as an item for evaluation, "Communications with students, parents and other personnel in a professional and effective manner." Also, the District's job description for teachers includes as specific duties and responsibilities, "Demonstrates and promotes constructive relationships with all staff members" and "with parents and community members," and, "Demonstrates appropriate language and voice usage [sic]."

The PERB complaint alleges that "[d]uring the 2000-2001 school year" Shagin served as an Association site representative at CHS. The reference to "2000-2001" is clearly in error, however, as the relevant school year preceding Shagin's transfer was actually 1999-2000.

By his own account, Shagin had served as a site representative at CHS since the early 1980's. During the 1999-2000 school year, there were five site representatives at CHS: three (including Shagin) were elected specifically as site representatives, and two (including McEvoy) were elected as Association officers but also served as site representatives. All five representatives were identified in the District's 1999-2000 employee directory.

The Association asserts that Shagin's involvement as a site representative increased during the 1998-1999 and 1999-2000 school years, but it bases that assertion solely on Shagin's own rather vague testimony. Shagin testified, "More and more members of the faculty seemed to be coming to me to get advice," but he gave no specifics and did not indicate how the District would be aware of these advisory activities. Shagin also testified that "a number of people were asking me to sit in on conferences with them, if they met with administrators," but again he gave no specifics, not even as to the identities of the administrators involved. There is no evidence Shagin ever participated in the grievance process in 1998-1999 or 1999-2000.

Most of the specific activity attributed to Shagin as a site representative apparently occurred prior to the 1999-2000 school year. Shagin testified he played a leading role in a lengthy dispute about summer school pay, but it appears the issue was successfully resolved before the start of summer school in 1998. Shagin further testified he was actively involved in a dispute about taking attendance, but it appears this issue was also resolved during the 1997-1998 school year.

Shagin also testified he served on the CHS building committee, where he successfully advocated for more bathrooms, but he could not remember which year that was. He was appointed to the committee by a principal whose last year at CHS was 1997-1998. Shagin

testified that on the committee his “concern was, as a site rep, to address what would be potential problems that members would raise and had voiced to me about working conditions, health, safety and so on.” It is not clear, however, that Shagin’s status as site representative was the basis for his service on the committee, to which the principal appointed one classified employee, two teachers, one counselor, the plant manager, two site administrators, one parent and one student.

There is one issue with which Shagin was unquestionably involved during the 1999-2000 school year: teacher notification of violent student behavior. Shagin first raised the issue with CHS Assistant Principal Steve Rosentsweig, who told Shagin he believed that another assistant principal, Joseph Guidetti (Guidetti), was in charge of such notification. Shagin did not then raise the issue with Guidetti, however; instead he drafted and sent the following letter to CHS Principal Susan Allen (Allen):

Dear Susan:

We are writing this letter in our capacity as Las Virgenes Educators Association building/site representatives. Please consider it a formal communication.

On behalf of the teachers at CHS, we are again requesting that the administrator(s) responsible for notifying teachers about any violent students who are placed in our classes FULFILL THE REQUIREMENTS OF THE LAW and inform us, in writing, as soon as possible.

We have been told, by Mr. Rosentsweig, that Mr. Guidetti has the responsibility of notifying the teachers. We are formally informing you that, as far as we know, not once in the last year and a half (Mr. Guidetti’s tenure at CHS) has any teacher been informed of a SINGLE VIOLENT STUDENT in his classes. This is a direct violation of law and we urge you to intervene and direct Mr. Guidetti to give this task the highest priority. SAFETY COMES FIRST!!! Other matters that Mr. Guidetti may be involved in during the workday, whether job related or of a

personal nature (like lifting weights, running laps, etc.) should be suspended until this critically important task is finished.

Very Truly Yours,

Julie Gardner
Tom Johnsen
Lee Shagin

LVEA Building Representatives

xc: Las Virgenes Educators Association
John Fitzpatrick, Superintendent
Donald Zimring, Deputy Superintendent
Debbie Coleman, Assistant Superintendent
Duffy Clark, Assistant Superintendent
LVUSD Board of Trustees

Allen received the letter on March 10, 2000. Presumably, the superintendents and the District Board received it at about the same time. It does not appear that Shagin sent Guidetti a copy.

