VACATED by Journey Charter School (2009) PERB Decision No. 1945a

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA TEACHERS ASSOCIATION/NEA, Charging Party, v. JOURNEY CHARTER SCHOOL, Respondent.	Case No. LA-CE-4808-E PERB Decision No. 1945 February 28, 2008

Appearances: California Teachers Association by Rosalind D. Wolf, Attorney, for California Teachers Association/NEA; Kronick, Moskovitz, Tiedemann & Girard by Christian M. Keiner, Attorney, for Journey Charter School.

Before Neuwald, Chair; McKeag and Wesley, Members.

DECISION

WESLEY, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Journey Charter School (JCS) to an administrative law judge's (ALJ) proposed decision. In the proposed decision, the ALJ held that JCS violated the Educational Employment Relations Act (EERA)[1], section 3543.5(a) and (b), when it refused to renew the contracts of three teachers, Stephanie Edwards (Edwards), Paola Schouten (Schouten), and Marlene Nicholas (Nicholas). The ALJ held that this conduct was in retaliation for their expressed intent to seek representation by the California Teachers Association/NEA (CTA), and for a letter that JCS teachers sent to parents.

The Board has reviewed the entire record in this case, including but not limited to the complaint, JCS's answer, the hearing transcript, the parties' post-hearing briefs, the ALJ's

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

proposed decision, JCS's statement of exceptions and supporting brief, and CTA's response.[2] Based upon this review, the Board reverses the portion of the proposed decision finding that JCS retaliated against Edwards, Schouten and Nicholas for engaging in protected activity. The Board does not address the portion of the proposed decision dismissing CTA's charge that the allegedly anti-union statements made by the Administrative Consultant, Rainbow Rosenbloom (Rosenbloom), interfered with the teachers' protected organizing activities. As neither party excepted to this finding, a review of the issue is unnecessary.

PROCEDURAL HISTORY

This action commenced on October 25, 2004, when CTA filed an unfair practice charge against JCS, alleging that an agent of JCS warned teachers not to become involved with unions, and that Edwards, Schouten and Nicholas were discharged because of their involvement with CTA. The Office of the General Counsel issued a complaint against JCS on February 2, 2005, alleging that by such conduct JCS interfered with employee rights and retaliated against employees in violation of EERA section 3543.5(a) and (b). The matter was not resolved at the conclusion of an informal conference held on March 14, 2005.

A hearing into these allegations was conducted before the ALJ on September 1, 2, 8, 9 and 23, 2005. At the hearing, CTA amended the charge and complaint to allege that JCS also retaliated against the three teachers in response to a letter sent by the teaching staff to the parents of JCS students. With the filing of post-hearing briefs, the matter was submitted for decision on December 9, 2005. The ALJ issued the proposed decision on January 19, 2006.

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[2]JCS requested oral argument in this matter. The Board has historically denied requests for oral argument where an adequate record has been prepared, and the parties had an ample opportunity to brief and did, and the issue before the Board is sufficiently clear to make oral argument unnecessary. (United Teachers of Los Angeles (Valadez, et al.) (2001) PERB Decision No. 1453; Monterey County Office of Education (1991) PERB Decision No. 913.) These criteria are met in this case. Thus, we deny the request for oral argument.

FINDINGS OF FACT

JCS, a charter school, is a "public school employer" within the meaning of EERA section 3540.1(k).[3] CTA is an "employee organization" within the meaning of EERA section 3540.1(d), but was not the recognized representative of JCS employees. Edwards, Schouten, and Nicholas were public school employees within the meaning of section 3540.1(j).

JCS is a public Waldorf Methods School, founded by Edwards and Schouten, and chartered by the Capistrano Unified School District (District) in 2001.[4] JCS's charter established a governance structure that includes a School Council (Council) comprised of parent and teacher representatives. The Council is responsible for personnel decisions, the school's legal and financial stability, and overall school policy. Evidence in the record shows that JCS attempted to operate by consensus and did not have much management structure. From 2001 until April 2, 2004, Edwards and Schouten served as classroom teachers, lead teachers/directors, and as teacher representatives on the Council. Schouten testified that she was part of an "administrative team" that undertook "administrative duties pertaining to curriculum ... [and] direction of the school." Edwards and Schouten conducted hiring and firing, made work assignments and directed other teachers.

