.STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

UNITED TEACHERS LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5847-E PERB Decision No. 2647 June 12, 2019

Appearances: Dannis Woliver Kelley, by Ellen Wu, Attorney, for Los Angeles Unified School District; Bush Gottlieb, by Dana Martinez, Attorney, for United Teachers Los Angeles.

Before Banks, Krantz, and Paulson, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by United Teachers Los Angeles (UTLA) and cross-exceptions filed by the Los Angeles Unified School District (District) to the proposed decision (attached) of a PERB administrative law judge (ALJ). At issue in this case is the District's decision, as part of converting Crenshaw High School (Crenshaw) into three magnet programs at the end of the 2012-2013 school year, to displace multiple teachers who had been active within UTLA. The District's right to implement the conversion is not in dispute. Rather, the unfair practice complaint alleged that the District violated the Educational Employment Relations Act (EERA)[1] by declining to select 12 teachers to teach at the magnet programs because of their protected activity during the public debate surrounding the conversion. Ultimately, except as

[1] EERA is codified at Government Code section 3540 et seq. All statutory references herein are to the Government Code, unless otherwise specified.

to one of the teachers, Alex Caputo-Pearl (Caputo-Pearl), the current President of UTLA, the ALJ concluded UTLA failed to demonstrate that the District's decision was retaliatory. The ALJ therefore dismissed the complaint allegations concerning the other 11 teachers.

In its exceptions, UTLA contends that the ALJ failed to apply the correct legal standards and to properly weigh the evidence of retaliation with respect to eight teachers: Cathy Garcia (Garcia), Meredith Smith (Smith), Cathy Creasia (Creasia), Tracy McKinney (McKinney), Linh Cao (Cao), Margot Tiff (Tiff), Christina Lewis (Lewis), and Chandra Roberts (Roberts) (collectively referred to as "displaced teachers").[2] For its part, the District takes exception to the ALJ's finding that the decision not to select certain teachers to teach at the new magnet programs constituted an adverse action. The District contends that the decision to displace the teachers did not constitute an adverse action because none of them lost pay or the opportunity to teach in a District school other than Crenshaw. Both parties except to certain aspects of the ALJ's legal analysis.

The Board has reviewed the proposed decision, the exceptions and cross-exceptions, and the responses in light of the record and the relevant law. The ALJ's factual findings are supported by the record, and we therefore adopt them as the findings of the Board itself. Additionally, the Board adopts the ALJ's conclusions of law insofar as they are consistent with this decision. Specifically, we agree with the proposed decision's conclusion that the District discriminated against Caputo-Pearl because of his protected activity. We also agree that

[2] UTLA does not except to the ALJ's dismissal of the complaint allegations related to Kenneth Maxey, Lynn Turner, or Sandra Luna. Because those portions of the proposed decision are not before us, they are final and binding on the parties but otherwise non-precedential. (PERB Regulation 32300, subd. (c); *County of Santa Clara* (2018) PERB Decision No. 2613-M, p 7 [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.].)

UTLA failed to establish that the District released the other teachers for the discriminatory reasons set forth in the complaint. However, we find it necessary to alter the ALJ's analysis in several respects, as more fully set forth below.

PROCEDURAL HISTORY

UTLA filed the operative first amended charge on October 9, 2013, and PERB's Office of the General Counsel issued the complaint on December 26, 2013. On January 15, 2014, the District filed its answer. After attempts at settlement failed, the ALJ opened the record on September 9, 2014, and then conducted 15 days of non-consecutive hearings, which concluded on December 10, 2014. After receiving post-hearing briefs from the parties, the ALJ closed the record on April 3, 2015. The proposed decision, dismissing all allegations of the complaint except those dealing with Caputo-Pearl, issued on November 10, 2016.

UTLA filed its exceptions on January 10, 2017. The District filed its response and cross-exceptions on March 6, 2017, and UTLA filed its response on March 27, 2017. The Board's Appeals Assistant then sent notice to the parties that the filings were complete and the case was placed on the Board's docket. Subsequently, on April 13, 2017, the District filed a motion to strike UTLA's response to the cross-exceptions.[3]

FACTUAL BACKGROUND

Since we adopt the proposed decision's factual findings, it is necessary to give only a summary of the relevant facts surrounding this case. By the start of the 2012 school year, the District believed Crenshaw was failing its students. The school's lackluster performance was

[3] In its motion, the District claimed that UTLA's response constituted an impermissible reply because it went beyond the scope of the District's cross-exceptions. We disagree and deny the motion for the reasons stated in *City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 13-14.

reflected in its poor academic metrics, low graduation rates, declining enrollment, and persistent turnover in staff and administration. Thus, after the District concluded that Crenshaw had not benefited sufficiently from prior extraordinary efforts to improve its academic performance—including additional funding and training for staff—it determined that a major transformation was necessary.

After some public deliberation, the District decided to convert the high school into a magnet school with three theme-based campuses. The parties do not dispute the District's authority to take this action. Indeed, over 40 years ago, the District began utilizing magnet schools to satisfy a court order to combat entrenched racial segregation: "'Magnet schools' are schools which are designated by the district to provide some special classes or programs generally unavailable at some other schools within the district; the technique attempts to restructure the curriculum at certain segregated schools so as to attract the voluntary transfers of students which will promote integration." (*Crawford v. Board of Education* (1976) 17 Cal.3d 280, 305, fn. 17.) Under its longstanding policies for magnet conversions, all current Crenshaw staff—classified, credentialed teachers, and administrators, including the newly hired principal, L. Remon Corley (Corley)—were ultimately required to reapply for their jobs.

UTLA Opposition to Magnetization

The District first informed UTLA that it intended to magnetize Crenshaw at a fall 2012 meeting held at the offices of District School Board Member Marguerite LaMotte. Attendees included District Superintendent John Deasy (Deasy), Corley, Caputo-Pearl, then a member of UTLA's Executive Board, and his fellow teacher and former co-chairperson of the Crenshaw UTLA chapter, Maynard Brown (M. Brown). District and UTLA officials disagreed about the

necessity and advisability of the planned conversion from the beginning. In particular, Caputo-Pearl was outspoken in his criticism of the plan at this meeting and at every subsequent discussion of the subject. For his part, Deasy was equally adamant about the need to take decisive action to transform Crenshaw's academic performance.

At roughly the same time as it disclosed its intention to magnetize Crenshaw, the District also announced its decision to terminate its Memorandum of Understanding (MOU) with the Greater Crenshaw Educational Partnership (GCEP), a group of civic foundations and community leaders that had contributed substantial financial and governance assistance to the school since 2008. The District claimed it decided to terminate its MOU with GCEP because the MOU had not produced the desired improvements in educational achievement and several leaders within GCEP were transitioning to new positions in other organizations. Believing that GCEP deserved at least another year to produce results, many Crenshaw teachers, including some of the displaced teachers, voiced their opposition to the District's decision. These UTLA members, and in particular Caputo-Pearl, believed the District had decided to terminate the MOU with GCEP as a precursor to "reconstituting" Crenshaw in order to displace faculty, specifically outspoken members of the union.