At the hearing, Principal Allen testified:

I was very concerned about what seemed to me a non sequitur as part of the letter inserted into it, that attacked Mr. Guidetti, that gave false information about Mr. Guidetti, and it seemed to have really nothing to do with the relevancy of the issue that was -- the legitimate issue that was being addressed in the letter.

Allen testified she was specifically concerned about the implicit accusation that Guidetti was “working out on school time.” She knew the accusation was false, but she believed it would undermine Guidetti’s effectiveness as an assistant principal.

Allen responded to the letter with a memo to the three Association representatives. The memo began:

I am writing in response to the undated letter that I received from you on March 10, 2000. As the CHS representatives of the LVEA, I appreciate your concern that teachers be notified about any violent student[s] who are in their classes.

The memo then responded at some length to the notification concern. It concluded:

There is another section of your letter that I believe is misleading. You accuse Mr. Guidetti of taking time during his work day to take care of matters of a “personal nature (like lifting weights, running laps, etc.)” Like all administrators on this campus, Mr. Guidetti puts in a tremendous number of hours. He frequently works a 65-70 hour week. I encourage all administrators, including myself, to find time to maintain their health and well being. The fact that Mr. Guidetti stays on our campus to do a brief workout, after the normal school day, and before he does evening supervision, I believe is admirable. I only wish I had as much self-discipline.

Once again, I would like to reiterate my invitation to you to discuss any concerns that you have regarding our school. Like you, I strive to make CHS a safe, supportive place for both students and staff.

As Shagin had done with his letter, Allen sent her memo to the superintendents and the District Board.

Allen and Guidetti met informally with Site Representative Julie Gardner (Gardner) about the letter. According to Allen, Gardner said several things in the meeting:

. . . First of all, that she didn't know that the letter was going to the board, that she thought the letter was just coming to me. She said that she had edited the version of the letter and crossed out the statements about Mr. Guidetti, that there had originally been even more statements about Mr. Guidetti in it. She crossed out all the statements about Mr. Guidetti. And she wasn't aware that it had been sent to the board and the Superintendent with those statements in it.

Gardner sent Allen a memo about the meeting, stating in part:

You started by saying that you were both shocked to have received this letter since you have always supported a policy of following proper channels (i.e. parents talk to teachers first before heading to administration.) This is, by the way, a policy I support and am grateful for. In response, I explained that Tom Johnsen, Lee Shagin and I had felt it necessary to put our request in writing since, as it had been told to me, administration had been asked three times to provide teacher notification, with no

response. At this time, both you and Mr. Guidetti said that you had never been approached with this issue. Believing I was in the wrong, I immediately felt remorse for what appeared to be a breach [sic] in proper channeling and admitted that I had been acting on information available to me as a teacher who is only on campus part-time.

You then explained that you were more concerned with statements in the letter that you felt were inaccurate personal attacks against Mr. Guidetti. I admitted that I had no personal knowledge of Mr. Guidetti ever lifting weights or running during school hours and that I, frankly, did not care if he had. At this point, both you and Mr. Guidetti adamantly denied that he had ever done this. I then told you that it had been my belief that references addressing Mr. Guidetti weakened the purpose of the letter and, for this reason, I had edited out these parenthetical allusions from the original letter. It was my desire to emphasize that I had no hidden agenda and to perhaps make amends for my perceived hastiness in sanctioning the letter. I did not intend my comments to divide me from the other two representatives or to undermine my sincere desire to gain teacher notification. After the meeting ended abruptly at the start of third period, I mentioned to you that I was unaware that so many people were going to receive this letter and sincerely hoped that no one perceived my intentions to be other than sincere.

Allen also met informally with Site Representative Tom Johnsen (Johnsen), who also told her he had no idea the letter was going to the District Board.

