STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION AND ITS CHAPTER 111, Charging Party, v. PALO VERDE UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5023-E PERB Decision No. 2337 October 29, 2013

Appearances: California School Employees Association by Christine C. Bleuler, Staff Attorney, for California School Employees Association and its Chapter 111; Atkinson, Andelson, Loya, Ruud & Romo by William A. Diedrich, Attorney, for Palo Verde Unified School District.

Before Huguenin, Winslow and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to the proposed decision (attached) of an administrative law judge (ALJ). The ALJ ruled that Palo Verde Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by discharging Eva Guilin (Guilin) in retaliation for her protected activity, including, inter alia, assisting Guilin's union, the California School Employees Association and its Chapter 111 (CSEA), to file an unfair practice charge against the District.

We have reviewed the record, the proposed decision, the District's exceptions and CSEA's response thereto. The ALJ's findings of fact are supported by the record. We adopt them as the findings of the Board itself, except as noted specifically below. 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.

conclusions of law are well reasoned and in accordance with applicable law. We therefore adopt the ALJ's conclusions of law, subject to our discussion below of issues raised by the District's exceptions.

PROCEDURAL HISTORY

On December 7, 2006, CSEA filed an unfair practice charge alleging that the District had changed unilaterally the work duties for numerous represented classifications, including that of purchasing clerk, then held by Guilin.

On March 14, 2007, CSEA amended its charge, alleging that on December 8, 2006, the District discharged Guilin in retaliation for protected activities, and in January 2007, retaliated against CSEA President Donna Vibanco. On July 16, 2007, CSEA supplemented its allegations in a second amended charge. On March 3, 2008, CSEA withdrew all allegations except the Guilin discharge.

On March 4, 2008, the PERB's General Counsel issued a complaint alleging that by discharging Guilin, the District violated EERA section 3543.5(a), and by the same conduct violated section 3543.5(b).[2] The District answered, denying any wrongdoing.

On April 1, 2008, CSEA moved to amend the complaint to allege that one of Guilin's protected activities was her participation in a CSEA unfair practice charge. The District opposed the amendment. On September 8, 2008, the ALJ granted CSEA's motion to amend the complaint.

[2] EERA section 3543.5(a) makes it unlawful for a public school employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." Section 3543.5(b) makes it unlawful for a public school employer to "[d]eny to employee organizations rights guaranteed to them by this chapter."

On September 17 and 18, 2008, the ALJ conducted a formal hearing. On December 19, 2008, with the filing of post-hearing briefs, the matter was submitted for decision.

On January 19, 2009, the ALJ issued her proposed decision.

On February 10, 2009, the District timely filed its exceptions, to which CSEA timely responded on March 9, 2009.

FACTUAL SUMMARY

The ALJ's findings of fact are stated at pages 2-13 of the proposed decision. We provide here our own brief summary of the events surrounding Guilin's employment.

The Purchasing Clerk Position

Prior to March 2006, the purchasing clerk position had been located at the District's warehouse. In or about March 2006, while the position was temporarily vacant, the District reorganized, moving some purchasing clerk duties to a confidential accounting specialist position at the District headquarters, relocating the displaced accounting duties to a non-confidential headquarters accounting position, and thus eliminating altogether the position of purchasing clerk. In or about May 2006, CSEA objected to this reorganization. Thereafter, following discussions with CSEA, the District restored the purchasing clerk position.[3]

Guilin's Employment

On or about June 19, 2006, the District hired Guilin to fill the restored and vacant position of purchasing clerk. The previous purchasing clerk had worked at the District warehouse and been supervised by Facilities Director Marty Braden. Guilin was told in her interview that she would report to and assist Business Manager Olivia Aguirre (Aguirre), would be stationed in the District's headquarters adjacent to Aguirre, would also serve as purchasing clerk, and would receive a revised job description.

[3] In or about September 2006, CSEA and the District agreed, inter alia, to a job analysis and to negotiate over any further job description changes.

Guilin's Service

During the first several months of Guilin's employment, Aguirre advised Guilin from time to time to refrain from involvement with CSEA. Aguirre told Guilin variously that involving the union was not the way to advance with the District, union involvement would not help her, and Aguirre herself was not "big" on the union.

In or about August or September 2006, Guilin spoke by phone with the District's outside computer consultant. After the phone call, Guilin told Aguirre that the consultant had been rude and probably would call Aguirre. Thereafter, the consultant did call Aguirre, and complained that Guilin had been hard to work with. Later Aguirre herself assisted Guilin with the issue which had prompted Guilin's call to the consultant. Aguirre neither scolded nor counseled Guilin over the telephone incident.

Guilin's duties for Aguirre and her location at the headquarters prevented Guilin from performing those purchasing clerk duties necessarily performed at the District's warehouse. Consequently, the District reassigned the warehouse-based duties to a warehouse employee. Aguirre told Guilin to inform the warehouse employee of the reassignment, and that he, not Guilin, was responsible to perform the duties. Guilin did so.

In or about September and October 2006, Guilin and the warehouse employee assigned the purchasing clerk duties became embroiled in a dispute arising from that assignment. Ultimately, their supervisors intervened and counseled them. During the counseling the warehouse employee admitted to being the aggressor. Both employees were admonished to be cooperative. Neither was disciplined. Aguirre told Guilin not to worry about the matter. Each employee received a comment on the respective formal evaluation urging improvement in relations with co-workers. In addition, the warehouse employee was rated "unsatisfactory" in

the "employee contacts" category on his evaluation, and given a "less-than-satisfactory" overall evaluation. By contrast, Guilin was rated "satisfactory" overall.

Guilin's Evaluation

In early November 2006, Aguirre gave Guilin her evaluation. Aguirre rated her "satisfactory" in each category, including "employee contacts," and recorded the following comments:

> *RECORD JOB STRENGTHS*
> Responsible and cares about her job and performance.
>
> *AREAS WHERE IMPROVEMENT IS NEEDED*
> Continue to learn purchasing galaxy.
> Bid processing on rules and regulations.
> Respectful communications with co-workers (warehouse dept).
>
> *STEPS NEEDED FOR IMPROVEMENT*
> Ask a lot of questions.
> Read instructions and handout materials for galaxy and Bids.
> Attend training as needed.

Thereafter, November passed without further incident.

Guilin's Protected Activity

On Friday December 1, 2006, two CSEA officials approached Guilin at her desk. They asked Guilin to assist them in preparing for an imminent meeting with the District by printing out for them some information. Guilin provided the requested assistance, and also provided the CSEA officials a listing of her job duties – a combination of purchasing clerk and other administrative duties. As Guilin spoke with the CSEA officials, Aguirre's supervisor, Assistant Superintendent for Business Yul Whitney (Whitney), approached. Whitney, whose office was nearby, overheard what he described in his testimony as "union stuff," and therefore promptly ordered Guilin and the two union officials to cease their conversation. They did so. Whitney testified that he intervened because he deemed it inappropriate for employees to do

"union stuff" on their work time, although he conceded there was no District rule prohibiting such casual conversations on working time.

The Discharge

On the following Monday, December 4, 2006, Aguirre and Whitney discussed Guilin's possible discharge during a meeting of the District administrative cabinet. Details of this conversation are not in the evidentiary record. Thereafter, according to Aguirre, she pondered discharging Guilin until Tuesday, December 5, 2006, when she decided she would do so on Friday, December 8, 2006. Aguirre claimed the discharge was due to Guilin's personality conflicts with other employees, but cited no incident which had triggered the discharge.

On Thursday, December 7, 2006, CSEA filed the instant unfair practice charge, alleging, inter alia, that the District had unlawfully changed duties of the purchasing clerk position held by Guilin. Whitney's office received a fax copy of CSEA's charge just before noon on December 7, 2006.

On Friday, December 8, 2006, Whitney telephoned Aguirre. Guilin, who customarily screened Aguirre's calls, answered. Whitney at first expressed surprise and then irritation at speaking with Guilin rather than Aguirre. Guilin put Whitney through to Aguirre. Later that day Aguirre summoned Guilin into her office, and informed Guilin that she was discharged effective immediately. Guilin asked "why." Aguirre responded to Guilin that she was "not a good fit," "it wasn't working out," "you know why already" and that Aguirre need not provide reasons. No further reasons were given. Guilin departed Aguirre's office, packed her personal belongings and left.[4]

[4] Several months later the District restored the purchasing clerk position to the warehouse, and employed a "business secretary" to assist Aguirre at headquarters.

PROPOSED DECISION

The ALJ concluded that: (1) CSEA established a prima facie case of unlawful retaliation, to wit, that Aguirre discharged Guilin on December 8, 2006, because of Guilin's protected activity of December 1, 2006, assisting CSEA officials and informing them about her duties and job description, and (2) the District failed to establish that absent Guilin's protected activity it would have discharged her. We review first the ALJ's analysis of CSEA's prima facie case, and then her analysis of the District's affirmative defense.

The ALJ relied on *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*). She concluded that CSEA established a prima facie case, as follows: (1) Guilin exercised EERA rights by conferring with CSEA officials on December 1, 2006; (2) the District knew of this protected activity (Whitney witnessed it, and Whitney's knowledge was either communicated to Aguirre, or is attributable to Aguirre based on circumstantial evidence and inferences drawn from the record as a whole [suspicious timing, direct evidence of anti-union animus, vague and ambiguous reasons, and disparate treatment]; (3) the discharge was adverse to Guilin; and (4) the District's animus is established by direct and circumstantial evidence on the record as a whole, including (a) direct evidence (Aguirre's anti-union advice to Guilin, and Whitney's objection to Guilin's conferring with CSEA officials), (b) suspicious timing (Guilin's conversation with CSEA officials preceded by just one day the District's Cabinet's discussion of Guilin's discharge, and CSEA's PERB charge preceded by just one day Guilin's discharge itself), (c) vague and ambiguous reasons for the discharge (Aguirre's statements to Guilin during the discharge meeting, the absence of District documentation supporting the discharge, remoteness in time of the personality conflict incidents claimed to support the discharge decision, and the intervening satisfactory evaluation), and (d) disparate treatment (unlike its treatment of other probationary employees, the District neither warned

Guilin that she was in jeopardy of discharge nor followed its Facts, Rules, Impact, Suggestions, Knowledge (FRISK) intervention and assistance procedures) (Proposed Dec., at pp. 17-18), plus (e) suspicious circumstances (discussion among District officials about Guilin immediately following her protected conduct), and (f) inherently unbelievable contentions of District witnesses (Aguirre's and Whitney's claims that prior to Guilin's discharge on December 8, 2006, they did not discuss either Guilin's December 1, 2006 protected conversation with CSEA officials or CSEA's December 7, 2006 PERB charge).

Under *Novato, supra*, PERB Decision No. 210, once the charging party establishes a prima facie case, the burden shifts to the employer to establish by a preponderance of the evidence that it had an alternative, non-discriminatory basis for the discharge, and that it acted on that basis rather than because of the employee's protected activity. Here, the District asserted as an alternative basis for the discharge, that Guilin had personality conflicts with other employees.

