STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 150, Charging Party, v. ESCONDIDO UNION ELEMENTARY SCHOOL DISTRICT, Respondent.	Case No. LA-CE-4862-E PERB Decision No. 2019 April 30, 2009

Appearances: California School Employees Association by Christina C. Bleuler, Attorney, for California School Employees Association & its Chapter 150; Lozano Smith by Amanda S. Georgino, Attorney, for Escondido Union Elementary School District.

Before Rystrom, Chair; Neuwald and Wesley, Members.

DECISION

RYSTROM, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Escondido Union Elementary School District (District) to findings in the administrative law judge's (ALJ) proposed decision.

The first amended complaint requested by the California School Employees Association & its Chapter 150 (CSEA), alleged that the District violated the Educational Employment Relations Act (EERA)[1] section 3543.5(a) and (b)[2] by retaliating against

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

[2] EERA section 3543.5 makes it unlawful for a public school employer to:

> (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.

Lance Barry (Barry) for filing a government tort claim against the District in May 2004, and the instant unfair practice charge initially filed on June 3, 2005 (hereinafter referred to as this unfair practice charge or Barry's unfair practice charge). The acts of retaliation for this protected activity were alleged to be: the issuance of disciplinary memoranda dated December 6, 2004 (December 6 memo), March 3, 2005 (March 3 memo) and July 12, 2005 (July 12 memo); as well as a July 18, 2005 letter of reprimand (July 18 reprimand); an August 30, 2005 notice of disciplinary action-statement of charges (August 30 notice); and a September 13, 2005 decision of superintendent's designee regarding proposed disciplinary action to impose a five-day suspension (September 13 suspension).

The ALJ concluded that the December 6 and March 3 memos were not issued in violation of EERA.[3] The ALJ found the July 12 memo, July 18 reprimand, August 30 notice, September 13 suspension and a September 27, 2005 improvement plan (September 27 plan)[4] were issued in violation of EERA by the District because they were in retaliation for the filing of this unfair practice charge. The District timely appeals the ALJ's findings of the EERA violations based on the July 12 memo, July 18 reprimand, August 30 notice, September 13 suspension, and September 27 plan.

We reviewed the entire record in this case, including but not limited to the first amended complaint, the District's answer, the hearing transcript, the parties' post-hearing briefs, the ALJ's proposed decision, the District's statement of exceptions and supporting brief,

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

[3] No exceptions were filed by either party to these findings. Thus, we do not review the bases of these findings.

[4] Although the September 27 plan was not listed in the first amended complaint as one of the adverse actions taken against Barry in retaliation for engaging in protected activity and was not litigated by the parties, the ALJ found that it was unlawful.

and CSEA's response thereto. Based on this review, and for the reasons stated below, we find that the July 12 memo, August 30 notice, and September 13 suspension were retaliatory as alleged and constituted violations of EERA section 3543.5(a) and (b).[5] We dismiss the allegations alleging retaliation based on the July 18 reprimand finding CSEA failed to prove a prima facie case as to this disciplinary action. We also find that the September 27 improvement plan was not included in the complaint and that it does not meet the test for an unalleged violation.

PROCEDURAL BACKGROUND

This action commenced on June 3, 2005, when CSEA filed an unfair practice charge against the District. The charge alleged that the District violated EERA by issuing the December 6 and March 3 memos to Barry in retaliation for filing a government tort claim against the District on May 11, 2004. PERB issued a complaint on July 7, 2005. On July 26, 2005, the District filed an answer to the complaint denying its allegations.

On August 8, 2005, PERB received a first amended charge from CSEA, which further alleged that the District issued the July 12 memo and July 18 reprimand in retaliation for PERB issuing the July 7, 2005 complaint on CSEA's charge. CSEA requested an amended complaint be issued on October 14, 2005 based on CSEA's amended charge.

A formal hearing in the matter was held December 14-16, 2005. On the first day of the hearing, at the request of CSEA, the ALJ issued a first amended complaint which included all prior allegations and further alleged that the District issued Barry the July 12 memo, July 18 reprimand, August 30 notice and September 13 suspension in retaliation for Barry causing the filing of this unfair practice charge. The ALJ issued her proposed decision on April 3, 2006.

[5] We do not adopt the ALJ's proposed decision as to these disciplinary actions given our legal reasoning differs from that of the ALJ. We find that the District failed to meet its burden of proof in this mixed-motive case.

ALJ'S PROPOSED DECISION

The ALJ found the evidence insufficient to show that the District issued Barry the December 6 memo in retaliation for filing a government tort claim against the District because CSEA failed to prove that the District had knowledge of Barry's involvement in the tort claim.

As to the March 3 memo, the ALJ concluded that the evidence failed to demonstrate two necessary elements: that the District knew of Barry's involvement in the tort claim and that such involvement constituted protected activity. The ALJ also concluded that even if Barry's tort claim was protected activity and the District knew about it, the District would still have issued Barry the March 3 memo.

The ALJ found that the District retaliated against Barry in violation of EERA section 3543.5(a) and (b) for the filing of this unfair practice charge when it issued him the July 12 memo, July 18 reprimand, August 30 notice, September 13 suspension, and September 27 plan. The July 12 memo and July 18 reprimand were found to be retaliatory on the basis that they were inaccurate, exaggerated, and the product of an inadequate and cursory investigation by Francis Spoonemore (Spoonemore), the director of maintenance and operations, and Barry's second line supervisor, who relied chiefly on the reports of three lead workers who were known to have antagonistic relationships with Barry. Spoonemore was also found to hold a degree of union animus.

The ALJ reasoned that the subsequent August 30 notice, September 13 suspension and September 27 plan were retaliatory because they were based on and tainted by Spoonemore's July 12 memo and July 18 reprimand. A further reason given by the ALJ for this finding of retaliation was that the August 30 notice, September 13 suspension and September 27 plan were unjust because they were additional adverse actions for the same conduct for which Barry had already been disciplined.