In his testimony, Shagin did not deny that Gardner had edited a draft of the letter and crossed out all references to Guidetti. He did not explain why he sent the letter in Gardner's name with the accusation against Guidetti still included. He also did not testify that he had any actual reason to believe that the accusation against Guidetti was true or relevant. Thus, although there is no reason to doubt the sincerity of Gardner and Johnsen in raising the notification issue, it appears that Shagin had his own independent agenda: to attack Guidetti.

This was not the first incident of hostility between Shagin and Guidetti. In fact, the first real meeting between the two, after Guidetti came to CHS in the fall of 1998, turned into a

confrontation that was later investigated by an assistant superintendent. The investigation summary stated in part:

On November 14, 1998, Assistant Principal Mr. Guidetti reported in writing that Lee Shagin, a social science teacher at Calabasas High School, interrupted a student conference in his office the prior day at about 12:00 p.m. I initiated an investigation on the reported incident which included interviewing and receiving the statements of witnesses. The student in the conference reported that Mr. Shagin did interrupt the conference, complained students were stealing from his box, and was cussing i.e. using words like "freakin," "crap," and "damn." She further reported that the Assistant Principal was silent until the outburst stopped and then followed Mr. Shagin out of the room.

Donna Welti reported that Mr. Shagin proceeded into the office when Mr. Guidetti was in the middle of the student conference without hesitating. She characterized Mr. Shagin's volume as "shouting." She further related that Mr. Shagin complained about students and parents in the work room and insisted that the office staff should do "their own work." She reports that when Mr. Guidetti followed Mr. Shagin out of the office that Mr. Shagin told him that he didn't want to discuss the incident. She reported that there were students in the office during the interchange but she couldn't remember who.

Shirl Humes reported that Mr. Shagin came to her desk and alleged that "Kenny" had taken his mail again. She also reported that later Mr. Shagin said that he didn't want to talk about "it" and said that he was "tired of this shit." She reported that when Mr. Shagin entered the work room he called Mr. Guidetti a "little twit."

Ellen Blackmun was interviewed because she was making copies in the work room and saw the aftermath of the office incident. She reported that she heard loud voices and then observed Mr. Shagin walking away from Mr. Guidetti. She believed Mr. Guidetti said that Mr. Shagin wasn't to walk away from him and Mr. Shagin responded, "Don't point your finger at me." She didn't hear either swear at the other but said that Mr. Guidetti may have under his breath when he walked away. She offered that Shirl Humes may have overheard the incident. Ms. Blackmun is a second year teacher and while being in a position to hear the exchange appeared to have little recall for specific words.

When asked of the incident, Mr. Shagin denied that he had shouted although he admitted to having a loud voice which he must make an effort to control. He admitted to wanting to emphasize his words because of the urgency of the security problem with the teacher mail boxes. Mr. Shagin denied having used words such as "shit" or "damn" or "freaking," but admitted to using "crap." He denied barging into the office and said he only spoke after Mr. Guidetti acknowledged that he was standing in the doorway with "Yes?" He says he only used "shit" in response to Mr. Guidetti's use of "shit." He says that he was in the office in his capacity as a union representative.

Based upon the multiple interviews, the admissions of Mr. Shagin, and written statements which I have received on the incident in Mr. Guidetti's office and its aftermath, I have concluded that Mr. Shagin did barge into Mr. Guidetti's office and interrupted the student conference. He shouted. He characterized students with disparaging comments such as "damn students,["] "freakin' student aides." He insisted that office workers should do their work and students and parents be kept out of the work area. He slammed a door between attendance and the work room and refused to respond to Mr. Guidetti's request to discuss the incident. He reacted to Mr. Guidetti's directive not to interrupt a student conference again by telling Mr. Guidetti not to shake his finger at him. He either said, "I'm not going to put up with this shit or this crap." He admits to using "crap."
[References to attachments omitted.]