The teachers' opposition intensified when the District confirmed at a faculty meeting in December 2012 that it was committed to converting Crenshaw into magnet campuses focused on (1) Science, Technology, Engineering, Mathematics, and Medicine, (2) Visual and Performing Arts, and (3) Business, Entrepreneurship, and Technology ("BET"). With that announcement came the realization that all staff would, in fact, be required to reapply for their jobs. There were several tense moments during that meeting, as teachers and parents raised questions about the conversion and voiced their concerns. One of the most notable occurred

during a heated exchange between Caputo-Pearl and Deasy, during which Caputo-Pearl insistently questioned the rationale for the magnet conversion and also confronted Deasy about negative remarks concerning UTLA he allegedly made in July 2012.

Subsequently, UTLA members organized numerous public actions in opposition to the planned magnetizing of Crenshaw. These included wearing red UTLA shirts on Tuesdays, when faculty meetings were held, leafleting outside the school and at Board meetings where the magnetization process was discussed, attending Board meetings, holding press conferences, and a variety of other activities designed to bring attention to their concerns. All of the displaced teachers and numerous other teachers participated in these activities, to varying degrees, as more fully discussed in the proposed decision. The District did not contest its knowledge of these protected activities or of the displaced teachers' participation.

In response to these actions, Corley engaged in several acts that, while not alleged in the complaint as discrete violations, were offered as evidence of his animus to UTLA's opposition campaign. For instance, teachers testified that Corley used his cellphone to video record teachers at meetings who asked questions about the magnetization process. He also made uninvited appearances at some afterschool meetings organized for parents and teachers and took notes while listening to the discussions. UTLA argued that this unusual conduct amounted to unlawful surveillance for the purpose of discouraging teachers from engaging in protected activities. Finally, in the fall of 2012 as the opposition campaign gained steam, Corley forbade UTLA from using the campus public address system during school hours to notify teachers about union meetings. UTLA argued that this conduct also evidenced Corley's animus to the teachers' protected activities.

The Selection Process

As noted, all staff had to apply for a position at one of the new magnet campuses within Crenshaw. The process was initially supervised and coordinated by various members of District administration, led by the District's Director of Intensive Support and Intervention, George Bartleson (Bartleson), who shepherded several other schools through the magnetization process that year and in past school years. All current teachers and staff who wished to obtain a position at the new magnet campuses had to submit an application to Bartleson's team. Corley also had to apply to remain principal, and he was the first to be interviewed and offered a job. All other staff were interviewed by a panel of community members, students, and other stakeholders beginning in April 2013.

Corley had the ultimate responsibility to select staff; he testified without contradiction that the decision was his alone to make. According to him, he based those decisions on his personal experience with each candidate, opinions that other administrators shared with him, the results of the interview panels,[4] and materials in personnel files. Of central importance to his decision were his personal observations and his determination about how best to achieve the high standards the District expected to set at the new magnet programs.

The District announced the teacher selections in the final weeks of April 2013. While none of the displaced teachers were selected, several other UTLA activists were, including M. Brown, who attended the aforementioned October 2012 meeting with Caputo-Pearl when the District first notified UTLA that it had decided to magnetize Crenshaw. The District also

[4] UTLA criticizes Corley's asserted reliance on the interview results because the parties stipulated to the inadmissibility of the ratings, notes, and other impressions documented by the panel members. But the stipulation did not prohibit Corley from testifying that he reviewed the results of those interviews or that they factored into his decisions.

selected James Altuner (Altuner), the other co-chairperson of UTLA's Crenshaw chapter, a member of its steering committee, and one of the most active teachers in opposition to the magnetization process.

The Displaced Teachers

The basic facts surrounding the displaced teachers are as follows:

Cathy Garcia

Garcia taught math at Crenshaw from 2006 until being displaced. For a total of five years during that time, she served in an elected leadership position for UTLA's local chapter. Garcia was chapter chairperson during the 2012-2013 school year, and she also served on the steering committee. In that capacity, Garcia played a prominent role in opposing the District's magnetization process: she asked pointed questions of Corley and other administrators during faculty meetings, hosted UTLA membership meetings in her classroom after school, posted materials to the union's bulletin board, attended Board meetings, acted as UTLA's Spanish translator at meetings and during press conferences, and wore red clothing on Tuesdays.

Garcia submitted an application and interviewed for a position at one of the new magnet campuses, but was not selected. Corley testified that his decision resulted from the fact that Garcia had been absent for nearly half the school year, including almost all of November.[5] Since math was a core academic subject, Corley was concerned that Garcia's prolonged absences would negatively affect student learning. Adaina Brown (A. Brown), an Instructional Specialist and administrator at Crenshaw, corroborated Corley's concerns. Additionally, Corley complained that Garcia used works of literature in the classroom, which he felt were

[5] At some point in 2013, Garcia applied for and received approved medical leave for some of her absences during the spring semester.

unrelated to the approved math curriculum. Corley never documented his concerns about Garcia's performance, and Garcia had received satisfactory evaluations in the years prior to her non-selection. Nevertheless, Corley believed Garcia would not provide the kind of instruction he was hoping to offer students in the new magnet programs.

Meredith Smith

Smith worked as a math teacher at Crenshaw from 1991 until she was displaced. During the 2012-2013 school year, she taught math to students in Crenshaw's gifted program. Throughout the magnetization process, Smith wore red on Tuesdays and leafleted outside the school to inform parents about UTLA's opposition. Smith also attended UTLA meetings during her lunch hour and publicly expressed her opposition to the magnetization process during press conferences.

Smith applied and was interviewed for a position at the new magnet campuses. Corley testified that he did not select Smith because she had previously exercised poor judgment and was relieved of her duties as Athletic Director when she permitted a coach to return to campus after he had been banned for engaging in inappropriate conduct with female students. Additionally, Corley testified that he was concerned that Smith's recent experience teaching in Crenshaw's gifted program would not serve her well since that program was being discontinued. Corley believed that Smith's lesson plans and teaching style did not differentiate between varying student abilities. Crenshaw's former principal, Sylvia Rousseau, corroborated these concerns. Finally, Corley testified that Smith's classroom décor violated District safety standards, for which he claimed the school received a citation during an unspecified inspection. As with all the other displaced teachers, Corley never documented his concerns with Smith in

an evaluation or written warning and never referred her to the District's Peer Assistance and Review program.

Cathy Creasia

Creasia taught special education at Crenshaw from 2003 until she was displaced. Creasia taught in a special day classroom and served as a resource specialist. As such, she taught students in her own classroom for part of the day and also traveled to other classrooms to support students who needed special education services. For a time she served as the chairperson of the special education department. Creasia was a co-chairperson of UTLA's local chapter during the 2012-2013 school year. In that capacity she represented teachers in their dealings with the administration, including disciplinary conferences with Corley. Creasia also hosted lunchtime UTLA meetings in her classroom and wore red on Tuesdays. She passed out leaflets and posted materials related to the magnetization process on the union's bulletin board. Additionally, Creasia raised concerns to Corley about the future of special education after magnetization. Caputo-Pearl testified that she was one of the most outspoken UTLA activists at Crenshaw.

Creasia applied for a position at the new magnet campuses, but her busy evening schedule did not allow her time to participate in an interview. Corley testified that he did not select Creasia because she did not complete Individual Education Plans (IEPs) on time and missed several IEP meetings. These concerns were corroborated by Danielle Frierson (Frierson), a Bridge Coordinator and experienced special education administrator, who wrote a couple of contemporaneous e-mails documenting deficiencies with Creasia's IEPs and meeting attendance. From Corley's perspective, the special education department was a primary concern, since roughly a third of the approximately 120 IEPs were out of compliance at any

given time. While Corley did not document his concerns with Creasia's performance, she did not deny that some of her IEPs were late or otherwise out of compliance. According to Creasia, however, these failures were due to missing forms or the failure of parents to sign off on essential documents.

