

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



OAKLAND EDUCATION ASSOCIATION,

Charging Party,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SF-CE-2283-E

PERB Decision No. 1880

January 11, 2007

Appearances: Beeson, Tayer & Bodine by Sheila K. Sexton, Attorney, for Oakland Education Association; Liebert Cassidy Whitmore by Emi R. Uyehara, Attorney, for Oakland Unified School District.

Before Duncan, Chairman; Shek and McKeag, Members.

DECISION

DUNCAN, Chairman: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Oakland Unified School District (District) to the administrative law judge's (ALJ) proposed decision (attached). The complaint alleged that the District violated the Educational Employment Relations Act (EERA)¹ by retaliating against teacher Ronald Robinson (Robinson) for engaging in protected activities when it (1) issued him a notice of non-reelection, and (2) subsequently placed him on paid administrative leave. The Oakland Education Association (OEA) charges that this conduct violated EERA section 3543.5(a).

We have reviewed the entire record in this matter, including, but not limited to, the hearing transcript, the complaint, the ALJ's proposed decision, the District's exceptions² and

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

²The District filed 103 exceptions to the ALJ's proposed decision.

OEA's response. We find the ALJ's findings of fact to be free from prejudicial error and we adopt the proposed decision as the decision of the Board itself, except as set forth below.

We conclude that the District did retaliate against Robinson when it issued him a notice of non-reelection. However, the District has met its burden and demonstrated that it would have placed Robinson on administrative leave even if he had not engaged in protected activity.

DISCUSSION

I. Standard of Review

PERB Regulation 32320³ provides, in pertinent part, that "[t]he Board itself may . . . [i]ssue a decision based upon the record of hearing, or . . . [a]ffirm, modify or reverse the proposed decision." Accordingly, the Board enjoys broad discretion in its review of an ALJ's proposed decision.

The Board announced the proper standard of review in Santa Clara Unified School District (1979) PERB Decision No. 104 (Santa Clara):

While the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of the testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented.

The Board affords "great deference to the ALJ's credibility determinations because the ALJ is in a better position to make those findings." (Fresno County Office of Education (2004) PERB Decision No. 1674 (Fresno COE); see Whisman Elementary School District (1991) PERB Decision No. 868, noting that the Board will defer to the ALJ's credibility determinations absent evidence in the record to support overturning those determinations; United Teachers of

³PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

Los Angeles (Keskey) (1991) PERB Decision No. 914, holding that the Board will defer to the ALJ's findings of fact based upon the credibility of witnesses.)

II. Retaliation Claims

EERA section 3543.5(a), declares that it shall be "unlawful for a public school employer to ... [i]mpose 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."

To establish a prima facie case of retaliation under 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 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 (Carlsbad).)

The third element of the Novato test is often the lynchpin in a charge of retaliation. This element speaks to the employer's "unlawful motive" in pursuing its chosen course of action. The "unlawful motive" element represents the "specific nexus required in the establishment of a prima facie case." (Novato.) Time and again, the Board has recognized the difficulty of providing direct proof of a retaliatory motive. The Board has thus concluded that "unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (Ibid.; Carlsbad.)

The timing of an employer's adverse action is an important indicia of unlawful motive. (North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento).) However, adverse action taken in close temporal proximity to an employee's engagement in

protected activity is not, by itself, sufficient to establish a prima facie case of retaliation.

(Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S (Transportation I)); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S (Parks and Recreation)); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572 (Cupertino)); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento.)

If the charging party establishes a prima facie case of retaliation, the burden then shifts to the employer "to prove that its action(s) would have been the same despite the protected activity." (Novato: see also, Wright Line, A Div. of Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169]; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 729-30 [175 Cal.Rptr. 626] (Martori Brothers).) In the so-called "dual motive" case, where it appears that adverse action taken against an employee was motivated by both valid and invalid reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (Martori Brothers.) Under this "but for" test, once the burden has shifted to the employer, the employer must show that it would have pursued its chosen course of action regardless of the employee's engagement in protected activity. (Id at

p. 730.) If the employer fails to carry this burden, the Board is entitled to find the adverse action improper. (Ibid.)

III. Robinson's Non-Reelection to the 2002-2003 School Year

The ALJ concluded that Robinson engaged in a variety of activities protected under EERA. Specifically, the ALJ found Robinson's protected activity to be (1) participation in the Mayor Brown meeting; (2) his decision to copy Bruce Colwell (Colwell) on his April 27 letter to Lynn Haines Dodd (Dodd); (3) his numerous requests for, and representation by OEA; and (4) his committee participation.

A. Protected Activities

1. Mayor Brown Meeting

The District excepts to the ALJ's findings regarding the Mayor Brown meeting as being beyond the scope of the first amended complaint,⁴ and thus, the ALJ's scope of authority.

In Antioch Unified School District (1985) PERB Decision No. 515 (Antioch), the Board found that the ALJ had "improperly broadened the scope of his proposed decision on his own initiative." In Antioch, it was absolutely essential to the Board's conclusion that the ALJ issued a ruling finding independent violations of EERA which were alleged neither in the charge nor in the complaint. In that sense, Antioch is clearly distinguishable from the present case.

Here, the ALJ did not use evidence regarding the Mayor Brown meeting to form the grounds for an independent violation of EERA, but rather only as "background information" necessary to understanding the tension underlying Robinson's relationship with Dodd during

⁴The first amended complaint in paragraph 4 confines the scope of Robinson's engagement in protected activities to the period "[i]n or about September 2000 through May 2002."

the course of his employment at McClymonds High School. The ALJ noted that the Mayor Brown meeting is relevant as it represents the commencement of a "pattern of antagonism" between Robinson and Dodd. Evidence regarding the Mayor Brown meeting was offered by OEA for the exact purpose of showing that "pattern of antagonism," and the evidence is thus relevant in establishing an unlawful motive attributable to the District when it issued Robinson a notice of non-reelection.

The Mayor Brown meeting focused on issues affecting conditions of employment at McClymonds, such as student violence and disciplinary issues. Robinson's participation in the Mayor Brown meeting was protected under EERA. (Sec. 3543.2(a); see San Diego Community College District (1983) PERB Decision No. 368 (San Diego).

2. April 27, 2001. Letter to Dodd

The ALJ found that Robinson's complaints about student fights in his April 27, 2001, letter to Dodd, and his decision to copy Colwell on that correspondence, were protected under EERA.

Copying a union representative on correspondence, without more, neither rises to the level of protected conduct nor establishes an intent to solicit union assistance. (California State University, Long Beach (1987) PERB Decision No. 641-H.) "Whether such conduct may be characterized as protected activity depends entirely upon the context in which it occurs and must be resolved on a case-by-case basis." (Ibid.)

In his April 27 letter, Robinson addressed safety and violence issues at McClymonds. Robinson discussed in the letter Norman Thompson's (Thompson) failure to timely respond to a student fight sixteen days earlier. In this context, Robinson engaged in protected activity relating to the conditions of his employment at McClymonds when he copied Colwell. (See San Diego.)

The ALJ made significant credibility determinations regarding the circumstances surrounding the April 27 letter. As noted above, the Board will afford "great deference" to the ALJ's findings of fact incorporating determinations on the credibility of witnesses.

(Fresno COE.)

The District is unable to offer any evidence sufficient to support a decision to overrule the ALJ's determination on this issue. While Robinson's April 27 letter primarily concerns itself with an incident alleged to have occurred sixteen days earlier, the District counters with certain evidence regarding an incident alleged to have occurred on April 27. The District's arguments on this matter are thus misguided and unpersuasive.

The ALJ's findings of fact regarding Robinson's April 27 letter, and his decision to copy Colwell, are supported by the record, and the Board will not disturb them.

3. Requests for, and Representation by OEA

The ALJ devoted considerable attention to Robinson's numerous requests for, and representation by OEA during the course of his employment at McClymonds.

Robinson's request for representation at the Hickory Pit meeting was protected under EERA. The Supreme Court of the United States has declared that an employee may request union representation as a condition of his participation in an interview with the employer where the employee has a reasonable basis to believe that disciplinary action will result.

(NLRB v. Weingarten (1975) 420 U.S. 251, 255 [88 LRRM 2689] (Weingarten): see Rio Hondo Community College District (1982) PERB Decision No. 260 (Rio Hondo), adopting the rule of Weingarten.) It should be noted, however, that Weingarten becomes applicable only when there is a reasonable belief that discipline will result. The issue thus

becomes whether the District's decision not to reemploy a teacher employed on a temporary contract is consistent with the notion of "discipline" contemplated by Weingarten. If it is, the employee is entitled to have representation at the time such a decision is made.

A school district may deny continued employment to temporary and probationary employees not eligible for permanent status regardless of the sufficiency of the cause. (Ed. Code sec. 44929.21; McFarland Unified School Dist. v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 166 [11 Cal.Rptr.2d 405] (McFarland).) Such a decision lies entirely within the discretion of the governing board of the school district. (McFarland.) Thus, faculty employees employed on the basis of a temporary or probationary contract not yet eligible for permanent employee status have no legitimate claim to an expectation of continued employment. (See Coleman v. Department of Personnel Administration (1991) 52 Cal.3d 1102, 1112 [278 Cal.Rptr. 346], stating that "California's statutory scheme regulating employment in civil service 'confers upon an individual who achieves the status of permanent employee' a property interest in the continuation of his [or her] employment which is protected by due process'.")

Termination is the most severe form of discipline which an employer can impose on one of its employees. Sue Woehrle (Woehrle) conditioned Robinson's continued employment at McClymonds on his decision to attend the Hickory Pit meeting. Whether a condition placed on the renewal of a temporary or probationary contract constitutes an unfair labor practice, it must be made on the basis of the facts of the case before the Board. In Los Angeles Unified School District (2004) PERB Decision No. 1657, the Board concluded that the union failed to establish a prima facie case of retaliation when the district decided to not reelect a temporary

teacher after that teacher failed to sign a "commitment form" which the district required. The Board concluded that the employee did not engage in protected activity, and that the commitment form imposed a "valid term and/or condition of employment." (Ibid.)

In the present case, Woehrle and Dodd scrutinized Robinson and his tendency to involve "outsiders" in school affairs. The ALJ credited Robinson's testimony that Woehrle and Dodd expressed concern over Robinson's commitment to the "McClymonds family" as a result of his tendency to seek OEA representation and advice.

Robinson's letter to Dodd regarding student violence, his decision to copy Colwell on that letter, his decision to copy Colwell again on his correspondence to Harold Pendergrass regarding his employment status, and his decision to request Colwell's presence at the Hickory Pit meeting were all protected under EERA. The conditioning of his continued employment at McClymonds on his assurance not to engage in protected activity cannot be said to be a valid term and/or condition of employment. In fact, the District's conduct in this regard approaches the level of unlawful interrogation. (See Clovis Unified School District (1984) PERB Decision No. 384 (Clovis), stating that an unlawful interrogation exists where, in the context of an interview, the employer conveys "disapproval toward the union and creates an expectation of employee response"; see also S & R Sundries, Inc. (1984) 272 NLRB 1352 [118 LRRM 1085] (S & R Sundries), finding that employer's inquiries as to employee's "loyalty" was coercive.)

Robinson reasonably believed that his continued employment at McClymonds would be decided at the Hickory Pit meeting, and his request for OEA representation was thus protected. (See Clovis.)

The ALJ also concluded that Robinson's request for representation at a counseling session following his use of the silent sustained reading (SSR) "provocative prompt" was protected under EERA. When Robinson made his request to Dodd for OEA representation,

Dodd expressed her anger and frustration at Robinson's inability to meet with her promptly regarding his distributed SSR material.

Robinson was instructed by Thompson to obtain representation because the session would be dealing with a "very serious matter."⁵ Indeed, Robinson reasonably believed he would be facing some sort of disciplinary action for distributing the prompt to his students, and his request for OEA representation was thus protected. (Weingarten; Rio Hondo.)

4. Committee Participation

Robinson's participation in the School Climate and Leadership Committees became a focal point of tension in his relationship with Dodd. These committees devoted significant attention to issues such as safety, school violence and student discipline. The committees essentially represented vehicles through which faculty at McClymonds could voice their concerns over, and formulate specific proposals towards, improving the conditions of employment at McClymonds. (EERA sec. 3543.2(a), defining "terms and conditions of employment" to include "safety conditions of employment"; see King City Joint Union High School District (1982) PERB Decision No. 197, concluding that "the range of representational activities protected by [EERA] . . . includes a broad spectrum of concerns which arise out of the employment relationship and employee rights granted by EERA"; San Diego, finding that speech at faculty senate meeting regarding wages and hours concerned "employment relations" and were thus protected.)

We agree with the ALJ that Robinson's participation on the School Climate and Leadership Committees constituted protected activity under EERA section 3543.2(a).

⁵We note here our belief that the Hickory Pit meeting, too, concerned a "very serious matter." However, unlike Robinson's counseling over his SSR prompt, Robinson was warned against bringing representation to that meeting.

B. Prima Facie Case of Retaliation

Robinson engaged in a variety of protected activities during the course of his employment at McClymonds. It is not disputed that the District knew Robinson participated in such activities. The Board now turns its attention to the critical third element of the Novato test for establishing a prima facie case of retaliation under EERA: Whether the District acted with an unlawful motive when it issued Robinson a notice of non-reelection to the 2002-2003 school year. (Novato.)

Of course, the search for direct evidence of a retaliatory motive is often daunting and elusive, and the Board has recognized that such an unlawful motive "can be established by circumstantial evidence and inferred from the record as a whole." (Novato.) Here we find that the District acted with an unlawful motive when it issued Robinson a notice of non-reelection.

1. Timing

The element of close temporal proximity between the protected activity and adverse action has been met. On the same day that Robinson delivered to Dodd the minutes of the controversial School Climate Committee meeting, Dodd recommended Robinson's non-reelection to the District. This timing coupled with the District's inconsistent justifications for its decision sufficiently state a prima facie case of retaliation.

2. Pretext Treatment

The record demonstrates that Robinson has been subjected to disparate treatment in relation to other faculty members at McClymonds. (See Transportation I.) The District asserts that it has a clear policy against showing "R" rated films in the classroom without prior administration approval.⁶ No written form of this policy was offered at hearing. Additionally,

⁶The District excepts to the ALJ's descriptions of the films "Menace II Society" and "Sankofa" which rely on information accessed online at http://www.suntimes.com/ebert/ebert_reviews/1993/05/85947.html and

the District asserts that films not listed in a District pre-approved list must be approved by the administration prior to being shown in the classroom. No such list was ever produced at hearing. Two faculty members, Richard Charlesworth (Charlesworth) and Al Claiborne (Claiborne), testified at hearing that they were completely unaware of any District policy regarding the use of "R" rated films. Charlesworth and Claiborne have taught at McClymonds High School for 12 and 24 years, respectively. The District's heavy reliance on the clarity of its "R" rated film policy is thus undermined by the ignorance of any such policy by two well-seasoned veterans of McClymonds. Furthermore, while it does appear that Robinson showed more films in the classroom than did the average teacher, testimony and evidence offered at hearing established that there were some teachers who showed more films than Robinson.

The District also subjected Robinson to disparate treatment when it required him to attend the Hickory Pit meeting in July 2001 as a condition of continued employment. No other teachers were required to attend any such off-campus meetings in the middle of summer. The record indicates that teachers at McClymonds were notified regarding the status of their continued employment well before July 2001. Robinson, on the other hand, was required to attend this meeting at the Hickory Pit in early July 2001, and ultimately did not receive a new contract until July 23, 2001.

<http://dickinsg.intrasun.tcjn.edu/sankofa/s-scenelog.html>. The District contends that the ALJ improperly passed upon the educational value of the films, as opposed to rendering an independent legal judgment as to the non-retaliatory purpose the District proffered for non-reelecting Robinson.

The District's contentions are without merit. The ALJ looked to the websites noted above for descriptive purposes, in order to put the films in context for the unknowing reader. It cannot be said that the ALJ relied on these descriptions in reaching any substantive determinations. The information provided by the ALJ serves only a descriptive purpose, and in no way supports any factual determinations made regarding the appropriateness of the films for classroom instruction.

3. Inconsistent Justifications

The District has proffered inconsistent justifications for its adverse action against Robinson. (See Parks and Recreation.) In an email dated April 2, 2002, Dodd responded to a request by the District for reasons why Robinson was being non-reelected. Dodd responded in that email by providing the following list:

- * 2000-01 Evaluation indicated does not meet standards developing in 3 out of 6 teaching standards.
- * 2001-02 Evaluation (formal - still in progress) indicates meeting standards.
- * Informal evaluations indicate lack of student engagement, use of video's [sic] and/or lecturing for majority lessons [sic].
- * Use of inappropriate instructional materials.
- * Instructional practices not aligned with identified best practices and student outcomes as indicated in the II/USP Comprehensive School Site Action Plan.
- * Inconsistent grading policies and attendance procedures.
- * No consistency between formal and informal classroom observations.

Robinson received notice of his non-reelection on March 8, 2002. Robinson requested a meeting with Dodd, and Dodd, Thompson and Robinson met on March 25, 2002, to discuss the matter. Dodd prepared a list of "talking points" prior to that meeting. That list was largely similar to the email list which Dodd sent to the District, but it did contain some points left out of the email. Among her talking points, Dodd included references to Robinson's students not being challenged and Robinson's lack of assigned homework.

In stark contrast to its justifications for non-reelecting Robinson at or around the time such action was taken, the District offered at hearing the SSR "provocative prompt" as a key ground for its decision, in addition to Robinson's failure to implement SSR in his classroom. Dodd testified heavily on the SSR prompt in this regard. However, because the SSR prompt was never raised among the grounds for its decision not to reelect Robinson, the District's reliance on the SSR prompt at hearing is questionable. Also, as the ALJ notes, Dodd's

concerns regarding Robinson's implementation of SSR arose only after she had communicated her recommendation for Robinson's non-reelection to the District. Thus, the issue of Robinson's implementation of the SSR is irrelevant to the decision not to reelect Robinson, as it had not ripened prior to the time that adverse action was taken.

The District excepts to the ALJ's treatment of Robinson's SSR prompt.⁷ We believe that the ALJ committed an error in substituting his own personal judgment for that of Dodd regarding the appropriateness of the prompt for classroom distribution. The ALJ characterized Dodd's reaction to the prompt as "sanctimonious and overly dramatic." Evidence offered at hearing, in addition to Robinson's exceedingly evasive testimony on the matter at hearing, highly suggest that Robinson authored the prompt. A high school principal has every reason to take alarm at reading material distributed to students by a teacher which contains profanity, slang and derogatory racial commentary. The ALJ should have limited treatment of the prompt strictly to its relevance as a justification for Robinson's non-reelection.

However, we find that the ALJ's error in this regard has not resulted in prejudice to the District. The facts remain the same in the context of the District's decision to non-reelect Robinson. The District placed heavy emphasis on the prompt at hearing as providing justification for Robinson's non-reelection. Even in its appeal to the Board, the District reiterates this heavy reliance on the SSR prompt as a legitimate, non-pretextual justification for Robinson's release. However, from the evidence and witness testimony offered at hearing, the prompt never, at or around the time of Robinson's non-reelection, entered into the District's

⁷The District also excepts to the ALJ's use of the Berkeley High School Slang Dictionary in relation to Robinson's SSR prompt. However, like the websites identified in footnote 6, the ALJ does not use the Berkeley High School Slang Dictionary in order to support any substantive finding regarding the prompt. Rather, the ALJ used the dictionary only to clarify the meaning of some of the relevant language in order to put such language in context for the unknowing reader.

calculus regarding the decision whether or not to reelect Robinson. If Robinson's use of the prompt did, in fact, constitute one of the District's relied upon grounds for non-reelection, the District should have so indicated at the time it took the adverse action.

4. Antiunion Animus

The record demonstrates that the District has shown an animosity towards union activity. (See Cupertino.) Such animosity is evident in both Dodd's and Woehrle's reactions to Robinson's requests for union representation, in addition to Robinson's decision to copy his union representative on certain correspondence. It is apparent throughout the record and hearing transcript that Dodd perceived such actions on Robinson's part as a lack of "commitment" to McClymonds and that Robinson was not a "team player" because of it. Indeed, Robinson was questioned by both Woehrle and Dodd regarding his "commitment" to McClymonds and his decisions to involve "outsiders" in school affairs. (See S & R Sundries, concluding that employer's questioning of employee was coercive where employee was placed in position of having to reveal her "loyalties".) An employer may never require an employee to forego or refrain from exercising protected rights as a quid pro quo of continued employment. (See Waterbury Hotel Mgmt. LLC (2001) 333 NLRB 482 [171 LRRM 1348], finding interference with protected activity when employee wearing union button was terminated following comment that he was not a "team player".)

OEA has carried its burden in establishing a prima facie case of retaliation. OEA has satisfied the Novato test, and has established the "specific nexus" necessary in establishing an unlawful motive attributable to the District when it issued Robinson a notice of non-reelection. (Novato.)

The burden now shifts to the District to establish that it would have pursued its chosen course of action regardless of Robinson's engagement in protected activities.

C. District's Burden

The District is unable to carry its burden. Specifically, the District is unable to show that it would have pursued its chosen course of action regardless of Robinson's participation in protected activities.

As stated in Martori Brothers, the issue is "whether the [adverse action] would not have occurred 'but for' the protected activity." In the present case, Robinson's engagement in protected activities provided the major driving force behind the District's decision not to reelect him.

The District proffers various grounds allegedly justifying its decision to non-reelect Robinson. The District points to Robinson's inconsistent scores on his formal and informal evaluations. In his first formal evaluation in January 2001, Robinson received scores indicating that he was mostly meeting standards. In her email to the District, Dodd asserts that Robinson failed three out of six teaching standards in this evaluation. That assertion is contradicted by the evaluation form itself. In his January 2001 formal evaluation form, Thompson left the "summative rating" boxes unmarked. Robinson largely scored as meeting standards in that first formal evaluation, and only in a few categories were his scores substandard. As the "summative ratings" for each category were left blank, Robinson received no cumulative scores on which Dodd could ground her assertion that Robinson failed in three out of six categories.

In his second formal evaluation, which took place in December 2001, Robinson scored as meeting standards in every category marked. However, the District points to various informal evaluations of Robinson which indicate substandard effectiveness in his teaching style. The ALJ discussed various issues which arose in this context, and made significant credibility determinations based on the witness testimony offered at hearing. Thompson

testified that he conducted two informal evaluations in Robinson's classroom during March and April 2002. Thompson claimed to take personal notes of his classroom observations, but could not produce any such notes at hearing. Robinson denied being observed on these occasions. Also, the ALJ determined that Thompson manipulated a "final evaluation report" dated April 23, 2002 in order to create a paper trail justifying the District's non-reelection decision. Robinson claimed that the evaluation report was not in his personnel file when he inspected it on April 30, 2002, but that the report did appear in his file when he inspected it in December 2002. A clerk at the District's human resources office told Robinson that the form appeared to have been improperly filed because it bore no date-filed stamp. The ALJ discredited Thompson's testimony as implausible.