In March 2004,[5] District Deputy Superintendent Margaret LaRoe, informed the Council that the JCS charter, which was up for renewal, as well as the 7th and 8th grade curricula, were not acceptable and needed to be rewritten. She also expressed concern about the special

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[3]EERA is applicable to charter schools. (Ed. Code section 47611.5(a).) As of January 1, 2000, charter school employees have the right to form, join and participate in the activities of employee organizations under EERA section 3543, and PERB has the authority to investigate allegations of unfair practices committed in a charter school under EERA section 3541.3(i).

[4]Edwards and Schouten wrote the original JCS charter.

[5]All dates hereafter refer to the year 2004 unless otherwise specified.

education program, lack of sufficient student supervision, and a budget deficit projection. Some parents communicated to the Council their fears that the charter was in jeopardy.

Council Member Scott Hargis (Hargis) called a special Council meeting for April 22. Before the meeting, Hargis gave Edwards and Schouten a list of parent complaints directed at them for running the school unilaterally without any input from other sources or any accountability to the Council or to the JCS community. At a closed session at the end of the April 22 meeting, Council Members Hargis, David Jones (Jones), Karen Lichty (Lichty), and Tracy Seemann (Seemann) voted to remove Edwards and Schouten as directors but to retain them as teachers, and to appoint Lichty and Seemann as interim directors. On April 23, Hargis and Jones informed Edwards and Schouten that they were "fired" as directors but retained as teachers. The Council announced its decision at a lunchtime teachers' meeting. Several teachers cried, and many walked out of the meeting.

The school community was divided over this decision. On the morning of the annual Mayday festival, several parents gathered outside the school to protest the Council's action, some carrying signs. Hargis testified that this protest, in the presence of children, was inappropriate. Edwards, Schouten, and Nicholas went to the office of the principal of the high school on whose campus JCS is located, for advice on how to calm down the situation. When they returned to the school gate they barred parents from entering the campus, which some Council members felt put a damper on the Mayday festivities. That evening a Council meeting was held to discuss the day's events. Approximately 50-60 parents rallied on both sides of the issue. Nicholas spoke strongly in support of Edwards and Schouten. She got into a verbal altercation with a parent and expounded that all parents were role models for their children and that when some were hiding in the bushes, "I wonder how much longer before we have another Columbine." The parent became greatly upset and had to be escorted off the property. On

May 3, Nicholas wrote a letter of apology to the Council, parents, and staff for her reference to Columbine.

On May 6, Lichty sent a letter to parents soliciting their complaints about Edwards and Schouten and seeking support for the Council's April 22 action. Approximately 20 percent of the school's parents responded with complaints.

At a Council meeting on May 12, Hargis made a motion to terminate Edwards and Schouten completely from JCS, which was not seconded. The Council then passed a motion, with Hargis dissenting, to return them to their director positions on the condition that they participate in mediation. The Council also voted to employ the services of Rosenbloom as a consultant to mediate between the Council and the teaching staff. On May 14, the Council sent a letter to parents explaining the recent events and asking everyone to come together.

Concerned about her status and those of her fellow teachers, Edwards contacted CTA and on May 13 the teachers met in a JCS classroom with CTA Organizer Joe Boyd (Boyd) to discuss the possibility of union representation. Several teachers expressed fear that their jobs had no protection and seemed favorable to bringing in CTA.

Rosenbloom held mediation sessions during June and July, attended by Edwards, Schouten, Lichty, and Council President Bas Mulder (Mulder). At the first session, there was a general discussion about the current climate of distrust. Rosenbloom suggested restructuring the JCS governance, which he labeled "re-imagination." As a result, new committees were formed, including an Executive Committee to consist of administrators, teachers, and parents. Although Edwards and Schouten solicited teachers to participate, they were reluctant, as they felt they were being asked to assume more duties. According to Schouten, she informed Lichty after a meeting in June that the teachers were "going to organize."