THE DISTRICT'S EXCEPTIONS

The District excepts to all of the ALJ's findings in support of her conclusions that CSEA met its burden of proof of a prima facie case for each of the disciplinary actions found to be retaliatory and that the disciplinary actions would not have issued in the absence of Barry's unfair practice charge.

CSEA'S RESPONSE TO DISTRICT'S EXCEPTIONS

CSEA responds by claiming that all of the ALJ's findings are supported by the weight of the evidence.

FACTUAL BACKGROUND

Barry has been employed as a carpenter with the District since 1989 and has acted as the chief steward of CSEA for the past 12 years. From 1989 until May of 2004, Barry was supervised by Maintenance Supervisor, Dan Lloyd (Lloyd). The only annual evaluations of Barry were done by Lloyd and were for the years 1992, 1994, 1995, 1997, 1998 and 1999.[6] In each evaluation, Lloyd rated Barry's performance as above average. The District acknowledged that in most of the subcategories of those evaluations, Barry received above-average ratings. There is no evidence that Barry received any separate oral or written discipline by Lloyd.

CSEA acknowledged that Barry was not a perfect employee. Each of Lloyd's evaluations stated that Barry needed to complete more projects and increase his productivity and organization. Barry's 1997 evaluation commented that he should make it a goal to spend less time socializing. Barry admitted that planning was one of his weak points.

[6] District witness Jean Welser (Welser), director of classified personnel, testified that employees are normally evaluated once a year. She acknowledged that there have been gaps in the annual evaluations and did not know why they were not done in some cases.

Spoonemore was promoted to the director of maintenance and operations position in July 2003, at which time he became Barry's second-line supervisor. In this position, Spoonemore was responsible for the disciplinary actions in the maintenance and operations department where Barry worked. In September or October 2004, Spoonemore spoke with Barry regarding concerns about Barry's work productivity. Barry admits meeting with Spoonemore in September 2004 regarding Spoonemore's belief that Barry's jobs had not been completed in a timely manner.

Spoonemore testified that because he felt he was not getting through to Barry, Spoonemore had a "one on one" meeting with Dave Foster (Foster), the CSEA president, hoping that Foster could get through to Barry so his productivity and work habits would improve and the need for documentation would be obviated.[7] Spoonemore began drafting a disciplinary memorandum to Barry in September or October 2004.

Welser worked with Spoonemore on his disciplinary actions and was usually the first to review them. When Wesler received Spoonemore's initial draft of the December 6 memo on September 2, 2004, she reviewed Barry's prior evaluations looking for common deficiencies or patterns. In this review she noted a pattern of reports about Barry's lack of productivity and excessive socialization.

Spoonemore issued this first disciplinary memorandum to Barry on December 6, 2004.[8] The memo was critical of Barry's work productivity and cited several specific incidents as examples of tardiness, not starting or completing work orders in a timely fashion and excessive

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[7] Foster testified that his first conversation with Spoonemore regarding Barry's work productivity was at a disciplinary meeting regarding Barry's Skilsaw. This disciplinary meeting took place in March 2005.

[8] No exceptions are made to this disciplinary memo or the March 3 memo, but these facts are relevant to the District's progressive discipline policy discussed *infra*.

socializing. The December 6 memo informed Barry that he was being placed on shop duty for six months so that his work could be closely evaluated. It further stated that during this time if Barry had to leave the shop, he needed to report to Spoonemore where he was going, what he was doing and how long he would be gone. The memo provided that Barry's work progress would be evaluated at the end of six months.

On March 3, 2005, Spoonemore issued Barry a disciplinary memo that charged him with insubordination for the repeat offense of making an unauthorized and potentially unsafe modification to his newly issued Skilsaw.[9] The March 3 memo resulted from a safety inspection that Spoonemore ordered Larry Rouse (Rouse), one of Barry's leads, to conduct on February 16, 2005, during which Rouse discovered that Barry's Skilsaw had been modified. Barry admitted that he modified his second Skilsaw the same as he had modified his previously asssigned Skilsaw.

The July 12, 2005 Memorandum

On July 12, 2005, Spoonemore issued Barry a follow-up memo to the December 6 memo referenced "Follow up Memorandum on Your Attendance, Work Performance, Safety, and Job Conduct." The memo was four pages long and cited eight major criticisms of Barry's work with examples as follows.

[9] The first offense occurred on July 23, 2004, when an inspection by the Division of Occupational Safety and Health revealed that Barry's Skilsaw had been modified with two little holes. Barry admitted being informed by the Department of Industrial Relations, Division of Occupational Safety and Health (Cal/OSHA), that the District could be cited for this modification. After the inspection, Spoonemore cut the electrical plugs off of Barry's Skilsaw (rendering it useless), and issued him a new Skilsaw with explicit instructions not to modify it in any way. Barry denied receiving such instructions from Spoonemore with the replacement Skilsaw.

1. Failure to follow directives: Barry violated Spoonemore's December 2004 directive to work from a prioritized list of orders and to see Spoonemore upon completion for further orders which constituted insubordination.

2. Low productivity: Between December 20, 2004 and June 23, 2005, Barry closed only 28 work orders, with other maintenance workers substantially completing 14 of them. This productivity rate is very low considering the size, scope and complexity of the work assigned.

3. Delay in beginning assignment: For more than 40 days after Spoonemore had conducted a walk through at Linclon School assigning Barry a casework project, Barry failed to order any materials for the project. Barry's ability to follow directions and priorities, remain on task and complete work was cited as unsatisfactory.

4. Failure to work with an assigned assistant: Upon his request, Barry was assigned an assistant, Pete Tabone (Tabone) to help Barrry on June 29 and 30, 2005. On June 29 Barry did not begin working with Tabone until 10:00 a.m. On both days Barry was observed talking on the phone or visiting with another employee while Tabone stood around waiting for instructions. Later, Barry was observed wandering around the yard or in another shop while Tabone, a new maintenance employee, worked by himself. Barry was criticized for not working with and overseeing the work of his assigned assistant.