The ALJ concluded that the District failed to prove that it acted because of the asserted personality conflicts rather than because of Guilin's protected activity. In support of her conclusion, the ALJ noted: (1) except for two instances of personality conflict occurring prior to Guilin's satisfactory evaluation, the District presented no percipient witness testimony of alleged employee complaints about Guilin; (2) the District produced no evidence that it (a) documented complaints about Guilin's personality conflicts, or (b) offered Guilin assistance to overcome the problem, or (c) warned Guilin that failure to change her behavior would lead to discharge; (3) the District offered no proof that it customarily discharged probationary employees without such documentation; (4) the District admitted it gave Guilin a satisfactory evaluation, but offered no evidence of (a) improper behavior occurring after the evaluation, or (b) improper behavior which triggered the discharge, or (c) improper behavior

which even allegedly triggered the discharge; (5) the District gave a less than satisfactory rating to, but did not otherwise discipline or terminate, the warehouse employee who displayed similar, albeit more serious, disrespectful behavior than did Guilin.

Based on the foregoing, the ALJ concluded that the District failed to prove that it was motivated by Guilin's alleged personality conflicts with other employees, rather than her protected activity, when it discharged her on December 8, 2006. In consequence, the ALJ ruled that: (1) the District failed to prove up its defense of lawful motivation; (2) CSEA's prima facie case would prevail; and (3) the District did violate EERA section 3543.5(a) and (b), when it discharged Guilin. The ALJ proposed a customary remedy for retaliatory discharge, including both cease and desist orders, reinstatement, make whole relief, and posting of PERB's order.

DISTRICT'S EXCEPTIONS

On appeal the District urges that: (1) the ALJ ignored or misapplied Board decisions governing requirements for a prima facie case of discrimination/retaliation; (2) the ALJ made improper witness credibility determinations; and (3) the ALJ improperly declined to credit District explanations for its termination of Guilin.

CSEA'S RESPONSE

CSEA responds that: (1) the ALJ properly concluded that the District knew of Guilin's protected activity; (2) the ALJ properly found direct evidence of improper motive; (3) the ALJ properly inferred unlawful motive based on the record as a whole, including circumstantial evidence of suspicious timing, vague and ambiguous explanations, and disparate treatment; and (4) the ALJ properly made witness credibility determinations.

DISCUSSION

We first review the prima facie case of retaliation and the affirmative defense of lawful motivation, and then turn to the District's contentions.

Discrimination or Retaliation

1. The Prima Facie Case

To establish a prima facie case of retaliation in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights guaranteed by EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took action against or adverse to the interest of the employee; and (4) the employer acted because of the employee's exercise of the guaranteed rights. (*Novato, supra*, PERB Decision No. 210.)

Unlawful motive is "the specific nexus required in the establishment of a prima facie case" of retaliation. "[D]irect proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus, . . . unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Novato*, *supra*, PERB Decision No. 210, at p. 6; *Carlsbad Unified School District* (1979) PERB Decision No. 89; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Radio Officers' Union v. NLRB* (1954) 347 U.S. 17, 40-43.[5])

To assist with assessing circumstantial evidence of unlawful motive, PERB has developed a set of "nexus" factors. Although the timing of the employer's action in close temporal proximity to the employee's protected activity is an important factor

[5] When construing California Public Sector Labor Relations statutes, California courts and PERB rely on National Labor Relations Board (NLRB) and judicial decisions construing similar language in the National Labor Relations Act. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

(*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), it does not, without more, demonstrate the necessary nexus between the employer's action and the protected activity. (*Moreland Elementary School District* (1982) PERB Decision No. 227 (*Moreland*).)

Along with suspicious timing, facts establishing one or more of the following factors must also be present for a prima facie case: (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 (*Santa Clara*)); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786 (*McFarland USD*)); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento, supra,* PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Where the employer's motive is the central issue, the fact finder must often rely heavily on circumstantial evidence and inferences. Only rarely will there be probative direct evidence of the employer's motivation. (*Shattuck Denn Mining Corp. v. NLRB* (9th Cir. 1966)

362 F.2d 466 (*Shattuck Denn*).) An illegal purpose harbored by a discriminating employer may be inferred from the circumstances surrounding the discipline or discharge. These may include anti-union animus exhibited by the employer or its agents; the pretextual nature of the ostensible justification; or other failure to establish a business justification. (*Shattuck Denn.*) In such cases, the Board is free to draw inferences from all the circumstances, and need not accept an employer's self-serving declarations of intent, even if they are uncontradicted. (*NLRB v. Walton Mfg. Co.* (1962) 369 U.S. 404 (*Walton Mfg.*); *NLRB. v. Mrak Coal Co.* (9th Cir. 1963) 322 F.2d 311 (*Mrak Coal*); *NLRB v. Pacific Grinding Wheel Co., Inc.* (9th Cir. 1978) 572 F.2d 1343 (*Pacific Grinding Wheel*); *NLRB v. Warren L. Rose Castings, Inc.* (9th Cir. 1978) 587 F.2d 1005 (*Rose Castings*); *Royal Packing Co. v. Agricultural Labor Relations Bd.* (1980) 101 Cal.App.3d 826 (*Royal Packing*).)

2. The Affirmative Defense

Upon proof that anti-union animus played a part in the employer's decision to act, the burden then shifts to the employer to prove that its actions would have been the same notwithstanding the employee's having engaged in protected activity and the employer's anti-union animus. (*McFarland, supra, USD,* PERB Decision No. 786, affd *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166 (*McFarland*); *McPherson v. Public Employment Relations Board* (1987) 189 Cal.App.3d 293, 304 (*McPherson*); *Novato, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083 (*Wright Line*).) In such cases the employer has both the burden of going forward with the evidence <u>and</u> the burden of persuasion. (*Hunter Douglas, Inc.* (1985) 277 NLRB 1179; *Hyatt Regency Memphis* (1989) 296 NLRB 259.) Proof of an alternative, non-discriminatory reason for the challenged action is insufficient standing alone to overcome the

prima facie case. The employer must prove that it had both an alternative non-discriminatory reason for its challenged action, and that the challenged action would have occurred regardless of the employee's protected activity and the employer's anti-union animus. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista*), citing *The TM Group, Inc. and Kimberly Grover* (2011) 357 NLRB No. 98, citing *Hicks Oils & Hicksgas* (1989) 293 NLRB 84, 85; *Framan Mechanical Inc.* (2004) 343 NLRB 408, 411-412; *Roure Bertrand Dupont, Inc.* (1984) 271 NLRB 443 (*Roure Bertrand*).)

District Contentions

The District excepts to numerous provisions of the proposed decision. Nonetheless, in its supporting brief, the District limits its contentions to the following: (1) the ALJ wrongly concluded that the District knew of Guilin's protected activity; (2) the ALJ wrongly concluded that the District failed to prove it would have discharged Guilin absent her protected activity; (3) the ALJ wrongly assessed the credibility of District witnesses; and (4) the ALJ wrongly exceeded PERB's proper scope of inquiry when assessing the District's affirmative defense rationale for discharging Guilin. We address each of the District's contentions.

1. The District's claim that the ALJ wrongly concluded that the District knew of Guilin's protected activity

The District urges that the ALJ erred by attributing to Aguirre knowledge of Guilin's protected activity, notwithstanding Aguirre's testimony that she did not know thereof. We revisit our standards for assessing employer knowledge of protected activity, and then review the ALJ's conclusions.

We have long held that circumstantial evidence and inferences drawn from the record as a whole are sufficient to establish the employer knowledge element of a discrimination or retaliation violation. (*Moreland, supra,* PERB Decision No. 227, at pp. 12-13, citing *NLRB v.*

Long Island Airport Limousine Service Corp. (2nd Cir. 1972) 468 F.2d 292; *NLRB v. Wal-Mart Stores, Inc.* (8th Cir. 1973) 488 F.2d 114; *Rosen Sanitary Wiping Cloth Co., Inc.* (1965) 154 NLRB 1185.) The NLRB likewise relies on circumstantial evidence and inferences drawn from the record as a whole to establish employer knowledge of an employee's protected activity (*Regional Home Care, Inc. d/b/a North Atlantic Medical Services* (1999) 329 NLRB 85 (*Regional*); *Kajima Engineering & Construction* (2000) 331 NLRB 1604 (*Kajima*); see Higgins, The Developing Labor Law (6th Ed. 2012) Ch. 7, pp. 357-360.) and also will infer employer knowledge of employee protected activity from the small size of the employer's plant or other facility. (*Id.*)

The ALJ inferred Aguirre's knowledge from the following:

1. direct, un-rebutted evidence of anti-union animus in Aguirre's and Whitney's statements and conduct; (Proposed Dec., at p. 16.)

2. suspicious timing of the discharge, which occurred a day after Whitney received a copy of CSEA's unfair practice charge, and a week after Whitney observed, overheard and directed that Guilin cease a workplace conversation with CSEA officials about "union stuff;" (Proposed Dec., at pp. 8, 16.)

3. vague and ambiguous reasons given to Guilin by Aguirre for the discharge; (Proposed Dec., at pp. 17-18.)

4. disparate treatment of Guilin vis-à-vis other probationary employees with workplace problems; (Proposed Dec., at p. 18.)

5. suspicious facts surrounding the discharge; (Proposed Dec., at pp. 18-19) and

6. witness credibility; (Proposed Dec., at pp. 19-20).

On the basis of these factors, and the record considered as a whole, the ALJ concluded that Aguirre knew of Guilin's protected activity, and that Whitney made the discharge decision, which was motivated by Guilin's protected activity.

The District objects that the ALJ failed to accept on its face either Aguirre's testimony that she lacked knowledge of Guilin's protected activity or the testimony of Aguirre and Whitney concerning their discussions of Guilin. The District, relying principally on this testimony, rejects the inferences drawn by the ALJ concerning Aguirre's knowledge of Guilin's protected conduct. We assess the District's contentions.

We note at the outset that an employer's declarations of lawful intent may be deemed self-serving and therefore not credited, where, as here, they are contradicted by persuasive circumstantial evidence on the record considered as a whole. (*Walton Mfg., supra,* 369 U.S. 404; *Mrak Coal, supra,* 322 F.2d 311; *Pacific Grinding Wheel, supra,* 572 F.2d 1343; *Rose Castings, supra,* 587 F.2d 1005; *Royal Packing, supra,* 101 Cal.App.3d 826.) With that principle in mind, we evaluate the District's claim that the record does not support the ALJ's inferences regarding the following *Novato, supra*, PERB Decision No. 210 factors: animus, timing, vague and ambiguous reasons, and disparate treatment.

Animus: The District urges that there is no direct evidence of anti-union animus. It argues that Guilin's testimony describing Aguirre's statements discouraging union involvement was hearsay and not supported by other evidence. We are not persuaded. Guilin was a percipient and competent witness to Aguirre's statements advising Guilin to avoid the union, and Aguirre did not rebut this testimony. The ALJ properly relied upon it as direct evidence reflecting Aguirre's animus. Likewise, Whitney admitted his own displeasure at overhearing Guilin talking with CSEA officials about "union stuff," which supports an inference that Whitney, too, harbored anti-union animus. Where, as here, a supervisor

(Aguirre) who has displayed animus discharges an employee, with the support and ratification of the supervisor's own supervisor (Whitney) who himself displays animus, we attribute both supervisors' actions and animus to the employer. (*San Bernardino City Unified School District* (2004) PERB Decision No. 1602, pp. 20-21.) With the ALJ, we credit this direct evidence of animus.