Rosenbloom also met regularly with the teaching staff to discuss the current dissension and his "re-imagination" concept. At a teacher meeting with Rosenbloom in June, Edwards and Schouten said they would step down as directors, and Dana Ware (Ware) was appointed director and teacher representative to the Council.

On June 13, Rosenbloom sent an e-mail to the Council members, seeking approval for a letter he drafted to the JCS community regarding the results of the mediation process. In his draft letter, he urged an "aura of mutual respect and admiration" and the restructuring of JCS governance, and stated that Edwards and Schouten had resigned as directors. He also noted that henceforth, all "official communication" from JCS would contain a statement that it was "approved by Journey faculty and Council."[6] However, the letter was not sent because Hargis insisted that Edwards and Schouten first put their resignations in writing, which was not done.[7]

The record shows that by June 26, the last day of the 2003/2004 school year, Edwards and Schouten had stepped down from their positions as directors, although they had yet to submit written resignations to the Council. The teachers had an informal meeting that day with Mulder and Lichty, expressing concerns regarding their new workload under the "re-imagination" changes. According to Ware, she told Mulder and Lichty this was the reason the teachers needed to join the union.

On July 19, Ware e-mailed Jones regarding her concerns about Rosenbloom's changes to teacher contracts. Ware did not mention CTA in the e-mail, but testified that a few days later, she spoke with Jones about the same concerns and said that when the teachers join the

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[6]The record is unclear as to when this communication policy was adopted. It was in response to critical e-mails Hargis sent regarding Edwards and Schouten, that were thought by many parents to be official JCS communications.

[7]Hargis and Mulder contend that they either told Rosenbloom to obtain their written resignations or it was understood that he would do so. Edwards and Schouten denied ever being asked to submit written resignations.

union, the union will be handling the teachers' contracts. Ware also testified that she raised the union issue with Hargis on July 28 when he refused to allow her to attend a closed session of the Council. She told Hargis that until the teachers joined the union, she was the only voice for them on the Council.

On July 26, the teachers met at Edwards' home and drafted the following letter:

> Dear Parents of Journey School,
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> This letter by the teacher faculty at Journey School is intended to communicate directly to you some of the issues that have been weighing heavily on our hearts and minds. We are aware and sensitive to the honest concerns that some of the parents have expressed concerning their frustration with some aspects of the parent-teacher relationship and operations of Journey School. The teaching faculty is open and committed to these efforts of dialogue and mediation for resolving issues.
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> The teacher faculty, along with the parents, has been committed to the students' educational welfare from the very inception of the school. The record shows that even with 'growing pains', Journey School had been a flourishing and financially sound place where the children were thriving.
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> The teachers have believed that continual acrimony on certain issues was unnecessary and unhealthy for the welfare of the children and the school. This was the reason that the teaching Directors decided to take a hiatus while mediation was in process and had not taken any legal recourse.
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> We have been seriously concerned with the financial and executive management course that the school has taken since April 21, 2004. It is our belief at this point that the Council's financial and management decisions are putting the school at serious legal and financial risk of insolvency. These issues pale in comparison to the possible non-renewal of the charter by the district. We have serious concerns over the financial, executive management and accountability of the school for the following reasons:
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> - Repeated violations of the Brown Act (by failure to properly agendize items for meetings and improper posting of agendas) and continuing to ignore the school's legal council [sic] opinion on conducting the council meetings within the boundaries of the law.

- Accessing of confidential student files by Council members.

- Prior to April 21, Journey School was financially sound with a balanced budget of more than $1,000,000 in revenue and $300,000 in savings. Currently, the school is facing a $311,000 shortfall that has been exacerbated by an enrollment decrease of 30%.

- The hiring of a consultant despite Journey School's policies to put the contract up for competitive bidding. This consultant was initially hired for the mediation process, but has now been directed to run the school's operations, despite the schools growing budget crisis.