Corley also complained that Creasia did not perform her resource specialist duties and was often seen sitting in her classroom alone as opposed to providing instructional support to students in other classrooms as expected. This concern was corroborated by A. Brown, who testified that she did not see Creasia with students. One of Crenshaw's Assistant Principals, Douglas Meza (Meza), also testified that he had found Creasia alone in the Learning Center when her schedule indicated she was supposed to be in a classroom providing targeted support to her students. A. Brown and Meza claimed they found Creasia in her classroom working on her doctoral dissertation instead of providing instruction.

Tracy McKinney

McKinney also taught special education at Crenshaw, where she'd worked since 2007. Her protected activities included wearing red, attending meetings and rallies, and leafleting outside school. Additionally, McKinney complained to Corley about class-sizes and the lack of instructional support.

McKinney applied for a position at the new magnet campuses and interviewed. Corley testified that he did not select her because he believed she did not set high expectations for her students or devote enough time to lesson planning. According to Corley, McKinney did not use grade-appropriate reading texts or otherwise demand very much from her students. He also cited the fact that she had left students alone in the classroom while she used the restroom.

Although none was documented, these observations were corroborated by Frierson's testimony.

Linh Cao

Cao taught math at Crenshaw from 2008 until she was displaced. During the public debate about the magnet conversion, she went to UTLA meetings during lunchtime, wore red, attended a press conference, and leafleted outside the school.

Cao applied for a position and interviewed. Corley testified that he did not select her because she had poor classroom management skills. Specifically, students felt free to leave Cao's classroom and administrators often had to intervene to impose basic discipline. Although these concerns were not documented in an evaluation, A. Brown testified that she personally observed these problems and intervened to help control the classroom environment.

Margot Tiff

Tiff taught physical education (PE) at Crenshaw from 1993 until she was displaced. During the 2012-2013 school year, Tiff wore red, attended UTLA's meetings, and encouraged other teachers to do the same. She also attended a Board meeting on the subject of the magnetization process and asked difficult questions of Deasy and other administrators at a faculty meeting on the subject.

Corley testified that he did not select Tiff for a PE teaching position because she excessively failed students and did not build constructive relationships with them. According to him, students often complained about Tiff's harsh demeanor. He observed her locking the gymnasium gates as the tardy bell rung, even as students were rushing to get to her class. A. Brown also corroborated these observations and stated that she believed Tiff did not develop positive relationships with the students.

Christina Lewis

Lewis taught math in Crenshaw's special education program from 2004 until she was displaced. Lewis was on the union's local steering committee and played a vocal role during the magnetization process. She wore red on Tuesdays, spoke at a Board meeting, and gave a statement during a press conference. Additionally, Lewis directly confronted Deasy about the magnetization plan at the December 2012 staff meeting, and raised questions about the District's plan to pursue a full inclusion model for students in special education she believed required a special day class.

Corley testified that he did not select Lewis because she taught at a low level, did not consistently seek to present grade-level material to her students, and did not support the full inclusion model that the District had chosen for its special education teaching. Frierson corroborated these accounts, testifying that Lewis presented basic skills at a third or fourth grade level.

Chandra Roberts

Roberts taught special education at Crenshaw from 2000 until she was displaced. She was a member of UTLA's local chapter steering committee and participated in a number of actions designed to bring publicity to the union's opposition to the magnet conversion. Among these activities, Roberts wore red, attended a press conference, and spoke with a journalist about the magnetization. Additionally, Roberts expressed concerns to Corley about the impact of the conversion on the special education department and pressed him to provide more information about the transition to a full inclusion environment.

Corley testified that he did not select Roberts because she did not support the full inclusion model that the District had chosen for its special education teaching, she provided

comparatively poor academic instruction, she failed to adequately supervise students, and she exhibited poor attendance and tardiness. Many of the observations were corroborated by Frierson, who stated that Roberts engaged in very little direct instruction and showed a lot of videos during class time. A. Brown also observed Roberts making jewelry during instructional time and stated that she informally counseled Roberts for being tardy to school. Roberts denied these allegations.

According to the District, about 50 percent of the certificated applicants were selected for a position in one of the new magnet programs. Apart from this statistic, neither party offered any significant evidence about the applicants or those selected for positions. Therefore, it is not possible to draw any comparisons between these groups or to compare the displaced teachers against those who were offered positions.

DISCUSSION

Novato is the correct test for evaluating the District's actions

It is first necessary to clarify the appropriate legal standard to apply in this case. We agree with the parties that the evidence should be evaluated under the traditional test for discrimination set out in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and elaborating decisions. Under that standard, in order to demonstrate that the District violated EERA section 3543.5, subdivision (a), UTLA must show that: (1) the displaced teachers exercised rights under the EERA; (2) the District had knowledge of the exercise of those rights; (3) the District took adverse action against the displaced teachers; and (4) the District took the action *because of* the exercise of those rights. (*Novato, supra*, PERB Decision No. 210, pp. 6-8.)

In view of the peculiarity of the magnetization process and its requirement that all staff reapply for their positions, the ALJ approached this case as if it were a discriminatory refusal to hire case. Invoking a decision of the National Labor Relations Board (NLRB), *FES (A Division of Thermo Power)* (2000) 331 NLRB 9, enf'd (3d Cir. 2002) 301 F.3d 83 (*FES*), the proposed decision then analyzed the evidence to answer the following questions: (1) Was the District seeking to hire teachers at Crenshaw? (2) Were the displaced teachers qualified for the available jobs? (3) Did anti-union animus contribute to the District's reasons for not hiring them?

No one disputes that the District was seeking teachers for its newly formed Crenshaw magnet campuses or that the displaced teachers were qualified teachers. Rather, the only question to be decided is whether the District made its hiring decisions for unlawfully discriminatory reasons. Because a *Novato* analysis is squarely focused on that question, we find no practical difference, at least in this case, between the *Novato* framework and the framework the ALJ applied. Indeed, the ALJ properly focused her attention on the District's motivations for its decision not to hire the displaced teachers. Since the essence of the *Novato* test is to determine whether the employer acted for a discriminatory reason (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3), this inquiry into the District's motivations was appropriate and, as we will explain, the ALJ correctly determined that UTLA failed to establish those motivations were unlawful except as to Caputo-Pearl. But before resolving the exceptions relating to motivation, it is first necessary to address the

District's exception to the proposed decision's implied finding that non-selection for a position at the magnet campuses constituted an adverse action.[6]

Non-Selection for a Position Amounts to an Adverse Action

The District contends that UTLA cannot state a prima facie case of discrimination under *Novato* because the displaced teachers did not suffer an adverse action when they were not selected for positions at the magnet campuses. In determining whether an employer's action is adverse, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 24-25.) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Id*. at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.) In contesting this element of the prima facie case, the District's logic rests on the idea that no reasonable employee would consider non-selection to be adverse because the teachers were only displaced from their former positions but remained salaried employees.