In a written response, Shagin rejected the findings of the investigation as "inaccurate/biased/flawed," but I find that the evidence at hearing supporting those findings was more credible than Shagin's own testimony about the events.²

As a result of the investigation (which also covered a confrontation between Shagin and a new female teacher whose political views Shagin found "sexist"), Shagin received a letter of reprimand and notice of unprofessional conduct, which instructed him in part:

Do not insult, criticize, or degrade other staff members in public or in private settings where there is a reasonable likelihood that your comments will be reported to that staff member.

² On this point, I find the District's Exhibit S to be relevant, to the extent that the after-acquired statements contained in that exhibit corroborate other evidence.

Shagin responded in part, "I am COMPLETELY UNABLE TO UNDERSTAND the instructions " in the letter of reprimand.

Shagin apparently did not follow the instructions either. Guidetti testified:

Students and I had a very close relationship, and often on a weekly basis they would ask me questions like, you know, what did you do to Mr. Shagin, boy, he really hates you. Things of that nature. He was talking about you in class. He didn't mention your name today, but he showed a video of me wrestling another student and he played it backwards and forwards and backwards and forwards, things like that.

Shagin denied he had any control over the wrestling video, which he said was broadcast on an internal television system, but he did not deny making his hostility toward Guidetti apparent to his students.

This was not the first reprimand Shagin had received for intemperate conduct. In January 1998 he received a memo stating in part:

This memo will serve as a reprimand for your conduct during the passing period from nutrition to period three on December 12, 1997. This reprimand is based on witness reports, Mr. Misel's written summary, and your written account.

The following is a summary of my understanding of the incident: The ASB Communication Commissioners were playing music during the nutrition period over the ASB sound system in the lower quad area between the gym and S building. The Commissioner's [sic] were previously directed by Activity Director Giblin and Assistant Principal Misel to stop the music during the passing period. The passing bell rang and the music continued. The Activity Directors were leaving the area and no administrator was in the immediate area at this time. You felt many of the students did not hear the bell or chose to stay and listen to the music. From the perch area at the end of H building you signaled to the Commissioners to turn off the music. The music continued playing at which point you walked down the ramp and through the quad to the sound system.

When you reached the sound system you asked the student to turn the music off. You indicate you said “turn it off” other witnesses reported you said “turn this shit off.” At this point you felt your direction was not followed by the student and attempted to turn off the sound system by disconnecting the cord. You pulled the cord/wire hard enough to disconnect a metal plate being held in place by four metal screws.

One of the Commissioners alleges you shoved him against the wall. He is the only person alleging you shoved him. Other witnesses, including the only adult witness, contradict his version of the incident. While it is possible some contact between you and the student may have occurred in your attempt to turn off the system, any contact, if it occurred, was not intentional, violent, or sufficient to have created injury or harm to the individual.

I do not find fault with your intention to get students moving to third period. However your actions in turning off the sound system were not those expected or required of a teacher. I do not know why you felt it necessary to disable the equipment the way you did, but such conduct was unacceptable.

In a written response, Shagin accepted this summary of the events as a “reasonably accurate account,” but he still asserted, “In different circumstances my actions would bring PRAISE not a reprimand.”

The PERB complaint also alleges:

On or about August 16, 2000, Respondent [the District], acting through its agent, Superintendent John F. Fitzpatrick, Ed.D., took adverse action against Mr. Shagin by involuntarily transferring him from his position at Calabasas High School to Arthur E. Wright Middle School.

There is no dispute that the District did take action to transfer Shagin on that date. A letter to Shagin signed by Superintendent John F. Fitzpatrick (Fitzpatrick) stated in part:

This is to serve as formal notice that, in accordance with the Las Virgenes Unified School District/Las Virgenes Educators Association Contract Article 8.3.3 (District Office Initiated Transfer), you are being transferred from your position at Calabasas High School to Arthur E. Wright Middle School.

The letter gave no reasons for the transfer. A similar letter was sent to McEvoy, transferring her to Agoura High School.