- Lack of follow up on solid leads in procuring a site in San Clemente.

This management approach is not in accordance with the spirit of Steiner's model. We are open to meeting with any parent or parents directly and discussing and resolving the issues.

We do not feel that the current political climate is serving the best interests of the children, the parents, or the community. We do not want any part of a political power struggle; we want dialogue, cooperation, and balance and a truly model educational environment for the children to exist and thrive. We agree that there are areas within the school where we could have done a better job, which is something we want to examine and improve upon. However, we do not think that this gives current Council a license to compromise the educational welfare of the children to serve political ends. Our experience with Council's management has brought us to the conclusion that there is little interest in a collaborative, open, and transparent model, which ultimately impacts the viability of the school.

In closing, our reports are nearing completion and our summer training was inspiring and uplifting. We are looking forward to moving into the future where the vision and integrity of Journey School's promise to deliver a quality Waldorf education will not be compromised. We ask for your help and commitment towards the goal of a healthy Steiner school.

The letter contained the names of all of the teachers. It was duplicated on plain paper and mailed to parents in JCS envelopes.

Schouten testified that the teachers sent the letter because "[t]here was a general sense amongst the teachers of mismanagement within the school," and the teachers wanted to communicate their perspective to the parents. Ware testified that the letter spoke with the teachers' "collective voice," and was sent because the Council had not been listening to what they "have been trying to say." The teachers were dissatisfied with their "work status," and felt that they did not have job security.

Some parents were angered by the letter. Also incensed were the Council members, who believed Edwards and Schouten instigated and wrote the letter and that the other teachers did not give their full consent. Hargis testified that Edwards and Schouten should have addressed their complaints to the Council. Hargis believed they created more dissension and violated the new communications policy by sending the letter directly to the parents. According to Ware, Lichty phoned her and asked why they sent the letter, because Lichty believed everything was fine. Ware responded that everything was not fine and when they join the union they would not have such problems.

On August 10, the teachers met again with CTA representative Boyd and voted to become part of the District's faculty bargaining unit. One of the teachers, whom Rosenbloom considered a confidante, informed him of the meeting with CTA.

At a Council meeting on August 17, Mulder, Hargis, and Lichty went into closed session to discuss teacher contracts. They voted unanimously not to renew the contracts of Edwards, Schouten, and Nicholas, notwithstanding Rosenbloom's recommendation that they be renewed as teachers but not as directors.

On August 19, Mulder phoned Schouten, who was out of the country, and informed her that her contract was not renewed because there was no position available to her as the 7th grade curriculum had not been approved. He also phoned Edwards and Nicholas to come to

the school and discuss their contracts. When asked by Edwards why they needed a discussion, he said she "no longer fit in."[8]

The three Council decision-makers testified as follows: Hargis contended that JCS could only "come together" and continue "in the proper manner" without the three teachers. He stated his belief that Edwards and Schouten were treating the school as their own personal property and were not accountable to the Council, the parents, or the District. However, he conceded that he witnessed no misconduct and had no problems with either of them, from the time of their reinstatement as directors on May 12 until the July 26 letter, which he attributed to them. Mulder also believed Edwards and Schouten were running the school by themselves, controlled all the teachers, and urged them not to volunteer for the new committees in order to undermine the "re-imagination" process. He testified that he did not believe they could separate their teaching roles from that of their directorships; however, he conceded that after they resigned as directors, he did not see them perform any director-like functions. Yet, according to Mulder, in spite of the efforts at mediation, the power struggle between Edwards and Schouten, and the Council continued, as evidenced by the July 26 letter, for which he found them responsible. Mulder claimed, however, that their contracts would have been renewed if they had submitted written resignations of their directorships. Lichty testified that Edwards' and Schouten's contracts would have been renewed but for the July 26 letter, which she believed broke the trust which had been building during mediation. As to Nicholas, Mulder contended that her Columbine remark was so unacceptable that he did not want her to

[8]The three teachers, contending that they were unsure whether they had actually been terminated, appeared at the JCS office on September 7, the first day of school. Mulder arrived and asked what they were doing there, as they had no contracts. Schouten said their contracts never expired. Mulder left and returned with Rosenbloom, who told the three teachers, apologetically, that he had "nothing to do with it." Edwards stated that Mulder never told them they were fired. The teachers subsequently left. None of the three teachers received any further reason or notice for their termination.

continue at the school. Similarly, Hargis testified that Nicholas said some "inappropriate things" and the campus would "come back together" without the three teachers.