5. Attitude regarding lack of productivity: Barry's actual work productivity matches comments he has described to Spoonemore between 2000 and 2003 and made to others more recently that: "The District is lucky if they get 15% out of me;" proudly referring to himself (Barry) as "the Dark Side" and "Captain

Chaos;" and stating that he "Comfort the distressed and distress the comforted." These statements are interpreted by Spoonemore as indicating Barry is content with and even proud of his lack of productivity and disruptiveness making his work performance unacceptable.

6. Excessive socialization: Barry socialized in excess with other employees which was observed by Spoonemore and reported by Lead Workers Rouse and Eric Thompson (Thompson), Custodial Supervisor Eric Daniels (Daniels) and nutrition warehouse Supervisor Scott Oppitz. In addition, Barry engages in activities that are insubordinate, unauthorized and/or detrimental to department operations and morale.

   Examples of these criticisms are: (a) making the unauthorized purchase of a laser level and lying to his Lead Worker, Rouse, that the level had been loaned to Barry by the lumber company; (b) telling Rouse who was questioning some materials in Barry's truck that they were for a project Spoonemore had approved when Spoonmore had not approved Barry's starting the project; (c) on April 7, 2005 telling Custodial Supervisor Daniels that Barry would be doing union business for the rest of the day rather than informing one of Barry's Lead Workers, Rouse or Thompson; (d) responding to Lead Worker Rouse, who inquired about a project at Pioneer School, that Barry didn't care if it took him one or two days, its been eight weeks and the project would be finished when Barry finished it; (e) on June 8, 2004 at 8:15 a.m. Barry was observed having a 45-minute discussion with a warehouse worker, David Lawrence, in Nutrition without permission from the District administration to take this time away from Barry's carpentry work; and (f) on June 2, 2005, at 8:15 a.m. Barry was

observed by Rouse with Kevin Hagerty (Hagerty) in the carpentry shop who left after Rouse walked by and then returned fifteen minutes later and remained until 10:00 a.m. visiting with Barry and Terry Smith from grounds.

7. Undermining professional atmosphere: Barry engaged in unprofessional disruptive behavior on June 6, 2005, when he interrupted a business meeting custodial supervisor Daniels was having with a supplier by dropping off a piece of paper with the word "CHAOS" written on it.[10] The word "chaos" on the paper is considered further evidence of the pride Barry takes in undermining the professionalism, productivity and morale of the Maintenance Department operation.

8. Organizing barbeque: On April 21, 2005 Barry organized an unauthorized and secret barbeque with a handful of other maintenance employees inside the paint shop building with the main roll up doors closed. The grill was placed just outside the side building exit door with the open flames within 20 feet of highly flammable items. No permission was asked for the barbeque which constituted an unauthorized use of District property as well as a negligent, insubordinate and dishonest action.

The July 18, 2005 Reprimand

On July 18, 2005, Spoonemore issued Barry a letter of reprimand criticizing his conduct at a staff safety meeting and his participation in a July 13, 2005, incident involving Rouse's tools.

The reprimand cited two instances where Barry was insubordinate during a staff meeting. The first occurred when a group of employees were reading information on working

[10] In his written response, Barry apologized for this incident.

safely and using trained personnel in confined spaces. Barry interrupted and stated that "these guys [meaning the supervisors] would probably send in subs."

The second took place after Barry gave a pre-approved budget update when he made comments to the group about: the fact that PERB had issued a complaint in his unfair practice charge, his disciplinary problems, and how he thought Spoonemore treated him unfairly. Spoonemore reprimanded Barry for making these comments on the basis they were unapproved and unsolicited comments which resulted in undermining teamwork and confidence in the District's leadership by bringing up Barry's personal disciplinary situation. It also stated that Barry had intimidated fellow co-workers by giving misinformation about the process.[11]

The July 18 reprimand also described an incident where Barry wasted time. This incident began when two maintenance employees brought a pile of Rouse's tools and equipment to the carpentry shop where Barry was preparing a project. Custodial Supervisor Daniels testified he observed Barry and his assistant carry tools and equipment belonging to Rouse from the carpentry shop and dump it in a corner of the lead worker's office. When Daniels asked them what they were doing, Barry replied that Rouse's equipment was in his way and he could not find Rouse's truck.

Lead Worker Thompson[12] testified that he observed Barry and another maintenance employee carry Rouse's tools from the carpentry shop, where some of them would typically belong, and put them in the lead worker's office where they did not belong. Consistent with

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[11] Barry told the workers attending the staff meeting that the PERB hearing officer was investigating Barry's complaint and could subpoena witnesses.

[12] Thompson had been a maintenance department lead worker since October 1, 2004. He testified that lead workers receive, prioritize and assign work orders. They may not impose discipline, but do refer disciplinary incidents to the director.

the reprimand, Thompson also testified that the carpentry shop was originally a bus garage which was approximately 45-feet by 60-feet and contained more than sufficient room to put Rouse's tools in it. At Thompson's direction, Barry moved the tools from the lead worker's office. Thompson wrote Barry up because he believed Barry's actions were inappropriate and provoked an unnecessary problem because there was already discord between Barry and Rouse.[13]

The August 30, 2005, Notice of Discipline

The August 30 notice stated that the District would propose to suspend Barry for five days without pay. On July 28, 2005, prior to issuing this notice, Welser met with Spoonemore, Rouse, and Thompson to review Barry's response to the July 12 memo. Although Welser could not recall the exact date, she testified that the decision to recommend Barry's suspension must have been made at least several weeks before August 30, because it takes time to put together a statement of charges. Welser testified that point-by-point she went over all the memoranda that had been given to Barry, his responses, and anything else she had in his file. She did this in an effort to make sure that all their information was correct and to determine whether or not to take further disciplinary action against Barry.