There is a dispute about whether the action against Shagin was actually adverse. The District points out that Shagin's new middle school assignment had a shorter teaching day and fewer adjunct duties. In its post-hearing brief, the Association argues:

Shagin was transferred to Arthur E. Wright Middle School, despite the fact that in his twenty-seven years of teaching, he has never held a position other than substitute at a middle school, and that was almost 30 years ago. Neither of the subjects Shagin has taught – American government and European history – is offered at the middle school level. [Transcript citations omitted.]

Shagin's actual testimony on the last point was that European History at the middle school level "is an entirely different period of history." Shagin filed a grievance seeking "damages" for the transfer, but neither in the grievance nor at hearing did he specify a basis for damages.

There is also a dispute about why Fitzpatrick acted to transfer Shagin. The PERB complaint alleges it was because of Shagin's recent activities as a site representative.³ The District denies the allegation.

Fitzpatrick testified at hearing about why he acted to transfer Shagin. He denied that Shagin's Association activities were a factor. He explained his decision as follows:

Well, I think that there was a negative pattern of environment at the high school. I couldn't keep a Principal at the school. After Mr. Sutton had left we moved Christianson over there, who was probably the best Principal we had in the school district, and at the end of the time he left. He said basically he'd rather go to Westlake High School as a Spanish teacher and take a \$50,000 cut in pay rather than stay there and be harassed by Mr. Shagin.

³ As noted above, the complaint erroneously refers to the 2000-2001 school year, when it should refer to the 1999-2000 school year.

So he was going to quit. I luckily had a position at the district where I was able to move him to that position. After that, Susan Allen, who was Assistant Principal, who also was an outstanding administrator, was put into the principalship.

At the end of her term at that school she had decided that she was going to leave basically because of Mr. Shagin and his intimidation and all the problems that they have had at the school and all the staff issues, kind of an environment, a totally negative environment at the school, people being harassed by Mr. Shagin, different teachers. And ultimately she decided to leave and she ultimately got a position with L. A. Unified and she left.

And after looking at all of that, talking with the cabinet, reviewing issues with [Assistant Superintendent] Mr. Hanke, taking a look at personnel files, I ultimately made a decision that it was in the best interests of Calabasas High School to improve the negative environment. Sometimes you just have a bad mix of teachers and so I felt like we needed to move Mr. Shagin out of that school.

I found Fitzpatrick to be a credible witness.

In its post-hearing brief, the Association points out that some of Fitzpatrick's testimony was inconsistent with statements previously made by the District. On cross-examination, Fitzpatrick testified that the transfer was motivated by Shagin's unprofessional performance outside the classroom. This was inconsistent with part of the District's response to Shagin's grievance, which denied that Shagin was transferred for performance reasons.

I resolve this inconsistency in favor of Fitzpatrick's sworn testimony. The District's grievance response was not made under oath. Had that response admitted that the transfer was for performance reasons, the District would have had to grant the grievance, because sections 8.3.3.1 and 8.3.1.1 of the collective bargaining agreement, taken together, precluded a "District Office Initiated Transfer" for "performance reasons." The District was obviously unwilling to grant the grievance. It is to Fitzpatrick's credit that he was willing at the hearing to contradict the District's stated reasons for denying the grievance.

The Association argues at some length that Fitzpatrick's decision was tainted by two messages he received from Principal Allen. The first message, dated June 16, 2000, stated:

I am sorry to inform you that I am considering leaving Calabasas High School. I felt it was important to notify you now, even though my future plans are still uncertain, so that we can plan for an effective transition, should I, indeed, decide to resign. The rationale that has brought me to this crossroad stems from my concern over the following issue:

I feel handicapped in providing effective leadership at Calabasas High School and in making changes that would move us forward in meeting district goals and improving student achievement. My ability to provide the type of leadership that Calabasas High School needs -- whether it is in the areas of course offerings, school safety, or personnel -- is limited, in large measure by the incessant, undermining of my authority by a veteran teacher, Lee Shagin. The negativity with which Mr. Shagin attacks and constantly questions my credibility, to both students and staff members creates an antagonistic work environment that has impaired my ability to perform professionally and has had a detrimental affect [sic] on me personally.