However, the District's logic ignores the context: the displaced teachers lost their positions at Crenshaw by virtue of the magnet conversion, were made to reapply for those positions, were not selected for new positions, and were thus involuntarily displaced. In other words, on these facts, we have no trouble concluding that a reasonable employee in these

[6] As neither party excepted to the ALJ's conclusion that the displaced teachers engaged in protected activities or that the District was well aware of these activities, we accept these conclusions and will discuss them only as necessary to a full consideration of the exceptions. (PERB Regulation 32300, subd. (c).)

circumstances would believe non-selection to be an adverse action. Under Board law, a performance-based decision to release a professional from his or her longtime position is almost always in the nature of an adverse action. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 14). Indeed, the District recognized the adverse nature of its decision when it "regrettably" informed the displaced teachers of their non-selection in a form letter; there would be no need to communicate such sentiments were the consequences of this decision anything but adverse to the interests of the displaced teachers. On this basis, we reject the District's exception and conclude that the non-selection constituted an adverse action for purposes of establishing a prima facie case of discrimination under *Novato*.

UTLA Proffered Insufficient Evidence of Unlawful Motivation to Outweigh the District's Evidence of Non-Discriminatory Reasons for Most of Its Selection Decisions

The majority of UTLA's exceptions focus on the ALJ's conclusion that there was insufficient evidence of specific unlawful motivation to support the complaint allegations, except with respect to Caputo-Pearl. In short, UTLA contends that the evidence of general anti-union animus was sufficient to overcome the District's proffered reasons for its decision not to select the displaced teachers for positions in the new magnet campuses. In support of this contention, UTLA urges us to find that the decision to magnetize Crenshaw arose from the District's animosity to teachers' protected activities, and that this animus (along with evidence of his own antagonism towards UTLA members) influenced Corley to target the displaced teachers for non-selection. Responding to the District's evidence of non-discriminatory justifications, UTLA argues that Corley's reasons should not be credited because he never documented his concerns about their performance. Thus, according to UTLA, the evidence supporting general animus outweighs the evidence supporting the District's non-discriminatory motivations.

We disagree. The proposed decision correctly concluded that UTLA failed to proffer sufficiently persuasive evidence to establish that Corley's disputed decisions were motivated by anti-union animus. To be sure, the parties were locked in a heated disagreement over the future of Crenshaw and the virtues of the magnetization process. But we must weigh evidence of anti-union evidence against the significant counter-evidence, including the fact that Corley chose to hire a number of UTLA-activists, several of whom engaged in protected activities at least as prominent as the displaced teachers. When all these facts are placed on the scales, we cannot conclude that most of Corley's disputed decisions were unlawfully motivated. That is, UTLA's exceptions are not supported by a preponderance of the evidence and must be dismissed. (PERB Regulation 32178; *Novato, supra*, PERB Decision No. 210, p. 14.)

UTLA's Evidence of Animus

As recounted in the proposed decision, the displaced teachers engaged in a variety of protected activities for the purpose of opposing the District's planned magnetization of Crenshaw. Although the type and quality of these activities was different in the case of each teacher, generally all of them participated in public rallies, press conferences, the wearing and display of union regalia, leafleting, and confrontations with District management over the magnetization process. Additionally, Garcia was UTLA's local chapter chairperson and Creasia was its co-chairperson during the 2012-2013 school year, meaning they, along with Caputo-Pearl, played an even more prominent role in the union's opposition campaign.

In response to these increased activities, Corley appears to have begun monitoring UTLA-members' activities more closely and took notes of his observations of union

activities.[7] Additionally, Corley took other steps to constrain the union's activities: in the fall of 2012, he forbade UTLA from using the public address system, and ended his practice of meeting regularly with Caputo-Pearl to discuss teachers' concerns. And the District was committed to completing the magnetization conversion and thus was antagonistic to UTLA's goal of halting that process. But the displaced teachers participated in the same protected activities as numerous other teachers, many of whom were selected for positions at the new magnet campuses. Thus, it is not possible to distinguish them or to explain on the basis of their protected activities alone what role, if any, the District's animus might have played in their non-selection.

Of particular note is M. Brown, who had once served as co-chairperson of the Crenshaw chapter of UTLA. M. Brown attended UTLA's anti-magnetization rallies and spoke to journalists at a press conference. He also leafleted and otherwise identified himself with the opposition to the conversion of Crenshaw. None of these activities prevented Corley from selecting M. Brown to serve as a teacher at the BET campus. Corley selected several other standout UTLA activists, including Altuner, another co-chairperson of the local UTLA chapter during the 2012-2013 school year, and whom Caputo-Pearl identified as one of the most outspoken opponents of the magnet conversion. While it is true that the manner in which "the District treats other employees engaged in union activities does not dispose of how it treated

[7] We do not adopt the proposed decision's discussion of surveillance, at pages 67-68. Because the complaint does not allege unlawful surveillance, it is unnecessary to determine whether such surveillance amounted to a separate violation of EERA. However, we believe the facts adduced about Corley's increased monitoring of UTLA's activities surrounding the magnetization—his note taking and video recording during parent and faculty meetings—should be treated as evidence of animus and have given those facts their appropriate weight in this analysis. (See *County of San Bernardino* (2018) PERB Decision No. 2556-M, pp. 19-23 [unlawful surveillance when employer photographs or videotapes employees or openly engages in recordkeeping of employees participating in union activities].)

these [displaced teachers]" (*Livingston Union School District* (1992) PERB Decision No. 965, p. 36), UTLA chose to advance a theory that the District intended to rid itself of union activists at Crenshaw. But the selection of such prominent union activists militates against a finding that the District in fact made selection decisions based upon anti-union animus. Indeed, the only difference between the displaced teachers and the activists selected for a position was Corley's evaluation of their potential to serve successfully in the new magnet programs.

By contrast, the record contains far more evidence of anti-union animus directed specifically at Caputo-Pearl. Both Deasy and Corley engaged in public heated exchanges with Caputo-Pearl at various times during the roughly six-month magnetization process. There is also evidence that the District specifically singled out Caputo-Pearl as a "troublemaker" because of his role as a UTLA leader and activist. Finally, as detailed in the proposed decision, Corley's reasons for not selecting Caputo-Pearl were not only flimsy, they were based on untrue rumors of misconduct that Corley never bothered to investigate. That is, Corley stated that the most significant reason for his decision rested on the unfounded allegation that Caputo-Pearl gave extra-credit to students who completed surveys related to the magnet conversion and/or Corley's practice of robocalling parents on Sundays with prerecorded messages. Corley made no attempt to verify any of those allegations and simply accepted them. At the same time, Corley went out of his way to minimize the substantial contributions Caputo-Pearl made to Crenshaw, including his work with major benefactors like the Ford Foundation. Given this pattern of both aggrandizing unsubstantiated negatives and minimizing true positives, all within an atmosphere of anti-union animus, the ALJ rightly concluded that the District's non-discriminatory reasons for not selecting Caputo-Pearl were mere pretexts designed to conceal Corley's true unlawful motivation.

Caputo-Pearl's case provides a useful comparison in our analysis of the other displaced teachers. In those instances, UTLA was unable to establish by a preponderance of the evidence that Corley gave pretextual reasons for his decisions. We turn to those reasons now.

The District's Non-Discriminatory Reasons for Its Non-Selection of the Displaced Teachers

UTLA contends that the District's purported non-discriminatory reasons for not selecting the displaced teachers was insufficient to overcome the evidence of the District's animus. When it appears that the employer's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) In this regard, the employer must establish both that a legitimate, non-discriminatory reason existed for taking the adverse action, and that the reason proffered was, in fact, the but-for reason for taking the adverse action. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13) (*Palo Verde*).) Success requires "the employer [to] meet or exceed a charging party's prima facie case with equally or more persuasive [evidence in support of its] affirmative defense." (*Id*. at p. 33.) With these principles in mind, we concur with the ALJ's conclusion that the District made out its affirmative defense and will address UTLA's counter-arguments below.