This "final evaluation report" was allegedly the product of a third formal evaluation. The District's formal evaluation reports contain spaces where the evaluator may make certain comments or critiques of a teacher, and there is additional space for the evaluated teacher to respond to those comments. Robinson used these spaces in the past to voice disagreements with Thompson's critiques or to state his agreement with Thompson on the progress of the students. On this "final evaluation report" allegedly completed by Thompson, the spaces allotted for Robinson's responses were all blank. The ALJ found it implausible that Robinson would forego the opportunity to respond to such a negative evaluation when he had in the past asserted his right to respond on such forms to much less negative critiques. We agree.

With regards to the negative substance of this alleged "Final Evaluation Report," we also find it suspicious that in his December 2001 formal evaluation, Robinson scored as "meeting standards" in every completed category, and Thompson even entered very positive remarks on Robinson's teaching style at that time.

The ALJ also discussed discrepancies in the District's reliance on Robinson's excessive use of films in his classroom instruction. In September 2001, Robinson met with Thompson to discuss his objectives and teaching agenda for the 2001-2002 school year. At that meeting, Robinson presented Thompson with his Stull Objectives for the school year. Robinson informed Thompson of his plan to show several controversial films over the course of the school year. Thompson objected to two such films, and Robinson accordingly withdrew those two from his agenda for the year. Thompson denied receiving Stull Objectives from Robinson, and also denied reaching any agreement on Robinson's use of films for the school year. However, Thompson was forced to retract these claims when presented with an evaluation report on which Thompson had indicated that the objectives were received and that an agreement had been reached.

The District also relies on Robinson's failure to teach to standards. As discussed above, Robinson's formal evaluations indicate that Robinson did teach to standards. However, the District also asserts that Robinson failed to give sufficient homework to his students, failed to challenge his students, and failed to display student work in the classroom. SAT-9 testing scores offered at hearing show Robinson as ranking fourth out of six teachers for his students' performance. However, a closer look at the actual scores shows that Robinson's students scored near, albeit below, t

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The District additionally proffers Robinson's inconsistent grading and attendance policies as justifying his non-reelection. Indeed, the evidence adduced at hearing does raise some troubling questions. The District emphasizes Robinson's award of a "B" grade to a

⁸Additionally, Robinson's students scored much closer to the top three than the bottom two, who were considerably below the top four. Thus, the District's assertions that Robinson's students were deficient in reading and writing skills are contradicted by the evidence in the record.

deceased student. After Robinson explained to Thompson that he had mixed up the names of two students, Thompson remained unconvinced because the student which Robinson indicated had already been awarded a grade. Furthermore, the record does demonstrate a troubling trend of high grades being awarded to students who failed to attend any other classes at McClymonds. Indeed, various students who had virtually dropped out of school for all intents and purposes somehow continued to receive "A"s and "A+"s in Robinson's class, which represented the only class for which these students were awarded grades. When confronted with such evidence at hearing, Robinson's testimony was evasive and unconvincing.

However, due to the glaring inconsistencies underlying the District's decision to non-reelect Robinson, the Board holds that the District has failed to carry its burden in showing that it would have chosen to non-reelect Robinson regardless of his engagement in protected activities.

Due to the abundant inconsistencies in the District's case, and the doubts raised by the anti-union animus evident in the conduct of Dodd and Woehrle, we find that the District retaliated against Robinson for engaging in protected activities when it issued him a notice of non-reelection in violation of EERA section 3543.5(a).

Because the District retaliated against Robinson for engaging in protected activities, we also find that the District concurrently violated EERA section 3543.5(b), by denying OEA the right to represent its members.

IV. Robinson's Placement on Paid Administrative Leave

The ALJ concluded without discussion that OEA had established a prima facie case of retaliation, relying heavily on the Board's holding in Oakland Unified School District (2003) PERB Decision No. 1529 (Oakland). We are required to review the entire record, including the testimony and evidence offered at hearing, and to rely on Oakland would be to shirk our

responsibility to do so here. (See Santa Clara.) Therefore, we find that while Oakland indicates OEA established a prima facie case at that stage of the proceeding, it is not controlling to the ultimate decision reached by the Board on a full record.

The District contends that it placed Robinson on paid administrative leave on May 17, 2002, after finding that he posed a credible safety threat to himself and others at McClymonds. OEA alleges that the District retaliated against Robinson for engaging in protected activity when it placed him on administrative leave. We find that Robinson's actions in the days immediately preceding his placement on administrative leave were unprotected by EERA. In his proposed decision, the ALJ discussed Robinson's May 13, 2002, memorandum to Dodd only in passing. We, however, believe the memo deserves far closer attention.

While an employee's criticism of his or her employer is protected to the extent it is intended to further a legitimate interest in terms and conditions of employment (Barstow Unified School District (1996) PERB Decision No. 1164), an employee's criticism of his or her employer based upon a personal grudge is not protected. (State of California (Department of Transportation) (1982) PERB Decision No. 257-S (Transportation II); Pittsburgh Unified School District (1978) PERB Decision No. 47, concluding that leaflets used to wage personal attack on management employee were not protected.)

Robinson's May 13 memo does discuss, albeit in passing, certain committee activities and reform proposals. The memo further criticizes Dodd for her administration's actions in blocking committee proposals. And although Robinson does claim in the memo that it is not intended to serve as a personal attack on Dodd, the overall tone and content of the memo lead to the inevitable conclusion that it is nothing more than that. Robinson devotes much of his attention in the memo to matters completely irrelevant to any committee activities, and further voices his personal dismay at how Dodd could appear to be so ignorant of his qualifications as

a teacher. The memo continues to discuss at quite some length Robinson's own personal feelings about Dodd and her administration at McClymonds.⁹ The overall tone of the memo conveys a mocking and accusatory message directed specifically at Dodd.

Robinson's May 13 memo cannot be considered protected under EERA, as Robinson has transgressed the realm of protected activity in order to wage his own personal attacks on Dodd. It is true that an employee's criticism of his or her employer is protected to the extent that the "purpose is to advance the employees' interests in working conditions." (Trustees of the California State University (Sonoma) (2005) PERB Decision No. 1755-H (CSU (Sonoma).) In CSU (Sonoma), the Board declared that "[t]his protection extends to speech that is uncomplimentary to the employer; and even to speech containing inaccuracies and exaggerations." It is only when the speech is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption of or material interference with school activities" that it loses its protected status. (Rancho Santiago Community College District (1986) PERB Decision No. 602 (Rancho Santiago.)

We do not believe that Robinson's May 13 memo to Dodd is intended to advance any legitimate employee interests in terms and/or conditions of employment at McClymonds, and that the memo thus does not fall within the class of activities protected under EERA. Robinson uses the memo as a means of waging his own personal attack against Dodd and her administration, and devotes a great deal of attention in the memo to boast his own personal credentials and qualifications as a teacher. And, assuming arguendo, that Robinson's May 13 memo did fall within the realm of protected speech by furthering employee interests in working conditions, we would still find that the speech became stripped of its protected status

⁹In the May 13 memo, Robinson progresses into a lengthy tangent in which he likens himself to Lieutenant Doug Roberts aboard the U.S.S. Reluctant, and refers to Dodd as "Captain of the McClymonds ship."

in that the speech was so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption of or material interference with school activities." (Rancho Santiago.) In this regard, we must consider the May 13 memo not in isolation, but in the overall context of the surrounding circumstances, including the committee meetings held on May 14. Viewed in this context, we believe that Robinson's conduct did substantially disrupt and materially interfere with school activities to the point where such conduct could no longer be considered protected under EERA.

The activities of the faculty committee and Leadership Committee are within the sphere of activities protected under EERA. (EERA sec. 3543.2(a); see San Diego.) However, on May 14, Robinson used these committee meetings as a platform from which to levy his final salvo at the McClymonds administration. An employee cannot cloak his or her own personal agenda in the veil of protected activity, and then seek the same insulation which such protected activities are afforded under EERA. (See Transportation II, finding that speech is not protected when it is "for the purpose of humiliating the supervisor against whom the employee harbored a personal grudge".)

Robinson used the faculty council meeting to force a discussion of his May 13 memorandum. The ALJ found that the faculty largely agreed to his proposal. However, the ALJ reached this conclusion by specifically discrediting pertinent witness testimony that the faculty felt uncomfortable with Robinson's proposal because they believed that the memo was a matter solely concerning Robinson's battle for reelection, a matter more appropriately addressed to OEA rather than the faculty council. As evidenced in the events following the Leadership Committee meeting, we believe that the ALJ erred in discrediting witness testimony stating that the faculty did not wish to discuss Robinson's May 13 memo. Our review of the record shows that in the context of the events which occurred on May 14, various

faculty members did feel uncomfortable with Robinson's determined stance to force his May 13 memo into the faculty council agenda. We look especially at the events of the Leadership Committee meeting for corroboration.

The Leadership Committee meeting proved to be a very tense and unsettling event, and a group of faculty members felt compelled to remain after the meeting so that they could discuss the source of the meeting's tension. They agreed that the source of that tension was Robinson. They further discussed the general ineffectiveness of Robinson's teaching style and Robinson's apparent anger and frustration at the lack of support he had been able to garner from the faculty in his fight for reelection. Indeed, the lack of faculty support for Robinson in his reelection struggle and the lack of any similar support for his outspoken criticism of the administration further undermine the proposition that Robinson was engaging in any sort of concerted activity for which protection must be afforded under EERA. (Mushroom Transp. Co. v. NLRB (1964) 330 F.2d 683, 685 [56 LRRM 2034], finding that an employee's speech aimed at improving that employee's own status without involving other employees is "an individual, not concerted, activity,. . . more than likely to be mere 'gripping'"; see Hentzel v. Singer Co. (1982) 138 Cal.App.3d 290, 296, fn. 4 [188 Cal.Rptr. 159], discussing the National Labor Relations Act, and stating that "while the actions of an individual employee to enlist the support of other employees for the purpose of improving working conditions may be . . . 'concerted' . . . the 'public venting of a personal grievance, even a grievance shared by others, is not a concerted activity'.") To the contrary, this evidence all points to the conclusion that Robinson on May 13 and 14, 2002, had personally attacked Dodd.

The faculty members remaining present following the Leadership Committee meeting also discussed Robinson's mental, emotional and physical stability. They described Robinson's conduct at the meeting as rude, and further described Robinson as having been red

in the face, yelling, not pausing for interruption, in addition to appearing physically tense and twitching. These faculty members largely tied Robinson's apparent instability to his unsuccessful attempt to win faculty support in his bid for reelection. Three faculty members, Jennifer Ough (Ough), Bridget Taylor (Taylor) and Edna Perkins (Perkins), were so affected by the events of May 14 that they felt compelled to submit written letters to Dodd expressing their concerns that Robinson posed a credible safety threat not only to himself but those around him, and particularly Dodd.

Motivated by the letters which she received, Dodd contacted her immediate supervisor, Jose Martinez (Martinez), to relay the substance of those letters. Martinez arrived at McClymonds two days later on May 17, and conducted several interviews with faculty members regarding the current situation with Robinson. Martinez concurred with Dodd's characterization of Robinson as a credible safety threat at McClymonds, and the two requested that the requisite paperwork for placing Robinson on administrative leave be initiated. This paperwork was completed by District Labor Relations Analyst, Leonard Bellows, and Robinson received notice that he was being placed on paid administrative leave later that same day.

The ALJ concluded from witness testimony offered at hearing that Dodd solicited the letters regarding Robinson's condition. The ALJ determined that Dodd's testimony on the matter gave rise to a conflict in witness testimony regarding the submission of the letters, and the ALJ resolved that conflict by concluding that Dodd solicited the letters. Upon review of the hearing transcript and the pertinent witness testimony, we do not perceive the testimony in question to be so conflicting that it merits a finding that Dodd acted unilaterally in implementing Robinson's placement on administrative leave. Further, we do not believe that

Martinez acted simply as a rubber-stamp with regards to Dodd's decision to report Robinson's apparent instability.

Ough, Taylor and Perkins all testified that the letters they submitted were not solicited. Dodd testified that she asked that the faculty place their concerns about Robinson in writing. However, the line of questioning posed to Dodd with regards to this issue is not entirely clear. The ALJ stated in his proposed decision that Martinez directed Dodd to have the teachers put their statements in writing, but all the pertinent testimony offered at hearing indicates that the statements were placed in writing and submitted to Dodd before she spoke with Martinez. It also appears from the line of questions presented to Dodd that the timing of certain events is not entirely clear. Indeed, it is a common theme throughout the entire hearing transcript that the parties, witnesses, and even the ALJ, became confused at various points about the timing of certain events and to which time periods certain lines of questioning were being directed. It appears in the questions presented to Dodd on this issue that the chronology of events is blurred. We thus do not believe that Dodd's testimony regarding the submission of letters was so fatal as to reach the conclusion drawn by the ALJ that Dodd played the instigating role in initiating and following through with Robinson's placement on administrative leave. Rather, we are persuaded by the testimony of Robinson's own faculty peers, Ough, Taylor and Perkins, who all testified in uniformity regarding Robinson's threatening and aggressive behavior. Indeed, it is the testimony of McClymonds faculty members which provided the impetus for reporting Robinson's conduct to District officials.

We conclude that Robinson did not engage in protected activity in the days preceding his placement on administrative leave. He engaged in a personal attack on Dodd and her administration after he learned that he would not be reelected, and his decisions to express his

own personal grievances in his May 13 memo and at the faculty and Leadership Committee meetings do not merit protected status under EERA. Robinson's own faculty peers felt threatened in Robinson's presence, and described him as a safety threat. Martinez's suggestion to Dodd to contact local police authorities does not lend support to the ALJ's conclusion that Martinez acted as Dodd's "rubber stamp" in the decision to place Robinson on administrative leave. Dodd was not required to wait for the worst to happen before reporting Robinson's condition to local police. It is a reasonable safety precaution to alert local authorities when a teacher has been described as a safety threat by other faculty members. However, we do note here that no police report was ever filed, nor was any police action at the school site requested. Dodd merely advised local authorities as to the potential safety threat posed to the faculty and student body at the school. Nor do we believe that Martinez's failure to interview Robinson when he arrived at the school site lends support to the ALJ's conclusion that Martinez was a rubber stamp. Indeed, Robinson was the subject of the interviews being conducted, and the pertinent inquiry in those interviews focused appropriately on Robinson's status as a perceived safety threat to other faculty members.

Here, the District has met its burden and demonstrated that it would have placed Robinson on administrative leave even if he had not engaged in protected activity. (Ventura County Community College District (1999) PERB Decision No. 1323.)

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b).

Pursuant to EERA section 3541.5(c), and Public Employment Relations Board (PERB) Regulation 32325 (Cal. Code Regs., tit. 8, sec. 31001, et seq.), it is hereby ORDERED that the District, its administrators and representatives, shall:

A. CEASE AND DESIST FROM:

1. Discriminating against Ronald Robinson (Robinson) by non-reelecting him for the 2002-2003 school year because of his exercise of protected rights under EERA;
2. Denying the Oakland Education Association (OEA) its right to represent employees in their employment relations with the District by the above-described conduct.

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

1. Within ten (10) workdays following the date this Decision is no longer subject to appeal, rescind the notice of non-reelection issued to Robinson and destroy all copies thereof.
2. Within ten (10) workdays following the date this Decision is no longer subject to appeal, reinstate Robinson to an equivalent position in the Oakland Unified School District and make him whole for lost benefits, monetary and otherwise, including back pay, plus interest at the rate of 7 percent per annum.
3. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations in the District where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of PERB, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on OEA.

Member McKeag joined in this Decision.

Member Shek's concurrence and dissent begins on page 29.

SHEK, Member, concurring and dissenting: I respectfully concur with the majority decision on the issue of involuntary administrative leave, but based on a different rationale; and dissent from the majority decision on the issue of non-reelection. I would find that the Oakland Unified School District (District) would have neither reelected Ronald Robinson (Robinson), nor exercised its discretion to rescind its non-reelection decision, even if Robinson had not involved himself in protected activities. Additionally, I would conclude that the District did not place Robinson on paid involuntary administrative leave because of protected activity.

Summary of Background

Robinson was a probationary teacher at McClymonds High School (McClymonds) of the District for three academic years between 1999 and 2002. In the 1999-2000 school year, Robinson taught multi-cultural studies and social studies. In 2000-2001, the District offered Robinson a second temporary contract to teach multi-cultural studies and United States history. In 2001-2002, the District offered him a probationary teacher contract to teach U.S. history and life skills sections. On January 31, 2002, McClymonds Principal Lynn Haines Dodd (Dodd) informed the District of her decision not to reelect Robinson. The District's governing board adopted Dodd's recommendation on February 27, 2002. Robinson was released from his probationary contract on March 8, 2002, and did not return for the 2002-2003 year.

Robinson claims that the District retaliated against him because of protected activities by: (1) not reelecting him, and (2) placing him on paid involuntary administrative leave.

Standard of Review

In considering an appeal, the Public Employment Relations Board (PERB or Board) reviews the entire administrative record as well as the parties' appellate papers. PERB reviews

the record de novo. It may reverse legal determinations of an administrative law judge (ALJ) and, from the factual record, may draw opposite inferences to those drawn by the ALJ. (Woodland Joint Unified School District (1990) PERB Decision No. 808a; Santa Clara Unified School District (1979) PERB Decision No. 104.) However, PERB ordinarily gives deference to an ALJ's factual findings, which incorporate credibility determinations based on considerations such as witness demeanor and appearance. In the present matter, I would defer to the ALJ's painstakingly thorough findings of facts and credibility determinations. However, I draw different inferences from those of the ALJ, and reach a different result.

Unlawful Retaliation Charge - Non-reelection

To establish an unlawful retaliation violation of the Educational Employment Relations Act (EERA) section 3543.5(a), the charging party bears the burden of showing that he/she engaged in protected activity, that the employer knew of the activity; and that the protected activity was a "motivating factor" in the employer's decision not to reelect him. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.) The charging party must also show, under objective standards, that the employer's action was adverse to the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689.)

Protected Activity

Beginning as early as the 2000-2001 school year, and continuing until the District's decision not to re-elect him, Robinson engaged in activities protected under EERA. He copied one of his complaints about student fights to the Oakland Education Association (Association).

He used and requested representation by the Association at the "commitment" session¹ and the silent sustained reading (SSR) counseling session. There is no dispute that Dodd had knowledge of Robinson's protected activities or that Robinson suffered adverse action as a result of his non-reelection and placement on administrative leave. (Proposed dec, at pp. 62-63.)

Unlawful Motivation

When direct proof of unlawful motivation is not readily available, the Board reviews the record as a whole to determine if the inference of unlawful motive should be drawn. Factors that may support such an inference include the timing of the employer's adverse action in relation to the employee's protected conduct. (North Sacramento School District (1982) PERB Decision No. 264). However, timing alone, without more, does not demonstrate the

¹McClymonds was officially designated a school within the State Immediate Intervention/Underperforming Schools Program (II/USP) in the fall of 1999. If test scores did not improve over time, the state superintendent of schools was authorized to impose a number of harsh sanctions, including closure, reconstitution of the school and staff, and removal of staff. (Proposed dec, at pp. 3-4.)

Pursuant to the official designation of McClymond's as a school within the II/USP, an outside evaluator Ralph Baker (Baker) developed a report of findings on "barriers to student success" by March 2001. The findings were incorporated into the II/USP action plan for McClymond's. In April 2001, Dodd, Executive Director of High Schools Sue Woehrle (Woehrle) and Baker held individual II/USP "commitment sessions" for the teachers at McClymonds as part of the action plan implementation. The purpose was to obtain each teacher's commitment to implementing the plan. A teacher who could not make such a commitment would need to consider a transfer to another school. The District assessed the teachers' ability and willingness to develop rigorous lesson plans that centered on the standards tested by the state. Represented by Association Executive Director Bruce Colwell (Colwell), Robinson discussed his desire to teach critical thinking skills, make his curriculum relevant to the students' own life experiences, connect the past with the present, and teach African-American students to overcome the "collision of value systems" that impeded their learning of history. Woehrle noted that Robinson was not clear on "differentiated" teaching and gave a weak answer on standards. Dodd recalled Robinson stating he would become a "better team player," on the various teams, "be it leadership, be it Positive School Climate meetings like that." (Proposed dec, at pp. 13-14.)

necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra. PERB Decision No. 264.)

On January 17, 2002, Robinson, Colwell, Dodd, and Vice-Principal Dr. Norman Thompson (Thompson), met to discuss the "provocative prompt"² distributed by Robinson during SSR in his classroom. Addressing Colwell, Dodd stated that as a parent, she, too,

²The "provocative prompt" read, in part:

First Day SSR, I look around the room and I see students doing SSS, silent sustained sleeping. . . . I gave them a two page excerpt from a speech by Frederick Douglass, an ex-slave who taught himself to read under threat of death, because black folk in the day could get 'kilt' if they were caught reading. . . . Worse yet, they think they already know everything already — that they're already adults. 'I'm a grown ass man.' Or 'I'm a grown ass woman,' yet they're scared of silence, or of reading a book. No wonder our people are the laughing stock of the human race.

would have been appalled. Dodd directed Robinson to discuss the matter with the complaining parent, meet with Thompson regarding lessons in the future, and confine future lessons to the "context of the subject and content area." At the conclusion of the meeting, Robinson offered a hug to Dodd, who refused, stating, "I'm still mad at you." When Robinson reported back to Dodd, Dodd told him he should have been "man enough" to meet without the Association. (Proposed dec, at pp. 35-36.)

Since the SSR counseling session and Dodd's last comment about union representation occurred on or about January 17, 2002, approximately two weeks before Dodd's recommendation to non-reelect Robinson on January 31, 2002, it can reasonably be inferred that Dodd's action against Robinson was motivated by his exercise of protected rights.

The "But For" Test

In retaliation cases, once an inference of unlawful motivation is drawn, the burden shifts to the employer to establish that it would have taken the action regardless of the employee's protected conduct. (Novato.)

[T]he test of employer conduct in a mixed motive situation, where legitimate business reasons arguably concur with anti-union motivations as the basis for an employment decision, is a 'but for' test - whether the discharge or other violation of protected activity would have occurred anyway regardless of the improper antiunion motivation, this is an affirmative defense which the employer must establish by a preponderance of the evidence, once the charging party has proved antiunion animus played any part in the decision.

(McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 304 [234 Cal.Rptr. 428].)

Participation in protected activity does not insulate or immunize an employee against decisions made by the employer, including adverse employment actions. (Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) The Board

will find the employer's conduct to be unlawful if it determines that the action would not have been taken but for the employee's protected conduct. (Id. at p. 730.)

The ALJ's findings and the witnesses' testimony support a finding that the District would have non-reelected Robinson regardless of whether he had engaged in protected activity. As the District contends, there were valid reasons not to re-elect Robinson. Dodd's reasons for her recommendation not to re-elect Robinson were:

2000-01 Evaluation indicated does not meet standards[/]developing in 3 out of 6 teaching standards.

2001-02 Evaluation (formal - still in progress) indicates meeting standards.

Informal evaluations indicate lack of student engagement, use of video's [sic] and/or lecturing for majority lessons [sic].

Use of inappropriate instructional materials.

Instructional practices not aligned with identified best practices and student outcomes as indicated in the II/USP Comprehensive School Site Action Plan.

Inconsistent grading policies and attendance procedures.

No consistency between formal and informal classroom observations.