In addition, Mr. Shagin has harassed one of my Assistant Principals, J. Guidetti, which has weakened my administrative team at the school. I believe Mr. Shagin's attacks on this excellent administrator are directly related to incidents last year when Mr. Guidetti challenged Mr. Shagin for inappropriate behavior. Mr. Guidetti has recently applied for an administrative position in a neighboring district, because of Mr. Shagin's ongoing harassment. I have attached a copy of a memo he recently sent to me.

Mr. Shagin's actions have contributed to creating a detrimental working relationship between us. Based on his constant criticism of me, my administrators, or the environment that I am charged with supervising, I find that I hesitate to interact with him in a normal manner. Even when I affirmed his teaching success in his evaluation, but provided him with feedback to improve in two areas, his reaction was to attack me and deny my credentials for evaluating him.

I cannot continue to work with Mr. Shagin. His actions, I believe have impaired his working relationship with me and adversely

affected the best interests of the school. I am asking you for assistance in resolving this situation.

Allen's second message, dated June 30, 2000, stated:

It is with regret that I am submitting my resignation as principal of Calabasas High School. My life has been enriched in many ways by my tenure at CHS and the many wonderful people who work there.

However, there is a small group of teachers at the school who have created such a hostile work environment that I am no longer willing to continue in my current position as principal. I am leaving because of the ongoing harassment of the administration, by this group which is led by Lee Shagin. This harassment has taken a variety of forms:

- * The deliberate attacks Mr. Shagin made on my administrative team, especially on Mr. J. Guidetti and me.
- * The inaccurate public portrayal of CHS as a dangerous and violent environment for students and staff members and the resulting worry that caused staff and parents.
- * The frequent dissemination of inaccurate information to students and staff by Mr. Shagin which hurt or upset people unnecessarily and which took extensive amounts of time to correct.
- * The constant criticism of administrators and administrative policies by Mr. Shagin to both staff members and students in his classroom.
- * The manipulation of students by Mr. Shagin as he encouraged them to protest school policy and disrupt the school environment.
- * The inability to move forward with school reform that could result in improved student achievement, because of the resistance of Mr. Shagin to any suggestions by administration for change.

The vast majority of the staff of Calabasas High School are wonderful people. However, they are, for the most part, afraid to speak out against Mr. Shagin. People who have spoken up in the past have either stayed and been harassed or, like me, have chosen to leave the school.

My negative experiences with Mr. Shagin and his small group of supporters, has not, however, damaged my perspective on the district as a whole. I want to thank you for the opportunities that you and the members of the Board of Education of LVUSD have extended to me over the past three years. Most of my

experiences in this district with students, staff, parents, and especially district administration have been positive and rewarding.

The Association argues that these two messages disclose “the District’s true [unlawful] motive” for transferring Shagin.

It is actually not clear to what extent Allen’s messages may have influenced Fitzpatrick’s transfer decision. As the Association acknowledges, discussions of Shagin’s possible transfer began before Allen’s first message. Furthermore, the actual transfer decision was made in August 2000, more than a month after Allen’s resignation. If Fitzpatrick was inclined to act on the basis of Allen’s statements, presumably he would have acted on her first message, in which she clearly threatened to resign, rather than acting well after she actually did resign.

It is also unclear to what extent Allen’s messages may have referred to Shagin’s protected Association activity. As previously noted, most of the specific activity attributed to Shagin as a site representative apparently occurred prior to the 1999-2000 school year, when Allen was principal. Contrary to the Association’s implication, Allen’s stated concern that Shagin was “undermining [her] authority” does not establish that Shagin was engaged in some specific protected activity that Allen found objectionable. At most, one may infer that Allen’s stated concern about “attacks” on Guidetti referred in part to the attack included in Shagin’s letter of March 2000 about teacher notification of violent student behavior.