Before proceeding to those arguments, however, it is important to emphasize that while non-selection for a new position at the magnet campuses was certainly an adverse action under Board law, it was not disciplinary in nature. Rather, the magnetization process itself was a

unique and extraordinary effort by the District to transform the educational dynamic for the benefit of Crenshaw's students. We are not called upon to address the wisdom of this transformation—that is a matter for the community. But it is evident that the District's decision not to choose a particular teacher to participate in that transformation cannot be interpreted as discipline.

The degree to which evidence constitutes persuasive support for an employer's affirmative defense necessarily changes with the nature of the adverse action itself. Thus, depending on the quality of the prima facie case, uncorroborated testimony from a single witness is unlikely to be persuasive in the context of a termination premised on a pattern of misconduct. On the other hand, such testimony could well suffice to justify a written warning. Since this case arises from a unique, non-disciplinary displacement of numerous employees, it is necessary to contextualize these decisions before evaluating the persuasiveness of the District's evidence in support of its non-discriminatory motivations.

Here, the District's decision maker, Corley, was faced with the rather daunting task of supervising the magnetization process (including extensive community engagement), reapplying for his own job (which he'd held for less than a year), and selecting an entire staff for three new educational programs—all while performing his usual administrative duties. As the ALJ correctly acknowledged, it stands to reason that Corley would not have the time to document every observation on which he subsequently based his staff selections. Moreover, since non-selection was not a form of discipline, Corley would have no reason either to give a written explanation for his decisions or ensure that there was an independent documentary basis for those decisions. This fact—that historically no staff member ever received a reason for his or her non-selection—is undisputed in the record. In this unique context, then, Corley

was tasked with selecting a new staff and preparing that staff to carry out the magnet conversion. We must therefore evaluate the persuasiveness of his testimony and other evidence supporting his decisions in this context.

On this score, we agree with the ALJ that Corley credibly and persuasively testified regarding his reasons for not selecting most of the displaced teachers. Indeed, as to seven of the eight teachers—Garcia, Cao, Tiff, Creasia, McKinney, Lewis, and Roberts—Corley's reasons were corroborated either by other credible witness or documentary evidence.[8] (See proposed decision at pp. 69-74.) And in Smith's case, Corley based his decision in part on the fact that he had to relieve her of her Athletic Director duties because she permitted a volunteer coach who had been banned for inappropriate conduct with female students to enter campus—a fact not in dispute. Based on our review of the record, the ALJ was correct to credit Corley's explanations and we therefore agree that the District made out its affirmative defense under the *Novato* test.[9]

UTLA attempts to undermine Corley's reasons with references to various cases that it asserts require performance-based adverse actions to have been fully investigated and

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[8] UTLA argues that *Berkeley Unified School District* (2015) PERB Decision No. 2411 (*Berkeley*) prohibited Corley from taking into account Creasia, Lewis, and Roberts' publicly stated concerns over the use of a full inclusion special education model. While UTLA is correct, we do not find a violation, as this allegation is not included in the complaint and UTLA has neither argued nor shown that the unalleged violation doctrine applies. Notably, we adopt neither the proposed decision's discussion of *Berkeley* nor its discussion of *Bellevue Union Elementary School* (2003) PERB Decision No. 1561 and *Trustees of the California State University* (2008) PERB Decision No. 1970-H.

[9] Though the Board is the ultimate fact finder, to the extent that an ALJ assesses credibility based upon observing a witness in the act of testifying, we defer to such assessments unless the record warrants overturning them. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 12.) We accord no particular deference to those aspects of an ALJ's credibility determination not based on the ALJ's firsthand observations. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 10-11.)

documented through verbal coachings, formal discipline, or written performance evaluations. (*See, e.g., Baker Valley Unified School District* (2008) PERB Decision No. 1993, pp. 20-21 [rejecting employer's affirmative defense where it non-renewed a teacher due to problems with student engagement in his classroom because the district had never before discussed this matter with him, it was not documented in his performance evaluations, he had no discipline in his file, and he had no reason to be aware of it]; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221, pp. 21-23 [finding no evidence to support employer's claim that adverse action was taken because of employee's poor interpersonal skills].) We take no issue with those decisions and agree that in the context of disciplinary adverse actions, the employer's burden to furnish persuasive evidence in support of its affirmative defense cannot normally be satisfied without such documentary proof. However, as already noted, this is an exceptional case, and in this unique context we are persuaded that Corley's reasons were genuine.[10]

The Preponderance of the Evidence Does Not Support a Finding of Discrimination

Returning to the essence of the *Novato* test, i.e., the determination of the District's motivations for not selecting the displaced teachers, we must weigh all the evidence supporting the District's justification for its selection decisions against the evidence of its unlawful motive. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 19; *Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 14; *Palo Verde*, *supra*, PERB Decision No. 2337, p. 33.) Here, only the complaint allegations pertaining to Caputo-

[10] It should also be recalled that UTLA stipulated to the inadmissibility of the results of the displaced teachers' interviews with the stakeholder panels. In the absence of such evidence, it necessarily became more difficult for UTLA to establish that any of Corley's proffered reasons were pretextual.

Pearl are supported by a preponderance of the evidence. Unlike in the case of Caputo-Pearl, there was simply insufficient evidence to prove that the District would have selected the other displaced teachers for new positions absent the protected activities alleged in the complaint. Consequently, we uphold the conclusions of the proposed decision except as noted above.

CONCLUSION

For the foregoing reasons, we affirm the proposed decision's conclusion that the District violated subdivision (a) of section 3543.5 of the EERA by discriminatorily displacing Alex Caputo-Pearl from his teaching position at Crenshaw High School. All other allegations of the complaint are dismissed.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5, subdivisions (a) and (b). The District violated EERA when it refused to hire Alex Caputo-Pearl as a teacher at Crenshaw Magnet High School for a discriminatory reason.

Pursuant to Government Code section 3541.5, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representative shall:

A. CEASE AND DESIST FROM:

1. Discriminating against certificated employees because of their union activities.

2. Failing to select Alex Caputo-Pearl for a teaching position at Crenshaw Magnet High School.

3. Interfering with the right of certificated employees to be represented by United Teachers Los Angeles (UTLA).

4. Interfering with the right of UTLA to represent its members.

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

1. Within ten (10) workdays after this decision is no longer subject to appeal, offer Alex Caputo-Pearl the teaching position for which he applied at Crenshaw Magnet High School, or if such a position no longer exists, then a substantially similar position. If requested by UTLA, the effective start date of the offered position shall coincide with the end of Caputo-Pearl's term as UTLA president.

2. Within ten (10) workdays after this decision is no longer subject to appeal, make whole Alex Caputo-Pearl for losses which he suffered as a result of the District's refusal to hire him at Crenshaw Magnet High School, including paying him back-pay augmented at an interest rate of 7 percent per annum, from the beginning of the 2013-2014 school year until the date of the offer of the new position, subject to any mitigation.

3. Within ten (10) workdays of a final decision in this matter, post at all work location where notices to certificated employees are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its certificated employees. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that this 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 to the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on UTLA.