Timing: The District urges that its timing of the Guilin discharge was driven not by Guilin's protected activity and CSEA's ensuing unfair practice charge, as concluded by the ALJ, but instead by the approaching end of Guilin's probationary period, which concluded on December 18, 2006. We are not persuaded. If Guilin's soon-to-end probationary status were the District's sole motive for the discharge, why discharge her ten days early on December 8, 2006? Why not permit her to work through December 18, 2006, or at least December 15, 2006 (the Friday before December 18, 2006)? Moreover, if Guilin's personality conflict incidents of September and October 2006, were the basis of continued District dissatisfaction with Guilin, why accord her a satisfactory evaluation in early November plus continued employment thereafter until she was observed assisting CSEA to prepare and file its unfair practice charge, following which she promptly was fired? With the ALJ, we conclude that the facts strongly suggest that Guilin's discharge on December 8, 2006, was triggered by events of December 1 and 7, 2006, not by the impending close of Guilin's probationary period on December 18, 2006, and not by the personality conflict incidents of September and October. (*Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H [adverse action five days following protected activity]; *Rio School District* (2008) PERB Decision No. 1986 [adverse action one week following protected activity].)

Vague and Ambiguous Reasons: The District labels "false" the ALJ's conclusion that reasons given by Aguirre to Guilin for Guilin's discharge were vague and ambiguous. The

District relies on its claimed "practice" of not providing reasons for termination and on its claim that Guilin expected the discharge. We are not persuaded. An employer's alleged practice of not providing reasons for discharge does not overcome credible testimony describing the reasons for discharge actually given an employee by the employee's supervisor. Whether or not an employer is required to provide reasons for discipline or discharge, or has a practice thereof,[6] where the employer does offer reasons, the reasons may be considered. With the ALJ, we conclude that the reasons given Guilin by Aguirre for the discharge were vague and ambiguous, even though giving them at all may have been gratuitous or contrary to the District's practice. (*Novato, supra*, PERB Decision No. 210.)

Moreover, an employee's apprehension of impending discharge does not support the inferences urged here by the District, to wit, that the employee knew the supervisor's reasons for the discharge. Even if Guilin expected the discharge on Friday, December 8, 2006, such expectation affords no basis for an inference that Guilin either understood Aguirre's motivation or that the Aguirre's motivation stemmed from alleged personality conflicts rather than Guilin's protected activity.[7] With the ALJ, we conclude that the reasons given Guilin by Aguirre were vague and ambiguous.

Disparate Treatment: The District claims that it treated Guilin no differently from other probationary employees. We are not persuaded. The ALJ concluded correctly there was evidence of disparate treatment, in that: (1) probationary employees customarily were given,

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[6] The Board has ruled that, absent a requirement or practice of providing reasons for discipline or discharge, a failure to do so does not rise to an inference of unlawful motive. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.) Here, however, there was no failure. Aguirre provided reasons.

[7] Indeed, since Aguirre had warned Guilin several times against union involvement and only a month earlier had given Guilin a satisfactory evaluation, and since Whitney had recently ordered Guilin to cease conferring with CSEA officials, Guilin would easily have inferred that Aguirre's vague reasons alluded to her conversation with the CSEA officials and to Aguirre's several earlier warnings against union involvement.

at the least, a pre-discharge warning that their conduct or performance was not acceptable, and that Guilin was not so warned; and (2) the warehouse employee who admitted he was the aggressor in an altercation with Guilin which escalated to supervisorial intervention, was retained in employment and not disciplined. The District rejoins that it counseled Guilin about her conduct, but not, however, that it warned her that she faced discharge. We conclude, with the ALJ, that: (1) the failure to warn Guilin was a departure from the District's admitted customary practice of pre-discharge warning and thus evidenced disparate treatment, as was (2) discharging Guilin while imposing no discipline on the warehouse employee.

In sum, we conclude that the ALJ appropriately relied on circumstantial evidence in finding that Whitney and Aguirre knew of Guilin's protected activity. (*Moreland, supra,* PERB Decision No. 227 and cases cited therein; *Regional, supra,* 329 NLRB 85; *Kajima, supra,* 331 NLRB 1604.)

We conclude with the ALJ that the record as a whole supports the finding of knowledge notwithstanding Aguirre's self-serving, contrary testimony.

2. <u>The District's claim that the ALJ wrongly concluded that the District failed to prove it would have discharged Guilin absent her protected activity</u>

The District urges that it acted against Guilin solely on the basis of Guilin's personality conflicts with other employees. The District points to the testimony of Aguirre and Whitney, which testimony, it contends, sufficiently establishes its affirmative defense. We revisit our standards for an affirmative defense to a charge of retaliation, and our evidentiary standards applicable thereto, and then review the ALJ's determination not to credit certain testimony.

Once a charging party establishes a prima facie case of retaliation, the burden shifts to the respondent to establish both: (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory

reason and not because of the employee's protected activity. (*Novato, supra*, PERB Decision No. 210; *Wright Line, supra,* 251 NLRB 1083; *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393 (*Transportation Management*).) A responding party must prove up its affirmative defense through persuasive evidence. Although admissible, hearsay testimony and documents are insufficient to support a finding. (PERB Reg. 32176.)[8] The Board requires "sufficient independent [non-hearsay] evidence" to conclude that the challenged action would have occurred in the absence of the employee's protected activity. (*County of Riverside* (2009) PERB Decision No. 2090-M; *Escondido Union Elementary School District* (2009) PERB Decision No. 2019 (*Escondido*); *The Regents of the University of California* (1998) PERB Decision No. 1255-H (*Regents*); *Woodland Joint Unified School District* (1987) PERB Decision No. 628.)[9]

The District contends that its hearsay and double hearsay evidence of employee complaints, when combined with its witnesses' own first-hand accounts of Guilin's pre-November personality conflicts, provided sufficient independent evidence to prove its affirmative defense, and that the ALJ's refusal so to find was improper. The District cites PERB Regulation 32176; *County of San Joaquin (Health Care Services)* (2004) PERB Decision No. 1649-M (*San Joaquin*) and *Cantrell v. Zolin* (1994) 23 Cal.App.4th 128 (*Zolin*). We review each authority.

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

[9] See also *Hilmar Unified School District* (2004) PERB Decision No. 1725 (*Hilmar*) (district official's testimony regarding alleged complaint from health plan administrator about union agent's telephone calls to administrator deemed hearsay and insufficient to establish operational necessity defense to alleged interference); *Alamo Rent-A-Car, Inc.* (2002) 338 NLRB 275 (*Alamo*) (absent independent evidence, supervisor's hearsay account of customer complaint held insufficient to establish *Wright Line, supra,* 251 NLRB 1083 defense to General Counsel's prima facie case of retaliation).

PERB Regulation 32176 sets forth PERB's unremarkable rule that hearsay evidence is admissible, but "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Pursuant to this rule hearsay evidence is regularly admitted PERB in proceedings, but absent other non-hearsay evidence may not be relied upon to support a finding. Thus, testimony regarding an out-of-hearing statement by a person other than the witness may be admitted, but not for the truth of the matter asserted by the absent speaker who cannot be cross-examined unless permitted by an exception to the hearsay rule. An exception exists permitting reliance on such evidence for a finding regarding the state of mind of the testifying witness, but the exception does not permit use of the absent speaker's account for the truth thereof. (Evid. Code, §§ 1250(b) and 1251.)

In *San Joaquin, supra,* PERB Decision No. 1649-M, the Board reviewed a charging party union's objections to an ALJ's determination that a respondent employer had adduced sufficient evidence to establish its affirmative defense to a prima facie charge of retaliation. The ALJ concluded, on the basis of a record containing extensive testimony of percipient witnesses, that the respondent employer had proved up an alternative non-discriminatory reason for the discharge and that this reason, rather than the employee's protected activity, motivated the discharge. In discussing the basis for his conclusions, the ALJ referred to, but did not rely upon except as corroboration, complaints of non-witnesses concerning the conduct of the discharged employee. On appeal, the Board rejected the contention that the ALJ had improperly relied on hearsay evidence, ruling that:

> First, the findings of the ALJ are not based solely on hearsay. Indeed, even if the disputed evidence is not considered, the Board finds sufficient admissible evidence in the record to support the decision. Second, for the hearsay evidence that was admitted, the ALJ properly applied exceptions to the hearsay rule. Third, the County's evidence that numerous complaints were made against [the employee] was not admitted for the truth of the matter, but to

> demonstrate the state of mind of the County's decision-makers. Submitted for this purpose, such evidence is not hearsay.

(*San Joaquin, supra,* PERB Decision No. 1649-M, at p. 2.)

In *Zolin, supra,* 23 Cal.App.4th 128, the court considered whether a statement by a second peace officer attesting to defendant's erratic driving prior to arrest on a charge of drunken driving was inadmissible hearsay when contained in the arresting officer's report. Neither officer testified at the hearing. The prosecution introduced and relied on the arresting officer's sworn report pursuant to Vehicle Code sections 23158.2 and 14104.7. On appeal, the issue presented was whether the arresting officer had reasonable cause to believe that the defendant had been driving under the influence of alcohol. The defendant challenged reliance on the second officer's statement. The appellate court ruled that the second officer's statement reported in the arrest report was not hearsay, as it was not offered to prove the truth of the second officer's observations of the defendant's driving, but rather to prove that the arresting officer had reasonable cause to believe that the defendant had been driving under the influence. In reaching his own conclusion, the arresting officer relied reasonably on the second officer's statement, concluded the court, because a peace officer may rely on statements of victims of, or witnesses to, criminal conduct who are reporting thereon to law enforcement. (*Mueller v. Department of Motor Vehicles* (1985) 163 Cal.App.3d 681, 686.) The court opined that because the second officer witnessed the defendant's driving, this rule applied as well to the second officer's report to the arresting officer. (*Id.* at p. 133.)

We conclude that neither of the District's case authorities is persuasive. We distinguish them as follows: In *San Joaquin, supra,* PERB Decision No. 1649-M, we ruled that the evidence there challenged as hearsay was unnecessary to the ALJ's conclusion, and that other

admissible evidence was sufficient to sustain the employer's affirmative defense.[10] By contrast, we conclude here that the admissible non-hearsay evidence of Guilin's conduct was insufficient, on the record as a whole, to establish the District's affirmative defense, namely, that it both had, and acted because of, an alternative non-discriminatory reason to discharge Guilin other than her protected conduct. In *Zolin, supra,* 23 Cal.App.4th 128, the court construed a particular statutory scheme expressly permitting a reporting peace officer's determination of reasonable cause to be based upon out-of-court statements of third parties. By contrast, we operate here under a different rule, to wit, that to prove up an affirmative defense to unlawful discrimination, independent evidence is required to establish both the existence of an alternative, non-discriminatory reason for challenged discipline, and that the employer acted because of that reason and not because of the protected conduct of the employee.

We conclude, with the ALJ, that much of the District's proffered evidence of Guilin's alleged inappropriate conduct is hearsay inadmissible for the truth of the matter asserted, to wit, Guilin's alleged inappropriate workplace behavior. Percipient witness testimony concerning Guilin's alleged improper conduct was provided only by Aguirre and Whitney, and only as to events which occurred prior to Aguirre's early November evaluation of Guilin. The other accounts of Guilin's allegedly inappropriate workplace conduct were out-of-hearing statements by other employees, none of whom testified. Because out-of-hearing statements describing Guilin's alleged improper workplace conduct cannot be cross-examined, we find the hearsay and double hearsay testimony by District supervisors insufficiently reliable to establish the District's affirmative defense.

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[10] Such admissible evidence included, without limitation, non-hearsay testimony of complaining employees with firsthand experience of the bad conduct alleged by the employer, plus numerous additional corroborating complaints.