The Association also argues that Fitzpatrick’s decision was tainted by input from James Christianson (Christianson), a former CHS principal who had become an assistant superintendent and a member of Fitzpatrick’s cabinet. Christianson testified he told the

cabinet Shagin was the center of a group of teachers “that certainly had one set of opinions as to how the school needed to be run.” Christianson further testified:

And my opinion was asked as to who were the most vocal in the group. Mr. Shagin, obviously, is the most vocal. Ms. McEvoy would be the next most vocal, in my opinion.

Christianson explained that Shagin was the most vocal in opposing change while McEvoy was the most vocal in supporting Shagin.

As with Allen’s messages, it is not clear to what extent Christianson’s input may have referred to protected Association activity by Shagin, or by McEvoy. Having “opinions as to how the school needed to be run” and “opposing change” are not necessarily related to Association activity or to matters within the scope of representation under EERA section 3543.2. It is not obvious that Christianson’s input can be connected to any specific protected activity attributable to Shagin or McEvoy as a site representative during the 1998-1999 school year (when Christianson was principal) or the crucial 1999-2000 school year.⁴

ISSUES

1. Does PERB have jurisdiction?
2. If so, did Shagin engage in protected activity known to the District?
3. If so, did the District take adverse action against Shagin?
4. If so, was the adverse action because of the protected activity?

⁴ At hearing, I did permit the Association to put on evidence of McEvoy’s involuntary transfer, because it might indicate District animosity toward Association activists. I overruled the District’s objection that the settlement agreement with regard to McEvoy barred such evidence. I do not read the agreement that way.

CONCLUSIONS OF LAW

Deferral

In its post-hearing brief, the District argues that PERB lacks jurisdiction, on the ground that this case is subject to deferral to arbitration. EERA section 3541.5(a)(2) states, in pertinent part, that PERB shall not:

Issue a complaint against conduct also prohibited by the provisions of the [collective bargaining agreement in effect] between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration.

In Lake Elsinore School District (1987) PERB Decision No. 646 (Lake Elsinore), PERB held that this section established a jurisdictional rule requiring that a charge be dismissed and deferred if (1) the grievance machinery of the agreement covers the matter at issue and culminates in binding arbitration and (2) the conduct complained of in the unfair practice charge is prohibited by the provisions of the agreement between the parties.

Recently, in State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S, PERB overruled Lake Elsinore, but even if PERB had not done so, the standards for deferral would not be met in this case. The parties' agreement prohibits retaliation only for participation in the grievance procedure. There is no evidence that Shagin participated in the grievance procedure in 1998-1999 or 1999-2000, and there is no allegation that he suffered retaliation because of any such participation. PERB has jurisdiction.

Retaliation

To demonstrate retaliation in violation of EERA section 3543.5(a), a charging party must show (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 employee because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde)). In determining whether such evidence is established, PERB uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.)

In its post-hearing brief, the District acknowledges that Shagin engaged in “some protected activity” known to the District, but it disputes the “recency” of such conduct. The District incorrectly cites Chula Vista Elementary School District (1997) PERB Decision No. 1232 (Chula Vista) for the proposition that holding an office (such as Shagin’s position as a site representative) is not protected activity. Chula Vista is a case about the temporal proximity of protected activity and adverse action as circumstantial evidence of unlawful motive; it is not a case that defines protected activity. EERA section 3543 explicitly gives public school employees “the right to form, join, and participate in the activities of employee organizations.” Holding office as a site representative is an exercise of that right.

The District is correct, however, that the record is “thin” with regard to more specific protected conduct by Shagin in 1999-2000. The one issue with which Shagin was unquestionably involved that year was teacher notification of violent student behavior. Shagin made sure that his involvement with the issue was well known, by sending copies of his March 2000 letter on the issue to four superintendents and the District Board itself. To the extent that the letter addressed this safety issue, it was protected activity.