The August 30 notice was based mainly on the incidents involving Barry described in the July 12 memo but also contained incidents from the December 6 memo and July 18 reprimand. Welser deleted the incidents in the July 12 memo regarding the priority listing of tasks and the unauthorized purchase of materials for the truck because she thought the listing of tasks could have been an honest misunderstanding and she determined that Barry had authorization to purchase the materials for the truck.

[13] Spoonemore testified that he believed he talked to Barry about the incident with Rouse's tools before issuing the reprimand and that Barry told him it was a dumb thing to do.

The August 30 notice included a cover letter which stated that "overall" Barry failed to correct the performance and behavioral issues identified in the four previous memoranda.[14] The cover letter also notified Barry that the suspension was being proposed due to his negligent, inefficient, and/or incompetent job performance, and because of his insubordination due to excessive socialization, failure to follow directions and undermining of departmental objectives and procedures.

The September 13, 2005 Suspension

On September 13, 2005, in a memorandum to Barry, Bob Leon (Leon) stated he would recommend the suspension to the Board of Education (BOE) at its meeting on September 15, 2005.[15] In this memo Leon indicated the reason for this recommendation was Barry's inappropriate behavior towards his supervisors and other employees, and concern's about Barry's work completion. BOE adopted the recommendation and Barry served his suspension from September 19-23, 2005.[16]

The September 27, 2005 Revised Improvement Plan

On or about September 27, 2005, Leon, Welser and Spoonemore issued Barry a revised improvement plan which listed various guidelines Barry was to follow in the future. The plan encouraged Barry to accept his supervisor's directions. Additionally the improvement plan directed him to refrain from insubordination, modifying equipment and excess socializing, to plan and complete work in a timely manner, to request permission before having barbecues,

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[14] These were the December 6 memo, March 3 memo, July 12 memo, and July 18 reprimand.

[15] Leon is the assistant superintendent of human resources for the District.

[16] Barry appealed his five-day suspension to the Merit System Commission as excessive, unreasonable and a product of supervisor abuse. As of the hearing on the instant unfair practice complaint, this appeal was scheduled for February 1-3, 2006.

and to notify his supervisors when he leaves the maintenance yard, where he is going and when he will return.

DISCUSSION

In considering an appeal, PERB reviews the entire record de novo. It may reverse legal determinations of an ALJ and, from the factual record, may draw opposite inferences from 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 (*Santa Clara*).)

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

(*Santa Clara.*)

CSEA's Retaliation Allegations

To establish a prima facie case of retaliation in violation of EERA section 3543.5(a) and (b), CSEA must show that: (1) Barry engaged in protected activity; (2) the District knew of this activity; and (3) the District took adverse action against him because of the activity. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

Once CSEA has established a prima facie case for the alleged adverse actions, the burden of proof switches to the District to show evidence that it would have taken the adverse action even if Barry had not engaged in protected activity. (*Novato*, *supra*; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal. 3d 721, 729-730 (*Martori Brothers*); *Wright Line* (1980) 251 NLRB 1083.) This is the "but for" test which is "an affirmative defense the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d p. 293.)

CSEA has alleged four retaliatory adverse actions: the July 12 memo, July 18 reprimand, August 30 notice, and September 13 suspension. We address each of the adverse actions seriatim.

1. The July 12, 2005 Memorandum

The District does not dispute Barry engaged in protected activity when he filed the instant unfair practice charge on June 3, 2005, but argues that CSEA did not prove a prima facie case of retaliation for the July 12 memo based on exceptions to the ALJ's conclusions that: (1) the District's agents responsible for issuing the memorandum had knowledge of the filing of this unfair practice charge prior to issuing the July 12 memo; and (2) a nexus existed between the issuance of the July 12 memo and Barry's protected activity. The District also challenges the ALJ's determination that the District would not have issued the July 12 memo in the absence of the protected activity.

a. Knowledge

The District claims the ALJ improperly assumed that the District knew of Barry's involvement in this charge, because Spoonemore was noted in the charge as having retaliated against Barry and did not deny such knowledge at the hearing. The District argues this assumption fails because CSEA did not present any direct evidence as to the filing and service of the charge or that anyone at the District knew of Barry's charge.

The burden of demonstrating the requisite knowledge of Barry's protected activity is on the charging party. (*Novato*, *supra*; PERB Reg. 32178.)[17] We find that the ALJ improperly placed the burden of proof on the District to affirmatively deny knowledge of Barry's involvement in protected activity. However, we conclude the record contains sufficient

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

evidence to support a finding of knowledge by the District of Barry's protected activity prior to the issuance of the July 12 memo.

It is clear from the record that Welser knew about the unfair practice charge by June 8, 2005, because on June 9, 2005, PERB received a notice of appearance form on behalf of the District that was signed and dated by Welser on June 8, 2005. Welser's testimony indicates she worked with Spoonmore in the preparation of the July 12 memo. Consistent with Wesler's testimony, when Spoonemore was asked whether he had help in preparing the July 12 memo or if he had reviewed it with anybody, Spoonemore responded he had reviewed it with Welser although he did not specify when.

Accordingly, we conclude the evidence justifies a finding that one of the District's disciplinary agents, Welser, knew of Barry's protected activity prior to July 12, 2005 and was involved in the issuance of the July 12 memo to Barry.

b. Nexus

When direct evidence of unlawful motive is not available, such motive can be established through circumstantial evidence and inferred by the record as a whole. (*Novato, supra.*) Although relevant, the timing of the adverse action, standing alone, cannot establish the action was taken because of the protected activities. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Evidence 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; *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S (*Parks and Recreation*)); (2) the employer's departure from established procedures and standards when dealing with the employee (*Los Angeles Unified School District* (2001) PERB Decision No. 1469; *Alisal Union Elementary School District* (2000) PERB Decision No. 1412); (3) the

employer's inconsistent, contradictory or vague justifications for its actions (*Parks and Recreation*, *supra*); (4) the employer's cursory investigation of the employee's misconduct (*Novato*, *supra*); (5) employer animosity toward union activists (*Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (6) any other facts which might demonstrate the employer's unlawful motive (*Novato*, *supra*).