Nor is this hearsay testimony sufficient if considered as "state of mind" evidence. The ultimate issue here is whether the employer established by independent competent evidence both that it had an alternative non-discriminatory reason to discharge Guilin and that it acted because of that reason and not because of Guilin's protected activity. Our analysis of the prima facie case and the affirmative defense accords to each party certain burdens. Once the charging party establishes that the responding party was motivated in whole or part by statutorily protected conduct, the burden shifts to the respondent to demonstrate that the employer had, and acted because of, an alternative non-discriminatory reason. Where such alternative reason is alleged to be improper workplace conduct of the charging party, which is claimed to give the employer cause for non-discriminatory discipline or discharge, the employer must prove through independent and competent evidence both the existence of such improper workplace conduct and that this conduct it motivated the employer's response. Recitation by employer agents of a litany of hearsay reports cannot, absent competent, direct and independent evidence, meet the employer's burden of proof that it acted for a lawful, non-discriminatory reason. (*Hilmar, supra,* PERB Decision No. 1725; *Alamo, supra,* 338 NLRB 275; *Escondido, supra,* PERB Decision No. 2019; *Regents, supra,* PERB Decision No. 1255-H.)

Here, the ALJ concluded that the District failed to carry its burden. (Proposed Dec., at pp. 20-22.) She found the District defense case both insufficient and unpersuasive. Due to the paucity of admissible evidence of the personality conflict problem itself or of District actions taken in response (Proposed Dec., at pp. 20-21), the ALJ concluded the District had not proved that Guilin had personality conflicts with other employees. On the same basis, the ALJ declined to find that either Aguirre or Whiney believed the complaints they received about Guilin were "serious enough to investigate, warn her about, include in her evaluation, note in

her personnel file, or terminate her." (Proposed Dec., at p. 22.) The ALJ concluded, therefore, that: (1) the District failed to carry its burden of proof that it was motivated to discharge Guilin by her alleged personality conflicts with other employees, and (2) by its failure to establish an alternative non-discriminatory reason for discharge, the District also failed to demonstrate that it would have discharged Guilin in the absence of her protected activities. (Proposed Dec., at p. 22.)

We conclude, with the ALJ, that under our evidentiary standards, hearsay and double hearsay accounts of occurrences are not reliable or persuasive evidence, are inadmissible for the truth of the matter stated, and insufficient by themselves to support a finding as to such matter. (*Hilmar, supra,* PERB Decision No. 1725; *North Sacramento, supra,* PERB Decision No. 264.) The Board requires "sufficient admissible evidence in the record to support" a respondent's *Novato, supra*, PERB Decision No. 210 affirmative defense.[11] (*San Joaquin, supra,* PERB Decision No. 1649-M, at p. 2.) Employee conduct asserted by a responding party to establish its affirmative defense under *Novato, supra*, PERB Decision No. 210 must be proved by "sufficient independent evidence," and where, as here, the independent evidence is insufficient, a proposed finding concerning the asserted conduct is properly refused. Hearsay may corroborate, but not serve in lieu of, admissible evidence. (PERB Reg. 32176.)

Although admissible, the role of hearsay remains supplementary. Hearsay may explain or support otherwise admissible evidence, but by itself, even in abundance, hearsay is insufficient for a finding either of the existence of an alternative, non-discriminatory reason or

[11] The District's authorities to the contrary are inapposite. In *Zolin, supra,* 23 Cal.App.4th 128, under the Vehicle Code provision there controlling which permit reliance by peace officers on extra judicial statements of witnesses there was sufficient admissible and non-hearsay evidence in the record. And in *San Joaquin, supra,* PERB Decision No. 1649-M, the Board concluded there was also sufficient admissible and non-hearsay evidence in the record.

that a respondent acted therefor. (*Hilmar, supra,* PERB Decision No. 1725; *North Sacramento, supra,* PERB Decision No. 264.)

3. The District's claim that the ALJ wrongly assessed the credibility of District witnesses

The District claims that: (1) an ALJ's credibility determination is entitled to deference only to the extent the ALJ identifies the "specific evidence of the observed demeanor, manner or attitude of the witness that supports the determination;" (2) here the ALJ "repeatedly failed to discuss . . . the witnesses' demeanor, manner or attitude;" and (3) therefore the Board on appeal must itself review and reconsider the ALJ's credibility determinations rather than deferring thereto. We discuss first our standard of review of an ALJ's findings. We then take up the District's objections to the ALJ's findings which rest on the ALJ's credibility determinations.

Under the Board's statutes, the Board itself, not the ALJ, is the ultimate finder of fact. (*McPherson, supra,* 189 Cal.App.3d 293.) "Findings of fact of PERB administrative law judges, who are mere delegates of the Board itself, are entitled to that amount of deference which the Board, in its discretion, wishes to afford them. In accordance with this rule, the Board has determined that it will normally afford deference to administrative law judges' findings of fact involving credibility determinations unless they are unsupported by the record as a whole." (*Anaheim City School District* (1984) PERB Decision No. 364a, pp. 3-4, fn. omitted.) "[W]hile the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented." (*Santa Clara, supra,* PERB Decision No. 104, at p. 12.)

Relying on section 11425.50(b), the District urges that the Board may defer to its ALJ's credibility determinations only to the extent that a reviewing court must accord them "great weight." We are not persuaded. We explain.

Section 11425.50(b) provides:

> The statement of factual basis for the decision may be in the language of, or by reference to, the pleadings. If the statement is no more than mere repetition or paraphrase of the relevant statute or regulation, the statement shall be accompanied by a concise and explicit statement of the underlying facts of record that support the decision. If the factual basis for a decision includes a determination based substantially on the credibility of a witness, the statement shall identify any specific evidence of the observed demeanor, manner or attitude of the witness that supports the determination, and on judicial review the court shall give great weight to the determination to the extent the determination identifies the observed demeanor, manner, or attitude of the witness that supports it.

Section 11425.50(b) was enacted in 1995, to be effective July 1, 1997. Its origin was a recommendation by the California's Law Revision Commission (CLRC),[12] in which the CLRC commented,[13] in pertinent part:

> Subdivision (b) adopts the rule of Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), requiring that the reviewing court weigh more heavily findings by the trier of fact (the presiding officer in an administrative adjudication) based on observation of witnesses than findings based on other evidence. This generalizes the standard of review used by a number of California agencies. See, e.g., Garza v. Workmen's Compensation Appeals Bd., 3 Cal. 3d 312, 318-19, 475 P. 2d 451, 90 Cal. Rptr. 355 (1970) (Workers' Compensation Appeals Board); Millen v.

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[12] The CLRC is an independent state agency charged with recommending reforms of state law to the Legislature. (§ 8289.)

[13] "[O]fficial comments of the California Law Revision Commission 'are declarative of the intent not only of the draftsman of the code but also of the legislators who subsequently enacted it' [citation], the comments are persuasive, albeit not conclusive, evidence of that intent." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Ca1.4th 1, 12, fn. 9, quoting *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.)

> Swoap, 58 Cal. App. 3d 943, 947-48, 130 Cal. Rptr. 387 (1976) (Department of Social Services); Apte v. Regents of Univ. of Cal., 198 Cal. App. 3d 1084, 1092, 244 Cal. Rptr. 312 (1988) (University of California); Unemp. Ins. App. Bd., Precedent Decisions P-B-10, P-T-13, P-B-57; Lab. Code 1148 (Agricultural Labor Relations Board). It reverses the existing practice under the administrative procedure act and other California administrative procedures that gives no weight to the findings of the presiding officer at the hearing. See Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. Rev. 1067, 1114 (1992), *reprinted in* 25 Cal. L. Revision Comm'n Reports 321, 368 (1995).
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> Findings based substantially on credibility of a witness must be identified by the presiding officer in the decision made in the adjudicative proceeding. This requirement is derived from Washington law. See Wash. Rev. Code Ann. §§ 34.05.461(3), 34.05.464(4) (West 1990). However, the presiding officer's identification of such findings is not binding on the agency or the courts, which may make their own determinations whether a particular finding is based substantially on credibility of a witness. Even though the presiding officer's determination is based substantially on credibility of a witness, the determination is entitled to great weight only to the extent the determination derives from the presiding officer's observation of the demeanor, manner, or attitude of the witness. Nothing in subdivision (b) precludes the agency head or court from overturning a credibility determination of the presiding officer, after giving the observational elements of the credibility determination great weight, whether on the basis of nonobservational elements of credibility or otherwise. See Evid. Code 780. Nor does it preclude the agency head from overturning a factual finding based on the presiding officer's assessment of expert witness testimony.

[Italics in original.] (Recommendation on Administrative Adjudication by State Agencies (January 1995) 25 Cal. Law Rev. Com. Rep. (1995), pp. 160-161.)[14]

Government Code section 11425.50(b) established statewide the rule of *Universal Camera Corp. v. NLRB* (1951) 340 U.S. 474, that upon judicial review great weight be accorded by the court to findings by the trier of fact based on observation of demeanor, manner

[14] The Board reviewed and discussed these administrative adjudication changes in *City of Torrance* (2009) PERB Decision No. 2004.

or attitude of witnesses. In *California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575 (*CYA*), cited by the District, a reviewing court concluded that an ALJ's proposed decision identified no specific evidence of the observed demeanor, manner or attitude of the witness. The court held that absent such evidence, section 11425.50(b) did not "come into play." The court declined to give special weight to the ALJ's credibility findings grounded on inferences unrelated to demeanor, etc., but cautioned that it was not holding that the ALJ's proposed decision was defective because it failed to identify demeanor, etc., of witnesses to support its credibility determinations. (*Id.* at p. 596.)

We read Government Code section 11425.50(b), as construed in *CYA*, to provide that: (1) credibility may be determined on the basis of both observational factors, viz., demeanor, manner and attitude, and non-observational factors including those specified in Evidence Code section 780; (2) reviewing courts are obliged by section 11425.50(b) to give "great weight" to observational factors only when the proposed decision contains information specified by section 11425.50(b); and (3) when the proposed decision fails to contain this information, section 11425.50(b) does not come into play. This construction is common sense. ALJs and the Board make credibility determinations based on both observational and non-observational factors. When reviewing a Board decision which assesses credibility based on non-observational factors, a court nonetheless approaches the Board's findings, including credibility determinations, with deference.[15] Moreover, for those credibility determinations

[15] Findings of the Board with respect to questions of fact, including ultimate facts, if supported by substantial evidence on the record considered as a whole, are conclusive. (EERA, § 3542(c).) Courts must accept PERB's factual findings as conclusive if they are supported by substantial evidence in the record; and the courts may not reweigh the evidence and may not consider that an alternative finding may be equally reasonable, or even more reasonable, than the finding made by PERB. (*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767, 781.) When PERB chooses between two conflicting views, a reviewing court may not substitute its judgment for that of the Board. (*Regents of University of California v. Public Employment Relations Bd.* (1986) 41 Cal.3d 601, 617-618.)

turning on observational factors, which are appropriately documented as required by section 11425.50(b), the court must accord "great weight" to the Board's findings as so determined.

Here, the ALJ relied on both observational and non-observational factors[16] when assessing credibility of witnesses. (Proposed Dec., at pp. 19-20.) The ALJ described in detail the demeanor, manner and attitude of witness Whitney on which she relied in assessing his credibility. (Proposed Dec., at p. 19.) The ALJ likewise described in detail the non-observable factors on which she relied in assessing the credibility of both witness Aguirre and witness Whitney. (Proposed Dec., at pp. 19-20.)

We have reviewed the hearing record. We conclude that the ALJ appropriately assessed the credibility of witnesses appearing before her, and made appropriate findings describing such credibility determinations. The ALJ's findings of fact, including her resolution of credibility issues of the several witnesses, are supported by substantial evidence on the record considered a whole. Consequently, we reject the contentions of the District that in assessing the credibility of witnesses the ALJ either exceeded her authority, or failed sufficiently to document her conclusions.