DISCUSSION

The issue on appeal is whether JCS declined to renew the contracts of Edwards, Schouten, and Nicholas because they engaged in protected conduct.

To establish a prima facie case of discrimination in violation of EERA section 3543.5(a), the charging party bears the burden of showing that the employee engaged in protected activity, the employer knew of the activity; and that the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employees because of the protected activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Upon a showing of protected conduct and adverse action, the party alleging discrimination must then make a prima facie showing of unlawful motivation. Under Novato, unlawful motivation occurs where an employer's action against an employee was motivated by the employee's participation in protected conduct.

When direct proof of unlawful motivation is not 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 (North Sacramento School District).) However, timing alone, without more, does not demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227 (Moreland).) 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 (Department of 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 School District, supra.)

Once an inference is made, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employee's protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721.)

JCS argues the ALJ erred in finding that Edwards, Schouten and Nicholas were terminated after they joined with other teachers in expressing their interest in joining CTA and in sending the July 26 letter to parents. JCS contends that this finding ignores the fact that Edwards and Schouten were "steeped in controversy because of their service as directors and founders of the school," and the evidence that Nicholas was "tangentially involved" in the "purported protected activities." JCS disagrees with the ALJ's finding that it had knowledge of the exercise of association rights, and that the July 26 letter constituted protected activity. JCS states that the letter concerns Waldorf policy issues, rather than terms and conditions of

employment within the meaning of EERA. JCS contends that the letter signified to many that the mediation process, a condition of the continued employment of Edwards and Schouten, had not worked. JCS further states that Edwards and Schouten were released "after lengthy attempts to resolve a variety of deep and longstanding disputes about the mission, governance status and location of Journey." The release was consistent with the "at will" employment relationship. With respect to Nicholas, JCS contends that neither the CTA purports nor the ALJ found that her remarks about "Columbine" were protected under EERA.

CTA supports the ALJ's finding that the Council had knowledge of the teachers' interest in union organizing because of Ware's more specific testimony regarding her communications to Lichty, Mulder, Jones, Hargis and Rosenbloom concerning the teachers' desire to join the union; and the ALJ's application of the "small plant doctrine." CTA agrees with the ALJ's finding that the July 26 letter was protected activity because it enumerated employment issues such as complaints about financial and management decisions, legal violations, a budget shortfall, hiring without competitive bidding, the "power struggle" between the Council and the teachers, and the Council's lack of interest "in a collaborative, open, and transparent model." CTA also concurs with the ALJ's finding that the letter was not "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice, or disruptive or interfered with school activities so as to lose EERA protection."

In finding that the contents of the July 26 letter constituted protected activity, the ALJ relied on Rancho Santiago Community College District (1986) PERB Decision No. 602 (Rancho Santiago). In Rancho Santiago, the charging party was disciplined for writing articles that were highly critical of the school district relative to an attempted murder of a faculty member and alleged intimidation of faculty. (Id., at pp. 6-7.) The Board determined that such complaints would be protected in some instances, stating:

> Preliminarily, the speech must be related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations. (Section 3543.)
> (Id., at p. 12; emphasis added.)
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> [The employee's] writings are related to matters of legitimate concern to employees as employees, including such subjects as teacher safety, negotiations, leaves, the autonomy and effectiveness of the exclusive representative and other employee organizations, educational policy and academic freedom.