Members Krantz and Paulson 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-5847-E, in which all parties had the right to participate, it has been found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

A. CEASE AND DESIST FROM:

1. Discriminating against certificated employees because of their union activities.

2. Failing to select Alex Caputo-Pearl for a teaching position at Crenshaw Magnet High School.

3. Interfering with the right of certificated employees to be represented by United Teachers Los Angeles (UTLA).

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

1. Within ten (10) workdays after this decision is no longer subject to appeal, offer Alex Caputo-Pearl the teaching position for which he applied at Crenshaw Magnet High School, or if such a position no longer exists, then a substantially similar position. If requested by UTLA, the effective start date of the offered position shall coincide with the end of Caputo-Pearl's term as UTLA president.

2. Within ten (10) workdays after this decision is no longer subject to appeal, make whole Alex Caputo-Pearl for losses which he suffered as a result of the District's refusal to hire him at Crenshaw Magnet High School, including paying him back-pay augmented at an interest rate of 7 percent per annum, from the beginning of the 2013-2014 school year until the date of the offer of the new position, subject to any mitigation.

Dated: _____ Los Angeles 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

UNITED TEACHERS LOS ANGELES, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5847-E PROPOSED DECISION (November 10, 2016)

Appearances: Holguin, Garfield, Martinez & Quiñonez[1] by Dana Martinez and Michael Wertheim, Attorneys, for United Teachers Los Angeles; Office of the General Counsel by Aram Kouyoumdjian, Attorney, for Los Angeles Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

A teachers' union alleges in this case that several teachers, who had to apply to continue to teach at their school site upon the site's conversion to Magnet schools, were not selected for positions in the Magnet schools because of their union activism. The school district employer counters that, in each instance, the candidates' non-selection occurred for a variety of legitimate business reasons and was therefore not motivated by union animus.

PROCEDURAL HISTORY

On September 5, 2013, United Teachers Los Angeles (UTLA or Union) filed the above-referenced unfair practice charge (charge) with the Public Employment Relations Board (PERB or Board) alleging that the Los Angeles Unified School District (District) discriminated

[1] After the time of the hearing in this matter, the law firm changed its name to Holguin, Garfield, Martinez, Goldberg, APLC.

against multiple unit employees in violation of the Educational Employment Relations Act (EERA) section 3543.5, subdivisions (a) and (b).[2]

On October 7, 2013, the District responded to the charge allegations through a position statement.

On October 9, 2013, UTLA filed a first amended charge alleging that additional unit employees suffered the District's reprisal in response to EERA-protected conduct. The District did not file a position statement in response to the new allegations.

On December 26, 2013, the PERB Office of the General Counsel issued a 62-paragraph complaint against the District alleging that it retaliated against 12 teachers because of their union activities.

On January 15, 2014, the District filed its answer to the complaint, denying all substantive violations of EERA and raising affirmative defenses.

On March 12, 2014, the parties participated in an informal settlement conference, but the case was not resolved and the matter was then set for formal hearing.

The hearing was held on 15 non-consecutive days between September 9, 2014 and December 10, 2014.

On April 3, 2015, the parties filed simultaneous closing briefs. At that point, the case was considered submitted for decision.

FINDINGS OF FACT

Jurisdiction

The District admits and I find that it is a public school employer within the meaning of EERA section 3540.1, subdivision (k), and under the jurisdiction of PERB. UTLA is an

[2] EERA is codified at Government Code section 3540 et seq.

exclusive representative of a unit of certificated employees of the District within the meaning of EERA section 3540.1, subdivision (e).

Background for the Decision to Convert Crenshaw High School to a Full Magnet Program

A. Magnet Programs

The backdrop of events that ultimately led to the filing of the charge in this matter involve the District's decision to convert Crenshaw High School into three Magnet programs, which collectively came to be known as Crenshaw Magnet High School (Magnet schools). The hallmark of a Magnet school is theme-based instruction, where the curriculum is designed around a particular subject area or around a cluster of related subjects. Magnet programs had their origin in the 1970's, deriving from a court-ordered integration plan that was meant to address inequities in racially isolated schools, including: low academic achievement, low self-esteem, lack of access to post-secondary opportunities, interracial hostility and intolerance, and overcrowded conditions.

The key part of the Magnet conversion process that led to the present controversy stemmed from the requirement that all existing staff at Crenshaw High School, including administrators, certificated employees, and classified employees, had to apply to work in what the District considered to be a newly formed school. UTLA witnesses characterized the situation as a "reconstitution" because all staff had to apply to continue working at their former school site. District witnesses stated that a reconstitution is a legal process where no more than 50 percent of former staff can be re-hired. Magnet conversion, in contrast, does not mandate a percentage of former staff that can be hired after the conversion process. There was no such mandated percentage in this case and, therefore, the District maintains it was not a reconstitution. No contrary evidence was presented.

According to the District's "Magnet Resource Program Handbook," Magnet guidelines were designed by the courts, and therefore strict adherence to those guidelines is required for compliance. The Handbook states under the heading, "Planning Guidelines": "Teachers who are interested in teaching in Magnet programs must apply. They are selected by the school Principal and members of the Magnet selection committee." Under the section of Handbook entitled, "Guidelines for Teachers/Staff Participating in the Magnet Program," it states: "**Teachers must be selected per Magnet Program Guidelines** (Ed. Code 58503: *Teachers employed in alternative schools of choice shall be selected entirely from volunteers. Teachers must be interviewed and selected for the position by the Magnet School Team. Must-place assignments are not allowed.*" (All emphases in original.) This requirement that all staff, including teachers, must apply to continue working at a school site that is being converted to a Magnet has been consistently applied by the District for schools undergoing a full conversion since the inception of the Magnet program according to Deborah Ignagni, the District's Interim Deputy Chief Human Resources Officer.[3] No contrary evidence was introduced.

B. Governance of Crenshaw High School Before the Conversion

Since 2008, Crenshaw High School had been managed through a unique relationship between the District and the Greater Crenshaw Educational Partnership (GCEP). GCEP was composed of community representatives from the University of Southern California, the Urban League, and the Tom and Ethel Bradley Foundation. GCEP was formed in order to generate funds for Crenshaw High School with the aim of improving student academic performance.

[3] In addition to Crenshaw High School, four other District schools underwent Magnet conversions during the 2012-2013 school year. All existing staff at those other schools were required to apply if they desired a position in the new Magnet school, with the exception of some teachers at King Middle School. There, an existing Magnet program was slated to continue and the teachers employed in that program had already undergone the Magnet selection process.

The relationship between the District and GCEP was governed by a memorandum of understanding (MOU) that was set to expire on June 30, 2013. Under the terms of the MOU, GCEP played a significant role in the governance of Crenshaw High School.

In the years leading up to the conversion, Crenshaw High School had a high turn-over rate of administrators. The school had as many as 33 different administrators during a seven year period. A new principal was required for the 2012-2013 school year. L. Remon Corley was ultimately selected for the position after he was first interviewed by a large panel that included members of GCEP, current teachers, parents and community representatives. A second interview was then held by two GCEP members after the field of candidates had narrowed to two. The final step was a meeting with and approval by then-Superintendent John Deasy.[4] Before the 2012-2013 school year, Corley did not have any personal familiarity with the teachers working at Crenshaw High School.