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[16] PERB and the NLRB have long recognized the appropriateness of assessing witness credibility on non-observational criteria. (*Regents of the University of California* (1984) PERB Decision No. 449-H [inconsistent pretrial statements; selective memory on cross examination; evasive, exaggerated, or inconsistent testimony; inherently unbelievable testimony]; *North Sacramento, supra,* PERB Decision No. 264 [inconsistent testimony, contradictory documentary evidence]; *Daikichi Sushi* (2001) 335 NLRB 622 [all the circumstances, including a party's failure to offer available witness testimony]; *Shen Automotive Dealership Group* (1996) 321 NLRB 586 [weight of the respective evidence, established or admitted facts, inherent probabilities, reasonable inferences which may be drawn from the record as a whole].)

4. <u>The District's claim that the ALJ wrongly exceeded PERB's proper scope of inquiry when assessing the District's rationale for discharging Guilin</u>

The District contends that the ALJ exceeded the proper scope of PERB's inquiry by considering, inter alia, whether the District investigated alleged employee complaints regarding Guilin or extended to Guilin the benefits of the District's FRISK intervention and assistance policy. By considering such issues, claims the District, the ALJ improperly infringed the District's discretion to determine grounds for employee discipline and to impose discipline on those grounds. The Board's proper inquiry, asserts the District, is confined to whether the employer acted for a reason proscribed by statute, viz., because of an employee's protected activity.

The District cites two PERB ALJ decisions, one of which became final (*Newman-Crows Landing Unified School District* (1989) 13 PERC ¶20164, (1989) PERB Decision No. HO-U-414 [13 PERC ¶20177]), and the other of which was appealed to Board and thereafter subsumed by the Board's decision. (*Central Union High School District* (1982) 6 PERC ¶13252, (1983) PERB Decision No. 324 [7 PERC ¶14189].) Neither ALJ decision is precedential.[17] Relying on the Board's *Moreland, supra,* PERB Decision No. 227 decision,[18]

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[17] PERB Regulation 32215 provides, in pertinent part: "Unless expressly adopted by the Board itself, a proposed or final Board agent decision, including supporting rationale, shall be without precedent for future cases."

[18] In *Moreland, supra,* PERB Decision No. 227, the Board ruled that the charging party failed to establish a prima facie case, since there was no direct evidence of employer knowledge of the employee's protected activity, and the circumstantial evidence did not support imputing such knowledge to the employer. The charging party urged that among the facts from which to impute employer knowledge was the employer's failure to establish just cause for disciplining the employee. The Board disagreed, ruling that, standing alone, the mere absence of just cause is insufficient to support an inference of unlawful motive necessary to support an imputation of employer knowledge of the employees protected conduct. The Board wrote:

ALJs in both these cases rejected allegations by a charging party attempting to establish a prima facie case, that the absence of just cause for imposed discipline alleged to be retaliatory was sufficient evidence of the employer's anti-union motivation. By contrast, we here consider whether the District established an affirmative defense. As explained below, we deem this distinction significant to our analysis.

For the reasons which follow, we conclude that the scope of PERB's proper inquiry when assessing an employer's affirmative defense under *Novato, supra*, PERB Decision No. 210 includes the matters here considered by the ALJ, and thus we conclude further that by considering such matters, the ALJ did not infringe the District's disciplinary discretion.

It is significant that here we treat an affirmative defense. Once a charging party establishes its prima facie case for discrimination or retaliation, the burden shifts to the respondent to prove, if it can, an affirmative defense, to wit: (1) that it had an alternative non-discriminatory reason for the challenged action; <u>and</u> (2) that it acted <u>because of</u> this alternative non-discriminatory reason and not because of the employee's protected activity. (*Novato, supra*, PERB Decision No. 210; *Wright Line, supra,* 251 NLRB 1083; *Transportation Management, supra,* 462 U.S. 393.) An employer defending against a prima facie case of retaliation "cannot simply present a legitimate reason for its action but must persuade by a

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> [L]ack of "just cause" is not synonymous with anti-union animus. By itself, it does not permit such a finding. Disciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board is therefore without power to remedy. [Charging party] bore the burden of producing evidence which would permit the conclusion that the injustice here was <u>an act of employer retaliation against Doe for his organizing efforts</u>. The totality of its evidence is insufficient to permit an inference that the District was unlawfully motivated against Doe. Therefore, there is no basis for inferring that the District had knowledge of his activities."

(Emphasis in original, fn. omitted.) (*Id.* at p. 15.)

preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." (*Roure Bertrand, supra,* 271 NLRB 443.)

We concur with an observation made by the ALJ in one of the opinions cited by the District, to wit, that PERB lacks "general authority to determine whether or not the District was justified in dismissing a coach or whether its reasons were valid or not," and is "only concerned with such reasons, in order to determine whether or not they support an inference that the true motivation of such dismissal was the employees' protected activities." (*New-Crows Landing Unified School District* (1989) 13 PERC ¶20164, at p. 584.) "[T]he crucial factor is not whether the [justification put forward] by [the employer was] good or bad, but whether [it was] honestly invoked and [was], in fact, the cause of the [employer's challenged action]." (*Ryder Distribution Resources* (1993) 311 NLRB 814, 816, citing *NLRB v. Savoy Laundry, Inc.* (2d. Cir. 1964) 327 F.2d 370, 371.) Thus, PERB must "analyze thoroughly and completely the justification for the . . . action presented by the employer" (*Escondido, supra,* PERB Decision No. 2019, at p. 21) in order to determine whether the justification constituting an employer's affirmative defense was "honestly invoked" and whether the employer's proof establishes that its justification "was in fact the cause of the [employer's] action." (*Chula Vista, supra,* PERB Decision No. 2221, at p. 21.)

Here the ALJ did analyze "thoroughly and completely" the employer's justification for its discharge of Guilin. (Proposed Dec., at pp. 20-22.) The District contended that it discharged Guilin solely because of her personality conflicts with other employees. The ALJ appropriately weighed the evidence, both evidence supporting and that contradicting the District's claimed justification for the discharge and the District's claim that it acted therefor and not because of Guilin's protected activity. The ALJ found the evidence insufficient to prove that other employees complained about Guilin. Likewise, the ALJ found the evidence

insufficient to establish that Guilin's supervisors deemed Guilin's personality issues were sufficiently serious to justify discharge.

The District counters that the ALJ exceed her authority, and that of PERB, when she examined the record for, and noted the presence or absence of, evidence that: (1) the District treated Guilin in accordance with procedures the District applied to other probationary employees (implementation of the FRISK intervention and assistance policy, and warning a probationary employee of possible discharge); (2) the District considered Guilin's alleged shortcomings sufficient to document; and (3) following the early November evaluation Aguirre received and investigated complaints about Guilin, thus triggering the early December discharge. In so doing, urges the District, the ALJ imposed on the District disciplinary standards differing from those of District officials. We disagree.

To succeed under *Novato, supra*, PERB Decision No. 210, the employer must meet or exceed a charging party's prima facie case with equally or more persuasive affirmative defense. The degree of persuasion required of the employer will depend on the extent and persuasiveness of the prima facie case. Absent unlawful motivation, California statutory and common law often afford wide discretion to an employer to discharge an at-will or probationary employee with little or no warning, reason, notice or hearing. However, under our statutes once the charging party presents a persuasive prima facie case that the employer acted against an at-will or probationary employee because of the employee's protected conduct, the employer's burden under *Novato, supra*, PERB Decision No. 210 attaches. To succeed, the employer must then demonstrate persuasively that it had both a permissible (alternative and non-discriminatory) reason for its action and that it acted because of this reason and not the employee's protected conduct.

Our statutes protect the right of at-will and probationary employees to engage in protected activity and to be free of discrimination or retaliation therefor. (*McFarland, supra,* 228 Cal.App.3d 166.) A PERB ALJ hearing a retaliation case, including one brought on behalf of an at-will or probationary employee, must "inquire fully into all issues and obtain a complete record upon which the decision can be rendered"[19] and "issue a written proposed decision."[20] Thus, when the burden in a PERB hearing shifts to an employer to establish an affirmative defense to a charge of discrimination or retaliation, the employer must demonstrate that it exercised its statutory or common law discretion in a manner consistent with the employee's rights under our statutes. We acknowledge that such demonstration imposes on an employer a greater burden of proof than would be required to sustain a routine discharge within its discretion where there has been no allegation of unlawful motivation.

We hold that under *Novato, supra*, PERB Decision No. 210, PERB's duty is to "analyze thoroughly and completely the justification for the . . . action presented by the employer" (*Escondido, supra,* PERB Decision No. 2019, at p. 21), and that in so doing PERB may "inquire fully into all issues" bearing on the employer's *Novato, supra*, PERB Decision No. 210 burden to establish that employer's affirmative defense was "honestly invoked" and its justification "was in fact the cause of the employer's action." (*Chula Vista, supra,* PERB Decision No. 2221, at p. 21.) We likewise hold that the employer's *Novato, supra*, PERB Decision No. 210 defensive burden is not limited by the extent of the employer's statutory or common law duty to the employee(s), but is measured rather by the extent and persuasiveness of the employee(s) prima facie case which a successful affirmative defense must either meet or exceed.

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[19] PERB Regulation 32170(a).

[20] PERB Regulation 32215.

In sum, we conclude, with the ALJ, that the employer failed to mount a sufficient defense to meet the CSEA's prima facie case. We also conclude, with the ALJ, that the District failed to prove up that it had, or acted on, an alternative non-discriminatory reason for Guilin's discharge.

CONCLUSION

We affirm the ALJ's conclusion that the District retaliated against Guilin because of Guilin's protected conduct, viz., conferring with and assisting CSEA officials on December 1, 2006, by discharging her on December 8, 2006. We likewise affirm the ALJ's proposed remedy.

ORDER

Upon the findings of fact and conclusions of law herein, and the entire record in the case, it is found that the Palo Verde Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. The District violated the Act by discharging Eva Guilin (Guilin) in retaliation for her protected activities, and by the same conduct, denying to the California School Employees Association and its Chapter 111 (CSEA) the right to represent its members.

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

A. CEASE AND DESIST FROM:

1. Terminating or otherwise retaliating against employees in retaliation for their engagement in protected activity;

2. Denying recognized employee organizations the right to represent their members.

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

1. Offer Guilin reinstatement to her former position of employment or, if that position no longer exists, then to a substantially similar position;

2. Make Guilin whole for lost benefits, monetary and otherwise, which she suffered as a result of the District's conduct, including back pay, plus interest at the rate of 7 percent per annum, from the date of her discharge, December 8, 2006, to the date the offer of reinstatement is made to her.

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to District employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 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. Respondent 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 CSEA.

Members Winslow and Banks 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-5023-E, *California School Employees Association and its Chapter 111 v. Palo Verde Unified School District*, in which all parties had the right to participate, it has been found that Palo Verde Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by discharging Eva Guilian (Guilian) in retaliation for her protected activities, and by denying to the California School Employees Association and its Chapter 111 (CSEA) the right to represent its members.

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

A. CEASE AND DESIST FROM:

1. Terminating or otherwise retaliating against employees in retaliation for their engagement in protected activity;

2. Denying recognized employee organizations the right to represent their members.

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

1. Offer Guilin reinstatement to her former position of employment or, if that position no longer exists, then to a substantially similar position;

2. Make Guilin whole for lost benefits, monetary and otherwise, which she suffered as a result of the District's conduct, including back pay, plus interest at the rate of 7 percent per annum, from the date of her discharge, December 8, 2006, to the date the offer of reinstatement is made to her.