The Board in Rancho Santiago referred to its prior decision in Mt. San Antonio Community College District (1982) PERB Decision No. 224 (Mt. San Antonio). In Mt. San Antonio, employees distributed leaflets at a graduation ceremony critical of the district's fiscal management and educational policies. The leaflets specifically mentioned negotiations with the faculty, which was a topic of wide publication in the community. The Board found that leaflets containing allegations which did not directly address disputed issues at the bargaining table or in negotiating proposals, were nonetheless "comments on matters which were of legitimate concern to the teachers as employees." (Id., at p. 7.)

In Regents of the University of California (1984) PERB Decision No. 449-H, an employee wrote a letter to the employer shortly after learning of a work cancellation. The ALJ wrote in the proposed decision which the Board adopted,

> The letter itself purported to speak for other employees and addressed a variety of employment-related subjects as they impacted on on-call workers.[9] . . . Criticism of a supervisor on employment-related subjects is protected under the Act when its purpose is to advance the employees' interests in working conditions.
> (Id., proposed dec., at p. 143.)

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[9]E.g., "the letter complained about such issues as advance notice, cancellation of work assignments, and the breakdown of communication between 'management and labor.'"

In the present case, contents of the letter to parents did not directly address any issues relating to the teachers' interests as employees. The teachers expressed their concerns for the operations of the school, welfare of the children, financial and executive management of the school, possible non-renewal of the charter, hiring of the consultant, and complained that the management approach was not in accordance with the spirit of Waldorf model. They stated they could have done a better job in certain areas. However, the teachers did not state how all these complaints impacted their working conditions, or how these concerns would advance their interests as employees. Without such evidence, the Board cannot make any inference of protected activity.

The evidence fails to show how the letter was specifically and directly related to work conditions, treatment of teachers as employees, job cancellation or labor relations problems. As the letter did not state matters of legitimate concern to the employees as employees, the teachers did not engage in activity protected by EERA when they distributed the letter.

CTA next contends that JCS discriminated against Edwards and Schouten for union organizing. It is undisputed that Edwards, Schouten, and Nicholas did engage in protected conduct when they sought the assistance of the CTA and decided to join the union.

The ALJ found that the Council, specifically Hargis, Mulder and Lichty who voted not to renew the three teachers' contracts, was aware of the union organizing effort. Hargis, Mulder and Lichty each testified that he or she had no knowledge of the teachers' organizing effort. On the contrary, Ware testified that on multiple occasions she informed JCS Council members of the teachers' contacts with CTA and their intent to organize.[10] The ALJ resolved

[10]As stated earlier, Ware informed Mulder and Lichty after an informal meeting on June 26, that the teachers needed to join the union. On July 19, Ware spoke to Jones that when the teachers join the union, the union would be handling the teachers' contracts. Ware also testified that she had raised the union issue with Hargis on July 28 when he refused to allow her to attend a closed session of the Council. After the July 26 letter was sent, Ware told

the contradictory testimony by crediting Ware's "specific testimony" over the other witnesses' general denials. The ALJ stated that she found it difficult to believe that Rosenbloom, who admitted to having knowledge of the teachers' union organizing efforts, would not have communicated this fact to the Council. We find the ALJ's credibility determination to be supported by the record, which contains extensive testimony by Ware explaining the circumstances under which she discussed the organizing efforts with Council members and parents. Therefore, we defer to the ALJ's finding that the Council was aware of the teachers' union organizing efforts.

It is undisputed that JCS's decision in not renewing the contracts of Edwards, Schouten, and Nicholas constituted an adverse action against them. We now consider whether JCS refused to renew the contracts of Edwards, Schouten and Nicholas because of the teachers' efforts to organize and join a union. Viewing the record in its totality, we find that there is insufficient evidence to support an inference that JCS was unlawfully motivated to discriminate against Edwards, Schouten and Nicholas because of their participation in protected union organization activities.

We note that the August 17 decision not to renew the teachers' contracts followed closely after the teachers' second meeting with CTA representative Boyd on August 10, in which they voted to become part of the District's faculty bargaining unit. However, timing alone, without more, does not demonstrate the necessary nexus between the protected act and the adverse action. (Moreland.)