Dodd explained to Robinson on March 25, 2002, upon his request, the reasons for his non-reelection. Dodd referred to Robinson's deficiency in embracing the comprehensive school site plan as it related to best teaching practices, and in providing rigorous and engaging lessons for students. Dodd stated that Robinson's teaching practices were counter-productive to the agreed-upon implementation of quality teaching occurring at all times in all classrooms. Students were not challenged. There were numerous ditto sheets, minimum writing and reading for both the classroom and homework. Students did not read at high reading levels.

Robinson used simple media and ditto sheets to teach students the content standards. He assigned little or no homework throughout the course of the school year. The majority of classroom instruction was lecturing or video, and there was little evidence of accumulated student work. There was also poor documentation on attendance. Robinson did not acknowledge Dodd's areas of concern and became agitated with her. Dodd then terminated the meeting with Robinson.³

The preponderance of the evidence in this record shows that the District consistently and thoroughly documented the standards required for Robinson's successful performance as a probationary multi-cultural and U.S. history teacher. Robinson was undisputedly aware of the fact that McClymonds, a designated II/USP school, was under a state mandate to improve test scores. McClymonds adopted an II/USP action plan after Baker, an outside evaluator, identified lack of assessment findings, effective use of classroom management strategies, and enforcement of attendance policies as "barriers to success." As part of the action plan implementation, Dodd and Woehrle conducted "commitment" sessions with individual teachers, including Robinson, to explain to them the District's expectation. It was apparent even during the commitment session that Robinson was more concerned with making his curriculum relevant to the students' own life experiences than teaching to the standards. Woehrle noted that Robinson gave a weak response on standards.

Thompson, Robinson's evaluator, repeatedly expressed his concerns about Robinson's teaching methodology to Dodd and Robinson. Dodd's decision for non-reelecting Robinson was based on many of these same concerns. In his 2000-2001 evaluation of Robinson, Thompson stated that Robinson lectured too much on "critical thinking" instead of actually

³Hearing transcript, Volume IX.

engaging students in such thinking. Under the category for the classroom environment, Thompson noted that Robinson failed to display more of the students' work in the room, and allowed some students to walk in late without admonition or apparent disciplinary consequence. Under the curriculum planning category, Thompson noted that Robinson had used some video material that might not have been appropriate for the students. (Proposed dec, at p. 12.) Thompson had early concerns about Robinson's own way of teaching and evaluating students. The curriculum being taught by Robinson, in many cases, did not conform to the norms of the District or the school. He did not have proper evaluation of students' response to course materials. Thompson expressed to Dodd his concerns about Robinson's failure to differentiate in the classroom, utilize "best practices," provide sufficient feedback in grading, assign sufficient homework, and refrain from using videos unrelated to the curriculum. Thompson had recommended that Robinson not be rehired for the 2001-2002 year, but Dodd rejected his recommendation. (Proposed dec, at p. 13.)

Robinson did not adopt a curriculum that conformed to the norms of the District or the school. For the 2001-2002 school year, Thompson and Robinson met on September 18, 2001, to outline an educational plan for the school year and reach an agreement on objectives, as part of the required evaluation process for probationary teachers. Thompson testified that he had not received a syllabus for United States History and Multi-Cultural Studies from Robinson, at least during the 2001-2002 school year, in spite of repeated verbal and written requests. Social Studies Department Chair Richard Charlesworth (Charlesworth) testified that teachers should

have a class syllabus.⁴ Robinson also failed to provide Thompson with the required six-week lesson plans for each marking period.⁵

Thompson conducted two days of formal classroom observation of Robinson in December 2001 in the 2001-2002 school year. Thompson gave Robinson a summative ranking of "3" out of "4" in five of six categories. Thompson noted on the evaluation form, "Teacher is making every effort to make standard base [sic] learning/teaching the heart of the course." During the hearing, Thompson noted Robinson had displayed the standards in his classroom, and on the days of the formal classroom observation, he was teaching to the standards. (Proposed dec, at p. 32.) Thompson opined that a lot of work remained to be done.⁶

Although Thompson found Robinson's teaching to be satisfactory during the formal classroom observation in December 2001, Thompson had noted inconsistency between formal and informal classroom observation. During informal observations in many instances, Thompson found it difficult to associate the activities in Robinson's classroom with the course content that had to do with standards. Several students were not on task. Robinson would engage a very small group of students in discussion, while the other students would participate in their own activities.⁷ Thompson testified to two informal observations of Robinson's classroom on March 5, and April 11, 2002 respectively, conducted in accordance with District policy. Thompson observed Robinson discussing current events without any reference to the

⁴Charlesworth testified that he had reviewed a syllabus prepared by Robinson, but there is no evidence that Robinson had submitted one to Thompson. A course syllabus should include a course description, standards and outline of the specific content of the various chapters.

⁵Hearing transcript, Volume VIII.

⁶Hearing transcript, Volume VIII.

⁷Hearing transcript, Volume VIII.

substantive content of the course.⁸ Thompson questioned Robinson's teaching methodology, which involved student discussion without any "closure" as to what the students should understand, or what would be a socially acceptable reaction to certain stimulus and information.⁹ Thompson also observed that Robinson was not teaching to the standards, which he had simply posted in the classroom.¹⁰

Thompson was suspicious of Robinson's grading policies. Some of Robinson's students who had essentially dropped out of other classes received high marks from him. The District introduced documents indicating that instances of the same occurred in 2001-2002. Thompson began monitoring this situation after he learned that Robinson had given a deceased student a passing grade. (Proposed dec, at pp. 15, 68-69.)

Robinson's explanation for these incidents of inconsistent grading policies was implausible. He explained that the passing grade given to the deceased student was probably meant for another student whose name was just below that of the deceased. However, the other student also received a grade. A grade analysis report showed that several students were given grades, even honor grades, in Robinson's class when in fact, they had attended no other classes. Robinson's explanation was that students were attending his class because they liked his class, yet, a student who had been marked absent a considerable number of times in Robinson's class received an honor grade of "B+." Another student whom the other teachers

⁸Hearing transcript, Volume VIII.

⁹Hearing transcript, Volume VIII.

¹⁰Hearing transcript, Volume VIII.

had not seen for a minimum of ten days in a marking period received a grade of "A+" from Robinson. Robinson stated that the student liked his class and was a good student.¹¹

A major concern of Thompson was that Robinson was not displaying more of the students' work. In February/March 2002, Robinson displayed students' "bust a nut" posters in his classroom. Thompson told Robinson that such posters were not the kind of student work appropriate for display. Despite Robinson's explanation for it, Thompson found the posters to be quite objectionable on their face.¹²

Thompson was concerned about Robinson's use of inappropriate instructional materials. The rules for SSR provided that students would select their own materials, and neither of them could read the same book. Thompson found Robinson's creation of a "provocative prompt" on one subject or for one book was totally out of order and therefore inappropriate.¹³ Despite Thompson's recurring request to obtain parental approval before showing controversial materials including videos to students, Robinson would decline to do it or wait until after the fact to do so. Robinson's refusal to abide by District policy, Thompson's recommendations and direction was a source of concern.¹⁴

Opportunities for staff training and development were made available to the teachers, but there was no evidence to show that Robinson was unaware of these staff training and development sessions or had participated in them. Wednesdays were minimum days designed for providing district-wide training to teachers in every department in the school, including

¹¹Hearing transcript, Volume VIII.

¹²Hearing transcript, Volume VIII.

¹³Hearing transcript, Volume VIII.

¹⁴Hearing transcript, Volume VIII.

social studies teachers. Staff development training on the content as well as methodologies was offered to the teachers one Saturday per month.¹⁵

The record herein solidly establishes that Robinson would not have been reelected, regardless of his protected activity. Robinson showed a disregard of the school's commitment to implement the II/USP action plan, and a lack of cooperation with the school administration in utilizing the "best practice" in teaching. Accordingly, I would find the District did not violate EERA section 3543.5(a) in non-reelecting Robinson.

Retaliation Charge - Involuntary Administrative Leave

Background Facts

On May 17, 2002, District Labor Relations Analyst Leonard Bellow, pursuant to the requests of Dodd and Dodd's immediate supervisor Jose Martinez (Martinez), gave Robinson written notice that he was placed on paid administrative leave based on allegations of "unprofessional conduct" at a Leadership Team meeting on May 14, 2002.

The Leadership Team consisted of the principal, two of the vice-principals, department chairs, and a representative from the University of California Academic Partnership Program. Robinson was a member from the outset, even though he was not a department chair.

At the meeting, Robinson insisted to be heard on a matter discussed in his memorandum to Dodd, dated May 13, 2002, entitled "The Corrosive Impact of the Contentions & Unresolved Issues Between McClymonds' Leadership Committee and School Climate Committee and Yourself."¹⁶ The matter of his memorandum was not on the agenda of the

¹⁵Hearing transcript, Volume VIII.

¹⁶Robinson sent copies of his May 13, 2002, memorandum to then-District Superintendent Dennis Chaconas, the Leadership Committee, the Climate Committee and the faculty council.

Leadership Team meeting, but he insisted on being heard and prevailed. In the memorandum, Robinson accused Dodd of tabling or blocking from the faculty meetings recommendations from the School Climate Committee (Climate Committee) and Leadership Committee with which she disagreed. Robinson accused Dodd of singling him out as being a "disloyal enemy," isolating him, and making an example of him. He raised issues concerning the lack of respect shown for his contributions; both in terms of the reform initiative and the personal skills he offered, namely, his use of video and technology in the classroom. He blamed the administration for failing to implement the Climate Committee's recommendations. (Proposed dec. at p. 53.)

The Climate Committee, which addressed issues of student behavior, was one of four subcommittees of the II/USP Whole School Reform Committee. At Baker's direction, a Whole School Reform Committee was established to implement the II/USP action plan. It was separate from, but essentially parallel to, the Leadership Team. The Climate Committee's purpose was to assist in developing an assessment document to identify priorities for programmatic change. The Climate Committee was a carryover of a previous school committee called the Positive School Climate Committee. The earlier committee developed in response to a District-wide task force investigating the high suspension rates of minority students. Dodd had selected Robinson to be on this committee in October 2000. Robinson became its chair formally, when Baker recommended that chairs be appointed. Robinson remained a chair, or co-chair, of this committee until his termination.

After the adjournment of the May 14, 2002, Leadership Team meeting, a group that included Dodd, social studies teacher and Leadership Team member Bridget Taylor (B. Taylor), LuPaulette Taylor (L. Taylor), math teacher Edna Perkins (Perkins) and English

teacher Jennifer Ough (Ough), both of whom were job stewards in the school, discussed the unnerving events during the meeting that Robinson's situation partially created. Subsequently, Ough, B. Taylor and Perkins submitted separate letters to Dodd expressing their concerns over Robinson's behavior at the Leadership Team meeting.¹⁷ Dodd contacted Martinez who advised

¹⁷Ough submitted a memorandum to Dodd on May 15, 2002, stating in part:

After the [Faculty Council meeting on May 14], a number of faculty expressed concern to me over Ron's mental state. They are worried that he is so unstable that he could hurt himself, but also that he could take out his frustration on the McClymonds 'family' of which he is no longer a part. I believe you will be that target of his retaliation.

After the Leadership Team meeting, where he demonstrated more so [sic] his irrational and delusional state of mind, I feel the danger that we face is that he realized, or should have realized, that he does not have support from the faculty.

B. Taylor submitted a memorandum with the following:

On May 14, 2002, . . . I noticed Ron's aggressive behavior begin to take over. He seemed very defensive and paranoid when a person tried to address the issues stated in the letter. It was at that time I noticed a physical change in his dealings with coworkers. He leaned in and raised his voice frequently, disagreeing with everything that was said to him in an effort to gain clarity on the issues stated in his letter.

At the leadership meeting, he came in seeming to have a set agenda for the evening, all about Ron. He first began with the attack on you, stating that you would not allow 'his' document from school climate committee and the group had to explain and prove to him that that statement was untrue. . . . It frightened me! He had the presence of a person on the verge of a breakdown. I actually looked at him during one of his tirades and had a flash of fear overcome me. I felt as though he might hurt any one of us at any time during that meeting, in particular, you. . . . I am writing this letter to you as a warning to keep your eyes open. I think things could become dangerous. . . . I am afraid he may do something irrational for attention. Please be careful, I have a bad feeling about this situation.

her to contact law enforcement, and she did. Martinez came to the school site on May 15 and met with faculty members. There was no evidence that Martinez spoke with Robinson.

Prior to attending the Leadership Committee meeting on May 14, 2002, Robinson attended a faculty council meeting.¹⁸ During the meeting, he brought up the allegations against the administration's failure to adopt the Climate Committee's recommendation as stated in his memorandum to Dodd dated May 13, 2002. Attending the faculty council meeting were B. Taylor, L. Taylor, Perkins, Ough, Spanish teacher Kafi Payne (Payne), and math teacher Stanley Heron. After some discussion, the faculty council members present at the meeting declined to take any action on Robinson's allegations against the administration. Payne agreed to discuss the memorandum further if Robinson would make it more specific. There was a general feeling that Robinson should take his allegations to the Association rather than present it to the faculty council.

DISCUSSION

In determining whether the District retaliated against Robinson by placing him on administrative leave for criticizing the administration for its failure to finalize and implement the Climate Committee's recommendations, the threshold issue is what protected rights, if any, were exercised here.

Dodd recalled that Taylor was the one voicing the greatest concern about her safety. Perkins offered a similar, but more sympathetic, memorandum:

Ron's outward appearance changes during the day from happy, all is well to frustration and anger, which is understandable, but there seems to be an edge to his moods that feels unpredictable. . . . Is there a way to get Ron some sort of exit counseling as he is making the transition?

¹⁸The faculty council is a creature of the contract between the District and the Association and intended for collective, site-based decision-making.

I find earlier that Robinson engaged in protected activities by copying one of his complaints about student fights to the Association, and having a union representative present at the "commitment" session and the SSR counseling session. I also find a reasonable inference, based on the proximity of time, that Dodd's recommendation to non-reelect Robinson on January 31, 2002, was motivated by Robinson's being represented by the Association at the SSR counseling session on January 17, 2002. However, Dodd's comment that Robinson was not "man enough" to attend the session without union representation occurred on or about January 17, 2002, approximately four months before the District placed Robinson on involuntary paid administrative leave. The "commitment" session and the copying of a complaint to the Association occurred during the 2000-2001 school year, almost a year ago. It cannot be established that the adverse action, effective May 17, 2002, followed close in time to Dodd's comments or these other protected activities, which were too tenuous to show any antiunion animus. (Los Angeles Unified School District (1998) PERB Decision No. 1300, adopting the Bd. agent's dismissal, at p. 1; and San Diego Unified School District (1991) PERB Decision No. 885.)

I would find Robinson's May 13 and May 14, 2002 criticism to be an act of self-representation, and therefore unprotected under Woodland Joint Unified School District (2004) PERB Decision No. 1722 (Woodland). Subsequent to the release of the ALJ's proposed decision, the Board issued Woodland on August 31, 2004, holding that the protected right of self-representation no longer exists under EERA. The Board stated that when EERA section 3543 was amended to include language discussing the imposition of fair share fees, the Legislature inexplicably deleted the original language granting employees the right to represent

themselves "individually."¹⁹ In Woodland, the Board reasoned that it "must presume the Legislature was aware that the language it removed was the very language granting employees the right to self-representation... and conclude that the protected right of self-representation no longer exists under EERA." (Woodland, at p. 2.)²⁰ Under Woodland, EERA no longer

¹⁹Prior to the legislative amendment, EERA section 3543 included the following provision:

Public School employees . . . shall have the right to represent themselves individually in their employment relations with the public school employer,. . .

The quoted language above was construed in Pleasant Valley School District (1988) PERB Decision No. 708 (Pleasant Valley) as granting employees a protected right of self-representation. The rationale in Pleasant Valley, however, is based entirely upon the statutory right of public employees "to represent themselves individually in their employment relations with the public school employer." The legislative amendment of 2000 has removed this language from Section 3543.

²⁰As now written, Section 3543 does not identify either a right of employees "to represent themselves individually in their employment relations with the public school employer" or a right "to refuse to join or participate in the activities of employee organizations." (Woodland, adopting proposed dec, at pp. 25-26.) Such omissions are "strong evidence of a contrary legislative intent." (Regents of the University of California v. Public Employment Relations Bd. (1985) 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698].) This seems especially true where the Legislature has removed a right that was contained in the EERA for 25 years. It may well be that the Legislature intended to take the EERA away from permissive individual representation that historically has been a characteristic of California public sector labor law and move the EERA toward the collective-representation-only model that marks federal labor relations statutes covering the private sector. (Woodland, adopting proposed dec, at p. 26; see, e.g., Meyers Industries, Inc (1984) 268 NLRB 493 [115 LRRM 1025].)

The Board also did not find the right of self-representation in Section 3543(b) that permits a school employee to "present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative." The language in Section 3543(b) has been part of the EERA since it was enacted and apparently was modeled after the proviso in National Labor Relations Act (NLRA) section 9(a). (The NLRA is codified at 29 U.S.C, sec. 151, et seq.) The proviso in NLRA section 9(a) reads, in relevant part as follows:

. . . Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without

protects employees who represent themselves individually in their employment relations with their public school employer.²¹

The facts in Woodland and the present case are similar. In Woodland, the employee was terminated because she represented herself in a meeting with her supervisor, during which she expressed to her supervisor, "you cannot treat me like that." The Board held that her act of self-representation was not a protected act. (Woodland, proposed dec, at p. 28.)

In the present case, the preponderance of evidence shows that Robinson acted alone in preparing and submitting the accusatory memorandum addressed to Dodd, dated May 13, 2002. There is no evidence that Robinson took this matter to the Association, or that he

the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining-contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

The courts find the proviso to be nothing more than an authorization for an employer to entertain grievances from individual employees without liability for bypassing the exclusive representative. The federal analysis of the section 9(a) proviso was adopted by the Board in Chaffey Joint Union High School District (1982) PERB Decision No. 202 (Chaffey) as the appropriate interpretation of Section 3543. Based upon the federal interpretation of section 9(a) of the NLRA as adopted in Chaffey, Section 3543(b) cannot be read to create in the EERA a protected right of self-representation.

²¹With the change, EERA thus joins the Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code sec. 3560, et seq.) in not having a provision specifically protecting an employee's act of self-representation. (See HEERA sec. 3565.) By contrast, the Meyers-Milias-Brown Act (MMBA) (Gov. Code sec. 3500, et seq.) and the Ralph C. Dills Act (Dills Act) (Gov. Code sec. 3512, et seq.) both specifically protect the right of public employees "to represent themselves individually in their employment relations with" public employers. (MMBA sec. 3502 and Dills Act sec. 3515.)

That portion of Section 3543 pertinent to the present matter reads as follows:

(a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

represented the Association at the Leadership Team meeting. When he spoke out of order at the Leadership Team meeting, and raised issues concerning the lack of respect shown for his contributions, he was speaking on his own behalf. Thus, his action amounted to an act of self-representation.

With regard to his participation in the faculty council, even if it were protected activity, Robinson's copying the May 13, 2002 memorandum to the faculty council would not necessarily constitute protected conduct, absent other more relevant evidence. The faculty council is not an exclusive employee organization under Section 3543(a). Moreover, Robinson was unable to obtain the faculty council's approval or ratification of his allegations against Dodd at the faculty council meeting on May 14, 2002. The general feeling of the faculty council was that he should instead present the issues to the Association.

Robinson's criticism that the administration had failed to implement the Climate Committee's recommendations was also an act of self-representation. The record contains no convincing evidence to show that the Climate Committee, as a sub-committee of the II/USP Whole School Reform Committee, qualified as an "employee organizations of [the employees'] own choosing for the purpose of representation on all matters of employer-employee relations." (Section 3543(a).) As stated earlier, the Climate Committee's purpose was to assist in developing an assessment document to identify priorities for programmatic change. Moreover, the facts that: (1) Dodd had originally selected Robinson to serve on the Positive School Climate Committee, predecessor of the Climate Committee, in October 2000, and (2) Robinson became chair when Baker had recommended the appointment of sub-committee chairs, would defeat most arguments that he was involved with the Climate Committee in furtherance of protected organizational activities. Even assuming the Climate

Committee was a qualified employee organization, which it was not, Robinson's effort on its behalf was no more than self-representation, considering the lack of authorization for his controversial and accusatory January 31, 2002 minutes.²²

CONCLUSION

After considering the totality of the circumstances and applying the standard under Woodland, I conclude that Robinson was placed on involuntary administrative leave because he represented himself in the Leadership Team meeting on May 14, 2002. I would conclude that his act of self-representation was not a protected act. I would therefore dismiss his charge of retaliation against the District.

²²On January 17, 2002, Dodd issued a memorandum to Robinson regarding the "unfinished" work of the Climate Committee. On January 31, 2002, the Climate Committee held a controversial meeting. Robinson took minutes of the meeting, in which he stated, "It was also agreed that the climate committee could potentially become the scapegoat in case this policy ... fail. (Sic.)" The minutes submitted by Robinson did not contain the approved signatures of the other teachers and staff members who attended the meeting. Most of the attending members declined to have their discussion during that meeting recorded in written minutes. Robinson subsequently erased the names of all the attending members. It can reasonably be inferred that Robinson's controversial and accusatory statements in the minutes of the January 31 meeting reflected only his recollection of the discussion and his own interpretation of the other members' opinion.

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**



After a hearing in Unfair Practice Case No. SF-CE-2283-E, Oakland Education Association v. Oakland Unified School District, in which the parties had the right to participate, it has been found that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b), when it retaliated against Ronald Robinson (Robinson) because of his participation in conduct protected by EERA. This conduct also denied the Oakland Education Association (OEA) the right to represent employees in their employment relations with the District.

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

A. CEASE AND DESIST FROM:

1. Discriminating against Robinson by non-reelecting him for the 2002-2003 school year because of his exercise of protected rights under EERA.
2. Denying OEA its right to represent employees in their employment relations with the District by the above-described conduct.

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

1. Rescind the notice of non-reelection issued to Robinson and destroy all copies thereof.
2. Reinstate Robinson to an equivalent position in the District and make him whole for lost benefits, monetary and otherwise, including back pay, plus interest at the rate of 7 percent per annum.

Dated: _____

OAKLAND UNIFIED SCHOOL DISTRICT

By: _____

Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



OAKLAND EDUCATION ASSOCIATION,

Charging Party,

v.

OAKLAND UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-2283-E

PROPOSED DECISION
(8/31/04)

Appearances: Beeson, Tayer and Bodine, by Sheila K. Sexton and Thomas Dubberke, Attorneys, for Oakland Education Association; Liebert Cassidy, by Emi R. Uyehara and Roger L. Crawford, Attorneys, for Oakland Unified School District.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a teachers organization claims that a probationary high school social studies teacher who participated in school site governance activities suffered retaliation when he was non-reelected by the school's principal and placed on administrative leave prior to the end of the school year.

The Oakland Education Association (Association) initiated this action by filing an unfair practice charge against Oakland Unified School District (District) on August 21, 2002. An amended charge was filed on October 15, 2002. On November 6, 2002, following its investigation of the charge, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the District issued a notice of non-reelection to Ronald Robinson because he exercised rights guaranteed by the Educational Employment Relations Act (EERA or Act).¹ This conduct is alleged to violate section 3543.5(a) and (b) of

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

the Act.² On the same date, the general counsel dismissed an allegation that Robinson suffered a second act of retaliation when he was placed on administrative leave with pay. On November 26, 2002, the Association appealed the partial dismissal.