Dated: _____ PALO VERDE UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION & ITS CHAPTER 111, Charging Party, v. PALO VERDE UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5023-E PROPOSED DECISION (January 16, 2009)

Appearances: Dale Wissman, Labor Relations Representative, for Charging Party; Atkinson, Andelson, Loya, Ruud & Romo by Sherry G. Gordon, Attorney, for Respondent.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

On December 7, 2006, California School Employees Association & Its Chapter 111 (CSEA) filed an unfair practice charge alleging that the Palo Verde Unified School District (District) unilaterally changed work duties for a number of represented classifications, including that of purchasing clerk, then held by Eva Guilin (Guilin). On March 14, 2007, CSEA filed an amended charge also alleging that the District discharged Guilin on December 8, 2006, in retaliation for her protected activities, and retaliated against CSEA president Donna Vibanco (Vibanco) in January 2007. On July 16, 2007, CSEA filed a second amended charge supplementing its factual allegations. On March 3, 2008, CSEA withdrew all allegations except Guilin's discharge. On March 4, 2008, the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that by discharging Guilin, the District violated the Educational Employment Relations Act (EERA) section

3543.5(a), and by the same conduct violated section 3543.5(b).[1] In its answer, the District denied any wrongdoing.

On April 1, 2008, CSEA moved to amend the complaint to change a typographical error and to allege that one of Guilin's protected activities was her participation in a CSEA unfair practice charge, rather than her participation in a grievance. The District opposed the motion. An informal settlement conference was held at the PERB offices on April 9, 2008, but the matter was not resolved. On September 8, 2008, the undersigned granted CSEA's motion to amend the complaint.

Formal hearing was held before the undersigned on September 17 and 18, 2008. After the filing of post-hearing briefs, the matter was submitted for decision on December 19, 2008.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). CSEA is a recognized employee organization within the meaning of section 3540.1(l), representing a bargaining unit of the District's classified employees.

Guilin was hired in June 2006[2] as a purchasing clerk in the bargaining unit represented by CSEA.[3] She began work on June 19 and was discharged on December 8. Under the District's six-month probationary period, she would have completed her probation on

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[1] EERA is codified at Government Code section 3540 et seq. Section 3543.5(a) makes it unlawful for a public school employer to "[I]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter." Section 3543.5(b) makes it unlawful for a public school employer to "[D]eny to employee organizations rights guaranteed to them by this chapter."

[2] All dates refer to the year 2006 unless otherwise specified.

[3] Guilin had applied for the position in April, but, as explained below, at that time it did not exist.

December 18. The job description for purchasing clerk contains the following general definition:

> Under general supervision, to perform specialized clerical work involved in the procurement of stock items, materials and equipment for the District; maintain records and inventory of stock items; and to do other related work as may be required.

The specific duties listed therein involve primarily the handling of purchase orders, inventory of stock items, and ordering the repair of equipment, all of which are related to the operation of the warehouse. Historically, the purchasing clerk was stationed at the warehouse, a separate building located four blocks from District headquarters. The only other employee working there was storekeeper[4] Larry Schneider, Jr. (Schneider), who has primary responsibility for warehouse operations. The warehouse supervisor is Facilities Director Marty Braden (Braden).

After Guilin's predecessor left the job in March 2006, the District had unilaterally reorganized some purchasing and payroll functions, and eliminated the position of purchasing clerk. Purchasing clerk duties were transferred to a confidential, non-unit accounting employee stationed at District headquarters, and the District intended to transfer some of that employee's duties to another accounting employee holding a non-confidential unit position. By letter of May 16 to the District, CSEA strongly objected to these "unilateral changes" in both the purchasing clerk's and accounting specialist's duties and threatened to file an unfair practice charge. In addition, CSEA and the District held many conversations on the subject, both during contract negotiations and informally, some of which became heated, according to

[4] Storekeeper is not a unit position.

CSEA president Donna Vibanco (Vibanco).[5] As a result, the position of purchasing clerk was reinstated, Guilin was hired into that position, and by tentative agreement of September 18 the District agreed to undergo a job analysis of selected job descriptions, to seek input from the affected employees and their supervisors, and to meet and negotiate with CSEA prior to any job description changes. A Focus Group comprised of unit employees and management was formed for this purpose; Guilin, among others, was invited to participate, but she declined.

During her interview just prior to her hire, Guilin was told by Business Manager Olivia Aguirre (Aguirre) that she would be assisting Aguirre as well as acting as purchasing clerk, and that a new job description would be forthcoming. Upon Guilin's hire, the purchasing clerk work station was relocated from the warehouse to the administration building, to a desk just outside Aguirre's office formerly occupied by Aguirre's business assistant, and Aguirre became her supervisor instead of Braden. Because Guilin was not in the warehouse, she was not able to perform several of the duties listed in the purchasing clerk job description, e.g., arranging for equipment repair, warehouse inventory, ordering warehouse materials and supplies, filling orders in storekeeper Schneider's absence, and securing warehouse facilities.

Schneider complained several times to Aguirre that ever since Guilin's predecessor left the job, he had been forced to perform purchasing clerk duties in addition to his own responsibilities, and urged that Guilin be moved to the warehouse. In her testimony, Aguirre admitted that she anticipated Schneider would be unhappy when the purchasing clerk was relocated to the administration building. Schneider also complained to his CSEA representative, who said she would look into the matter. In addition, Schneider had heated conversations with Guilin, including one "shouting match," because he believed Guilin was

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[5] ViBanco has been CSEA president since 2000, except for a brief period in 2005/2006.

giving him "orders" by telling him that he had to do warehouse duties and that he knew it. According to Guilin, Aguirre had instructed her to tell Schneider what tasks he was responsible for, even though she said she would rather not do that and even though it led to confrontations. Aguirre denied giving her these instructions.

More than once Guilin informed Aguirre of the confrontations, and Aguirre told her to just ignore Schneider's anger. But the confrontations continued, and after a particularly heated one in early October, Schneider and Guilin were called to meet with Aguirre, Braden, and Assistant Superintendent Dr. Yul Whitney (Whitney). Neither Braden nor Dr. Whitney had witnessed the confrontation, but heard about it from Aguirre. At the meeting, Schneider admitted to being the aggressor. Aguirre, Whitney and Braden said that Guilin was doing what she was instructed to do, that Schneider had to do what he was instructed to do, and that the arguments which had gone on between the two of them would not be tolerated.[6] After the meeting, according to Guilin, Aguirre told her not to worry about it. Thereafter, Schneider decided to avoid all contact with Guilin; if he had to bring papers concerning the warehouse to her desk, he would just drop them off without comment. There is no evidence that Guilin and Schneider had any further arguments, although their relationship remained hostile. There is no evidence that either one of them was spoken to again by Aguirre, Braden, or Dr. Whitney

Also because of the relocation, Guilin was performing some administrative duties. She testified that her workday started by unlocking Aguirre's office, checking her phone messages, getting her mail, and briefing her when she arrived. Guilin also screened Aguirre's phone

[6] Neither Guilin nor Schneider were disciplined because of these confrontations.

calls[7] and visitors. Vibanco testified that she saw Guilin answering Aguirre's phone calls, using the copy machine, and "playing a traditional secretary role." Alfonso Hernandez (Hernandez), former Director of Facilities and Special Programs, testified that he also observed Guilin performing some administrative tasks which Aguirre's former business assistant had performed, and when he himself needed help with an administrative task, Aguirre advised him to instruct Guilin on how to do it. According to Hernandez, Aguirre told him that the District was in the process of reevaluating Guilin's position to upgrade her classification and job description. In his testimony, Dr. Whitney acknowledged that there was a "business function" to Guilin's job.

Guilin's only written performance evaluation was done by Aguirre on November 3, four months after her hire; all the ratings were "satisfactory" and the following comments were made:

> *Record job strengths*
> Responsible and cares about her job and performance.
>
> *Areas where improvement is needed*
> Continue to learn purchasing galaxy.
> Bid processing on rules and regulations.
> Respectful communications with co-workers (warehouse dept.).[8]
>
> *Steps needed for improvement*
> Ask a lot of questions.
> Read instructions and handout materials for galaxy and bids.
> Attend training as needed.

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[7] Aguirre had the phone on Guilin's desk connected to the one in her office. She contends that Guilin only answered calls when she was out of the office; however, she acknowledged that Guilin also answered her calls when she was busy.

[8] Schneider testified that because of his arguments with Guilin, he received a similar comment on his next evaluation, as well as an "unsatisfactory" rating in the "Employee contacts" category, but he was not disciplined.

No incident reports accompanied the evaluation, and Guilin was never disciplined or warned about her performance or behavior, and there were no negative documents in her personnel file. Aguirre testified that when she gave Guilin her evaluation, she told her that the note on "respectful communications with co-workers" applied not only to Schneider but to other employees as well; that Guilin asked who they were, but Aguirre did not tell her because she was afraid Guilin would confront them and it would lead to more hostility. Aguirre contended that she did not document any personality problems in the evaluation because Guilin was trying and she wanted to give her "the benefit of the doubt."

According to Guilin, Aguirre mentioned only her conflict with Schneider at the evaluation meeting. I credit Guilin in this regard, as the evaluation cites the warehouse department not as an example, but as a clarification. Guilin testified that she got along well with Aguirre, to which Aguirre agreed, and had no personality conflicts or arguments with any co-workers except Schneider.

On December 1 Vibanco and CSEA vice president Tony Cisneros (Cisneros) were at District headquarters for a meeting with Dr. Whitney and District Superintendent Allen Jensen (Jensen) regarding salary negotiations. Prior to the meeting, Vibanco and Cisneros were at Guilin's desk getting payroll data from her computer in preparation for the meeting; they were also speaking with Guilin about her duties. Guilin was telling them that Aguirre was giving her business assistant duties; she said she wasn't sure whether she was supposed to do that, and was concerned about her purchasing clerk duties, as she did not believe she had an accurate job description. Dr. Whitney, who was headed to his office nearby, asked in passing what they were doing; Vibanco replied that they were just printing something out from Guilin's computer. Dr. Whitney told them to promptly end their conversation. In his testimony, Dr. Whitney admitted knowing that it was "related to something to do with the Association,

which I knew was not appropriate during work time," because it was "not related to what I was paying [her] for," and "not appropriate during work time" and that they might have been discussing Guilin's job duties. Dr. Whitney admitted that he told Vibanco to end the conversation precisely because they were discussing union business. He testified that this was the first time he ever observed Vibanco talking to an employee at their workplace about "union stuff," but acknowledged that the District has no policy against brief small-talk among employees.

Vibanco then phoned CSEA's labor representative and told him to file an unfair practice charge regarding unilateral transfers of job duties, including Guilin's; the instant original charge was filed on Thursday, December 7. There is a question as to when the District received it: a conformed copy of the docketed charge was received by CSEA on Thursday. It was also received by the facsimile machine in Dr. Whitney's office at 11:30 a.m. on Thursday. Dr. Whitney testified that it would have been put on his desk immediately; he could not recall exactly when he first saw it, but it was some time between the fax receipt and 11 a.m. on Friday, December 8, when he signed a Notice of Appearance form for the District's then-attorney.

Guilin testified that she had never before gone to CSEA for help regarding her duties because she was afraid of losing her job. She related that on occasion Aguirre would tell her that if she wanted to advance with the District, being involved with the union wouldn't help her, and that Aguirre was not "big" on the union. Aguirre did not rebut this testimony. Even on December 1, Guilin did not go to CSEA; they came to her.