In 2012, in advance of the MOU expiration, the District began to review Crenshaw High School data from the previous four years to assess whether the MOU would be extended for another five-year term. The school had persistently low academic performance. Only 2.4 percent of students were proficient in math. The Academic Performance Index (API) score for the 2011-2012 school year was 550 out of 1000, which was far below the state target score of 800.[5] The pass rate for the California High School Exit Exam (CAHSEE) was 42 percent, the second lowest in the District. The overall graduation rate was described as "low."

[4] After the hearing in this case, Superintendent Deasy left the employment of the District. He did not testify.

[5] A somewhat brighter spot was the performance of the Special Education department during the 2011-2012 school year. The department was informed that its API score had improved by around 90 points from the previous year to 383. Later, that gain was offset by the discovery that some special education students had been given the wrong assessment. An API of 383 was still also below the District's average API of 573 for Special Education.

Crenshaw High School was the recipient of various additional funds from government and private sources because it was a struggling school. As a result of its poor API rating, however, Crenshaw High School lost some additional funding in 2012 that had been paid through the Quality Education Investment Act because it did not meet academic performance targets. Crenshaw High School was also the recipient of additional funding through a federal School Improvement Grant (SIG) that remained in effect after 2012. SIG funds provided additional stipends for teachers through professional development activities and because the instructional day was extended by 20 minutes. The Ford Foundation also provided additional sources of funding for the school and professional development stipends for teachers during some relevant time periods. As discussed further below, Alex Caputo-Pearl, a long-time Crenshaw High School History teacher and member of UTLA's executive board, was instrumental in securing the Ford Foundation funding.[6] It appears from the record that some or all of the programs funded by the Ford Foundation may not have been in full effect during the 2012-2013 school year. However, during that year, Caputo-Pearl was actively trying to renew the school's relationship with that entity. Corley testified to attending meetings with Caputo-Pearl and representatives from the Ford Foundation to discuss educational programs and funding.

George Bartleson, Director of the District's division of Intensive Support and Intervention (ISI),[7] was asked by Superintendent Deasy to compile a report of Crenshaw High School teachers' base salary plus additional stipends from various sources of additional

[6] Caputo-Pearl also was involved in writing the school's SIG application.

[7] Bartleson's division is responsible for working with schools going through a "transition," and/or schools whose governance is shared in partnership with the District and another entity, such as the case between GCEP and the District running Crenshaw High School.

funding to assess whether the additional training and professional development was yielding results in terms of student success outcomes. The District concluded that teachers' additional compensation through various professional development activities at Crenshaw High School did not correlate with higher standardized test scores or improved CAHSEE pass rates. On cross-examination, District witnesses conceded that factors other than teacher performance including the low socio-economic status of the surrounding neighborhood, attendant high crime rates and gang activity, and the high turn-over rate of administrators, among other issues, also likely contributed to poor student performance.

In July 2012, Superintendent Deasy was invited to speak at a GCEP board meeting that had been widely advertised in the community because of concerns that the District was going to eliminate some programs at Crenshaw High School. Caputo-Pearl was in attendance at the meeting and testified about the Superintendent's remarks. During the meeting, Superintendent Deasy said that GCEP's role as a partner in the school was "under review," that it would be given another year to continue its existing academic programs, and then the District would assess what to do with the school and with GCEP. Superintendent Deasy also commented that some teachers at Crenshaw High School were "too political," but did not elaborate on his meaning.

C. Programs in Place at Crenshaw High School Before the Conversion

Before the conversion to a "full" Magnet program at the conclusion of the 2012-2013 school year, there were at least two existing Magnet programs at Crenshaw High School that had been previously in place for some years: the Teacher Training Magnet (which, as its name implies, was focused on training future educators) and a Gifted Magnet for high-performing

students.[8] At some point in time that is not clear in the record, these two Magnet programs may have been combined into a single one. Another unique educational program in place at Crenshaw High School in the 2012-2013 and preceding school years was the Social Justice and Law Academy. According to Caputo-Pearl, who was the Lead Teacher and co-founder of this Academy, it operated very similarly to a Magnet program in that the curriculum was theme-based. It was in effect from 2008 to 2013 with enrollment of between 250 and 300 students per year. A small group of 10 to 15 teachers taught in the Social Justice and Law Academy. The students in that program received their instruction from that same group of teachers for their whole four years of high school. Caputo-Pearl also briefly described another Academy in place at Crenshaw High School during this time period, Business and Entrepreneurship, that may have operated in a similar fashion to the Social Justice and Law Academy but there was no detailed information in the record in that regard or about that program in general.

Caputo-Pearl also initiated the Extended Learning Cultural Model—an inter-disciplinary curriculum that emphasized learning through internship experiences that students connected to their classroom instruction. After discussing the concept with GCEP board members Sylvia Rousseau[9] and Lewis King, Caputo-Pearl reached out to educational financiers such as the Ford Foundation and the Annenberg Institute seeking funding and support. The Ford Foundation ultimately funded the proposal, and the Extended Learning Cultural Model was implemented in both the Social Justice, and Law and Business and

[8] Although the testimonial record is not entirely explicit on this point, it can be fairly surmised that a "full" Magnet school is one in which all students in the school are enrolled in a Magnet program, whereas, as was the situation at Crenshaw High School pre-conversion, Magnet programs can exist in a school that also offers curriculum to students who are not enrolled in a Magnet program.

[9] Rousseau also served as an interim principal at Crenshaw High School during the 2011-2012 school year.

Entrepreneurship Academies. As a result, approximately 30 teachers teaching in both programs received additional professional development opportunities and stipends. Caputo-Pearl and Corley had meetings with Ford Foundation representatives during the 2012-2013 school year.

D. Community and Union Activism at Crenshaw High School

UTLA had a robust chapter at Crenshaw High School that frequently partnered with a parent-led group called the Crenshaw Cougar Coalition, apparently so-named for Crenshaw High School's mascot. The group had its origins over concerns that parents' voices were not being considered during reforms to the school in the mid-2000's that were connected to the passage of the federal No Child Left Behind Act a few years earlier. The group remained active from that time on.

During the 2012-2013 school year, Cathy Garcia was the UTLA Chapter Chair at Crenshaw High School. As noted before, Caputo-Pearl was then a member of UTLA's executive board.[10] Union lunch meetings were held weekly, typically on Thursdays, during the 2012-2013 school year in either Garcia's or Caputo-Pearl's classrooms. One or two meetings were also held in Special Education Teacher Cathy Creasia's classroom. These meetings were regularly attended by between 20-40 teachers. Several Union witnesses testified that they frequently saw administrators as they went to weekly UTLA meetings. Crenshaw High School also held faculty meetings at least once per month on Tuesdays during this time period and professional development on other Tuesdays during the month. Union supporters wore the color red on Tuesdays to show solidarity with the Union. Corley testified to his understanding that teachers wearing red on the same day were doing so to support UTLA.

[10] In 2014, after the events at issue, Caputo-Pearl was elected as the UTLA president.

The Crenshaw Cougar Coalition also met weekly during this time period on campus. There is some debate, as discussed further below, of whether they were authorized to use the school site for their meetings. Several teachers met regularly with this group, including, according to Caputo-Pearl (who acted as a teacher liaison), James Derrick, Cathy Garcia, Chandra Roberts, Christina Lewis, Maynard Brown (Mr. Brown), Meredith Smith, and Margot Tiff. One parent-member of the group, Eunice Grimsby, was also a member of the GCEP board.