On January 7, and March 20, 2003, informal settlement conferences were held, but the matter was not resolved.

A formal hearing commenced before the undersigned on June 2, 2003, and continued for 13 non-consecutive days, concluding on December 5, 2003.

On June 20, 2003, the Board reversed the Board agent's dismissal and ordered the issuance of an amended complaint. (Oakland Unified School District (2003) PERB Decision No. 1529.) On July 7, 2003, the general counsel issued the amended complaint. On July 23, 2003, the District answered the amended complaint, denying all material allegations and asserting a number of affirmative defenses. When the formal hearing resumed on September 22, 2003, the parties addressed the new allegations.

With the receipt of post-hearing briefs on April 5, 2004, the matter was submitted for decision.

² In relevant part, section 3543.5 provides:

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.

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

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). The Association is an employee organization within the meaning of section 3540.1 (d). Robinson is a public school employee within the meaning of section 3540.1 (j).

Background

Robinson began teaching in the District in the 1998-1999 school year as a substitute teacher at Oakland Technical High School, holding an emergency credential. His educational background includes a bachelors degree from Cornell University, two masters degrees (civil engineering and city planning) from Massachusetts Institute of Technology, and completion of course work for a doctoral degree (transformative learning) at California Institute for Integral Studies. His relevant employment history includes high school math teaching for one year (1996-1997), split between the Menlo-Atherton and Burlingame high schools.

Beginning in the 1999-2000 school year, Robinson assumed a teaching position at McClymonds High School, filling a full-time, temporary contract position. During his first year at McClymonds, Robinson commenced a credentialing program at California State University, Hayward (Cal-State Hayward). Robinson was offered a second temporary contract for 2000-2001, and a probationary teacher contract for 2001-2002.

In the 1999-2000 school year, Robinson was assigned five sections of multi-cultural studies, a ninth grade social studies class. In 2000-2001, he taught three sections of multi-cultural studies and two sections of eleventh grade United States history. In the fall semester of 2001-2002, Robinson taught four sections of multi-cultural studies and one U.S. history section. In the spring semester of that year, Robinson taught two multi-cultural studies sections, two life skills sections (a companion ninth grade class), and one U.S. history section.

Robinson was placed on paid administrative leave on May 17, 2002, and did not complete the academic year in the classroom. In June 2002, Robinson secured a clear, single-subject credential with a Cross-Cultural Language and Development (CLAD) certificate. Based on the March 8, 2002 release from his probationary contract, Robinson did not return for the 2002-2003 year.

McClymonds is located in and serves West Oakland. Approximately 670 students attend McClymonds. 30 to 35 teachers are employed there. McClymonds has traditionally been an academically underperforming school. West Oakland is an economically disadvantaged and racially isolated community. 78 percent of the student population is African-American, 12 percent is Hispanic, and 8 percent is Asian. Robinson is African-American. Robinson took up residence in a very poor section of West Oakland (locally referred to as "The Bottoms") when he began teaching at McClymonds.

The Public School Accountability Act of 1999 was designed to improve academic performance in California schools by establishing standardized testing as the basis for measuring performance and setting goals for underperforming schools. Using scores from the SAT-9 tests, an Academic Performance Index (API) is established for each school. McClymonds had the lowest possible API when it was initially measured (a "1," or the lowest decile of schools with similar demographics). 93 percent of McClymonds students scored below 50 percent on the 2000 SAT-9 tests, 85 percent in language and 88 percent in mathematics. African-American students as a subgroup performed more poorly than the school-wide figures in all of the testing areas.

In the 1999-2000 school year, McClymonds underwent accreditation review by the Western Association of Schools and Colleges (WASC). That review process provided impetus for the school engaging in a comprehensive approach to "whole school reform." Various

committees composed of faculty and staff took up areas of concern in that process.

Participation in the committees was on a volunteer basis and Robinson volunteered willingly for committee positions.

A Leadership Team formed during this time. It consisted of the department chairs, administrative staff (the principal and two of the vice principals), and a representative from the University of California's California Academic Partnership Program (CAPP). CAPP is designed to assist a selected group of underachieving schools by providing resources and expertise, particularly as it relates to teacher development. Robinson was a member of the Leadership Team from the outset, even though he was not a department chair.

At the same time as the Public School Accountability Act was passed, the Legislature established the Immediate Intervention/Underperforming Schools Program (II/USP). As a consequence of the release of test scores in the fall of 1999, McClymonds was officially designated an II/USP school. The legislation provides that the state superintendent of schools can impose a number of harsh sanctions if the designated school's test scores do not improve over time, such as closure, reconstitution of the school and staff, and removal of staff. Under the II/USP, designated schools receive grants to hire an outside evaluator and develop a report of findings, which is followed by an "action plan" addressing the identified barriers to student achievement.

1999-2000 School Year

Lynne Haines Dodd transferred from Castlemont High School in East Oakland to assume the principal position at McClymonds in the 1999-2000 year. It was also Robinson's first year at McClymonds. Robinson began to view Dodd as narrow-minded in her view on how to address the student discipline problem. Robinson interpreted Dodd's comments on the

subject as blaming the teachers for the problem because they lacked effective classroom management skills.

In November 1999, Robinson attended a community meeting on education at McClymonds, where he had occasion to speak with Oakland Mayor Jerry Brown about the school. They discussed the need for student discipline in the classroom. (Robinson recalled that the two related to each other based of their common Jesuit upbringing.) Brown proposed a no-administrators meeting at McClymonds to encourage full disclosure. Robinson testified that he sought Dodd's approval for the meeting space, and noted the no-administrators proviso. Dodd agreed after initially questioning the limitation. These points were disputed by Dodd, but I credit Robinson, for reasons explained below.

The Mayor Brown meeting occurred in January 2000. During the meeting, participants identified various student discipline issues. They included student fights and "hall-walking." Hall-walking is the practice of students, who skip class or have dropped out, roaming the halls in a manner that is disruptive to others intent on participating in the educational program. Yefel Thiembe, a campus supervisor, expressed that he did not feel safe from certain students. According to Robinson, Dodd learned of Thiembe's statements and then ridiculed him for being fearful because he was big and strong. Dodd denied that she ridiculed Thiembe, though, in a private conversation with him, she did question why he should feel threatened given that he weighed about 250 pounds.

Dodd chaired the Leadership Team and prepared its agendas. In the 1999-2000 year, the Leadership Team was focusing on the WASC accreditation process. Immediately after the Brown meeting, Robinson headed upstairs to a Leadership Team meeting, at which a buffet dinner was being served. Robinson quotes Dodd as saying, "I'm holding you personally responsible for everything said in that meeting." Dodd paused, added, in anger, "You

shouldn't even be allowed to sit and eat dinner with us," and walked away. Robinson sensed "there was definitely something going on with [Dodd] in that setting."

Dodd denied admonishing Robinson in this manner. She claims she did ask Robinson as a matter of protocol to notify her of this type of meeting in advance because she had not received notice prior to the event. As to the credibility disputes here, I credit Robinson's account because it is inherently more plausible. I doubt that a first-year, temporary-contract teacher such as Robinson, with no prior history with Dodd, would attempt to convene this type of meeting without seeking prior approval, and the event was not something that would or did go unnoticed by the staff.

Sometime prior to the end of the school year, Robinson inquired as to whether his temporary contract would be renewed for the following year. Dodd initially told him not to worry. Not hearing anything official from the District, Robinson inquired about his status with the District's human resources department in July 2000. He was told he was not on any school's list for a contract. When Robinson inquired with Dodd about this she responded, "You, of all people, should know there are no guarantees." Nonetheless, Robinson received a temporary contract for the 2000-2001 year.

2000-2001 School Year

The 2000-2001 year was significant because Ralph Baker, the II/USP outside evaluator, who coordinated the production of the report of findings, came on board in December 2000. Baker facilitated the gathering of information through focus groups and surveys of teachers, staff, students and community members. The report of findings issued in March 2001.

At Baker's direction, various committees were established to assist in this process. An II/USP Whole School Reform Committee was established. It was separate from, but essentially parallel to, the Leadership Team. Robinson was a member. Four task forces, or

subcommittees of the Whole School Reform Committee, included the School Climate Committee (which addressed issues of student behavior), Quality Teaching Committee, Professional Development Committee, and Small Learning Community Committee. The subcommittees' purpose was to assist in developing an assessment document to identify priorities for programmatic change. The School Climate Committee was a carryover of a previous school committee called the Positive School Climate Committee. The earlier committee developed in response to a District-wide task force investigating the high suspension rates of minority students. Dodd had selected Robinson to be on this committee in October 2000. Robinson became its chair formally, when Baker recommended that chairs be appointed. Robinson remained a chair, or co-chair, of this committee until his termination.

Baker distilled the staff input from the Climate Committee. The survey findings coalesced around issues of better disciplinary control of students. Particular emphasis was on establishing control of behavior in the common areas outside of the classroom and accountability of staff.³ Baker's "summary" section began with the statement:

This data suggests that there needs to be: Better coordination between teachers and administration in terms of understanding who is responsible for handling specific discipline problems in specific settings... [and] [s]tandardized penalties and enforcement for student non-compliance with expected behavioral norms that are understood by all....

³ The survey identified top priorities including "procedures for teaching all students appropriate social behavior in a school-wide curricula (i.e. anger management, violence prevention)," "procedures for monitoring student behavior (i.e. office referrals, suspensions, injuries)," "procedures to identify behavioral expectations in Cafeteria, hallways, restr[oo]ms . . .," "procedures for training staff to use specific setting [support] plans," "procedures for monitoring the effectiveness of specific setting [support] plans," "agree[ment] about what behavior problems are handled in classr[oo]ms and offices," "procedures for responding to rule violations," etc.

The report of findings was incorporated into the II/USP action plan, which issued in June 2001. The action plan provides this statement of "school" (as opposed to District)

"barriers to student success":

Content standards are not being articulated within and across grade levels in Reading (Literacy), English Language Development (ELD), and Academic English Development (AED) for African-American students and Mathematics (especially Algebra);

Assessment findings are not being used to drive instruction to improve student learning, mastery and growth on the API;

Not all teachers are using effective classroom management strategies;

Lack of enforcement, penalties and incentives for students and staff concerning attendance;

Lack of uniform code of conduct, consequences, enforcement of student discipline.

The first instance of any counseling or reprimand of Robinson occurred on December 1, 2000. Dodd wrote Vice-principal Dr. Norman Thompson a memorandum indicating concerns about Robinson's use of the films "Menace II Society" and "Sankofa" in his multi-cultural studies class. "Menace II Society" depicts the story of a young black man, growing up in South Central Los Angeles, who adopts "street values," lacks positive role models, and struggles unsuccessfully to recognize alternatives to the lives of those around him. It contains profanity and violence.⁴ Sometime prior to December 1, Dodd had overheard the profanity

⁴ Roger Ebert reviewed the 1993 movie, comparing it with the more popular "Boyz N the Hood," and wrote:

If "Boyz N the Hood" was the story of a young man lucky enough to grow up with parents who care, and who escapes the dangers of street culture, "Menace II Society" is, tragically, about many more young men who are not so lucky.

while walking the halls and spoke to Robinson about the film. Robinson explained to her that the film's significance lies in its focus on black-on-black crime, and "values and issues." A University of Michigan graduate student, speaking at a District staff development meeting in September 2001, touted "Menace II Society" and "Slam" as two movies excellent for inner-city youth. One of his most effective lessons was based on "Menace II Society." Dodd did not dispute this could be so, but claimed that the film would have to be "utilized for a specific purpose," such as for critical thinking, but not for "just something to watch." She did not see Robinson at the front of the room where he could pause the film for discussion and some students were not engaged.

"Sankofa" is a movie of the African diaspora attempting to present a more complex but "liberating" view than the "Hollywood" depiction of that epoch. It contains a rape scene involving a slave and her master.⁵ Dodd also witnessed Robinson showing this film and questioned Robinson about its relation to course content. Dodd had seen "Sankofa" and objected to its brutality against blacks (including the rape scene) and its use of profanity. Robinson indicated that the students would be writing essays about the movie. According to the memorandum, Thompson was to counsel Robinson not to show any video without prior

(Roger Ebert, Chicago Sun-Times (May 26, 1993 [webversion])
<http://www.suntimes.com/ebert/ebert_reviews/1993/05/859437.html> [as of August 16, 2004].)

The movie is rated "R" for strong violence, drug use and language. (Id.)

⁵ The rape of the slave leads her to a path of resistance and ultimately the killing of the master who violated her. (B. Costantino, E. Sanchez, T. Shariff, Sankofa website <<http://dickinsg.intrasun.tcnj.edu/sankofa/s-scenelog.htm>> [as of May 1, 2001].) The film's producer maintains a website describing the film as attempting to correct the Hollywood depiction of the involuntary African diaspora, by celebrating the resistance efforts of slaves. "Sankofa" is a renaissance symbol from the Ashanti/Akan people of Ghana signifying looking toward the past before considering the future, or "understand[ing] why and how we came to be who we are today." (Mypheduh Films, Inc. website <<http://www.sankofa.com/about.shtml>> [as of Aug. 16, 2004].)

approval from the administration. Dodd, in testimony, stated that only videos on a District-approved list could be shown without prior approval. No list was actually produced by the District. Several District witnesses were aware of the policy that "R" movies could only be shown with the administration's prior approval and/or parental consent slips. However, Richard Charlesworth, the social studies department chair, whom I found largely disinterested in the outcome of this case and otherwise credible, was unaware of a District-approved list or any clearly explicated policy on videos. Al Claiborne, a social studies teacher who also testified for the Association, was unaware of any school policy on videos.

During the 2000-2001 year, Robinson was evaluated by Thompson. Thompson conducted three classroom observations on consecutive days in January 2001. The "Certificated Evaluation Observation Form" utilized by the District entails a pre-observation conference and post-observation conference for each of the formal classroom observations. Thompson chose to observe Robinson's U.S. history class.

The official form has six teaching standards, two on each page (three pages total), and an additional three pages for other comments. The observation evaluation form introduced into evidence for Robinson has only two of the three teaching standards pages. No explanation was given for this discrepancy. For each of the teaching standards, the form lists a set of more specific criteria for grading. A number grade is to be assigned to each of these criteria, though not all boxes need be checked each time an observation occurs. The grades are: "1" for "does not meet standards: unsatisfactory"; "2" for "does not meet standards: developing"; "3" for "meets standards"; and "4" is for "exceeds standards."

Although the District also has a summary evaluation form which is to incorporate the findings from the observations forms (both for an "interim" and "final" evaluation, depending on which of two boxes is checked), this form was apparently never completed for Robinson in

2000-2001. Thus, the January observation report constitutes the only written evaluation of Robinson for that year.

Thompson rated Robinson as mostly meeting standards. Only five "2" marks out of a total of 50 total marks were given in the specific criteria. All the rest were "3"s. Thompson provided notes and constructive criticism on the "2" ratings. Under the category for engaging students, Thompson noted that Robinson lectured too much on "critical thinking" instead of actually engaging students in such thinking. (Thompson testified that a teacher should not lecture for more than four or five minutes without engaging students in dialogue.) Under the category for the classroom environment, Thompson noted that Robinson allowed some students to walk in late without admonition or apparent disciplinary consequence. Thompson was also critical of Robinson's failure to display more of the students' work in the room. Lastly, under curriculum planning, he noted that Robinson had used some video material that might not have been appropriate for the students.⁶ The negative comments were repeated in the short summary sections at the end of the form. Robinson chose to enter a disputed version to the comment that "some" students were not engaged and talked the entire period. Robinson claimed there was only one student who was not on task.

There is a box for a "summative" rating for each of the six teaching standards. The form indicates these final ratings must be entered by April. However, no summative ratings were entered on the 2000-2001 form. For this reason, Dodd's assertion in an e-mail to District

⁶ Thompson's attempt to expand on this issue at the hearing was nonspecific. Thompson testified that he had counseled Robinson following Dodd's December 1 memorandum, a claim denied by Robinson. Thompson's evaluation comment also noted that further assessment of the relevance of the video would be required to render final judgment. Apparently no further analysis was undertaken. At some other time, Robinson had volunteered to Thompson that he had shown the movie "Slam" to his students. Thompson had concerns about this movie as well.

offices at the time of her non-reelection decision that Robinson was not meeting standards in three of the six standards in 2000-2001 is contradicted by the record.

At the hearing, Thompson stated he had early concerns about Robinson. Discussing his overall impressions of Robinson, he testified:

My observations were that Mr. Robinson had his own way of teaching and evaluating students. In many cases, they did not conform to the norms of the district nor the norms of the school as it pertains to the curriculum being taught, the materials being used in support of that curriculum, and the proper evaluating of students' response to those materials. Where [as] he did work with the students, the content of such was in my opinion not on task with what should have been taught with that particular course.

According to Thompson, Robinson "felt the need to bring students into a contemporary focus and understanding of the content of what he was teaching, so his use of certain materials he felt was in keeping with that philosophy." Thompson also testified that Robinson failed to submit Stull objectives, which are discussed at the beginning of the year as part of the evaluation process, as well as six-week lesson plans in 2000-2001, despite requests to do so. In addition, he claimed Robinson failed to turn in a course syllabus for multi-cultural studies that year. Charlesworth and Claiborne testified that six-week lesson plans, but not the course syllabus were required. Charlesworth added that the administration was not consistent about requiring either. A reminder note from Thompson to Robinson in January 2001 mentions Robinson's missing Stull objectives but not the syllabus or lesson plans.

In April 2001, II/USP "commitment sessions" were held for the teachers at McClymonds as part of the implementation of the action plan. The teachers were individually interviewed by Dodd, Sue Woehrle, Dodd's immediate supervisor (executive director of high schools), and Baker. The purpose of the meetings was to obtain each teacher's commitment to implementing the plan. If a teacher could not make such a commitment he/she needed to

consider a transfer to another school. The meetings also allowed the District to assess the teachers' ability to contribute by ascertaining their strengths, weaknesses and philosophies. In Dodd's mind, a key to the success of the reform process was for teachers to "discard practices that were clearly not working for student achievement" and instill in students aspirations for post-secondary education. To that end, the committee was interested in the teachers' ability and willingness to develop rigorous lesson plans centered around the standards tested by the state. Robinson brought Association Executive Director Bruce Colwell to the meeting out of concern it might facilitate his involuntary transfer.

During his session on April 11, Robinson discussed his desire to teach critical thinking skills, make his curriculum relevant to the students' own life experiences, connect the past with the present, and teach African-American students to overcome the "collision of value systems" they experience making them resistant to learning history. Woehrle kept notes indicating that Robinson was not clear on "differentiated" teaching⁷ and gave a weak answer on standards. Around this time, Dodd had expressed to Woehrle concern about Robinson's use of videos. Woehrle's overall impression was that Robinson was "somewhat philosophic" in his approach. Dodd recalled Robinson stating he would become a "better team player," on the various teams, "be it leadership, be it Positive School Climate meetings like that." Colwell testified that Robinson was eloquent in articulating his commitment to the reform process. Yet he sensed

⁷ Differentiated teaching is considered by the teaching profession a component of "best practices." Essentially it is the concept of recognizing and employing strategies to address the differing skill levels of students in the classroom. The District's own evaluation tool for this standard cites the following indicators: "scaffolding" (temporary support/ guidance/ assistance provided to students on new or complex tasks, including providing comprehensible input); "modeling" (demonstration of skill or strategy (e.g., demonstrating "reading around the word" to identify context clues)); "visuals" (graphic organizers, pictures, gestures, artifacts, regalia (e.g., . . . flow charts)); "brainstorming" (students and teachers generate a variety of ideas for a topic); "checking for understanding" (teachers regularly check for understanding from the range of students (e.g., thumbs up/ thumbs down, asking for summaries and paraphrases)).

some conflict between Robinson and Dodd at this time. I found Colwell's testimony to be unrehearsed and balanced, and therefore credible.

By memorandum dated April 26, 2001, Dodd notified the human resources office of her decision not to renew Robinson's temporary contract. This was after first telling the District informally that she wanted to retain him. Dodd changed her mind because of her desire to hire a fully-credentialed social studies teacher and the fact that such teachers were available for interviews. She was also seeking one to teach advanced placement history. Sometime later, no such viable candidates surfaced. Multi-cultural studies teacher Yetunde Reeves began teaching at McClymonds on an emergency credential in 2001-2002, followed by an internship credential in 2002-2003.⁸

Thompson had recommended that Robinson not be rehired for the 2001-2002 year. Dodd considered, but ultimately rejected, Thompson's recommendation. Thompson shared with her concerns about Robinson's failure to differentiate in the classroom, utilize "best practices," provide sufficient feedback in grading, assign sufficient homework, and refrain from use of videos unrelated to the curriculum. As to grading, Thompson reported suspicions because some of Robinson's students got high marks, but had essentially dropped out of other classes. District documents were introduced indicating that instances of the same occurred in 2001-2002. Thompson actually began monitoring this situation after he learned that Robinson had given a deceased student a passing grade. Robinson's explanation that he thought he was assigning the grade to another student with a similar name did not sit well with Thompson because the other student had been assigned a grade.

⁸ The District was attempting to staff only with fully credentialed teachers District-wide and it was a component of McClymonds' action plan as well. Nevertheless, the District's own documents indicate that the District relies on temporary contract teachers to a great extent.

On April 27, 2001, Robinson wrote out a complaint to Dodd regarding student fights. After asserting that he had prevented two "large scale melees" from breaking out that day (a claim Thompson doubted), Robinson focused on his main concern: Thompson's slow response time to a fight 16 days earlier that resulted in a student being knocked unconscious. Robinson injured himself while apprehending one of the culprits. Robinson had asked two other teachers to use the school telephone to contact security and Thompson on that occasion. Robinson asserted that Thompson did not arrive until 20 minutes had passed. Robinson copied the letter to Colwell.

Thompson testified that he responded by calling Robinson's room but received no answer. He then called another teacher on the same floor and asked that teacher to look outside his class and report what he saw. That teacher responded that he did not see anything unusual. The District produced a letter to Thompson from the teacher confirming this account. The letter states that the teacher later discovered that the victim had been dragged into a classroom, and, when he attempted to contact Thompson, was told that Thompson had already departed from his office. He later saw Robinson, Thompson, and the victim near an elevator. Because it is uncorroborated hearsay, I cannot credit the letter's content (i.e., as to what the teacher observed in the hallway or subsequently).⁹ Robinson would file a similar written complaint with Dodd in October 2001 about a student kicking another on the ground and the failure of the security officer involved to report the matter to the administration.

⁹ The District suggests that Robinson may have written the complaint one day after his notification of release to in essence create a trail of protected activity and questions Robinson's claim that Thompson was slow to respond 16 days earlier, based on the other teacher's account of what he observed on "April 27 at 11:40 a.m." The contention is not convincing. If Thompson's delay did occur on April 27, Robinson's assertion that it occurred 16 days earlier would be inconsequential (even if untrue) because Robinson had no particular complaint at the earlier time that would constitute protected activity. Robinson himself wrote that on the earlier date Thompson assured Robinson he would follow up "on everything."