The District argues on appeal that it was improper for the ALJ to find that timing exists as a nexus factor because the timing of the July 12 memo had been set by the December 6 memo, which contemplated monitoring Barry's progress in six months. As such, the District claims any proximity in timing to the filing of Barry's charge does not properly show unlawful motivation on the part of the District, but rather the District's following up on the December 6 memo.

We find that the ALJ correctly concluded that CSEA established the timing nexus factor. The July 12 adverse action occurred approximately five weeks after the protected activity. (*Mountain Empire Unified School District* (1998) PERB Decision No. 1298 (*Mountain Empire*) [three months sufficient to establish timing].)

The ALJ found further nexus factors establishing an inference of unlawful motivation on the District's part were based on the following conclusions: (1) Spoonemore conducted a cursory investigation; (2) the memo contained exaggerations because it criticized Barry for persisting in engaging in activities which are insubordinate, unauthorized and/or detrimental to department operations based on unreasonable examples; and (3) Spoonemore exhibited a degree of union animus. The District excepted to all of these findings.

The ALJ concluded that Spoonemore conducted a cursory investigation because he relied on hearsay reports from Thompson, Daniels and Rouse with whom it was well known Barry had a hostile relationship. The ALJ found a cursory investigation based on the fact that

Spoonmore never spoke to Barry about the specific incidents alleged in the July 12 memo. While we affirm the ALJ's finding that CSEA established the District conducted a cursory investigation, we disagree with her reasoning.

Under PERB case law, absent evidence casting suspicion on the employer's actions, the failure of a second line supervisor to conduct an independent investigation of a direct supervisor's charges of misconduct or poor job performance does not reflect unlawful motivation. (*Riverside Unified School District* (1987) PERB Decision No. 639 (*Riverside*).)

It is CSEA's burden of proof to show that evidence exists casting suspicion on the District because of Spoonemore's reliance on his first line supervisors. We do not find evidence of such suspicion in this case. Regarding his July 12 memo, Spoonemore testified that it was based on a combination of reports from Rouse or Thompson (the leads), his custodial supervisor Daniels, and feedback Spoonemore gets from the school principals, office managers and teachers. In general, Spoonemore testified that he is more in an administrative role in the office so his crew leaders and maintenance leaders are his eyes and ears in the field. Spoonemore's testimony was corroborated by Wesler who testified that, based on her conversations with Spoonmore in preparing each of the disciplinary memos, he received information from the leads, Rouse and Thompson, as well as office managers at District school sites, school principals and in some instances by library staff.

There is no evidence that Thompson and Daniels had a hostile relationship with Barry. We agree that there is evidence that Rouse and Barry had a hostile relationship, but do not find that this by itself constitutes an inference of unlawful motivation on Spoonemore's part under the circumstances of this case.[18]

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[18] Barry and 17 other coworkers signed a letter of no confidence in Rouse's involvement in the alleged improper removal of asbestos, which was presented to Spoonemore

For instance, we would find differently had CSEA shown Spoonemore knew Rouse had provided false reports or that there was some other factual reason Spoonemore had reason to believe Rouse's reports should be discounted. But that is not the case. Under cross-examination Spoonemore testified that Rouse was the source of the criticism of Barry for talking on the phone June 29 and 30, 2005; and that Rouse was the observer of the barbeque and reported that the doors were partially down. Barry admitted that he had been on the phone on June 29 and 30 and claimed it was on union business. Regarding the barbeque information from Rouse, there is no evidence that Rouse reported to Spoonemore that Barry was the organizer of the barbeque. To the contrary, Wesler testified that after meeting with Spoonemore, Rouse and Thompson, to be satisfied that the information in the July 12 memo was correct, she concluded that Barry was not the prime organizer of the barbeque as stated in the July 12 memo.[19]

We also do not find that Spoonemore's failure to speak to Barry about each of the incidents in the July 12 memo establishes an unlawful motivation on Spoonemore's part. The failure of an employer to interview an employee in connection with a disciplinary related action may give rise to an inference of unlawful motivation, but only when there is evidence that the employer routinely interviews employees in such circumstances. (*State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.) In this case, there was no evidence that either the District or Spoonemore had a consistent practice of interviewing employees prior to their discipline. In fact, evidence to the contrary was introduced.

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in December 2003. Additionally, Thompson testified that there is discord between Barry and Rouse.

[19] The ALJ found that that Rouse exhibited union animus, but that Rouse's union animus was not imputed to Spoonemore because there was no evidence that Spoonemore and Rouse ever discussed Rouse's animus or that Spoonemore shared his sentiments. Neither party filed an exception to this finding.

[ALJ]: Do you check with the accused?

The Witness [Spoonemore]: At times I do.

[ALJ]: But not all the time?

The Witness: Not all the time.

Our finding that the District conducted a cursory investigation in issuing the July 12 memo is based on the District's assertions in the memo that Barry had organized a barbeque. According to the July 12 memo, Barry "organized an unauthorized and secret barbeque" which was conducted near flammable materials, and was a clear and reckless disregard for basic fire safety rules, exposed the District to significant liability and Barry's co-workers to injury.

Barry testified that he did not organize the barbeque. Hagerty testified that Barry did not organize this barbeque but just showed up and ate. Hagerty admitted he had done the grocery shopping for the barbeque and the cooking. As to how the barbeque came about, Hagerty explained that it was just a bunch of guys who regularly eat together deciding to have a barbeque and that they did it quite frequently. Hagerty was not disciplined for this barbeque. Wesler admitted that she was not sure if Barry had organized the barbeque and that after looking at it she did not believe he was the prime organizer.

Given the severity of the alleged barbeque offense by Barry detailed in the July 12 memo, at a minimum the District would be expected to conduct an investigation sufficient to confirm that Barry was in fact the organizer. The record indicates that this was not done prior to issuing the memo. The evidence at the hearing indicated this criticism of Barry was without basis.