On December 8, Dr. Whitney phoned Aguirre. Although Aguirre was in her office, Guilin answered the call; she testified that Dr. Whitney seemed frustrated and ask why she answered instead of Aguirre; she connected the call to Aguirre. Guilin contended that the call

took place at 5:00 p.m., just before she was summoned to Aguirre's office. Dr. Whitney contended that the call was in the morning, at 8:30-9:00 a.m., and that he left the office for the weekend at 11:00 a.m. Aguirre did not testify as to the time of the call. I do not find it necessary to determine whether the call was made in the morning or afternoon, as the same events would have proceeded in either case. I do, however, find that Dr. Whitney had already seen the unfair practice charge when he phoned Aguirre on the 8th, as it had been put on his desk on the 7th and he would have seen it when he first arrived at the office on the 8th. Neither Dr. Whitney nor Aguirre testified as to the contents of their conversation.

In Aguirre's office, she told Guilin that the District decided she was "not a good fit" and was letting her go.[9] When Guilin asked for reasons, Aguirre only repeated that she was not a good fit, that it "wasn't working out." Aguirre said, "You know why already," and that she did not need to give any more reasons. Guilin testified that she did not know what Aguirre meant and was completely surprised by the meeting; she had brought paper and pen into the office, prepared to take dictation. Aguirre claimed that Guilin knew she was to be discharged, told Aguirre that she expected it and that she had a box ready to pack up her things. Guilin denied having previously packed up her things, and that Aguirre and Jacob Jensen watched her do so after the meeting. However, she did not deny telling Aguirre that she expected the discharge and had a box ready at her desk. I therefore credit Aguirre in this regard. However, there is no evidence as to why Guilin may have expected to be discharged.

Since Guilin's discharge, the purchasing clerk position has been relocated to the warehouse, and a new classification of business secretary has been assigned to the desk outside

[9] Aguirre testified that she wanted to have someone else in the room to observe; she went looking for Dr. Whitney but could not find him, so she asked Jacob Jensen, Director of Special Services and son of District Superintendent Jensen, to attend; he attended but did not participate in the discussion. He did not testify at the hearing.

Aguirre's office. A new job description was written for business secretary, but no existing job descriptions were changed.

District defense

The District contends that the decision to terminate Guilin was made solely by Aguirre.[10] According to Aguirre, ever since August she had received complaints about Guilin from others on her own staff and from other supervisors who related complaints from their respective staffs. Aguirre named a few complainers and their complaints, all of which took place prior to Guilin's evaluation and were, in essence, that Guilin was bossy and talked down to people. Aguirre did not personally witness any of these incidents, and none of these employees or supervisors testified at the hearing. There is no evidence that Aguirre conducted any investigation on these complaints, Aguirre claimed that several times, both before and after the November evaluation, she spoke to Guilin about her behavior. However, Aguirre admittedly put it to Guilin in general terms, e.g., that she should not be rude; she did not describe any specific incident, any specific behavior, or name any coworkers; she contended this was because she did not want Guilin to "retaliate." Nor did Aguirre ever give Guilin any warning that she risked being disciplined or discharged. Aguirre testified that she was always trying to help Guilin, who frequently broke into tears, and she did not want to issue any written reprimands or warnings because Guilin was "trying."

Aguirre described one occasion, prior to the evaluation, when she overheard Guilin sounding upset while talking on the phone. After the call, Guilin came into Aguirre's office and said she was upset with the caller, Kevin (last name unknown) (Kevin), an employee of Riverside County assigned to help District employees with certain computer procedures.

[10] The complaint cites "Guery and Jacob Jensen" as the District agents responsible for the adverse action. It is obvious, and I so find, that "Guery" is Olivia Aguirre.

Guilin said Kevin had been rude to her and was probably going to call Aguirre. Whereupon Kevin did call Aguirre and complained that Guilin was difficult to work with. However, Aguirre did not scold or counsel Guilin, but rather showed her the procedures herself. Aguirre explained that at the time, the District was installing a new software system; she understood this was creating some tension, and it was appropriate for Guilin to express some frustration. According to Aguirre, the next day Guilin brought her a box of chocolates, which she took to be an apology. Guilin did not rebut any of this testimony.

Aguirre testified that she also discussed Guilin with the District's Cabinet, which includes herself, Dr. Whitney, and Jensen,[11] several times both before and after the evaluation, the last time on Monday, December 4 (one business day after Guilin's conversation with Vibanco and Cisneros). Aguirre testified that she went to Dr. Whitney's office after that Cabinet meeting and told him she had decided to terminate Guilin "for the sake of the District," but she wanted to sleep on it. Aguirre claimed that her decision was not based on Guilin's work performance but on her personal conflicts with other employees. The next day, Tuesday December 5, she told Jensen she was going to terminate Guilin, but wanted to wait until Friday to notify her, so that the other employees would not be gossiping about the termination all week but would have the weekend to absorb the news. On Friday, December 8, she called Guilin into her office and notified her of the discharge.

Aguirre acknowledged that she had seen CSEA's May 16 letter to Dr. Whitney complaining about changes to the purchasing clerk position and other positions under her supervision. However, she claimed that at the time she made her discharge decision, she had no knowledge of Guilin's conversation with Vibanco and Cisneros on December 1, or of the PERB charge, the latter of which she first learned of about a month after it was filed. Aguirre

[11] Jensen did not testify.

testified that in prior consultations with Dr. Whitney, he told her that if she had a disruptive employee who improved, she should keep her, but if there was no improvement, she should discharge her. She knew that Dr. Whitney believed Guilin was not a good employee, and that he would be displeased if she was not terminated but was instead allowed to pass probation.

Dr. Whitney testified that shortly after Guilin's hire, he heard from another (unnamed) employee that Guilin had personality problems at a previous job. He did not contact the previous employer, but put this information "in the recesses of my mind."[12] No such employee testified at the hearing. When asked to state specifically why Guilin was terminated, Dr. Whitney said that it was not because of how she performed her duties, but rather because of her "interaction with other employees." He claimed that he received reports from employees and supervisors of their difficulty in getting along with her, but he gave no specifics. He himself never witnessed any such incidents or problems, a fact which he kept trying under cross-examination to avoid admitting, but ultimately did admit. None of the observers to those alleged events testified at the hearing. Dr. Whitney concurred with Aguirre that Guilin was discussed at Cabinet meetings, and stated that it was highly unusual for a probationary employee to be discussed.

The District has in place a disciplinary guide entitled FRISK: Facts – the facts relating to the situation; Rules – the rule which was broken; Impact – on the work environment; Suggestions – made to the employee; Knowledge – letting the employee know something is being put in his/her personnel file. Dr. Whitney testified that FRISK can apply to probationary as well as permanent employees, depending on the level of misconduct, to be determined by the employee's supervisor. He contended that the District usually documents major employee

[12] Guilin testified that the previous employer told her that, after her discharge, Dr. Whitney sought information about her.

incidents, but not always; however, probationary employees, unlike permanent employees, are frequently let go without any prior discipline or supporting documentation; he did not provide any examples. He did, however, testify that probationary employees in danger of being discharged are warned that "there's something amiss, things aren't working out . . . Absolutely."

It is undisputed that FRISK was not implemented with regard to Guilin, that none of her alleged personality problems were documented, and that she was never warned that her behavior might lead to discipline or discharge. When asked why not, Dr. Whitney responded that her evaluation does document the problem, that she had been warned by Aguirre and by himself (referring to the October meeting with Schneider), and that "I don't think that there has to be five thousand pieces of paper in someone's personnel file."

Dr. Whitney acknowledged that CSEA and the District had conflicts regarding job descriptions and job duties, including those of purchasing clerk, but he kept downplaying it and repeatedly testified that the problem was resolved when the purchasing clerk position was relocated to the warehouse. However, under cross-examination, he admitted that the relocation did not take place until March 2007, after Guilin's discharge.

ISSUE

Did the District discharge Guilin in retaliation for her protected activities?

CONCLUSIONS OF LAW

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982)

PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (Novato, supra, PERB Decision No. 210; North Sacramento School District, supra, PERB Decision No. 264.)

There is no question that Guilin engaged in protected activities, the first Novato requirement, by discussing concerns about her job duties with Vibanco and Cisneros on December 1, and by providing the information which led to the filing of the original unfair practice charge which complained, inter alia, about those job duties.

Knowledge of her protected activities, the second Novato requirement, appears to be an issue here. Not with regard to Dr. Whitney, as by his own admission he knew that the December 1 conversation concerned "union business" and was related to Guilin's job duties; and he had seen the unfair practice charge at the latest on the morning of December 8, just hours before Guilin's discharge. It would take no leap of faith to connect the two events, as the charge complained about the very matters discussed in the December 1 conversation, i.e., Guilin's job duties. It is also undisputed, from Aguirre's testimony, that Dr. Whitney did not approve of Guilin and did not want her to pass probation. However, both he and Aguirre contend that Aguirre alone made the decision to terminate Guilin, that she was not influenced by Dr. Whitney, and that she knew nothing at that time about the December 1 conversation or the unfair practice charge. If their contentions are taken at face value, without more, then this essential element fails, as knowledge of one manager cannot be attributed to another if the latter was the sole decision-maker and was not influenced by the motivation of the former. (Sacramento City Unified School District (1985) PERB Decision No. 492.)

However, in Moreland Elementary School District, supra, PERB Decision No. 227, the Board noted that "several federal circuits have held that knowledge of the protected activity can be inferred from circumstantial evidence or anti-union motive," and cited the following principle stated in NLRB v. Long Island Airport Limousine Service Corp. (2d Cir. 1972) 468 F.2d 292:

> [T]here is no good reason why the two factual propositions – employer knowledge of general union activity and employer anti-Union motivation in discharging a particular employee – need be proved by different types of evidence. As to each, direct evidence may not be obtainable and circumstantial evidence and "inferences of probability drawn from the totality of other facts" [citation omitted] are perfectly proper.

A later NLRB case, Regional Home Care, Inc. (1999) 329 NLRB 85, makes this principle even more clear:

> It is well established that the "knowledge" element of a violation [of federal labor law] need not be established by direct evidence, but "may rest on circumstantial evidence [from] which a reasonable inference of knowledge may be drawn." *Montgomery Ward & Co.*, 316 NLRB 1248, 1253(1995), enfd 97 F.3d 1448 (4th Cir. 1996). We may infer knowledge based on such circumstantial evidence as the timing of the alleged discriminatory actions; the Respondent's general knowledge of its employees' union activities; the Respondent's animus against the Union; and the pretextual reasons given for the adverse personnel actions." [Italics in original.]

(See also, Kajima Engineering and Construction, Inc. (2000) 331 NLRB 1604.)

I shall therefore look at other indicia to determine whether the totality of evidence allows for an inference that Guilin's protected activities were known, and that her termination was wrongfully motivated.

I start with timing: Guilin's protected conversation with CSEA officers occurred on December 1, and the unfair practice charge arising from that conversation was filed and received by the District on December 7 and seen by Dr. Whitney no later than the morning of December 8. Guilin was terminated shortly after 5:00 p.m. on the 8th. The timing cannot get much closer. I also find evidence, not circumstantial but direct, of anti-union animus, in (1) Guilin's unrebutted testimony that Aguirre told her more than once that if she wanted to advance in her job, the union would not help her and that Aguirre did not like the union; and (2) Dr. Whitney's admission that he objected to her talking at her desk with CSEA representatives about her job duties because that was "not related to what I was paying for," and "not appropriate during work time," notwithstanding that the District had no rule or policy restricting such conversations.