One of the factors that can be used to establish nexus is employer animosity towards a union activist. (Cupertino.) JCS was aware of the teachers' union organizing effort, but there

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Lichty that when the teachers joined the union, they would not have the problems listed in the letter.

is no evidence that it had ever tried to frustrate, thwart or discourage their attempt. For example Ware, who testified about informing the Council of the teachers' organizing efforts, was not subjected to any adverse action. Further, when the teachers held their first meeting with Boyd in a JCS classroom on May 12, the Council took no action to prevent it.

Nexus can also be proven by evidence of the employer's inconsistent or contradictory justifications for its actions. (Department of Parks and Recreation.) However, the record is devoid of evidence that JCS's justification for its action was inconsistent or contradictory. JCS would have renewed the contracts of Edwards and Schouten if they had not written and sent the July 26 letter to the JCS parents. JCS's evidence demonstrated its serious intent to resolve the long-standing disagreement between the Council and Edwards and Schouten, as founders and former directors, over the direction and policy of JCS. Edwards and Schouten played different roles - as founders, as lead teachers/directors who supervised and assigned work to other teachers, and as teachers themselves. Since they wrote the original JCS charter and were in the process of re-writing the JCS charter, it is apparent that they had a definite vision for JCS that conflicted with other Council members and parents. Their dedication to their own vision caused other Council members and parents to criticize that they were running the school unilaterally or without any accountability to the Council or to the JCS community. Therefter a majority of the Council decided at the April 22 Council meeting to remove Edwards and Schouten as directors. Later, the majority opted to follow the Waldorf principles of operating by consensus, and reinstated Edwards and Schouten as directors at the May 12 Council meeting, on condition that they participate in mediation. Rosenbloom held mediation sessions during June and July, attended by Edwards, Schouten, Lichty and Mulder. Rosenbloom's extensive involvement in conducting mediation sessions with the various segments of the JCS community demonstrated that reaching a consensus was JCS's top priority.

The testimony of the Council members who voted not to renew the three teachers' contracts established that they made the decision because the contents of the letter showed that the mediation between the Council and the teachers had failed and the teachers had breached the policy to communicate with parents through the Council. Hargis, who had sought to remove Edwards and Schouten from JCS even before the teachers' first meeting with CTA representative Boyd, testified that he did not find any misconduct by either of them from their reinstatement as directions on May 12 until the mailing of the July 26 letter. He attributed the authorship of the letter to Edwards and Shouten and found they were treating the school as their own personal property, and were not accountable to the Council, parents or the District.

Lichty phoned Ware after receiving the July 26 letter to ask her why the teachers sent the letter because Lichty believed everything was fine. Lichty believed the letter broke the trust which had been building during mediation. Mulder testified that Edwards and Schouton continued their "power struggle" with the Council, as evidenced by the letter.[11] Thus, we conclude that JCS's justification for its non-renewal of the teachers' contracts was not inconsistent or contradictory.

CTA argues that the Council did not offer Edwards, Schouten and Nicholas justification for the non-renewal of their contracts at the time it took action on August 17. When asked by Edwards on August 19 why she needed to have a discussion concerning her contract, Mulder simply said she "no longer fit in." It was unclear if the Council had given

[11]CTA argues that "when employees join together to question the employer's actions or policies, the employer looks at it as a 'power struggle' or 'fostering dissension.'" We view the "power struggle" in this case as a struggle for the mission and direction of JCS, a Waldorf based charter school that adheres to the Rudolph Steiner educational method. Ideally, the entire JCS community would operate on consensus and engage in informal conflict resolution. When this ideal could not be achieved, JCS turned to mediation under Rosenbloom's guidance. Because the Council members had equated the success of this mediation process to its own continued existence, they seemed to view the letter as an affront to the effort to hold the JCS community together.

Schouten and Nicholas any specific reasons for the non-renewal of their contracts, other than Mulder's testimony that on August 19, he had phoned Schouten to inform her that her contract was not renewed because there was no position available to her as the 7th grade curriculum had not been approved. While it is true that JCS did not give a more clear reason to the teachers for the non-renewal of their contracts, the totality of the circumstances nevertheless indicate that JCS took the action because of the letter. We are therefore unable to draw a reasonable inference of unlawful motivation based solely on the proximity of JCS's action and its failure to give the teachers a clear justification for their decision.