These findings regarding the barbeque alone support our conclusion that CSEA met its burden to prove there was a nexus between the protected activity and the July 12 memo.

c. "But for" Test

Where as here, it appears that the employer's adverse action 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*, *supra*, 29 Cal. 3d 721.) In *Novato*, *supra,* PERB adopted the *Wright Line*, *supra,* 251 NLRB 1083, "but for" test for mixed motive cases.[20] In *Wright Line*, the NLRB[21] made two important points regarding its "but for" test. First, the NLRB noted that placing the burden on the employer to prove that the non-discriminative reason actually motivated the adverse action "represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation." Second, the NLRB stated that the goal in a mixed motive case is "to analyze thoroughly and completely the justification for the [adverse action] presented by the employer."[22]

In retaliation cases, PERB does not determine whether the employer had cause to discipline the employee. (*San Bernardino City Unified School District* (2004) PERB Decision No. 1602.) PERB's function in retaliation cases is to determine whether the employer took the action for an unlawful reason. (*McFarland Unified Sch. Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169.)

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[20] *Wright Line* established a definitive rule for mixed motive cases under the National Labor Relations Act.

[21] NLRB refers to the National Labor Relations Board.

[22] The United States Supreme Court approved the *Wright Line* test in *National Labor Relations Bd.* v. *Transportation Management Corp.* (1983) 462 U.S. 393. It stated that the burden shift to the employer was reasonable.

With these principles in mind, we examine the record to determine if the District met its burden of proof that it would have issued the July 12 memo even if Barry had not filed this unfair practice charge.

We find the District has not met its burden of proof. It failed to put on sufficient evidence for the Board to determine that the District would have issued the criticisms in the July 12 memo notwithstanding the filing of Barry's unfair practice charge.

For instance, Spoonemore testified generally about his dissatisfaction with Barry's work productivity without specifying that it applied **to** the time period covered by the July 12 memo and also failed to provide justification for any of his criticisms of Barry itemized in the July 12 memo.[23] Thompson who was one of the line supervisors Spoonemore relied on for information about Barry in the July 12 memo testified, but he too failed to offer any justification for the criticisms of Barry in the July 12 memo.[24] Rouse, Barry's lead who Spoonemore also relied on for information did not testify. Daniels, a custodial supervisor on whom Spoonemore relied on for information testified as to only one incident in the July 12 memo: Barry's interrupting a meeting Daniels was having with a vendor and handing Daniels a note with the word "CHAOS" on it.

According to Wesler the primary justification for the July 12 memo was the productivity issue regarding Barry. She testified that she did not personally verify Barry's low

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[23] Spoonemore did testify regarding the barbeque incident as to his justification for concluding it was secret, unauthorized and hazardous. Spoonemore did not testify that Barry had organized the barbeque or why Spoonemore's criticisms related to the barbeque incident should be made against Barry. Spoonemore's lack of testimony on this issue is explained by Wesler's testimony that after looking at the barbeque incident "they" did not believe Barry was the prime organizer.

[24] Thompson did testify in detail about a June 16, 2005 memo he had written regarding the dissatisfaction of the Grant School's librarian with Barry's work product at some unspecified time prior to June 16, 2005, however, Barry's failure to perform work at Grant School was not mentioned in the July 12 memo.

productivity but that she got her information from Spoonemore or Barry's lead workers. However, Wesler's testimony failed to provide specific examples of Barry's low productivity on which she was relying for her justification of the memo. Alternatively, the District could have adduced this evidence directly from the supervisors on whom Wesler relied. The record indicates no such evidence to support the District's justification for the July 12 memo was presented.

The criticisms contained in the July 12 memo are hearsay and by themselves and without independent evidence supporting them, cannot suffice to meet the District's burden of proof that it would have issued the July 12 memo's criticisms of Barry even had the instant unfair practice charge not been filed. (PERB Reg. 32176; *Regents of the University of California* (1998) PERB Decision No. 1255-H; see *Woodland Joint Unified School District* (1987) PERB Decision No. 628.) The only independent evidence justifying the July 12 memo was Barry's interruption of a vendor meeting which had nothing to do with Barry's productivity, claimed by the District to be the reason for the memo. Accordingly, we conclude that the District has failed to meet its burden of proof under the "but for" test which results in a finding that the July 12 memo was in retaliation for the filing of this unfair practice charge.

We therefore find that the District retaliated against Barry when it issued the July 12 memo.

2. <u>The July 18, 2005 Letter of Reprimand</u>

Neither party has appealed the ALJ's findings that the July 18 reprimand constitutes an adverse action and that the filing of this charge was protected. The ALJ did not specifically find the District had knowledge that Barry engaged in protected activity before issuing the reprimand. We find such knowledge is established given the reprimand criticizes Barry for

stating that PERB had issued a complaint on his unfair practice charge at a staff meeting on July 13, 2005.

We first review the record to determine whether sufficient indicia of unlawful motivation exists to show that the reprimand was retaliatory. We agree with the District that CSEA failed to demonstrate a nexus between Barry's protected activity and the July 18 reprimand.

The reprimand concerned allegations regarding the comments Barry made at the July 13 staff meeting and an incident involving Rouse's tools that same day. The ALJ found that unlawful motivation existed because the District failed to explain what was insubordinate or undermining about Barry's comments at the staff meeting, and because the criticism regarding Rouse's tools was inaccurate and exaggerated, as well as, the product of a cursory investigation in that Spoonemore did not interview Barry. We find that the ALJ incorrectly placed the burden of proof on the District.

The District's July 18 reprimand stated that at a staff meeting a group of employees were reading information about safety and using trained personnel when Barry interrupted them and commented with sarcasm that "these guys [meaning the supervisors] would probably send in subs." In addition, following Barry's budget update which he had requested and received permission to give, Barry, without permission, discussed the complaint PERB had issued on Barry's unfair practice charge, Barry's personal disciplinary situation and how Barry felt he was being treated unfairly by the District. The reprimand also indicated Barry gave misinformation about how PERB processes charges resulting in frightening other employees.[25]

[25] The reprimand is the only evidence as to what transpired at the meeting except for Barry's written response dated July 24, 2005, which does not contradict the reprimand.