Providing vague and ambiguous reasons for the discharge is also a factor. In the recent Baker Valley Unified School District (2008) PERB Decision No. 1993, the Board noted that its own cases, as well as those from the National Labor Relations Board, "establish that to be vague or ambiguous, the reason [for the adverse action] must be essentially meaningless to the employee under the circumstances." Using that guideline, the Board dismissed the complaint as to one employee who was told he was discharged because of his "classroom management" difficulties, as that employee had a known and documented history of classroom management problems. However, the Board upheld the complaint as to the other employee who was told he was being non-renewed because of unexplained "inconsistencies" in his classroom, as the school district had never before discussed this matter with him, it was not documented, and he had no reason to be aware of it.

Here, Guilin was told by Aguirre on December 8 only that she was "not a good fit," that it "wasn't working out," and that "[Y]ou know why already." However, although she may have expected to be discharged, there is no evidence as to why she thought so. It is plausible that, already fearing retaliation if she complained to CSEA about her job, she expected an adverse result after Dr. Whitney saw her talking with Vibanco and Cisneros on December 1 and told them to immediately cease their conversation. There was no reason for her to fear discharge for any other reason: there were no documents in her file nor conversations with Aguirre which could warn her of a discharge, her evaluation was satisfactory, her one-time phone conversation with Kevin was long-past, and she had no more confrontations with Schneider after the October meeting. She was aware, from the evaluation and the Schneider meeting, that the District wanted her to get along with Schneider, and notwithstanding the absence of verbal arguments, they remained hostile toward each other. However, nothing indicated that she was in danger of being disciplined because of their relationship, and it was

not spoken of again after the October meeting. I find, therefore, that Aguirre's stated reasons for the discharge were vague and ambiguous, another indicia of unlawful motivation.

Finally, there is evidence that Guilin was treated disparately from other probationary employees. By Dr. Whitney's own testimony, they are given, at the least, pre-discharge warnings that their behavior or performance is unacceptable; Guilin was not given any warning. Disparate treatment is yet another sign of unlawful motivation. (State of California (Department of Transportation), supra, PERB Decision No. 459-S.) In this regard, I note that even probationary employees, while they ordinarily may be discharged without cause, are entitled to engage in protected activities and may not be discharged in retaliation. (Livingston Union School District (2004) PERB Decision No. 1657; (McFarland Unified School District (1990) PERB Decision No. 786 (McFarland), aff'd McFarland Unified School District v. Public Employment Relations Board (1991) 228 Cal.App.3d 166.)

In summary, we have a close coincidence in timing, direct evidence of anti-union animus, vague and ambiguous reasons given for the discharge, and disparate treatment. Further, there are some suspicious facts surrounding the discharge: It is difficult to believe that, if Dr. Whitney thought Guilin was abusing her position by talking about union matters while at work on December 1, he would not have shared this with her direct supervisor, or that he would not have mentioned it at the Cabinet meeting on December 4 when they discussed Guilin. It is also difficult to believe that Dr. Whitney did not tell Aguirre about the unfair practice charge as soon as he saw it, as it was directed against the duties of positions under her supervision. It is clear that Aguirre liked Guilin and wanted to keep her, while Dr. Whitney did not; and to him, Guilin's December 1 conversation with CSEA and the unfair practice charge may have been the last straw. It is reasonable to infer that this attitude accounted for Dr. Whitney's being upset when Guilin initially answered Aguirre's phone on December 8, and

that it formed the basis for his ensuing conversation with Aguirre. As noted above, neither Dr. Whitney nor Aguirre testified as to the contents of their conversation. Further, I do not credit Aguirre's claim that she made her final decision on December 5 and told Jensen about it. Jensen did not testify, thus her claim was not corroborated. Nor is Aguirre's purported reason to delay telling Guilin until the 8th, i.e., so that other employees would not have the rest of the week to gossip, supported by any other evidence nor does it ring true; employees could certainly spend the following week gossiping if that was their bent.

Both PERB and the NLRB have declared that credibility resolutions may be made on the basis of such factors as demeanor, selective memory on cross examination, inconsistent testimony, or testimony which is inherently unbelievable, e.g., defenses to a discharge based on unsubstantiated and unsupported allegations, or on the record as a whole. (Regents of the University of California (1984) PERB Decision No. 449-H; North Sacramento School District, supra, PERB Decision No. 264; Daikichi Sushi (2001) 335 NLRB 622; Shen Automotive Dealership Group (1996) 321 NLRB 586.)

For the reasons stated above, I find Aguirre's and Dr. Whitney's contentions, that Aguirre had no knowledge of Guilin's protected activities and that she alone made the termination decision, inherently unbelievable. I further find Dr. Whitney's demeanor as a witness less than candid, e.g., when he tried to avoid admitting that he never observed any incident involving Guilin and when he downplayed the District's dispute with CSEA over job duties by contending that it was resolved when the purchasing clerk position was moved back to the warehouse, an event which took place after Guilin's discharge. I also find his exaggerated answer to why Guilin's alleged behavioral problems were not documented, i.e., "I don't think that there has to be five thousand pieces of paper in someone's personnel file," to be cavalier and unprofessional. Thus, I find sufficient evidence, based on strong probabilities

and the record as a whole, to reasonably infer that Dr. Whitney told Aguirre about Guilin's December 1 conversation and the unfair practice charge, that the decision to terminate Guilin was not made until December 8 after Dr. Whitney's phone call, and that he was the principal decision-maker.

The Board has long recognized that direct proof of a discriminatory motive is rarely found and, therefore, allows circumstantial evidence to satisfy the burden. (Santa Paula School District (1985) PERB Decision No. 505.) Based on the totality of the circumstances, I find that Aguirre knew of Guilin's protected activities, that Dr. Whitney decided on the discharge and Aguirre went along with it, and that it was motivated by Guilin's protected activities. Accordingly, I find that CSEA has satisfied the Novato criteria for a prima facie case of retaliation.

The burden now shifts to the District to show that it would have discharged Guilin in the absence of her protected activities. (Novato, supra, PERB Decision No. 210; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721; Wright Line, A Division of Wright Line, Inc. (1980) 251 NLRB 1083 (Wright Line).) This is referred to as the "but for" test, "an affirmative defense which the employer must establish by a preponderance of the evidence." (McPherson v. Public Employment Relations Board (1987) 189 Cal.App.3d 293, 304.) For the following reasons, I find that the District failed to meet this burden.

The District proffers a single reason for Guilin's termination, i.e., her personality conflicts with other employees. Yet there is no documentation of any such problem, nor did the District apply its FRISK program, although it has been used in the past regarding actions against other probationary employees. Dr. Whitney declared that there need not be "five thousand pieces of paper in someone's personnel file," and testified that probationary

employees are often discharged without any documentation, but he provided no examples of such. He also testified that probationary employees are usually warned when they are in danger of termination, but there were no warnings given to Guilin. Aguirre claims to have counseled Guilin a number of times, but no specifics were given, no names were mentioned, and she was never put on a performance improvement plan, sent to the District's Anger Management class, or warned by Aguirre about losing her job. Even with the Kevin and Schneider incidents, she was not warned. To the contrary, Aguirre understood Guilin's frustration regarding the new software program which Kevin was trying to teach her, thus Aguirre herself instructed Guilin; and after the Schneider meeting in October, Aguirre told her not to worry about it. Her November 1 performance evaluation was satisfactory, and the only mention of an interpersonal problem was the third item under "*Areas where improvement is needed* . . . Respectful communications with co-workers (warehouse dept.)," which I have found referred only to Schneider. Schneider received a similar comment on his evaluation, and even a less than satisfactory overall rating, but he was not disciplined or terminated. There is no evidence of any specific incident occurring after the evaluation. Nor is there evidence, or even allegation, of any misconduct to trigger the discharge.

Importantly, except for Kevin and Schneider, neither Aguirre nor Dr. Whitney witnessed first-hand any conflict between Guilin and her co-workers. None of these co-workers testified at the hearing, thus I cannot credit the validity of their complaints. (Hilmar Unified School District (2004) PERB Decision No. 1725; North Sacramento School District (1982) PERB Decision No. 264, citing PERB Regulation 32176(a);[13] Alamo Rent-A-Car (2002) 338 NLRB 275 (employer defense discredited in absence of independent evidence of

[13] Regulation 32176(a), which has since become Regulation 32176, provides in part: "Hearsay evidence is admissible but shall not be sufficient in itself to support a finding . . . ."

customer complaints about discharged employee.) Further, there is no evidence that Aguirre or Dr. Whitney investigated any of the alleged complaints. Failure to investigate has been held as another indicia of unlawful motivation. (Coast Community College District (2003) PERB Decision No. 1560; California State University, Fresno (1990) PERB Decision No. 845 (CSU Fresno), regarding a probationary employee.) (See also, Novato, where the school district's defense, that it received several complaints against the discharged teacher, was discounted because the complaints were neither investigated nor discussed with the teacher.)

I therefore do not find that Guilin had personality conflicts with co-workers in fact, or that either Aguirre or Dr. Whitney believed that any complaints they received about her were serious enough to investigate, warn her about, include in her evaluation, note in her personnel file, or terminate her. Accordingly, I conclude that the District was not motivated by Guilin's problems with other employees and has not sustained its Wright Line burden with sufficient evidence to show that it would have discharged Guilin in the absence of her protected activities.

I find that the District discharged Guilin in retaliation for her protected activities, in violation of EERA section 3543.5(a), and that by the same conduct the District interfered with the Association's right to represent its members, in violation of section 3543.5(b).

REMEDY

EERA section 3541.5(c) gives PERB:

> [T]he power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action . . . as will effectuate the policies of this chapter.

It has been found that the District discharged Guilin in retaliation for her protected activities. It is therefore appropriate that the District be directed to cease and desist from such

conduct. The District should also be ordered to offer reinstatement to Guilin to her former position of employment and to make her whole for any financial losses she suffered as a result of the District's conduct, including back pay together with interest at the rate of 7 percent per year. (San Jacinto Unified School District (1994) PERB Decision No. 1078; Oakland Unified School District (1985) PERB Decision No. 540.)

It is also appropriate that the District be required to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and of the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Palo Verde Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3540 et seq. The District violated the Act by discharging Eva Guilin (Guilin) in retaliation for her protected activities, and by the same conduct, denying to the California School Employees Association & Its Chapter 111 (CSEA) the right to represent its members.

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

A. CEASE AND DESIST FROM:

1. Terminating or otherwise retaliating against employees in retaliation for their engagement in protected activity;

2. Denying recognized employee organizations the right to represent their members.

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

1. Offer Guilin reinstatement to her former position of employment or, if that position no longer exists, then to a substantially similar position;[14]

2. Make Guilin whole for lost benefits, monetary and otherwise, which she suffered as a result of the District's conduct, including back pay,[15] plus interest at the rate of seven percent per annum, from the date of her discharge, December 8, 2006, to the date the offer of reinstatement is made to her.

3. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to District employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 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 (PERB or Board), or the General Counsel's designee. Respondent 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 CSEA.

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[14] Reinstatement of a probationary employee has been held to mean reinstatement to permanent status. (Livingston, supra, PERB Decision No. 1657; McFarland, supra, PERB Decision No. 786; CSU Fresno, supra, PERB Decision No. 845.)

[15] Santa Clara Unified School District (1979) PERB Decision No. 104.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130; see also Government Code section 11020(a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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

Ann L. Weinman
Administrative Law Judge