As the school year drew to a close, Robinson was again concerned about his employment status at McClymonds. On June 1, Dodd called Robinson into a meeting and asked him if he was "committed" to the school. Robinson testified that, when he stated he was, Dodd asked him why he had written the letter about the fights and copied the Association. She also questioned why he would personally get involved in breaking up fights. Dodds denied making these statements. Toward the end of the same conversation, Robinson asked Dodd if she was committed to keeping him. Dodd conceded that she "didn't want to make any changes." Dodd did not specifically deny this comment. I credit Robinson's account.

Hickory Pit Meeting

By June, 15, 2001, Dodd had notified human resources to rescind the release of Robinson, subject to documentation of progress toward his credential. Dodd believed that notwithstanding Thompson's reservations, Robinson would continue to develop proficiency if given the chance, and hopefully become a "better team player." On cross-examination, Dodd added by way of explaining the "team player" comment that Robinson appeared to have difficulty implementing a "specific methodology" to deepen students' reading and writing. Dodd believed that as a result of the II/USP action plan, specifically, the professional development component, "systems [were] in place to help teachers grow," including Robinson, and that all teachers would be made "very familiar with differentiated instruction" and the creation of "rigorous curricula." Dodd testified that before the last day of school, Dodd delivered each of the returning temporary teachers a tentative assignment for the following year.

Robinson became concerned in June that he had not received official notification of his rehire. As a result of his notice of release and Dodd's assurances, Robinson tried to "nip the problem in the bud." He spoke with Woehrle and human resources about his situation.

Woehrle said she would investigate the status of his credential. Robinson testified that after he fulfilled human resources' requirements for documentation of his internship credential, he contacted Woehrle, who told him she could not guarantee him a position and that then-District Superintendent Dennis Chaconas was only interested in hiring fully credentialed teachers at McClymonds. Woehrle neither confirmed nor denied these contacts from Robinson. Robinson then contacted Colwell who advised Robinson that he could qualify for a probationary contract because he had an internship credential. On that basis, Robinson wrote to Chaconas requesting an assignment, noting his internship credential and other contributions at McClymonds.

When he next heard that McClymonds was holding interviews for teachers, learned that Chaconas was about to embark on vacation, and failed to get Woehrle to confirm his return to McClymonds in writing, Robinson wrote a letter to District governing board member Harold Pendergrass, which he copied to Colwell. Through Chaconas, Woehrle became aware of Robinson's letters to Chaconas and Pendergrass. Dodd recalls Woehrle contacting her in reference to the Pendergrass letter on instructions from Chaconas to clear up Robinson's confusion. Woehrle confirmed with Dodd that Dodd had rescinded Robinson's release within the District's deadline and informed Robinson of that fact. Woehrle testified that she suggested to Dodd that they have a meeting with Robinson.

Dodd made notes of a call with Woehrle dated July 3, 2001, regarding the matter. Dodd's notes list concerns about Robinson: "classroom management [Dodd testified this referred to his use of movies], commitment session, Sacramento IIUSP sessions, [and] scholarship." The list in general referred to Robinson's attempts at "cultural exchange" with students as well as the need to "revisit" all of the issues raised with him that year. Dodd hoped the meeting would confirm Robinson's commitment to differentiated teaching and "team leadership," contrasted with the focus "on his concerns for what he wanted to see happen at the

school site as opposed to a collaborative group decision-making process."¹⁰ Woehrle, agreeing with Dodd at the time, noted she had observed Robinson dressed too casually for a scholarship awards ceremony sponsored by a local church group. At the hearing, Robinson claimed he was dressed in expensive, if "casual," attire and denied he was wearing jeans.

Woehrle testified that the meeting was primarily to address Robinson's concerns; that apart from his contract status, Robinson could set the agenda. Woehrle "assumed" Robinson had other concerns as evidenced by the Pendergrass letter, and that it was "almost his call for what the meeting would be" ~ a characterization I do not find plausible in light of all the circumstances. For example, the Pendergrass letter only addresses securing a position at McClymonds. Even if, as Dodd testified, Chaconas suggested a meeting to Woehrle, or if Woehrle initially believed she needed to be able to report back to Chaconas that a meeting had occurred, she could have dispensed with a meeting after speaking with Dodd and learning of Dodd's timely request for his reinstatement. Yet upon learning of Dodd's desire to "revisit" her concerns about Robinson, Woehrle went ahead. I believe ultimately the intent of the meeting was to elicit some type of commitment from Robinson as a quid pro quo for his return. This point is corroborated by statements at the meeting itself, described below.

When Woehrle called Robinson to set the meeting, Robinson asked if he was going to get a contract. Robinson recalls Woehrle replying that he would have to meet with them first. Sensing an "asymmetrical power relationship," Robinson requested the presence of an Association representative. Woehrle responded:

¹⁰ Elaborating on this point, Dodd recalled a training session at which Robinson appeared in Sacramento as a representative of the school and left early, and a summer 2001 Long Beach conference, where Robinson walked in late to the opening session, as a result of choosing to drive down alone rather than with the group, and came into other sessions late. This, too, was an example of Robinson's lack of team skills and "marching to his own drum." Robinson testified that he had car trouble on the way to the Sacramento conference and told

Damn it, to hell with the Union. I'm sick and tired of teachers always thinking they need to have a union representative. You're either going to meet with us or not, but that's what it's going to take to get the contract.

Robinson consulted with Colwell, who advised Robinson to proceed without him.

Woehrle denied the statements attributed to her. She testified she told Robinson that he did not need representation because no disciplinary action was involved and it was "his request" for the meeting. I assessed Woehrle to be quick, intelligent and fearless. Her demeanor and some of her comments suggested that she spoke impulsively at times and could easily be blunt. Colwell described her as "nice," but "combative," and questioning in the past of the Association's involvement in matters. I credit Robinson's quote as being accurate.

The meeting occurred on July 6, 2001, at an Oakland restaurant called the Hickory Pit. It lasted about 30 to 40 minutes, according to unrebutted testimony of Dodd. Robinson testified that Woehrle opened the pertinent discussion by stating concerns that he was "breaking the confidence of the McClymonds' family." She began by citing the letter to Pendergrass. Woehrle referred to Robinson as "the weakest link," which Robinson interpreted as weakest "in terms of maintaining a sense of propriety" with respect to dissemination of information. Robinson recalled the similarity of this discussion with the one he had had with Dodd regarding the Association and his April 27 complaint about fights. So when Woehrle, without mentioning the Association, stated that Robinson was contacting "outsiders," he asked specifically if she was referring to the April 27 letter as well. Dodd interjected, "That's right." Dodd added, "You're not going to do that anymore, are you?" Robinson agreed, knowing otherwise he would not receive a contract. Robinson viewed this part of the discussion as a loyalty test.

Dodd that was also the reason for him leaving early, around 3:00 p.m. Robinson denied he was late to the start of the Long Beach conference.

Woehrle denied she directed Robinson not to contact outsiders. Dodd was not asked specifically to refute that point, but she denied there was any discussion about "union activities." Dodd recalled that the meeting focused on her list of concerns from her pre-meeting conversation with Woehrle. Reprising Robinson's commitment-session pledge, Dodd asked if Robinson was still committed to the reform effort. Robinson answered he was committed to that and to West Oakland, at which point, Woehrle raised her concerns about Robinson's dress at the scholarship awards function, and his use of the term "The Bottoms" when referring to his neighborhood in West Oakland. Dodd interpreted Woehrle's concern with the phrase as owing to its slang nature and that "street culture" in general, including the use of profanity, runs counter to encouraging the higher aspirations of students.

I credit Robinson's account with respect to the "weakest link" comment and the directive not to contact outsiders. While there is a tendency of witnesses to remember points most relevant to them and Robinson appeared to edit out some matters during the 30-40 minute meeting, I find that Robinson's account as to the points pertinent to him is internally consistent and corroborated by Dodd's notes reflecting the concerns about Robinson's self-motivated agenda for reform and need to recognize the responsibilities of "team leadership." Only Dodd had seen the April 27 letter copied to the Association, which explains why she interjected her answer to the question Robinson had directed back to Woehrle.

On July 23, 2001, the District issued Robinson a contract reinstating him at McClymonds as a probationary teacher for the 2001-2002 year.

2001-2002 School Year

A. Napa Retreat

In June 2001, CAPP sponsored a conference in Long Beach, attended by members of the Leadership Team, including Robinson. The keynote speaker, Dr. Robert Rossi, outlined

research he had performed leading him to recommend a professionally staffed "intervention room" as an effective method of handling student discipline problems. Celeste DuBois, a French teacher, Leadership Team member, and Climate Committee member, and Dr. LuPaulette Taylor, chair of the English department, Leadership Team member, and Quality Teaching Committee member, were among the attendees. At the end of the conference, six teachers, including Robinson, DuBois, and Taylor met and came to some agreements. These included, among others, proposals for an intervention room staffed by a professional as well as a student rewards program for good citizenship.

The Climate Committee continued to meet informally over the summer, as an outgrowth of the Long Beach conference. DuBois recorded a list of recommendations from the committee in August. Recapitulating the Long Beach "agreements," it included a number of concrete proposals for addressing the disciplinary problems, specifically emphasizing the need to discipline hall-walkers. It proposed: (1) a "ladder of consequences" (i.e., a system of progressive discipline); (2) educational activities that might occur in the intervention room; and (3) adoption of a "shared vision," incorporating some concepts introduced by Rossi, including "Ma'at" (seven principles of a moral life) and "A Disciplined Life" (perspectives from a Chicago charter school).

DuBois testified that faculty and staff were conflicted about how to address the student discipline problem. She believed disruptive students needed to be dealt with. However, administrators were under pressure to reduce the suspension rate.¹¹ DuBois agreed with Robinson that the administration favored reliance on teachers' individual classroom

¹¹ A direct repercussion of high suspension rates is the loss of attendance-driven state funding. Since the formal hearing, local news sources have reported that the District, under the leadership of state-appointed administrator Randolph Ward, is aggressively seeking to increase student attendance by criminally prosecuting parents of students who are habitually absent. (Alex Katz, D.A. takes on truants' parents, Oakland Tribune (Mar. 26, 2004) pp. 1, 13.)

management skills to address the problem. DuBois was the last witness produced by the Association. She had been interviewed by the District as a possible witness. It became clear from her demeanor (extremely cautious and nervous) and other actions reported of her that she was striving mightily to remain neutral. I found her credible.

Sensing that the recommendations would not be well received, DuBois spoke with Geraldine Bradford, Community Assistant (also known as Community Liaison), who happened to see the list. Bradford's duties included monitoring student attendance and dealing with tardies and truants. Attendance clerk Sam McNeal and Bradford eventually spoke out (at a faculty meeting in January 2002) about concerns that increased teacher referrals of disciplinary problems would increase their workload. Bradford confirmed to DuBois that the recommendations would not be well-received.

The Leadership Team developed an agenda for the Napa retreat. Prior to the retreat, Dodd learned from McNeal and Taylor that Robinson wished to make a presentation about the recommendations at the retreat and of their concerns that the memorandum contained inaccuracies. McNeal's complaint was that the summer meetings had not included him and others, a point acknowledged by DuBois (though not by design). Dodd asked Robinson for a copy of the recommendations as she was about to leave for Napa.

Robinson testified that, after reviewing the list, Dodd told him, "You have no right to organize the faculty independent of the Leadership Team." He also quoted Dodd as saying:

You are not to pass this out. I don't want to hear anything about the intervention room.

Dodd testified that, after reading the list, she instructed Robinson that the retreat was not an appropriate time to address the matters and that perhaps it could be introduced at a later time. I credit Robinson's version. As will become clear below, Dodd demanded consensus before proceeding and she did not appear to be much of a risk-taker. This, coupled with the

reports of the administration's emphasis on individual classroom management solutions, suggests she had a motive to oppose having the recommendations aired. DuBois read Dodd as opposing the intervention room. Nina Moore, a director of teacher education and K-12 collaboration at the Office of the President for the University of California, was the CAPP representative working with McClymonds. She attended all of the Leadership Team meetings. She was a witness for the District, who described her high respect for Dodd, calling Dodd "exceptional" in terms of effort and "inclusive," perhaps to a fault (referring to Dodd's unwillingness to cut off discussion and direct an outcome). Based largely on Dodd's Hickory Pit directive to be "more collaborative" and on events transpiring later in 2001-2002 relevant to Robinson's activities, I deduce that Dodd's style of leadership involved attempting to forge consensus for major decisions as well as using admonitions to quell dissent. The report of recommendations was neither distributed nor discussed at the Napa retreat.

B. September 18, 2001 Stull Objectives Meeting

As part of the evaluation process, probationary teachers are required to meet with their evaluator, outline an educational plan for the school year, and come to an agreement on objectives. Robinson met with Thompson on September 18 for that purpose. Based on readings and in-service training, Robinson believes that the media plays an important role in the "culture collision" encountered by black students. Robinson believes in the need to mediate the heavy influence of media on youth, and in particular the types of images black students receive, by utilizing such media forms in the classroom as a tool for encouraging their buy-in to learning. Robinson was one of nine teachers in the District awarded a grant under the Urban Dreams program to produce a film with students. Robinson's application proposed a film entitled "Reparations" that would seek to draw parallels between the World War II internment of Japanese-Americans and the slavery experience of African-Americans.

Robinson acknowledged in his 2001-2002 Stull objectives for U.S. history and multi-cultural studies that differentiated learning was important to the administration. At the same time he was open about emphasizing his priorities, proposing "[d]ifferentiated instruction based on and correlated to standards - learner centered and culturally congruent pedagogy," and his "Sankofa" theme ("specific standards and skills to be emphasized will be the connection of past to present and the analyzing of contemporary social problems and the posing of solutions to those problems emphasizing critical thinking skills").

During the meeting, Robinson explained how he planned to use media in his class. He defined media broadly for Thompson to include "films, videos, music, plays, fashion, slogans, etc." He discussed films he wished to show, which included "Hurricane," "Remember the Titans," "Bamboozled," "Sankofa," "American History X," "Menace II Society," and "Slam." Robinson explained the relevance of these films. According to Robinson, Thompson only voiced concerns about "Menace II Society" and "Slam." Thompson demanded prior written parental consent to show "Menace II Society." Robinson chose not to show either "Menace II Society" or "Slam" during the year.

On direct examination, Thompson claimed that Robinson failed to present him Stull bill objectives on September 18. He was forced to retract that claim on cross-examination when shown his April 23, 2002 evaluation form, which marks as satisfied the box for submission of the objectives. The box for "agreement reached" was also marked. In this regard, Thompson had written: "Mr. Robinson's plan was accepted. ..." A copy of Robinson's objectives offered by the Association state under "support requirements," "admin[instration] support of innovative teaching strategies including non-linear thematic orientation of lessons, various multimedia including controversial films as discussed." After the retraction, Thompson nevertheless claimed there was no discussion of the films. I credit Robinson on these points.

C. Climate Committee Activities

The II/USP action plan called for each of the working committees to develop a plan of specific measures addressing the issues in the report of findings. To this end the Climate Committee met throughout the fall of 2001. According to Claiborne, a 24-year social studies teacher (American government and economics), colleague, and lunch-mate of Robinson, he joined the Climate Committee out of a desire to see real change in the matter of student discipline. He testified that the committee met two or three times each month in the fall. Claiborne is a tall man, with a deep baritone voice, who presents himself authoritatively, and was reputed to be a strict teacher. I found him to be a largely disinterested witness and he appeared credible to me.

Mark Rader, an 11-year teacher of math and physical sciences, also joined the Climate Committee and attended meetings during this time. He had previously been invited to the Long Beach conference by Dodd. Rader, who is white, was a popular teacher, due to his involvement in after-school activities. He is a former Navy pilot interested in the history of West Oakland, who chose to purchase a residence there to develop an affinity for his students. Through his after-school-activities he introduced students to aviation as well as another hobby, rock-climbing. On the witness stand Rader presented himself as voluble, self-assured, and spontaneous. Like Claiborne, he stood little to gain by supporting Robinson, and I found him credible. Rader participated in the Climate Committee until his involuntary transfer to another school mid-year due to a CLAD credentialing issue.

Rader testified that Robinson was the leader and facilitator of the committee, the "one guy that you knew was going to make sure it worked." He described Robinson as an excellent facilitator who did not dominate meetings. Nevertheless, some members of the Climate Committee, such as Kafi Payne, a Spanish teacher, Reeves, and McNeal, preferred placing

their energies toward different proposals, such as those for positive incentives for students and teachers. Reeves and McNeal, both witnesses for the District, chose at a later point to distance themselves from Robinson as a result of controversies described below.¹²

During his tenure, Rader complained to Dodd about hall-walkers, whom he described in the following manner:

Well, pretty much in my time teaching there, there was never a single day when there weren't, you know, large groups of kids roaming around the hallways almost every period of every single day. And it was the same group of kids. And some of the kids were kids that I had had in my class that had just dropped out of class and didn't show up anymore and continued to go around the halls.

Rader was concerned about student fights, student aggressiveness toward staff, lack of respect, and truancy. He became more vocal in staff meetings during 2001-2002, his second year at McClymonds, after seeing no progress on the problems (no "organized plan that was effective with the students"). He recalls at one staff meeting being chastised by Dodd for his complaint about hall-walkers. She accused him of not understanding the culture of black students because he was white. On other occasions at the beginning of the semester he complained about over-crowding in his geometry class, and insufficient numbers of chairs. Dodd responded to him by citing Taylor who also had 50 students in one class and telling him to "muscle up and don't complain." Rader claimed the District's grounds for his transfer — lack

¹² In 2001-2002, Reeves co-sponsored and helped implement "Mack Money" (in-kind credits) rewarding students for good citizenship. Reeves was the school's student activities director as well. As reflected by events surrounding Robinson's termination, particularly in minutes of meetings taken by Robinson, but also in statements Dodd attributed to Payne, the District implies that Robinson tended to dominate meetings and deemphasize work in which he lacked a strong interest. Payne denied the statement attributed to her by Dodd, testifying that she believed Robinson's service as chair was fine and that the committee did not stifle her area of interest. DuBois also vouched for Robinson's honesty in a December 6, 2001, memorandum to Bradford stating that Robinson took on the task of "organizer and recorder of what the [Climate] committee and the Leadership team have said they want," "a task which no one else took on," and that he did not "add or subtract material on his own."

of a CLAD credential ~ were specious, because, while he had a clear credential in math, the two teachers hired to replace him had emergency credentials. Based on his demeanor I find it quite likely Rader was outspoken and direct when it came to sensitive issues at the school.

CLAD certifies competence to teach limited-English-proficient students. Rader believed that the CLAD issue could have been addressed by transferring those few students he had to the math teacher who had CLAD. In addition, part of the reason he did not spend his summer earning the credential was because he enrolled in a masters program at the University of California, a slot he obtained with the help of Dodd's recommendation. Rader opined that, as it pertained to actual decision-making, Dodd operated on the basis of loyalty: "If you weren't in her little club or group, you were pretty much on the outside." This was a point to which Robinson alluded as well. Rader described Dodd as overtly pleasant and friendly, but duplicitous. Robinson agreed that Dodd was outwardly charming.

The Climate Committee produced a first draft of their report in December 2001. The report required approval by the Leadership Team, followed by adoption by the entire faculty. On January 8, 2002, the Leadership Team approved most of the recommendations of the report and placed it on the January 14, 2002, faculty meeting agenda. Those items set aside were ones for which additional discussion was required. The list of items adopted included, in order of listing: (1) attendance policies and staff responsibilities (time limit for taking attendance, recording of tardies, requirement for documentation of excused/not excused tardies issued to student by attendance office, definition of "truant," the requirement for intervention of the community liaison person for excessive absences, and incentive programs for good attendance); (2) discipline policies and staff responsibilities (requirement on teachers for classroom management rules and expectations, list of progressive discipline, chart of "Standardized Interventions and Consequences for Discipline Offenses," and agreement to

pursue grant for staffing of an intervention room); (3) student incentives ("Mack Money" for purchase of T-shirts, sweatshirts, game and dance tickets, and contests); and (4) staff and student morale. The one notable provision that appears to have been tabled by the Leadership Team was a set of rules to address hall-walkers under the tardy policy, by requiring violators to attend the detention room.

A tardy/detention policy had been severed from the package, announced to the school and community, and implemented on December 5, 2001. This policy required assignment of detention for the second tardy offense in one day, and possible detention for the second occurrence in one week. It prohibited participation in athletic events until detention was served.

D. Attempted Establishment of the Faculty Council

The collective agreement between the Association and the District provides for the establishment of a faculty council at each school site. This is a representative body of teachers, elected by the unit members. Its primary function is to facilitate site-based decisionmaking, including approving the allocation of discretionary site funding. During the 2001-2002 year, the McClymonds faculty council was dormant.

Jennifer Ough is an English teacher at McClymonds. She is also an Association site representative, a position that serves as a first-level grievance representative. During the 2001-2002 year, she served on the Leadership Team and Small Group Learning Committee. Ough testified for the District. She offered the opinion that McClymonds is not a "gung-ho union school." Ough, in her first year as site representative in 2000-2001, tried to drum up interest for the faculty council, without success.

In December 2001, Dodd announced the availability of funding which could not be disbursed without a working faculty council. Robinson volunteered to get the ball rolling.

According to Robinson, when Dodd gave Robinson the memorandum on funding, Dodd suggested he give someone else a chance because he was on enough committees. Dodd testified that Robinson asked her if she wanted him to be chair of the council and she responded that he should take it up with Ough as site representative; that she, Dodd, was "out of it." She specifically denied telling Robinson he was on enough committees. I credit Robinson's account as being more plausible. Robinson would have known the positions on the committee were voted in by the staff rather than appointed by Dodd. Robinson did contact Ough at Dodd's suggestion. But the council was not constituted until March 2002, and only after Robinson obtained the necessary paperwork for the elections from the Association and completed it. Robinson was elected to a position on the council. The first meeting was in late March or early April.

E. 2001-2002 Classroom Observations

Thompson conducted two formal observations of Robinson in his eleventh grade U.S. history class on December 10, and 11, 2001. Thompson entered these dates in the appropriate blanks on the first page of the standard classroom observation form. The form's own language states:

Completion of interim evaluation by 2nd Friday in December.
Completion of final evaluation by last working day in April.

The final evaluation is to be prepared on a separate form entitled "Evaluation Report for Certificated Employees." As opposed to 2000-2001, a final evaluation form for Robinson was prepared in 2001-2002.

The copy of the classroom observation form entered into evidence shows a date stamp of January 8, 2002, by the District's human resources office. The next three pages set out the teaching standards and the grading for each observation. As noted above, each standard has a set of evaluation criteria and there is a "summative rating" for each of the six standards. At the

top of the column for the summative rating, the form states "Final April Summary Rating."

The individual criteria allow for grades to be entered for up to five observations.

On the second page, Thompson entered all "3"s. There are three "3"s for the first standard ("engaging and supporting all students in learning"). Two criteria are left blank. Thompson also entered a "3" for the summative rating. As to the second standard on this page ("creating and maintaining effective environments for student learning"), Thompson entered four "3"s. He left two criteria blank. Again, Thompson entered a summative rating of "3" for the second standard. These individual ratings were all entered after the first observation. The appended comments following the first observation from Thompson state:

The teacher was able to engage most of the students in meaningful discussion on issues requiring the use of critical thinking skills. Some of the students were disengaged and did not participate.