The burden was on CSEA to demonstrate unlawful motivation. CSEA did not present any testimony regarding the staff safety meeting and no questions about the incident were asked of Barry, Spoonemore or Thompson. Similarly, the record contains no evidence that the criticism in the reprimand that other employees were frightened or intimidated by Barry's comments about the authority of the PERB Board agent to subpoena witnesses, was an exaggeration. We find CSEA failed to establish a nexus based on this part of the July 18 reprimand.

The same is true as to the July 18 reprimand's charge against Barry for dumping Rouse's tools. The evidence shows that two maintenance employees put a pile of Rouse's tools on an area in the carpentry shop that Barry had cleared for a project. There is no testimony contradicting that Daniels, one of Barry's leads, observed Barry and his assistant move Rouse's equipment from the carpentry shop to the lead worker's office. When Daniels testified, he was not questioned by CSEA regarding these observations.

Thompson testified that there was sufficient room in the workshop for the tools which Barry moved to the lead office and that in fact some of the equipment belonged in the carpentry shop. This shop was originally a bus garage and was 45-feet by 60-feet which was more than sufficient room for Barry's work and Rouse's equipment. According to Thompson, he wrote Barry up because the equipment obviously did not belong in the lead worker's office and he felt Barry's actions were inappropriate and provoked an unnecessary problem because there was already discord between Barry and Rouse.

It is clear from the record that Spoonemore based his criticism in the reprimand on the report he received from Thompson. CSEA proffered no evidence that Spoonemore embellished or exaggerated that report. Absent evidence casting suspicion on the employer,

the reliance on direct supervisors' reports for disciplinary action is not evidence of unlawful motivation. (*Riverside*, *supra.*)

3. The August 30, 2005 Notice of Disciplinary Action and the September 13, 2005 Decision to Recommend that the BOE Impose the Suspension

a. Nexus

The District excepted to the ALJ's finding of unlawful motivation based on: (1) both adverse actions being tainted because they derived from Spoonemore's retaliatory July 12 memo and July 18 reprimand; and (2) the conclusion that the August 30 notice and September 13 suspension constituted additional punishment for the same conduct that Barry had already been disciplined for in the July 12 and July 18 adverse actions.

While we disagree with the ALJ's finding that there was unlawful motivation because Barry had already been disciplined for the incidents raised in July 12 memo and July 18 reprimand, we do find that CSEA established a prima facie case.

No unlawful motivation can be found based on Barry's being suspended for acts cited in the previous disciplinary memos given the District's progressive disciplinary system. Building discipline incrementally upon prior documentation is the hallmark of the District's progressive disciplinary system of which the August 30 notice and September 13 suspension are a part.

The July 12 memo to Barry indicated that it was also recommending that the superintendent consider appropriate disciplinary action up to and including dismissal. The July 18 reprimand similarly provided that Barry's continuing inappropriate behavior necessitated a recommendation to the superintendent of disciplinary action up to and including dismissal. The August 30 notice and September 13 suspension carried out these earlier recommendations consistent with the District's progressive discipline policy.

The August 30 notice informed Barry of his right under Personnel Commission Rule 8.300.3 to request a conference with the District superintendent or designee (Leon), in order to review materials and respond to the charge prior to final action by the BOE.[26] Barry availed himself of this right and met with Leon on September 9, 2005. Personnel Commission Rule 8.300.3(A)(3) provides that "The employee shall be served with the Superintendent's decision prior to the date of intended final action by the [BOE]." It is clear that pursuant to the District's progressive discipline system, once Barry met with Leon to respond to the August 30 notice, Leon was required to serve Barry with his decision before action could be taken by the BOE on Leon's recommendation. The September 13 suspension was the progression to the next discipline step based on the results of the interview with Barry.

The record demonstrates the District's pattern of progressive discipline as applied to Barry was in keeping both with the District's Personnel Commission rules and with its practice and procedure under these rules. The evidence established that the District treated another disciplined employee, Lloyd, the same way under the District's progressive discipline policy. Four memoranda from Spoonemore to Lloyd dated January 8, 2004, January 23, 2004, February 5, 2004 and March 11, 2004, respectively, each contain criticisms of poor work performance and judgment on Lloyd's part. Each memorandum indicated that it will be placed in Lloyd's personnel file and warns that further discipline may result due to these and other incidents. There is also a notice of disciplinary action dated March 30, 2004, from Caston to Lloyd. That notice, much like Barry's August 30 notice, contained the criticisms from all of Lloyd's previous memoranda, and recommended that Lloyd be terminated.

[26] Rule 8.300 of the District's personnel commission rules sets forth the procedure for disciplinary action. Rule 8.300.2 provides that whenever the superintendent (Dr. Robert Caston (Caston)) or director of classified personnel (Welser) intends to recommend a suspension to the BOE, he or she shall cause a notice of discipline to be prepared.

However, we do find a nexus exists between Barry's protected activity and the August 30 notice and resulting September 13 suspension. First, we find that the temporal proximity between the protected activity and these disciplinary related documents of three and one-half months is sufficient to support an inference of retaliation. (*Mountain Empire*, *supra.*) But, as we held above, timing alone cannot establish the requisite nexus between the adverse action and Barry's protected activity, there must be an additional nexus factor.

Second, we consider the fact that the August 30 notice was based in part on the criticism of Barry that he either organized or was one of the organizers of an unauthorized and secret barbeque. As we discussed above, Barry and Hagerty testified Barry was not a organizer but simply showed up at the barbeque and ate. Wesler admitted in her testimony that they were not sure Barry had organized the barbeque and after looking into it did not believe he was the prime organizer. This evidence establishes that this criticism in the August 30 notice was the result of a cursory investigation. The evidence also established that Barry was discriminated against by this criticism given none of the other employees attending the barbeque, including Hagerty who testified he had done the actual barbequing, were disciplined for the barbeque.