I do not conclude, however, that the attack on Guidetti that Shagin included in the letter was protected activity. Even in employee relations at their roughest, there are limits on protected communication. (See generally Mt. San Antonio Community College District (1982) PERB Decision No. 224.) While an employee's right to engage in protected conduct permits some leeway for impulsive behavior, that right must be balanced against the employer's right to maintain order and respect. (State of California (Department of Corrections) (2001) PERB Decision No. 1435-S, citing Rio Hondo Community College District (1982) PERB Decision No. 260.) Shagin's attack on Guidetti was malicious and defamatory, and it happened not in the heat of the moment but as the apparent result of cool calculation. At the hearing, Shagin did not defend the attack as factual or relevant. He also did not explain why he included the attack in a letter sent in Gardner's name, even though Gardner had apparently crossed out the attack in the draft she saw. Shagin's attack on Guidetti had no apparent legitimate connection to protected activity, and it merits no protection.

Although there is no dispute that the District took action to transfer Shagin, there is a dispute about whether that action was actually adverse. In its post-hearing brief, the District correctly cites Palo Verde for the proposition that an involuntary transfer is not automatically to be considered adverse. Palo Verde requires that a charging party prove a transfer to be adverse by an objective standard.

In Newark Unified School District (1991) PERB Decision No. 864 (Newark), PERB concluded that the charging party had satisfied the Palo Verde standard by proving factors and circumstances that made a transfer from senior to junior high reasonably appear to be a negative career move. PERB specifically based its conclusion on the following evidence in that case:

According to District witness Roach, transfers from junior to senior high were regularly requested by junior high teachers as career moves. Additionally, the evidence indicated that, during Bookout's six-year tenure at the junior high, Bookout repeatedly attempted to transfer to the senior high. Furthermore, the ALJ reasonably determined that a transfer to the junior high was not looked upon as a desirable move, as evidenced by the lack of transfer volunteers from the senior high English department.

It is possible that in the present case the Association could have produced similar evidence, but the fact is it did not. Shagin filed a grievance seeking "damages" for his transfer, but neither in the grievance nor at hearing did he specify a basis for damages, nor did he otherwise explain how the transfer was objectively adverse.

In its post-hearing brief, the Association merely points out that Shagin had not taught middle school in almost 30 years and that middle school subjects were not the same as the high school subjects he had been teaching. The implication seems to be that teaching middle school might require more preparation time from Shagin. In Newark, however, PERB found that a similar implication did not support a finding of adverse action. The District, in its post-hearing brief, points out that Shagin's new middle school assignment actually had some objective advantages: a shorter teaching day and fewer adjunct duties. In its reply brief, the Association does not respond to this point. On the record before me, I cannot conclude that the Association has met its burden of proving that Shagin's transfer was adverse by an objective standard.

Furthermore, even if I concluded that Shagin's transfer was objectively adverse, I would not conclude that the transfer was based on protected activity. As noted above, the record is rather thin with regard to specific protected conduct by Shagin in 1999-2000 (or, for that matter, in 1998-1999). In March 2000, Shagin did send Allen his very public letter on teacher notification of violent student behavior. I have concluded that the letter was protected activity to the extent it addressed this safety issue, but not to the extent it attacked Guidetti.

Ultimately, this case comes down to the following question of fact: was Shagin transferred because he raised the legitimate teacher notification issue and had a history of raising similar issues as an Association site representative, or was he transferred because he attacked Guidetti and had a history of making similar attacks? Based on the record as a whole, as summarized in the above Findings of Fact, I conclude that the preponderance of the evidence comports with Fitzpatrick's credible testimony that Shagin's transfer was based not on his protected Association activity but rather on his unprofessional performance outside the classroom, which had generated a negative atmosphere at CHS.

PROPOSED ORDER

Based on the foregoing findings of fact and conclusions of law, and the entire record in this case, it is ordered that the complaint and the underlying unfair practice charge in Case No. LA-CE-4228-E, Las Virgenes Educators Association v. Las Virgenes Unified 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).)

THOMAS J. ALLEN
Administrative Law Judge