Robinson chose to enter this response in the space provided:

Students are working toward understanding the standards of the course relative to the discussions that are taking place in the classroom....

On the third page, Thompson gave Robinson two "3"s and left three blank under the standard for "understanding and organizing subject matter for student learning." A summative rating of "3" was entered for this standard. Thompson gave two "3"s, left three blank, and issued a summative "3" for "planning instruction and designing learning experiences for all students." These ratings issued after the second observation.

The fourth page contains no ratings, individual or summative, for the fifth standard, "assessing student learning." Thompson entered two "3"s after the first observation and two "3"s after the second observation under the sixth standard, "developing as a professional educator." A summative "3" was given for the sixth standard. In sum, Thompson gave Robinson a "3" for five out of the possible six summative ratings, with one blank.

Thompson's comments following the second observation were:

Teacher is making every effort to make standard base [sic] learning/teaching the heart of the course.

Robinson responded:

I agree and I am proud of how the students are coming along.

F. January 14 Faculty Meeting

Robinson was assigned to present the Climate Committee's recommendation to the full faculty on January 14. Robinson was caught off guard when Dodd told him of a late addition to the agenda. She had directed McNeal, Bradford, and another staff member handling attendance matters to present an update on the newly implemented tardy/detention policy. Robinson characterized this implementation as a "precursor to establishing a fully funded 'Intervention Room' for handling discipline, hall walking, tardies and other problems." Robinson interpreted the McNeal/Bradford report as maligning the teachers for referring too many students to the detention room. Apart from an additional concern from advocates for athletes who objected to the service of detention during practices and games, DuBois noted that Bradford and McNeal objected to implementation of the tardy/detention policy because it increased their workload. The attendance staff asserted that the detention room was not intended as a place to send students for problems other than tardiness. Dodd initially testified the attendance staff was simply reminding teachers to accurately and timely submit tardy notices to them, but later acknowledged that they also objected to teachers referring disciplinary problems other than tardies to the detention room.

Developed by the Climate Committee, the detention room took place in the auditorium after school, before school, or during lunch. The attendance staff along with Assistant Principal Tami Bell and Thompson staffed this room. Additional coverage of the detention room was assigned to staff on a rotating basis. According to Reeves, with 20 or more students

there, it was a hardship, and "[the room] just wasn't happening for McClymonds." In contrast, the intervention room would have occurred during the school day (thus explaining the need for funding for staff) and would have been a way to deal with discipline-problem students without suspending them.

Robinson began his presentation by pointing out that Dodd had approved use of the detention room for referrals of disciplinary problems other than tardies. Dodd acknowledged to the faculty that Robinson was correct. On redirect examination, she asserted that she added the caveat that this only applied when she was staffing the detention room, a claim I reject as implausible.

Because of the added agenda item and because Dodd wanted to press on with the remaining agenda items, no vote was taken on the committee recommendations. Robinson believed that a full-faculty vote was not always required to adopt such recommendations. The already implemented tardy/detention policy aside, Robinson believed the faculty approved the remainder of the recommendations. District witness Bell corroborated this to an extent when he testified that he assumed at least some portions of the recommendations were effectively approved for implementation.

Robinson acknowledged that Thompson raised an objection about the sequence of actions (chart of progressive sanctions) not conforming to District policy. The District has a form for suspension of students that lists which offenses may result in immediate suspension and which first require intervention steps. After the meeting, Robinson and Thompson spoke, with Robinson questioning why the administration had not raised this objection when it was before the Leadership Team. He insisted that the administration make those corrections; that the Climate Committee had concluded its work. Robinson also understood the package of recommendations would be placed on the faculty meeting agenda for February. Dodd testified

that Robinson took notes on faculty input and that the matter would be referred back to the Leadership Team, and returned thereafter to the faculty. It never was, as explained below.

Both DuBois and Claiborne were frustrated at what they perceived as the administration's failure to follow through with implementation of the recommendations to deal with disruptive students. DuBois believed that it was the Leadership Team, not the Climate Committee's, responsibility for moving forward with adoption of the recommendations. She was unsure what prevented the Leadership Team from acting. Claiborne met with Thompson and Bell to share his concerns. He claims he got no specific answers. As a result he concluded that all of the committee's efforts had "gone down the tubes." Claiborne had been involved with the disciplinary issue for many years at the school. He required students to serve detention with him personally.

As to the intervention room, Dodd testified that she advised Robinson and DuBois to write a county probation department grant application for the room, but none was ever written. DuBois testified that Dodd never encouraged anyone to seek funding for the room and, as noted above, she believed Dodd was opposed to the idea. Ough concurred with DuBois's reading of Dodd. Reeves recalled that DuBois got an application form for the grant with the probation department, but believed that Dodd would have had to complete it. Bell testified that an application had to be made to the County Office of Education through the District offices. Bell acknowledged that Dodd would have had to approve any application, but claims it never came to that for reasons not made clear to me by his testimony. Minutes from as late as the March 5, 2002, Climate Committee meeting, submitted by the District, indicate a report that a grant to the Alameda County probation department could be submitted for staffing of an intervention room. This contradicted testimony by Bell that the school was too late for the funding cycle. I find that whatever its professed explanations, the administration declined to

move forward with the intervention room recommendation and that a substantial motivating reason for that was its opposition to the room.

G. January 15 Silent Sustained Reading Implementation

The Leadership Team had resolved in the fall of 2001 to implement a "silent sustained reading" (SSR) period. Robinson supported the idea at that time. SSR was designed to encourage students to develop an appreciation and discipline for voluntary reading. Although some teachers had begun this practice earlier, it was announced that beginning on January 15, 2002, at a designated time all students, regardless of the classroom they were in, were to read some legitimate reading material they had selected for a 10-to-15-minute period.

During the first official day of the school-wide implementation, Robinson distributed a "provocative prompt." He did so because he had learned of resistance to the exercise at other schools through his credentialing program and discovered a fair number of his students came to class without selected reading material as instructed. The "provocative prompt" read:

First Day SSR, I look around the room and I see students doing SSS, silent sustained sleeping. Reading, focusing on something for even two minutes seems to cause them untold pain. I have never in my entire life witnessed anything so pathetic as this. It make me lose all hope as a teacher. Half students [sic] are not reading, one is taking phone calls after I told her to shut the phone off. Some are just staring off into space. Others are chomping at the bit to chop it up with anyone about anything so long as they don't have to read. I gave them a two page excerpt from a speech by Frederic [sic] Douglass, an ex-slave who taught himself to read under threat of death, because black folk in the day could get "kilt" if they were caught reading. I look at our black folk today with their \$150 sneakers and all the other freedoms they have and it makes me sick to see these young folks so spoiled with their gold teeth and cellphones and pagers talking about nothing except some he said she said shit. They're lost and they don't care. Worse yet, they think they already know everything already — that they're already adults. "I'm a grown ass^[13] man." Or "I'm a grown ass woman," yet they're scared of

¹³ Berkeley High School Slang Dictionary (N. Atlantic Books, 2004), page 11, defines "-ass" as:

suffix/adj., Add emphasis to an adjective. "Those are some good-ass cookies." "That is a bad-ass haircut."

silence, or of reading a book. No wonder our people are the laughing stock of the human race.

The following day, a parent of one of the students in Robinson's multi-cultural studies class complained to Dodd about the essay Robinson had distributed. Dodd spoke to some of the students. They reported to her that Robinson prepared it at the computer in the classroom because some students were not reading and some had failed to comply with his directive to turn off their cell-phones. Some students said they were offended by the "laughing stock" and materialistic references; others thought the essay was "cool." Several staff members also found the essay offensive to blacks, including Bradford and McNeal, who complained to Dodd. It appears Robinson had distributed the piece in staff mailboxes.¹⁴

Dodd was offended by the piece and informed Robinson to meet regarding the complaint. Robinson requested the presence of an Association representative. As reflected in his testimony and a contemporaneous memorandum he wrote to Colwell, Dodd became upset and angry with Robinson when he would not meet with her immediately because he could not arrange for Association representation, and that she hung up the telephone on him after he informed her that it was Thompson who advised him representation would be advisable due to the seriousness of the matter. Dodd claimed she told Robinson that rescheduling the meeting would be no problem. I credit Robinson on this point. Colwell was present when Robinson met with Dodd and Thompson on January 17.

At the January 17 meeting, Robinson explained that he was using the document for classroom management purposes and that the use of harsh language was a vehicle to get his students to relate to his plea. He also stated it was part of a lesson plan that included a

¹⁴ Bradford had a grandson attending McClymonds in the eleventh grade. She testified that her grandson brought the essay to her and was upset. But Dodd contradicted Bradford's claimed impetus for her complaint when she testified the complaint came from a parent of a student in Robinson's ninth grade multi-cultural studies class.

Frederick Douglass speech, presumably the one cited in the essay.¹⁵ According to Dodd, Robinson gave conflicting accounts regarding the essay's authorship, stating it was a fictional piece taken from the internet. I credit Dodd's testimony that he was not completely truthful in his answers regarding authorship.

Addressing Colwell, Dodd stated that as a parent, she, too, would have been appalled. Colwell neither agreed nor disagreed with her opinion. He agreed to have Robinson first clear any similar provocative device in the future with the administration. At the conclusion of the meeting, Robinson offered a hug to Dodd, who refused, stating, "I'm still mad at you." Robinson's testimony on this point was corroborated by Colwell. Dodd denied she said she was mad at Robinson. I credit Robinson and Colwell.

As a result of the meeting, Robinson was directed to discuss the matter with the complaining parent, directed to meet with Thompson regarding lessons in the future, and confine future lessons to the "context of the subject and content area." Robinson claims he spoke with the complaining parent, who was understanding after receiving his explanation. After reporting back to Dodd, Robinson testified that she told him he should have been "man enough" to meet without the Association.

Sometime in March 2002, Dodd observed Robinson leading his students single-file through the halls during SSR. He was reading, some in line were reading, and some at the end of the line were not. Dodd did not speak to Robinson about it, but she assumed this evidenced his continuing failure to implement SSR.

¹⁵ Robinson testified that the Douglass piece was attached to the handout distributed to the students. The District questions whether it was because neither Dodd nor Thompson had seen it before the meeting. Robinson produced it after the meeting, according to Thompson and Colwell. But Dodd testified both pieces as well as a lesson plan explanation were presented at the meeting. I find that the Douglass speech was passed out because the essay's contemporaneous reference to it would not otherwise make sense.

H. January 31 Climate Committee Meeting

On January 17, 2002, Dodd issued a memorandum to Robinson and McNeal regarding the "unfinished" work of the committee. After noting attendance statistics included with the memorandum, she requested "all final revisions" of the attendance, tardy/detention plan and student incentive plan be submitted to assistant principals Bell and Tadd Scott by February 1, to be followed by presentation to the faculty on February 19. She added:

... I want staff to see a committee that is functioning as a team and not see members of the committee questioning issues that should have been discussed and clarified before any presentation to your colleagues.

It is obvious that even members of your committee are unclear as to discussions, decisions, and recommendations agreed upon during your meetings.

Based on the context of the circumstances, I find this statement refers to the attendance staff's complaints at the January 14 faculty meeting. Dodd also indicated both areas (student attendance and student incentives) would be "presented" at the February 19 faculty meeting.

On January 24, 2002, a memorandum issued from the District offices notifying principals to submit recommendations for release of probationary, temporary-contract, and intern-credentialed teachers. The deadline for return of the recommendations was February 4, 2002. The District was obligated to notify released teachers by March 17, 2002.

On January 31, 2002, the Climate Committee held a controversial meeting. Some members complained that the committee was being set up as a "scapegoat" for failed implementation of reform around student discipline. The matter of Rader's involuntary transfer came up as a possible incident of retaliation. Robinson took minutes of the meeting, and noted these controversial comments, after Bradford had left. McNeal and Reeves did not agree with these comments. A request was made for signatures. DuBois did not want to sign.

Reeves explained to Robinson that she needed to distance herself from such controversy, owing to her tenuous status.

The minutes began with a summary of the committee's responses to Dodd's concerns, expressing agreement on specific consequences arising from early problems with implementation of the tardy/detention policy. Robinson recorded the following with respect to "potential scapegoating," the committee's apparent response to the accusatory tone in Dodd's January 17 memorandum:

It was also agreed that the climate committee could potentially become the scapegoat in case this policy or other initiatives fail. It was also agreed that the task we have before us to transform the culture and climate of the school is so complex, comprehensive, and difficult, that the few of us who have committed to this process have been put in the position of being condemned for not achieving unrealistic expectations while not receiving the support we need nor the appreciation we deserve for our efforts. Furthermore, the fact that only a few people are here for every meeting and that the membership is very transient due to the busy schedules that people have and the perceived difficulty of our task, has made consensus difficult and has made it difficult to keep everyone informed of every decision, whether by our committee, or by the Leadership Team, which has changed some of the recommendations made by the committee.

The January 31 minutes also contained a recounting of Robinson's attempts to clear the air in response to Bradford angrily returning a note Robinson had posted on the door outside her office, bearing the statement "Mind your own business." Robinson testified it was intended as a "do not disturb sign." I do not find Robinson's explanation credible. The more likely reason for the posting grew out of Bradford's role in causing him to be reprimanded by Dodd for his SSR provocative prompt. I conclude that Robinson's "mind your own business" sign related to her complaint. Robinson delivered the minutes to Dodd on February 1.

I. Dodd's Non-reelection Decision

On the same day the January 31 minutes were submitted, Dodd informed the District that she was non-reelecting Robinson. The list included the names of four other certificated employees.

At the hearing, Dodd first referred to an e-mail dated April 2, 2002, to the District in reciting the reasons why she chose to release Robinson. The e-mail is a response to a request for reasons why the five employees were released. As to Robinson, her e-mail states:

2000-01 Evaluation indicated does not meet standards[/]developing in 3 out of 6 teaching standards.

2001-02 Evaluation (formal - still in progress) indicates meeting standards.

Informal evaluations indicate lack of student engagement, use of video's [sic] and/or lecturing for majority lessons [sic].

Use of inappropriate instructional materials.

Instructional practices not aligned with identified best practices and student outcomes as indicated in the II/USP Comprehensive School Site Action Plan.

Inconsistent grading policies and attendance procedures.

No consistency between formal and informal classroom observations¹⁶

The list indicates that the recommendation for each teacher was based on teaching deficiencies or other cause (e.g., excessive absenteeism).

¹⁶ Other than the "Menace II Society" class, and another she observed with Woehrl, Dodd did not elaborate on deficiencies she personally noted during informal observations. Dodd testified that a "New Teacher Support Program" mentor teacher informed her Robinson's classes were not particularly effective during unannounced observations. That teacher did not testify. Thompson testified he did a number of informal observations. I found his attempt to elaborate on his criticisms unconvincing, vaguely repeating the previously cited incidents of students walking in late without consequence, teaching to only a core of the students, and Robinson's emphasis of social/political themes.

On cross-examination, Dodd led with failure to implement SSR, followed by continuous showing of movies without seeking administrative approval, and failure to engage students in a rigorous curriculum focusing on the subject matter of Robinson's courses. In this portion of her testimony, elaboration on Robinson's failure to implement SSR was weak and lacking specificity. Dodd claimed that Robinson's students "weren't necessarily engaged in active reading during a specific time of the day," according to some classroom observations conducted. Taylor, a witness for the District, offered some corroboration for Robinson's apparent failure to teach the U.S. history standards based on queries she made of students they shared in common. Unlike the students in other classes, his had difficulty explaining what topics they were studying and some denied learning about the Declaration of Independence and Constitution. Also, she had occasion as a resource teacher to observe Robinson's classes briefly and had some negative comments regarding course alignment. Taylor did not claim to have reported her concerns to Dodd.

The District's governing board adopted Dodd's recommendation on February 27, 2002. Notice of non-reelection was issued to Robinson on March 8. Robinson requested a meeting with Dodd to discuss the matter. A meeting was held on March 25, attended by Robinson, Dodd and Thompson. Dodd made a list of "talking points" to explain her reasons. The list was similar to the (subsequent) e-mail noted above, but had some items not included in the later list, such as "students not challenged - ditto sheets and minimal writing and reading," "little or no homework assignments," and "majority of classroom instruction is lecturing or video." The list did not mention the SSR provocative prompt. Robinson recalled that the only criticisms voiced by Dodd in the meeting were "not teaching to the standards" and "not sticking to the text." Dodd testified that the lack of homework assignments was based on a

parent complaint, directed at several teachers, but that the parent was only dissatisfied with Robinson's follow-through.

The Association presented Regina Brooks-Day to rebut the criticisms of Dodd. Brooks-Day, a graduate of McClymonds, was employed by the Gear-up Initiative Program, a student mentoring program sponsored by Cal-State Hayward. She has also been a substitute teacher in the Hayward Unified School District. Brooks-Day and her partner at McClymonds shared responsibility for mentoring and tutoring ninth grade students under the Gear-up program. Brooks-Day's tutoring took place in the classroom two or three days each week. She had the opportunity to observe Robinson's class as well as those of other teachers at McClymonds.

During the 2001-2002 year, Brooks-Day worked with students in one of Robinson's multi-cultural studies classes. She was impressed with Robinson's willingness to engage students by encouraging them to speak up in the classroom. She especially remembers one marginalized student who bought into her program largely because he had established a personal relationship with Robinson. In her view, Robinson communicated his expectations for students. Brooks-Day testified that Robinson did assign homework and that she and others worked with the students on those assignments. She also mentioned, as a caveat, that it was often difficult for ninth graders to develop homework habits. Some of the work the students did in Robinson's class was included in personal portfolios the students prepared for her program.¹⁷

¹⁷ As evidenced by an II/USP evaluation report, specifically, the section on the ninth-grade, small learning community initiative, ninth grade is a critical grade for acclimating incoming students to academic rigor. The report urges teachers to give them encouragement while setting high standards, have contact with parents, and be aware of students' life circumstances. Robinson did write to parents at the beginning of the year to establish a line of communication.

Brooks-Day denied that Robinson showed an excessive number of videos. The videos he did show had a positive impact on her. She cited the movie "Remember the Titans," noting that Robinson directed the students to consider a set of questions and respond to them in essays. The movie, starring Denzel Washington, recounts the success of an early integrated college football team in the South and how the team's goals contributed to development of cross-racial relationships. The Association introduced a sampling of student work from Robinson's multi-cultural studies and U.S. history classes, including the essay assignment for "Remember the Titans." The assignment called for a five-page composition using 70 of 100 listed vocabulary words. A copy of a final examination from one of Robinson's ninth-grade students thanked him for being a "challenging teacher."

Robinson's U.S. history course syllabus notes that the course will employ The Americans as the primary textbook, supplemented by articles, essays, other books, internet, multimedia resources, films and videos. Robinson indicates that for both his U.S. history and multi-cultural studies classes he will use differentiated teaching practices, defined as including direct instruction, inquiry, discussion, collaborative learning, research, project-based learning, multi-media, games and role-playing, debates, and computer and internet-directed learning. A post-Civil-War reconstruction unit lesson plan of Robinson's identifies the "California State Academic Standards" designed to be met through the unit.

The administration never voiced any concern to Charlesworth about Robinson failing to teach the standards prior to his release. Charlesworth noted that ninth grade social studies was not tied to state standards and that the District had elected multi-cultural studies and life skills

to fill the curriculum for that year.¹⁸ Charlesworth stated that multi-cultural studies was loose in structure but its focus was on post-World-War-II times. He understood Robinson's idea of supplementing the curriculum because "to make this course work for the students at McClymonds, there needed to be other things ... supplementing ... to ... get them interested and pull them in." Based on his brief drop-in visits to the classroom (total of 20-25 minutes of observation) and discussions with Robinson, Charlesworth believed Robinson attempted to have students more engaged, active, and "creating what they were interested in learning about" than would be the case in a more "traditional" classroom. Robinson's multi-cultural studies final examination does support the District's contention that Robinson relied on videos in his class. Robinson did show more than the average number of videos, but not as many as some others, according to Charlesworth.

The District introduced a ranking of SAT-9 scores for McClymonds social studies teachers for the spring of 2002. Robinson rated fourth out of six teachers. However the report also shows he was grouped closer to the top four than the bottom two and closer to the mean test score than the bottom two.¹⁹

¹⁸ The state Board of Education has established ninth grade as an elective year for social studies. There are no state standards for ninth grade. (California State Board of Education, History-Social Science Content Standards for California Public Schools, Kindergarten Through Grade Twelve (1998) pp. 41-42 <<http://www.ced.ca.gov/re/pn/fd/documents/histsocsci-stnd.pdf>> [as of Aug. 16, 2004].) The website produces a note stating that schools are urged to offer a suitable range of electives. Charlesworth labeled the life skills class even more nebulous content-wise than multi-cultural studies.

¹⁹ The mean score was 33.8798. Robinson's students tested at 32.6833. The top four scores were 36.8333, 36.0702 and 33.5147. The bottom two scores were 27.0547 and 20.7556. At the present time, there is no social studies testing at the ninth grade level. (California Department of Education, Standardized Testing and Reporting, Test Results Reporting Site, About STAR <<http://www.star.cede.ca.gov/star2003/aboutSTAR.asp>> [as of Aug. 16, 2004].)

The District conducted a compliance assessment of McClymonds teachers in April 2002, using its own evaluator, Derek Mitchell (equity issues) and vice-principal Scott. The District introduced the document to show that the social studies department ranked second to last based on the team's informal classroom observations. But I believe the more pertinent statistic is Robinson's individual ranking of 20 out of the total of 33 McClymonds teachers observed. Mitchell informed Robinson that only McClymonds' U.S. history classes showed rises in SAT-9 scores, and that of the three U.S. history teachers, he had the most students. There was no rebuttal from the District on these points.

The team's evaluation of Robinson's U.S. history class was also introduced, in part to allow Dodd to note Robinson's complaint about the "1" rating he got from Scott for "communicative instruction" (student-students and student-teacher interaction). Three observations occurred. Four standards were measured on each occasion. Of the 12 standards measured, Robinson received three "3"s, eight "2"s, and one "1." His average score was 2.17, or slightly above average. Notably, Robinson received a "3" on each observation for the standard related to the teacher's "communication of learning objectives and the relation to standards." Under that category, Mitchell gave a special commendation to Robinson for "build[ing] connections between past, present, and cultures." Robinson received a "2" on each occasion for the standard measuring differentiated learning, with the evaluator crediting Robinson for "regularly checking with students for their understanding from a range of students." After receiving the "1" for "communicative instruction," Robinson's subsequent grades in that category improved to a "2," with the evaluators noting that Robinson asked questions with sufficient wait-time for answers, and extended the discussion with follow-up questions. With respect to classroom management, Mitchell's notes indicate that Robinson had

addressed Thompson's January 2001 criticism about letting students in late without admonition.

Sometime in the 2001-2002 year, Robinson ran for a seat on the executive board of the Association. He distributed a flyer in staff mailboxes at McClymonds. His platform emphasized the need to improve teacher morale by dealing with disciplinary polices. He touted his activities on the Climate Committee. Robinson testified the flyer was posted in late February or early March 2002, which would have been after Dodd communicated her decision of non-reelection to the District.

J. 2001 -2002 Year-End Evaluation

Thompson testified that, after prompting by Dodd, he conducted two additional classroom observations on March 5, and April 11, 2002. Rather than utilizing the District's standard observation form as he had previously, Thompson took personal notes, but he was unable to produce them for the hearing. Robinson denied that he was observed on these dates.