Accordingly, we find that a nexus exits between this adverse action and the August 30 notice. Wesler's testimony that the barbeque criticism was included in the August 30 notice because there was a history of many, many things in Barry's file does not change our conclusion. Given the September 13 suspension resulted from the August 30 notice under the District's progressive discipline policy, we also find that the a nexus between the September 13 suspension and Barry's protected activity has been established.

b. "But for" Test

We turn now to the "but for" test and examine the evidence to determine if the District met its burden of proof as to the August 30 notice. As we held above, a disciplinary memo such as the August 30 notice is hearsay and cannot by itself meet the District's burden of proof therefore we must examine the record for supporting independent evidence.

Much of the August 30 notice is based on the July 12 memo for which, with one exception, there is no independent evidence justifying the District's criticisms in the memo. However, there was evidence which showed the District's justification seeking to discipline Barry for modifying his saw in February 2005 and the June 2005 interruption of Daniels with the "CHAOS" note. These constituted two of the twelve criticisms of Barry in the August 30 notice. The remainder of the criticisms were related to Barry's lack of production. As with the July 12 memo, we cannot find that the District has met its burden of proof that it would have issued the August 30 notice had this unfair practice charge not been filed because there is no independent evidence of Barry's production problems.

This is not to say that an employer must justify each and every criticism in a disciplinary memo to satisfy this burden of proof, but there must be sufficient independent evidence for us to conclude that the disciplinary action based on the hearsay criticisms would have occurred notwithstanding the employee's protected activity. In this case Barry's supervisors who were responsible for the information criticizing Barry for lack of work productivity, Rouse, Thompson and Spoonemore, did not testify as to the basis of any of their work productivity criticism in the disciplinary memos. Rouse did not testify and Thompson's testimony did not deal with Barry's lack of work productivity. The only work product testimony by Spoonemore was a simple "No he has not" when asked if Barry had complied with the December 6 memo's directives that Barry was to complete all assignments in a timely

manner, not delegate assigned work unless approved and to inform his lead worker if there will be any delays in completion of his work. This testimony does not by itself support a finding in the District's favor on the "but for" test.

Our interpretation of the September 13 suspension language indicates that its basis was Barry's work productivity and his inappropriate behavior towards his supervisors and other employees. Because the September 13 suspension is hearsay, the District was obligated to prove by independent evidence that the suspension would have been recommended notwithstanding Barry's protected activity. The criticisms on which the August 30 notice is based and which the District failed to prove would not have been made but for the protected activity are also the basis of the September 13 suspension. We therefore find that the District failed to meet its burden of proof under the "but for" test for the September suspension.

September 27, 2005 Revised Improvement Plan

The District excepts to the ALJ's conclusion that the September 27 plan was issued in violation of EERA, because it was based on the July 12 memo and July 18 reprimand and constituted unjust additional discipline for conduct previously addressed.

We conclude that no findings can be made as to the September 27 plan because it was not alleged in the complaint. The Board can only address an adverse action which is not alleged in a retaliation complaint if the test for reviewing an unalleged violation is met. Unalleged violations may only be considered when: "(1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue." (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C.)

The unalleged violation also must have occurred within the applicable statute of limitations period. (*Ibid.*)

We find that the criteria for us to consider the September 27 plan as an adverse action was not met because there was no notice to the District of a need to defend and the unalleged violation was not fully litigated. Although the September 27 plan was introduced into evidence and Barry testified that he disagreed with it, there was no additional examination or cross-examination and none of the parties made any arguments in their post-hearing briefs regarding the September 27 plan. On this basis we decline to make any findings as to the September 27 plan.

In summary, we agree with CSEA that the July 12 memo, August 30 notice and September 13 suspension were retaliatory. We agree with the District that the July 18 memo was not a retaliatory act. Having concluded that the September 27 plan is an unalleged violation we make no findings as to it.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-4862-E are hereby DISMISSED to the extent that they allege the Escondido Union Elementary School District (District) retaliated against Lance Barry (Barry) by issuing the July 18, 2005 reprimand. The charge and complaint are UPHELD to the extent that they allege the District retaliated against Barry by issuing the follow-up memorandum dated July 12, 2005, the notice of disciplinary action dated August 30, 2005, and the five-day suspension in September 2005, in violation of the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b).

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

A. CEASE AND DESIST FROM:

Retaliating against Barry-because of his exercise of protected activity.

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

1. Within ten (10) workdays following the date this Decision is no longer subject to appeal, make Barry whole by paying him back pay with interest at the rate of 7 per cent annum for all wages and benefits lost as a result of his five-day suspension in September 2005.

2. Within ten (10) workdays following the date this Decision is no longer subject to appeal, remove from Barry's personnel file and all District files, all references to the July 12 memorandum, the August 30 notice of disciplinary action, and the September 2005 five-day suspension.

3. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where notices to employees are customarily posted, copies of the Notice attached hereto. The Notice must be signed by an authorized agent of the District, indicating 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 the Public Employment Relations Board, 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 the California School Employees Association & its Chapter 150.

Members Neuwald and Wesley joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-4862-E, California School Employees Association & its Chapter 150 v. Escondido Union Elementary School District in which all parties had the right to participate, it has been found that the Escondido Union Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b), when it issued to Lance Barry (Barry) the follow-up memorandum dated July 12, 2005, the notice of disciplinary action dated August 30, 2005, and the five-day suspension in September 2005.

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

A. CEASE AND DESIST FROM:

Retaliating against Barry-because of his-exercise of protected activity.

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

1. Make Barry whole by paying him back pay with interest at the rate of 7 per cent annum for all wages and benefits lost as a result of his five-day suspension in September 2005.

2. Remove from Barry's personnel file and all District files, all references to the July 12 memorandum, the August 30 notice of disciplinary action, and the September 2005 five-day suspension.

Dated: _____

ESCONDIDO UNION ELEMENTARY 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.