Based on the evidence in the record and the ALJ's finding,[12] the Board finds that JCS decided not to renew the three teachers' contracts due to the contents of the July 26 letter, which we have determined is not protected activity, rather than the teachers' attempt at union organization.

With respect to the non-renewal of Nicholas' contract, the ALJ found that the Council terminated Nicholas based upon her support for Edwards and Schouten against the Council's removal of them as directors on April 22, her allegedly inappropriate "Columbine" remarks at the April 29 meeting, and the July 26 letter. Neither the letter nor her support for Edwards and Schouten was protected activity. CTA did not provide any relevant or pertinent evidence to justify that Nicholas's allegedly inappropriate "Columbine" remarks were protected activity. Therefore, the claim of discrimination with respect to the non-renewal of Nicholas's contract fails.

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[12]The ALJ stated on pages 21-22 of the proposed decision:

> It is clear from the record that the <u>overriding motivation</u> for the actions against Edwards and Shouten, as well as against their close ally Nicholas, as discussed above, was the contents of the July 26 letter, a protected activity.
> (Emphasis added.)

The evidence supports a finding that JCS did not renew the contracts of Edwards, Shouten and Nicholas because of the content of the July 26 letter, which was not protected activity. In addition, there is insufficient evidence to show JCS was unlawfully motivated to discriminate against the three teachers because of their expressed intent to form and join a union. Accordingly, the Board concludes that CTA has not sustained its burden of proof to show that JCS discriminated or retaliated against Edwards, Schouten and Nicholas for their participation in protected activity.

ORDER

The unfair practice charge and complaint in Case No. LA-CE-4808-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member McKeag joined in this Decision.

Chair Neuwald's concurrence and dissent begins on page 21.

NEUWALD, Chair, concurring and dissenting: I respectfully concur with the majority's conclusion that the letter sent to the parents of Journey Charter School (JCS) was not protected and, as a result, JCS did not retaliate against Stephanie Edwards (Edwards), Paola Schouten (Schouten), and Marlene Nicholas (Nicholas) for said activity. I, however, disagree with the majority's conclusion that JCS did not retaliate against Edwards, Schouten, and Nicholas when it refused to renew their contracts because of their expressed intent to seek representation by the California Teachers Association, NEA (CTA). Rather, I agree with the administrative law judge (ALJ) that JCS did retaliate against the teachers because of their protected conduct:

> The remaining question then is whether a sufficient nexus exists between the teachers' interest in CTA and the non-renewal decision. [Scott] Hargis, [Karen] Lichty and [Bas] Mulder all denied that the idea of a union would have upset them. However, everyone acknowledges that the problem between the Council and the faculty was one of control. If CTA had come on the scene, surely the Council would have further lost control over the teachers' wages and working conditions. Thus, the Council had a motive to try to keep the union out by removing those whom they believed instigated and controlled all teacher actions, i.e., Edwards and Schouten. Further, Hargis demonstrated his animus to concerted activity in his objections to the community protest outside the school on April 29.
>
> As to Nicholas, she was not held responsible for the conduct of the teaching staff to the same extent as Edwards and Schouten. However, she was perceived as Edwards' and Schouten's principal and most vocal supporter; her Columbine remark, which JCS contends had a lingering effect on the community, was made in the context of her support for them and her opposition to the Council's removing them as directors; according to Rosenbloom, the Council consistently complained about Nicholas' performance in the same breath as Edwards' and Schouten's; and Hargis testified that the only way for JCS to come together was

> without all three teachers. I therefore find that JCS had the same motivation to remove Nicholas as they had to remove Edwards and Schouten.
> (ALJ's proposed dec. at p. 19; emphasis in original.)

I, therefore, find a nexus between the teachers' interest in CTA and the Council's decision not to renew the three contracts and, as such, find a violation of the Educational Employment Relations Act, section 3543.5(a) and (b).