Thompson claimed he completed a final "evaluation report," dated April 23, 2002, presented it to Robinson, and discussed it with him. Robinson refused to sign it in acknowledgement of its issuance. Robinson denies he was presented with it. Robinson testified that he discovered the evaluation form when he inspected his personnel file at the District's central offices after his charge was filed, in December 2002. It was not in his file when he inspected it on April 30, 2002. Robinson further testified that the human resources clerk told him that the document appeared to have been entered in the file improperly, because it did not bear a date-filed stamp. The District offered no rebuttal on this point.

Thompson assigned Robinson one "3" ("meets standards") summative rating for "engaging and supporting all students in learning." He assigned four "2"s ("does not meet standards; developing") for all but one of the others, "planning and designing

instruction/learning experiences for all students," for which he assigned a " 1 " ("does not meet standards; unsatisfactory").

Under the comments section, Thompson wrote:

Mr. Robinson seems to have a personal agenda when it comes to subject matter content. He has the standards correctly posted in his room but uses personal standards and materials. He also uses methods of teaching the content that are questionable [sic]. Mr. Robinson did not comply with specific directions and recommendation from the principal, Lynn H. Dodd, nor his union representative regarding the use of specific materials. Mr. Robinson also violated district policy with regards to using students (filming them) as they responded to questions in reference to school site policy and procedures. Mr. Robinson refused to accept a letter from his evaluator regarding this action.

Thompson testified that during the 2001-2002 year, Chaconas directed a change in the evaluation procedure to require five classroom observations: three formal and two informal. Dodd interpreted the directive for the two informals as being fulfilled by additional formal observations as well. It was not clear whether Thompson's observations were informal or formal. The evaluation report suggests they were formal because they were preceded by pre-observation meetings, which Robinson denied ever occurred. If they were formal, one would have expected to see documentation.

Other inconsistencies concerned me. Thompson checked the box "continued evaluation" as the disposition following the evaluation report, rather than the box for "dismissal," which would have been the logical mark, given Robinson's March 8 release from employment. Despite having claimed that he recommended to Dodd that Robinson be released in February, Thompson denied telling Robinson of that fact as he continued to evaluate him. Again, his recommendation to Dodd suggests he would have documented the additional evaluations. Thompson's credibility was severely challenged by the abrupt change in the summative marks he gave on the previous classroom observation form (all "3"s in the "Final

April Summary Rating" box) to the "final" (one "3", four "2"s, and a "1"), without any documentation of the subsequent observations. Thompson's ability to identify his criticisms in the final evaluation prior to having it presented to him on the witness stand was non-specific and unconvincing. The overall assessment following the final classroom observations that he initially offered was surprising mild, but also vague:

My overall assessment was that Mr. Robinson had made some progress and the things we had discussed and evaluated upon his previous evaluation, but there still needed to be some improvement in specific areas regarding observing the kinds of recommendations made by administration as to his teaching methodologies, the pedagogy that he was using, . . .

Thompson claimed on cross-examination, in defense of the abrupt change in markings, that Robinson's culturally-based content increased markedly during this time, a claim I also find unconvincing. He stated:

I believe that Mr. Robinson had something personal he was trying to get over to the administration or maybe I don't know to whom. He was absolutely, when observed, was not following anything close to what he was doing when I was formally going into his classroom and letting him know I was coming. So, it became clear to me as I indicated there that for some personal reason, he has an agenda that is different from what should be done and taught in the classroom.

Given Robinson's SSR counseling and his continuing apprehension over his employment situation (his non-reelection notice was not issued until March 8), I seriously doubt he would have gone in this direction. Thompson's comments in this instance suggest he was claiming to do informal observations, but he never elaborated on instances of these, assuming they were separate from the scheduled observations.

Also, given that Robinson had entered remarks on his previous observation forms over relatively minor criticisms, I doubt he would have declined the opportunity to enter his position with respect to the harshly critical final evaluation form. The form indicates that signature

does not acknowledge agreement with the evaluation. As a form of absence-of-fresh-complaint evidence, Colwell, who was in constant touch with Robinson during this period of time, received no call from Robinson about a negative evaluation. I credit Robinson on his contention that the subsequent observations never occurred and that he was never presented with the final evaluation.

Thompson visited Robinson's classroom on April 9 while he was showing the movie "Hurricane," a movie about professional boxer Ruben Carter who was convicted of murder, fought for, and eventually won his freedom through a new trial. Robinson testified that Thompson observed the class for some time, asked a student a question, left without comment, and, after the class, complimented Robinson on his employment of the film as a teaching device. Thompson did not dispute these points, and I credit Robinson on them.

Nevertheless, Thompson issued Robinson two successive memoranda on the subject of the movie showing. The first emphasized the movie's "R" rating and the need for parental consent slips. The second (apparently a "corrected" version) added that Robinson was under a requirement to obtain prior approval from an administrator. I find it difficult to credit these memoranda as being sincere. Robinson was open with Thompson at the beginning of the year that he would be showing controversial films as evidenced by the agreement on Stull objectives. Robinson had identified "Hurricane" as a movie he intended to show. "Hurricane" is R-rated. (Internet Movie Database <<http://www.filmratings.com>> [search on movie title] [as of Aug. 16, 2004].) Thompson only objected to "Menace II Society" and "Slam."²⁰

²⁰ Thompson testified to other instances of post-non-reelection misconduct involving Robinson's failure to obtain permission slips for filming of students and leaving the school without permission to attend Good Friday services. I decline to make findings on these matters because of Thompson's credibility problems and their marginal relevance.

Math teacher Stanley Heron, an Association witness, credibly testified that he and other teachers have shown R-rated movies unrelated to curriculum, typically as a reward to students for attendance on state testing days. He noted the existence of copies of "The Matrix" and "X-Men" in other classrooms. Heron testified he showed "Anger Management" in his class. Although, as the District points out, "Anger Management" is not R-rated (PG-13, for "crude sexual content and language"), Matrix is. (Internet Movie Database <<http://www.filmratings.com>> [search on movie title] [as of Aug. 16, 2004].)

K. Faculty Council Election of Officers

Ough scheduled an election of officers for the faculty council in the art room at lunch time in late February or early March 2002. Robinson, DuBois, Heron and two other teachers convened in the room and waited for Ough. Ough never appeared. According to Ough, due to a mix-up on the meeting location, she, and two other teachers, including Taylor, held the election for chair and secretary in the hallway. Ough claimed it was just outside the art room, a point I reject as implausible. Robinson testified that he complained to Ough and asked for a re-vote. Ough did not recall Robinson complaining. As to this credibility dispute, I note that Ough's attitude toward the proceedings was exceedingly poor. Though some of her demeanor can be attributed to what I judged to be her spontaneous, reflexive, and somewhat quirky personality, and some of her statements were neutral with respect to Robinson, it was extremely difficult to assess when she was being sincere and when she was not. She showed contempt for the Association's counsel during cross-examination. When she believed it would suit her purposes, she was flippant and sarcastic. I credit Robinson's account on this point. Heron testified that he, too, was upset about the election after discovering it had occurred elsewhere. I believe Ough held the off-site election in order to prevent Robinson from being elected an officer, fulfilling Dodd's desire that his representative capacities be curtailed.

Ough was elected chair and one of the others from her meeting became secretary.

L. May 14 Faculty Council and Leadership Team Meetings

Robinson drafted a memorandum to Dodd on May 13, 2002, with a header line reading:

"The Corrosive Impact of the Contentions & Unresolved Issues Between McClymonds' Leadership Committee and School Climate Committee and Yourself." Copies were directed to Chaconas, the Leadership Committee, the Climate Committee and the faculty council.

Robinson began by acknowledging Dodd's professional commitment and her authority as the chief executive of the school. Then Robinson accused Dodd of tabling or blocking from the faculty meetings recommendations from the Climate Committee and Leadership Committee with which she disagreed. He claimed that the faculty perceived her administration as operating in "a cliquish and punitive manner.. ." and that "almost all of the faculty have been walking on eggs in regards to professional contributing to the school committees." Robinson accused Dodd of singling him out as being a "disloyal enemy," isolating him, and making an example of him.

Attached to this memorandum was a more detailed memorandum focusing on the failed implementation of the Climate Committee recommendations, the decline in teacher morale, and the editing of the January 31 Climate Committee minutes. (During a March 19, 2002, Climate Committee meeting, just after Robinson announced his non-reelection, McNeal moved to "correct" Robinson's January 31 minutes.) Of significance here is Robinson's assertion regarding the balance of the Climate Committee's recommendations, which he claims Dodd agreed to put back on the faculty meeting agenda, but never did. He noted Baker's admonition at an April 9, 2002, Leadership Team meeting regarding the "unfinished business" of the Climate Committee, from which Robinson inferred that Dodd had failed to tell Baker of the Leadership Team's approval of the Climate Committee's final recommendations in December

2001. Robinson noted in the memorandum, and repeated in his testimony, that he had requested that Dodd place the recommendations on the faculty meeting agenda each successive month beginning in February, without success.²¹ Robinson attempted to hold Dodd to an April 9 promise to place the matter on the May 14 Leadership Team meeting agenda. He added:

... I would like to request that you place the balance of our proposal on the final faculty agenda, in particular, the "Intervention Room," because of the lead-time required in applying for County Probation Department funding.

Robinson brought up the matter of his memorandum beginning with a faculty council meeting on May 14. Bridget Taylor, a social studies teacher, Small Learning Community Committee member, and Leadership Team member, and LuPaulette Taylor disagreed with the "walking on egg shells comment" and did not feel the meeting was an appropriate time or place to discuss the issue. According to LuPaulette Taylor, Robinson was "very upset," but not "ranting and raving."

Edna Perkins, a math teacher and leader in the school through her stewardship with Ough of the Small Learning Community Committee, recalled Robinson being "very disappointed" that no one supported him. I found Perkins an interesting study. Her demeanor was relaxed and she appeared to empathize with Robinson and his situation. However, she also appeared to have bought into notions that Robinson was an elitist, that students felt "he was not like them," and therefore did not relate to him.

²¹ The minutes of Climate Committee in the months of February and March, 2002, offered by the District, indicate that the committee was addressing issues concerning the need to recruit volunteers for the detention room. The March 19 minutes, prepared by DuBois, note McNeal observing that if chronic cutters were suspended, 100 suspensions would occur in a week. He also mentioned that if in-house suspensions did not occur, formal suspensions would have to occur, but that the school needed to be serious about its sanctions. Robinson is noted as seconding a motion to grant stipends to teachers staffing the detention room.

In a more supportive stance, Payne, corroborating Robinson, testified that the faculty council agreed to discuss the letter further and proposed that Robinson edit it to make it shorter and more specific. Payne did not believe Robinson acted inappropriately at any time. Heron agreed with Payne as to the resolution of the meeting. Heron opined that Robinson was passionate and intense, but never threatening. Bridget Taylor could not recall any discussion about reformulating the letter. I reject this testimony in favor of Payne and Heron's recollections. Several teachers interpreted Robinson as seeking support to be retained at McClymonds. Some felt uncomfortable with this notion, feeling it was either an inappropriate topic to be discussed, or believed Robinson failed to substantiate his contentions. Bridget Taylor believed that some shared her view that Robinson should take his issue to the Association rather than present it to the faculty council, an impression I do credit.

A Leadership Team meeting occurred later that day. Robinson was present, but came in late. His letter of complaint was not on the agenda, but he had spoken to Ough about getting it on the agenda. Even though it was not, Ough broached the issue. In essence, Robinson had chosen this moment to "be heard": the window for faculty approval of the Climate Committee recommendations, at least while he was at the school, was closed or closing.

Despite attempts to defer his issues, Robinson persisted. He raised issues concerning the lack of respect shown for his contributions, both in terms of the reform initiative and the personal skills he offered, namely, his use of video and technology in the classroom. He blamed the administration for failing to implement the Climate Committee's recommendations. This occasioned the most heated discussion because Bell and Robinson argued over Robinson's complaint that the work of the Climate Committee had been obstructed as a result of the administration repeatedly requiring the committee to redo some part of it. Robinson recalled that Dodd turned to Bell to ask him to confirm her understanding that the sequence of

actions had not been completed. Bell corroborated this point, recalling that Dodd wanted to know if he had given Robinson the District student suspension form. Bell testified that he handed Robinson the document at the previous Climate Committee meeting.

Robinson testified and produced minutes of the meeting quoting Bell as saying, "We can take this outside and settle this privately if you'd like," which Robinson interpreted as a physical threat. Bell testified that he did suggest that the matter be discussed between the two of them outside of the meeting, but it was because he sensed the tenor of the meeting degenerating and veering off tangent. Bell denied calling Robinson a liar, but did claim that Robinson called him a liar, when Robinson denied receiving the suspension form. Bell described Robinson's demeanor as "upset" and "frustrated."

LuPaulette Taylor recalled that Robinson and Bell had "reserved words" for each other. Ough denied there was any baiting going on. DuBois testified that both Robinson and Bell called each other liars over the issue of the committee's recommendations. Robinson's own notes indicate that both of them accused each other of misrepresenting the facts.

Dodd testified that Robinson at various points pounded (his fist) on the table, got up from his seat, leaned on the table, turned red, and called Bell a liar. Apart from the incident with Bell, no other witness corroborated these behaviors, and I do not credit them as occurring. I believe both Robinson and Bell called each other liars. It is unnecessary to resolve any other credibility disputes.

As noted above, Bell testified that some of the recommendations of the Climate Committee had been accepted by the faculty at the January 14 meeting, specifically those involving the incentive/rewards program for student behavior. But Bell believed it was up to the Climate Committee to rectify the discrepancies between the suspension form and the sequence of actions. Both Bell and Thompson testified that the committee's recommended

sequence of actions conflicted with the District policy by being too severe, and that for the committee's recommendation to be acceptable, it needed to conform to the grounds for suspension contained in the District policy.

Robinson, in response, claims he earlier had cited the success of a similar set of sanctions at Fremont High School, another II/USP school, a point corroborated by DuBois.

DuBois testified:

Mr. Scott and Mr. Bell were administrative members of the Climate Committee, and part of their charge was to make sure we were comporting. On the Leadership Team, Dr. Thompson, as well, and so when the discussion occurred with regard to changes that were being made to the sequence of action, it was agreed by all that we had comported to the District's policy and from the initial steps that came from Fremont where Fremont had also comported to the very last thing that had been approved by the Leadership Team.

I credit Robinson and DuBois's view that Bell and Thompson's late objections were disingenuous. Each had an opportunity to object to the sequence of actions chart at the fall 2001 Leadership Team meetings but failed to do so. While the District's suspension form segregates types of misconduct for which a suspension is appropriate, with and without required interventions, the District entered into evidence an inconsistent November 15, 2001, memorandum from Vice-principal Scott, attaching for review a draft of policies that includes a section on suspension and due process. There Scott states he began work on the document in the summer of 2001. Scott's suspension section is at odds with the District suspension notice because Scott lists all types of misconduct on the suspension notice, without indicating that interventions are required prior to any of the suspensions. Scott ends his memorandum stating:

At this point, we are ready to move as a committee to adopt the document at the next committee meeting so that it may be brought before the faculty and principal for adoption into the student handbook. There is a sense of urgency. We would like to move on this swiftly so that the entire handbook is available for students and families before the winter break.

Furthermore, the District's only evidence of a discrepancy was from Bell who recalled "defiance of authority" as not having intervention steps prior to suspension. However, the committee's sequence of actions does have two intervention steps prior to suspension and thus conforms to the District form.

After Robinson left and the Leadership Team meeting adjourned, a group that included Dodd, LuPaulette Taylor, Bridget Taylor, DuBois, Perkins, Ough, and Moore remained. The events were sufficiently unnerving to compel the teachers to discuss Robinson's situation. Moore reflected the views of those attending when she stated that Robinson's efforts to cull support were going nowhere. Critical comments about his teaching also emerged. Moore wrote in contemporaneously taken notes that everyone knew that Robinson was not teaching effectively, but that no one had confronted him or assisted him. She noted there was sentiment for more direct teacher mentoring going forward. Some teachers expressed concern for Dodd's personal safety.

Ough submitted a memorandum to Dodd on May 15, 2002. It stated:

The [Faculty Council] meeting of 5/14 addressed the letter that Ron Robinson passed out the day before. The letter expressed some concerns that the faculty had some fears of speaking out for fear of retaliation and were "cliquish." When Ron was asked to clarify his statements, he couldn't. When the council was asked for our support, we couldn't. After the discussion, a number of faculty expressed concern to me over Ron's mental state. They are worried that he is so unstable that he could hurt himself, but also that he could take out his frustration on the McClymonds "family" of which he is no longer a part. I believe you will be that target of his retaliation.

After the Leadership Team meeting, where he demonstrated moreso [sic] his irrational and delusional state of mind, I feel the danger that we face is that he realized, or should have realized, that he does not have support from the faculty. He came to me the next day to tell me he wanted to give me some notes of his to be put into the [Faculty Council] minutes. I feel uncomfortable

and pressured to include his notes in the minutes, but I won't.
But then what?

Thank you for your attention to this.

Bridget Taylor submitted a memorandum with the following:

On May 14, 2002, I began to notice a change in normal behavior of one of our faulty members. As a concerned member of the McClymonds family, I decided to attend the Faculty Council meeting at lunch, to see what was going on. To my dismay, this meeting was consumed with addressing a lengthy letter that Ron Robinson had written and delivered the day before. At that time, I noticed Ron's aggressive behavior begin to take over. He seemed very defensive and paranoid when a person tried to address the issues stated in the letter. It was at this time I noticed a physical change in his dealings with coworkers. He leaned in and raised his voice frequently, disagreeing with everything that was said to him in an effort to gain clarity on the issues stated in the letter. Later that same day, he attended the leadership meeting.

At the leadership meeting, he came in seeming to have a set agenda for the evening, all about Ron. He first began with the attack on you, stating that you would not allow "his" document from school climate committee and the group had to explain and prove to him that that statement was untrue. He seemed to just get more angry and desperate to get some attention. It seemed that as the meeting progressed, he became more angry calling people liars, and stating that he was going to finish what he had to say, even though he was speaking out of turn, being rude and inconsiderate of people who were in the room. I noticed through all of this, his spacing out, not hearing what people had to say, and having outbursts throughout the meeting. It frightened me! He had the presence of a person on the verge of a breakdown. I actually looked at him during one of his tirades and had a flash of fear overcome me. I felt as though he might hurt anyone of us at any time during that meeting, in particular, you. It seemed as though he wanted one of us to validate him in his quest to crucify you as an unfair principal and person. I am writing this letter to you as a warning to keep your eyes open. I think things could become dangerous. He is looking for someone to be on his side and because he is not getting the support requested, I am afraid he may do something irrational for attention. Please be careful, I have a bad feeling about this situation.

Dodd recalled that Taylor was the one voicing the greatest concern about her safety. Perkins offered a similar, but more sympathetic, memorandum:

I as other faculty members are aware of teacher Ron Robinson's pending dismissal as he announced it in the [Faculty Council] meeting on May 14, 2002. It is clear that Ron is going through an extremely stressful period as he is fighting for his position. Ron's outward appearance changes during the day from happy, all is well to frustration and anger, which is understandable, but there seems to be an edge to his moods that feels unpredictable. The level of support that he seeks from staff is not forthcoming and he is unable to identify his part in his problematic situation. Although Ron is justified in feeling frustrated I am concerned that he is unprepared for the consequences of what he is about to experience. The loss of his position may catch him by surprise and without support for his stressful experience I am concerned that he may experience long-term negative reactions that will further limit his ability to rebound successfully. Is there a way to get Ron some sort of exit counseling as he is making the transition.

Thank you for attention to this urgent matter.

Ough agreed that Perkins and Bridget Taylor were her closest friends at the school. Perkins spoke with Ough and Taylor as she drafted her statement. At the hearing, Ough offered that Robinson was always an intense person, but that his body language and diction changed at this time. He was louder, sharper, and his posture was "closed up." Perkins reiterated at the hearing that Robinson looked "very stressed" and that he exhibited mood swings. Ough did not fear for herself, but for Robinson. Ough claimed that DuBois told her she was terrified of Robinson at this time, a point denied by DuBois. DuBois is quoted in Moore's notes as believing that Robinson was not presenting an objective view of the fate of the Climate Committee's work. DuBois herself appeared to agree that Robinson had crossed the line of civility.

Dodd left a voicemail for her immediate supervisor Jose Martinez (who had assumed Woehrle's position during the 2001-2002 year) on the evening of May 14 regarding the threat

to her safety. The next morning Martinez directed Dodd to have the teachers put their statements in writing, and he advised the teachers of the same. Those statements are quoted above. Dodd confirmed that she asked the teachers to do so. Ough and Taylor claimed their statements were unsolicited, contradicting Dodd's testimony. Perkins also gave that impression.

After they spoke the next morning, Martinez advised Dodd to contact law enforcement, and she did. Martinez came to the school site on May 15 and met with faculty members. Martinez did not testify. There was no evidence that Martinez spoke with Robinson.

On May 17, Martinez and Dodd requested that District Labor Relations Analyst Leonard Bellow initiate the paperwork to place Robinson on paid administrative leave. Bellow paraphrases the allegations against Robinson as:

Teachers are scared of his behavior. He has emotional outbreaks and the staff feel unsafe around him. He received a March 15th letter and since then he started his bizarre behavior. . . .

Personnel analyst Sharon Mitchell added a note that Martinez had observed Robinson and concurred that he was a "safety issue." On May 17, Bellow gave Robinson written notice that he was on leave because of allegations of "unprofessional conduct" and that an investigation would be conducted. Bellow, whose task it is to investigate the allegations of misconduct, decided the issue was moot since Robinson would not be returning to the school site before the end of the school year, or returning the following year. The formal investigation never occurred.

Dodd claimed she played no role in the decision whether to have Robinson placed on administrative leave, a claim I reject. Colwell testified that the District's practices with respect to paid administrative leaves for purposes of investigating allegations have been vexing, because, while the District claims there is nothing "disciplinary" about the action, the

employee and Association are powerless to defend against the stigma of the investigation and inability to effectively challenge the forced removal of the employee from the worksite based on the low threshold of proof required.

ISSUES

1. Did the District retaliate against Robinson because of his exercise of protected activities when it issued him a notice of non-reelection?

2. Did the District retaliate against Robinson because of his exercise of protected activities when it placed him on administrative leave on grounds that he was a threat to the safety of others?

CONCLUSIONS OF LAW

The amended complaint alleges that the District retaliated against Robinson by non-reelecting him for the 2002-2003 school year and placing him on administrative leave in May 2002. These acts are alleged to have occurred "because of Robinson's exercise of activities that are protected under the EERA."²² Section 3543.5(a) makes such conduct unlawful. To prove this violation, the charging party bears the initial burden of showing evidence that (1) the employee engaged in protected activity, (2) that the employer knew of the activity, and (3) that the protected activity was a "motivating factor" in the employer's decision to take adverse action against the employee. (California State University, Hayward (1991) PERB Decision No. 869-H; Novato Unified School District (1982) PERB Decision No. 210 (Novato).')

²² Section 3543(a) provides that:

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

Motivation may be proven by either direct or circumstantial evidence, or a combination of both. (Carlsbad Unified School District (1979) PERB Decision No. 89.)

Types of circumstantial evidence probative of unlawful intent include: (1) timing of the adverse action (North Sacramento School District (1982) PERB Decision No. 264); (2) inadequate, inconsistent, or shifting justification for the adverse action (Novato); (3) disparate treatment of the employee (Regents of the University of California (1984) PERB Decision No. 403-H); (4) departure from standard procedures (Santa Clara Unified School District (1979) PERB Decision No. 104); (5) cursory investigation (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S), and (6) pattern of antagonism toward the union or individuals engaging in protected activity (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

Once protected activity is established to be a motivating factor, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 730 [175 Cal.Rptr. 626].)

These principles apply despite the fact that the Education Code permits the public school employer's non-reelection of a probationary teacher without cause. (Ed. Code, sec. 44929.21; McFarland Unified School District v. Public Employment Relations Bd. (1991) 228 Cal.App.3d 166 [11 Cal.Rptr.2d 405] (McFarland).) The District's power to non-reelect a probationary teacher for any lawful reason does not insulate its decision from PERB review in cases where that decision was made in retaliation for conduct protected under the EERA. (McFarland, at p. 168.)

The Association contends that Robinson's requests for union representation, participation on faculty committees, and complaints about student fights motivated Dodd to

non-reelect him and that the purported justifications given were pretextual. The Association places heavy emphasis on the incongruity between Thompson's positive pre-non-reelection evaluation and the subsequent attempts to build a case of deficiencies against him. Similarly, it contends the decision to place Robinson on administrative leave was unsupported by any genuine concerns and instead was yet another retaliatory act in a continuing pattern of such unlawful conduct.

The District contends that Robinson was terminated for poor classroom performance, his reliance on too many videos, failure to engage his students in critical thinking, and refusals to promote SSR. It claims there is no evidence of disparate treatment as to the judgment of Robinson's teaching compared with others not engaged in protected activity. The District contends that much of Robinson's activity was a personal agenda and therefore not protected. Even if protected, that activity lost its protected status when Robinson's views conflicted with the II/USP action plan's mandate to promote student achievement.

As to the issue of protected activity, I find that Robinson's role in organizing the Mayor Brown meeting, his complaints about student fights, one of which he copied to the Association, and his use of, and requests for, representation by the Association (commitment session, Hickory Pit meeting, and SSR counseling session) were protected activities. (Barstow Unified School District (1996) PERB Decision No. 1164, adopting administrative law judge decision citing Dreis & Krump Mfg. Co. v. NLRB (7th Cir. 1976) 544 F.2d 320 [93 LRRM 2739] [individual employee activity directed against a supervisor's performance protected when its purpose is to further a legitimate interest in the employees' working conditions]; State of California (Department of Transportation) (1982) PERB Decision No. 257-S [same]; Rio Hondo Community College District (1982) PERB Decision No. 272 [union representation of a single individual, because it affects or potentially affects others].) Robinson's assistance

organizing and participation in the faculty council were protected, since the council is a creature of the contract and intended for collective, site-based decisionmaking. The faculty council was a potential mechanism for obtaining funds for the intervention room. (Barstow Unified School District, supra, PERB Decision No. 1164 [employee complaint about site council].) Robinson's participation on the Climate Committee and Leadership Team was also protected. These committees were organizational vehicles by which changes in matters having an impact on negotiable matters could be implemented to the benefit of the entire faculty. Claiborne had concerns about student discipline issues for a long time. Rader developed the same when he arrived at McClymonds. Both were motivated to join the Climate Committee to address these issues. (State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S [tenant organization where housing was a condition of employment].) PERB also stated in its decision reversing the Board agent's partial dismissal in this matter that Robinson's activity was protected, characterizing it as being in the nature of complaints to administrators regarding working conditions. (Oakland Unified School District, supra, PERB Decision No. 1529, citing Los Angeles Unified School District (1999) PERB Decision No. 1338; see also Regents of the University of California (1992) PERB Decision No. 949-H [speaking critically of management in a collective fashion].) There is no dispute that Dodd had knowledge of Robinson's protected activities or that Robinson suffered adverse action as a result of his non-reelection and placement on administrative leave.

Non-reelection Decision

I find that Dodd exhibited animus toward Robinson's protected activities as reflected in her directives, suggestions, and veiled threats, all having the ostensible purpose of discouraging further protected activity on his part. (San Diego Community College District (1983) PERB Decision No. 368 [threatening remarks following protected speech to governing

board]; Woodland Joint Unified School District (1987) PERB Decision No. 628 [supervisor threatening employees with job loss for protected activity].) The evidence establishes a pattern of antagonism beginning with comments made regarding the Mayor Brown meeting. Dodd's statements continued with those at the Hickory Pit meeting, prior to the Napa retreat, the SSR meeting attended by Colwell, those related to the faculty council formation, and finally her disparagement of the dissension on the Climate Committee. Colwell sensed a conflict between Dodd and Robinson as early as the April 2001 commitment session. Dodd made early reference to Robinson's failure to be a "team player" at that time in relation to his committee work. I reject any claim that this label was directed primarily at his classroom teaching. While such a phrase undoubtedly may refer to qualities deemed highly important in the workplace, it is commonly a form of disparagement of protected activities. (Waterbury Hotel Mgt. LLC (2001) 333 NLRB 482 [171 LRRM 1348] [termination of employee wearing union button following comment he was not a "team player" because of it].)

The element of close timing between notable protected activity and the decision to non-reelect is especially evident in this case. On the same day that Robinson delivered to Dodd the controversial and accusatory minutes from the January 31 Climate Committee meeting, Dodd forwarded her recommendation on Robinson to the District offices.

Without delving deeply into the actual merits, I find the District's primary justifications to be suspect. In examining the District's justifications, it is important to focus on the reasons articulated at the time of the decision, more so than the witnesses' opinions at the time of the hearing. According to Robinson, Dodd, at the March 25 meeting, only cited Robinson's "not teaching to the standards" and "not sticking to the text" (essentially the same deficiency). Dodd's list included the same noting that Robinson's instructional practices were "not aligned

with the school-wide efforts to progressively increase student achievement by creating rigorous and engaging lessons" as identified in the II/USP action plan.

Weakness in the area of teaching standards was a criticism of the teaching faculty as a whole according to the II/USP report of findings which issued in March 2001.²³ Thompson appeared to allude to this in his 2000-2001 evaluation of Robinson. However, the only supporting reference in an otherwise strong evaluation was Robinson's "possible" use of questionable videos. Perhaps he was also referring to Robinson's use of videos and other supplementary materials in his multi-cultural studies classes. But in that setting there are no state standards and no mandated District curriculum. There was no evidence that Robinson, unlike others, failed to remediate his deficiency in this area after the II/USP action plan was presented in June 2001. Dodd referred to the II/USP action plan's programs to address this matter through professional development activities, but there was no evidence that Robinson was offered assistance in this regard. Thompson never suggested that he sought to reconstruct Robinson's teaching objectives at the start of the 2001-2002 year, but instead blamed Robinson, falsely, of failing to submit any plan for that year. Moore's May 15, 2002, meeting notes recount that even as teachers criticized Robinson's teaching they acknowledged he had deserved more assistance. Other examples of this sort of criticism are Thompson's early claim that Robinson only taught to a core of his students and both his and Dodd's concern about differentiated teaching. These are challenges any beginning teacher might find daunting at McClymonds. Nevertheless, Robinson was able to articulate an understanding of differentiated teaching and execute it to some degree in the classroom. I find that any attempt on Thompson's part to claim Robinson was counseled constructively on these matters was

²³ In a letter from Rader to Dodd, offered by the District, Rader, an experienced teacher, admitted in January 2001 not being "fully familiar" with standards-based classroom practice.

vague and unconvincing. (North Sacramento School District, supra, PERB Decision No. 264 [pattern of weakly justified reprimands following protected activity].)

The foregoing evidence is sufficient to demonstrate a prima facie case of unlawful animus. I now turn to the question of whether Robinson would have been terminated on the grounds asserted irrespective of his protected activity.

There were two occasions on which Robinson was counseled for objectionable teaching practices prior to Dodd's decision not to reelect. The first occurred in December 2000 when Dodd objected to Robinson's showing of "Menace II Society" and "Sankofa." Although "Menace II Society" was touted as a good teaching device for inner-city youth, I can understand a principal's objection to such a movie simply on grounds of the profanity and violence. The same holds true for "Sankofa." Robinson did not show "Menace II Society" again. Nor was he again counseled about his use of movies prior to his non-reelection. He presented to Thompson a list of the movies he intended to show as part of his Stull objectives for the 2001-2002 year. Since the record shows no objection by Thompson to any ones other than "Menace II Society" and "Slam," neither of which he showed, Robinson was entitled to assume he had approval to show the others.

Robinson was counseled on his SSR provocative prompt in January 2002. Robinson's semi-fictional essay could legitimately be criticized as an inappropriate device to motivate students. But I find that Dodd's reaction was sanctimonious and overly dramatic. The essay was obviously directed at the students who lacked motivation to engage in the exercise. Based on the student reports to Dodd, I believe the class understood that the essay was directed at those who were not taking the exercise seriously as opposed to those who were. Robinson's use of "profanity" ("grown-ass man" etc.) was mild at worst, and only contemporary slang at best. The point of "calling out" the youth and their life-styles might raise hackles, as have

entertainer Bill Cosby's recent comments on literacy problems in the black community. But for an administrator who believed that classroom management was the primary responsibility of the teacher, Dodd demonstrated a particularly narrow and arbitrary view of Robinson's discretion in choosing to criticize rather than coddle his disrespectful students.²⁴ I believe it quite likely that Robinson's "provocative" prompt was partly a reaction to his impression that Dodd was undermining the recommendations of the Climate Committee as reflected in the January 14 faculty meeting. The "promenade exercise" occurred after Dodd's decision and so it has no material bearing on this case. There is no substantial evidence supporting Dodd's claim that Robinson was refusing to implement SSR prior to her decision.

I turn now to the District's articulated reasons for non-reelection. Robinson denied that Dodd covered all of the "talking points" on her March 25 meeting list. Nevertheless, I will grant that the list identifies the reasons Dodd was then relying on. Condensed somewhat, her reasons were that Robinson's instructional practices violated the goals of the II/USP action plan, that he was not conducting a rigorous class (as evidenced by too many videos, too much lecture, and too little homework, reading and writing), and grading discrepancies (the deceased

²⁴ The McClymonds Youth Engaged in Leadership and Learning group produced a survey of students and staff which found the disrespectful attitude of students to be the school's biggest problem. (Youth Engaged in Leadership Project, Hear Us YELL: A New Beginning (2002), pp. 4, 14 <<http://www.whatkidscando.org/images/studentwork/YELLReport2.pdf>> [as of Aug. 16, 2004].) This report corroborates Robinson's complaints about security. (Id. at p. 14.) A preliminary version of the same report was entered into evidence. (See also John McWhorter, Losing the Race: Self-Sabotage in Black America (Free Press, 2000) pp. 145-150, 160-163 [discussion of the anti-education peer pressures within the black community]; Pedro Noguera, Promoting Safety by Reducing the Gap Between School and Community, In Motion Magazine (Apr. 28, 1996) [originally published in 1995 Harvard Educational Rev.] <<http://www.inmotionmagazine.com/pedro8.html>> [as of Aug. 16, 2004] [former Harvard Graduate School of Education professor's early 1990s case study of a West Oakland middle school that considered an intervention room, attempted a culturally relevant curriculum targeted at disruptive students, acknowledged the futility of suspending students, and debated public humiliation of students as a form of discipline].)

student and high grades to students flunking in other classes). I find these reasons exaggerated, contradicted, and stale.

Before the bulk of Robinson's more controversial protected activities, Thompson, in his December 2001 observations, agreed that Robinson was making every effort to make standards-based curriculum the core of his U.S. history class. As noted, the ninth grade course offerings are not tied to state standards. Despite the fact that Robinson used more than the usual number of videos in his multi-cultural studies classes, it does not appear they were merely to entertain students. They were tied to Robinson's pedagogical concepts related to media and youth culture, dealt for the most part with post-World-War-II race relations, and required essay and critical thinking exercises. The evidence establishes that if Robinson tended to be unconventional it was with the purposes of developing a bond with his inner-city youth and opening them up to studying social studies. Charlesworth, who vouched for Robinson's syllabus, his use of movies, and his non-traditional teaching style, was never consulted by either Thompson or Dodd.²⁵ Brooks-Day concluded that Robinson's use of films was successful in reaching students. A ninth grade student wrote in one of her works that she found Robinson a challenging teacher.

Grading discrepancies did surface in 2000-2001, but Robinson received only one inquiry as to the grade given to the deceased student. The additional suspicions were unsubstantiated. As Robinson testified, and I credit, some students at McClymonds are selective in attending the classes they like and boycotting those they do not. The excessive hall-walking is testament to that. If anything, high grades reflect students' positive response to

²⁵ Dodd noted that effective and best teaching practices under the action plan were to be implemented primarily through the departments, which would have started with Charlesworth. Under the Beginning Teachers Support and Assessment program, Charlesworth was also Robinson's designated mentor teacher.

Robinson's classes and perhaps the success of his more personalized style of teaching. I do not have difficulty believing that low gross GPA scores for schools like McClymonds reflect poor attendance as much as in-class deficiencies. Dodd admitted that McClymonds had the lowest combined GPA of all the District's comprehensive high schools.

Robinson was observed in December 2001 in his U.S. history class and received summative "3" ("meets standards") in each of the five standards for which he was graded (no grade was given for the sixth). There were no deficiencies noted with respect to teaching the standards. Robinson received a "3" for the sub-categories of establishing and maintaining standards for student behavior, using instructional time effectively, engaging students in critical thinking, demonstrating knowledge of subject matter and content, and differentiated learning. These ratings were corroborated by the Mitchell-led evaluation in April 2002. I note further that when Dodd sent her e-mail to the District explaining the reasons for releasing Robinson, she asserted that Robinson was not making satisfactory progress in three of the six standards in 2000-2001, a clear misreading of Thompson's evaluation for that year. In my view, the events surrounding the complaints of the attendance staff regarding the detention room at the January 14 faculty meeting and the Climate Committee's January 31 attempt to defend itself appear to be the real impetus for Dodd's decision.

The pretextual nature of Dodd's decision is cemented for me by the highly unethical attempt on Thompson's part to manufacture a strongly negative final evaluation, essentially to create an after-the-fact rationale for Robinson's termination. This conduct demonstrates consciousness of guilt in the strongest terms. Thompson's comment included in that evaluation that Robinson appeared to have a "personal agenda" with regard to curriculum is the only point on which I believe the District could have sincerely constructed a case for non-reelection, given that the other criticisms of his teaching were minor or do not withstand

scrutiny. But Thompson comments in this regard suggest that he was in fact relying on his contrived view that Robinson abruptly changed the level of his culturally-based curriculum sometime after his first observations, an assertion I reject. "Personal agenda" strikes me to be more a reference to Robinson's alleged non-collaborative approach to school reform.

The evidence also establishes for me that Thompson acquiesced in Robinson's culturally relevant curriculum until Robinson's protected activity became objectionable. The ideas Robinson supported (intervention room, principles for teaching students self-discipline,²⁶ and use of videos raising contemporary issues related to racial disparities) were ones sanctioned by the District through the CAPP conferences and in-service trainings. I believe Robinson was, as Thompson and Dodd characterized him in his first year, a new teacher on the path to becoming proficient in his field.²⁷ While I also believe that Dodd did harbor suspicions about the quality of Robinson's teaching and that his personal style probably grated on her, I am convinced that she would not have terminated Robinson, but for the nature and content of his protected activity. The District has not carried its burden to establish that Dodd would have terminated Robinson regardless of that protected activity.

Accordingly, I find that the District violated EERA section 3543.5(a) by discriminating against Robinson as a result of its decision to non-reelect him. Setting aside the faculty committee reform activities which do not directly implicate Association representation,

²⁶ Robinson incorporated Rossi's Ma'at principles in his lesson plans.

²⁷ Citing Bellevue Union Elementary School District (2003) PERB Decision No. 1561, the District claims that a non-reelection decision will be upheld whenever a teacher fails to achieve a "superior" evaluation. I read that decision as limited to the facts of that case, where the evidence established a pre-existing high standard applied across-the-board to all probationary teachers. No such evidence has been presented in this case.

Robinson utilized or requested representation from the Association on a consistent basis and helped establish the faculty council, which is a creature of the Association's contract.

Therefore, the District's retaliation also violates section 3543.5(b) by denying the Association the right to represent its members.

Involuntary Administrative Leave

I have already found that the decision to non-reelect Robinson was motivated by animus toward his protected activities. The decision to place him on administrative leave was an immediate (and essentially direct) response to his further protected activity: criticism of the administration for failing to finalize and implement the Climate Committee's recommendations. (Oakland Unified School District, *supra*, PERB Decision No. 1529 [Robinson's activity protected].) This simplifies somewhat the issues of protected activity and prima facie evidence of unlawful animus.

The context of the decision does present certain complexities. Dodd was prompted to contact Martinez, at least in part, because of concerns expressed by Ough, Taylor and Perkins, and possibly others who stayed following the Leadership Team meeting. Dodd's decision to contact the District offices was not "unilateral" in that sense. Then there is the question whether animus on the part of Ough, Taylor and Perkins must be found. Further, the fact that the District views the leave-for-investigation-purposes to be a preemptive and prophylactic measure and requires a low threshold of evidence ("reasonable suspicion") to trigger the action also presents potential issues.

In this context, Dodd claimed that she did not cause the decision to be made. As I have found however, I do not find that her role was insignificant and I reject her claim that merely initiating a request for investigation absolves her of wrongdoing. To the contrary, I find that because the District's threshold is a low one the administrator making the request assumes the

critical responsibility for the decision. The focus initially must be on the motives of the administrator making the request.

Martinez did not testify as to what thought processes he went through in making his decision to initiate the referral to human resources. I find no value in the double hearsay evidence offered by the District that Martinez also observed Robinson to be a safety issue when he visited the school site. The circumstances related to his position as the first line of support for principals and his immediate recommendation to Dodd that she contact law enforcement strongly suggest that he was essentially a rubber-stamp for Dodd's request. (Konocti Unified School District (1982) PERB Decision No. 217; County of San Joaquin (Health Care Services) (2003) PERB Decision No. 1524-M.) They also suggest that whatever Dodd herself conveyed to him played a significant role in his decision. Of all the accounts given, her description of Robinson's behavior at the Leadership Team meeting was the most exaggerated. Any inferences to be drawn on this point I resolve in favor of the Association due to the District's failure to call Martinez to the stand.

This exaggerated description of Robinson's mental state is further reflected in Bellows's casual paraphrasing of the allegations against the teacher as reported to him by Martinez. The summary states that Robinson has "emotional outbreaks" (plural) and that "he started his bizarre behavior" following receipt of the March 15 letter. It states that "teachers" are scared of him. The credible evidence establishes that Robinson crossed the line of civility once, during the Leadership Team meeting. There was no "pattern" of bizarre behavior. I note that even at the height of tension during the meeting, when Bell and Robinson traded accusations, District witness LuPaulette Taylor described the two as only having "reserved

words" for one another.²⁸ Teachers who complained did not express fear for their own personal safety.

The letters from Ough, Perkins and Taylor fail to convince me that Robinson was a credible and/or imminent threat of physical harm to Dodd. Perkins's concern that Robinson was more of a threat to himself does not provide a basis for a forced leave. Based on my observations of Robinson over the course of thirteen days of hearing, I found him focused and driven, and thus infer that the range of his moods could be greater than average. The most I can concede to the credibility of the Ough, Taylor and Perkins letters with respect to actual outward manifestations on Robinson's part was Perkins's comment that Robinson exhibited greater mood swings around May 14, attributable in all likelihood both to his disappointment in the lack of support he received and the formulation of his pre-meditated decision to have his points aired. Taylor and Ough's comments that Robinson was "delusional" and "irrational," followed by predictions that he would act out, reflect insubstantial and subjective characterizations based solely on his behavior on May 14. I understand how Robinson's direct criticism of the principal may have been highly unnerving to some present. And to the extent he intended to have the faculty choose sides, he was successful in rallying most of the teachers to Dodd's side. But in her role as "the sheriff," as Claiborne once referred to her, Dodd was the decisionmaker who would be expected to rationally consider the actual threat of harm from Robinson. I believe her decision reflected more animus toward his protected activity than real fear of safety issues at the school. I therefore conclude that Robinson would not have been placed on administrative leave but for his protected activity.

²⁸ I do not find evidence sufficient to conclude that Robinson's breach of "civility" caused his conduct at the Leadership Team meeting to lose its protected character. (See Atlantic Steel Co. (1979) 245 NLRB 814, 816 [102 LRRM 1247] [four-factor test involving place of discussion, subject matter of discussion, nature of employee's outburst, and whether outburst was provoked by an employer's unfair practice].)

Accordingly, I find that the District violated EERA section 3543.5(a) by discriminating against Robinson by virtue of its decision to place him on administrative leave. This conduct also violates section 3543.5(b) by denying the Association to represent its members, for the reasons explained above.

REMEDY

Section 3541.5(c) grants PERB

the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

The District has retaliated against Robinson because of his activities protected by the EERA, in violation of section 3543.5(a), as a result of non-reelecting him for the 2002-2003 school year and placing him on administrative leave in May 2002. It is appropriate to order the District to rescind the notices of non-reelection and involuntary administrative leave, reinstate Robinson to his teaching position at McClymonds, and make him whole for lost benefits, monetary and otherwise, including back pay from the date of his last employment with the District, and interest at the rate of 7 percent per annum. (Rancho Santiago Community College District (1986) PERB Decision No. 602 [rescission of notice of unprofessional conduct]; McFarland, at p. 169 [reinstatement of probationary teacher].)

As a result of each of the above-described violations, the District has also denied the Association its right to represent employees in their employment relations with the District in violation of EERA section 3543.5(b). The appropriate remedy is to cease and desist from such unlawful conduct.

It is also appropriate that the District be required to post a notice incorporating the terms of this order. The Notice should be signed by an authorized agent of the District

indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting of such notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (Davis Unified School District (1980) PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it has been found that the Oakland Unified School District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code sections 3543.5(a) and 3543.5(b), when it retaliated against Ronald Robinson because of his participation in conduct protected by the EERA. This conduct also denied the Oakland Education Association (Association) the right to represent employees in their employment relations with the District. Pursuant to Government Code section 3541.5(b), it is hereby ordered that the Oakland Unified School District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against Ronald Robinson by non-reelecting him for the 2002-2003 school year and placing him on involuntary administrative leave, because of his protected conduct under the Act;
2. Denying the Association its right to represent employees in their employment relations with the District by the above-described conduct.

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

1. Within ten (10) workdays of service of a final decision in this matter, rescind the notices of non-reelection and involuntary administrative leave issued to Ronald Robinson and destroy all copies thereof.

2. Within ten (10) workdays of service of a final decision in this matter, reinstate Ronald Robinson to his social studies teaching position at McClymonds High School and make him whole for lost benefits, monetary and otherwise, including back pay, plus interest at the rate of 7 percent per annum.

3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the District where notices to employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Within thirty (30) workdays of service of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

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. (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).)

Donn Ginoza
Administrative Law Judge