The District's Communications in Public and Private Meetings Regarding Magnet Conversion, the End of the Partnership with GCEP, and "Trouble-Makers"

A. Superintendent Deasy's Phone Call to Lewis King

Around the summer of 2012, one of GCEP's founding board members, King, assumed the role of GCEP chairperson. Two other GCEP board members, including the chair, had recently retired around that time. Superintendent Deasy initiated a phone call to King sometime during that summer.[11] King testified that Superintendent Deasy told King that the District would not be continuing the GCEP MOU because there were "too many problems with the Union and its activism at Crenshaw." King said this concerned him, because it raised the possibility that the District may end the MOU early. King requested that Superintendent Deasy meet with the GCEP board to inform them of this news. In June 2012, Superintendent Deasy had issued a letter to King and other GCEP board members suggesting that the District-GCEP relationship should be "put on hold" while other avenues of managing Crenshaw High School were explored. King recalled receiving the letter, but his testimony of when he received it was imprecise. King also denied that he wrote or was consulted over a letter

[11] King testified that from the way Superintendent Deasy began their conversation, the Superintendent may have intended to call someone else.

written around that same time from GCEP board members to Superintendent Deasy, which included King's name, that acknowledged that GCEP believed other governance models for Crenshaw High School should be examined. According to the District, the decision not to renew the GCEP MOU and for the District to take over full control of Crenshaw High School's affairs was a mutual decision between GCEP and the District.

B. Meeting in District Board Member Marguerite LaMotte's Office

On or around October 22, 2012, Caputo-Pearl and fellow teacher Mr. Brown were summoned to a meeting at District board member Marguerite LaMotte's office with Superintendent Deasy, Corley, and Bartleson, from the ISI division. Superintendent Deasy explained that the District had determined to convert Crenshaw High School to three Magnet schools and, in the course of that process, all staff would have to apply to work in the new Magnet programs. Superintendent Deasy also stated that teachers who were a good fit with the new programs would be selected and discussed possible themes for the new Magnet schools. Caputo-Pearl inquired whether existing programs would be discontinued and Superintendent Deasy responded, "Let's not have a war at this school." According to Caputo-Pearl, Superintendent Deasy "reacted negatively" when Caputo-Pearl characterized the action as a reconstitution. Caputo-Pearl questioned the fairness of forcing teachers who had devoted many years to the success of the school to reapply for their jobs. Caputo-Pearl also questioned why the decision had been made at that time, when a few months earlier Superintendent Deasy had said Crenshaw High School would be reassessed at the end of the 2012-2013 school year to determine whether existing programs had yielded success. Superintendent Deasy responded that the school was failing and that the Magnet conversion would go forward.

C. First Meeting With the Faculty to Announce the Conversion

Approximately the day following the meeting in LaMotte's office described above, on October 23, 2012, the District publicly announced the plan for Magnet conversion in an all-faculty meeting on the Crenshaw campus. Tommy Chang, the superintendent of the District's Intensive Support and Innovation Center (ISIC),[12] and Donna Muncey, the chief of the ISI division (and Bartleson's supervisor), made the announcement.[13] Before this meeting, Chang and Muncey asked Corley to record the meeting so that the District could prepare written responses to any questions that were asked. Corley testified without contradiction that a written response was so prepared. Chang and Muncey also had a private "pre-meeting" with Caputo-Pearl and teacher/UTLA Chapter Chair Garcia where they explained that they would announce the planned conversion and tell the staff that they would have to apply to work in the new Magnet schools. Caputo-Pearl stated to Chang and Muncey that the process was a reconstitution. He said Chang and Muncey denied that the conversion was a reconstitution and they "reacted negatively" to that word.

The primary focus of the District's presentation to teachers in the general faculty meeting was that the GCEP partnership was coming to an end and that the school's academic progress was consistently low. The teachers were informed of the Magnet conversion plan and told that they would have to apply if they wanted to work in the Magnet schools. Corley used his cell phone to record the question and answer period of the faculty meeting. Several teachers asked questions during this meeting. One of them, Regional Occupational Program (ROP) teacher Sandra Luna, testified that she felt uncomfortable because the meeting was

[12] The ISIC division of the District works with schools that have consistently low student performance levels.

[13] Neither Chang nor Muncey testified.

being recorded and because teachers were also asked to state their names when they spoke. Luna raised a concern during the meeting about Special Education students being affected by the Magnet conversion. Caputo-Pearl expressed concerns about teachers' voices being heard in the conversion process. Garcia criticized the conversion plan for lacking detail about curriculum, class assignments, and access to instructional materials. Special Education teacher Chandra Roberts asked whether there would be changes made to that department.

D. December 2012 Faculty Meeting With Superintendent Deasy

Superintendent Deasy and District board member LaMotte attended a Crenshaw High School faculty meeting in December 2012 to further discuss the Magnet conversion plan. Corley and Bartleson were also in attendance at the meeting. Teachers handed out a UTLA fact sheet before the meeting that questioned the efficacy of reconstitution in urban schools as related to improved student performance. Superintendent Deasy's presentation focused on the school's declining enrollment with the loss of students to nearby charter schools and other Magnet programs, and also students' persistently low academic performance as reasons for the District's decision.[14] He described it as a "moral imperative" to convert the school to Magnet programs. Special Education teacher Christina Lewis asked Superintendent Deasy what teachers were to do when students were coming to them with second and third grade reading and math proficiency levels, to which LaMotte interjected, "I'm tired of you teachers thinking these babies can't learn."[15] Caputo-Pearl criticized Superintendent Deasy's expression of there being a "moral imperative," by stating to Superintendent Deasy during the meeting:

[14] Crenshaw High School had the capacity to accommodate 2,500 students, but its enrollment during this timeframe was down to 1,300 students.

[15] LaMotte did not testify.

> [W]hy it had taken so long to get around to that moral imperative when the School District had placed so many administrators at the school, when some of John Deasy's allies in the charter school community had been allowed to pop up charter schools around the school and drain out the higher performing students, like where was the moral imperative before. Why now and why does the moral imperative involve blaming teachers and reconstituting the school?

Caputo-Pearl and Superintendent Deasy had another exchange during this meeting over which multiple witnesses from both sides testified. Caputo-Pearl said that he was concerned that Union leaders and/or advocates would be targeted for exclusion in the Magnet selection process since Superintendent Deasy had stated at the July 2012 GCEP board meeting that teachers at Crenshaw High School were "too political," and he had heard from another reliable source that Superintendent Deasy had said disparaging things about UTLA activists at the school. According to Caputo-Pearl, Superintendent Deasy got flustered and angry and denied making such statements. Teacher Meredith Smith testified regarding this exchange that Superintendent Deasy accused Caputo-Pearl of "being inappropriate, that he was just trying to rile people up and get them upset about this whole process." Teacher Creasia described Superintendent Deasy as being "spit-hissing mad" in response to Caputo-Pearl's comments. Teachers Luna, Roberts, and Lewis all described Superintendent Deasy as being red in the face and/or loud and angry as a result of the exchange. Corley testified that Superintendent Deasy reacted by saying to Caputo-Pearl, "you weren't present at this meeting, and why are you putting out things that you don't know if those are true or not." Corley described the demeanor of the two men as "just sharing their standpoints," but not being "mad" at each other. Bartleson denied that Superintendent Deasy raised his voice during the conversation. Adaina Brown (Ms. Brown), who held the title of "Instructional Specialist" at Crenshaw High School, a position that was described as being similar to an assistant principal and as being a part of

Corley's administrative team, testified as follows regarding Caputo-Pearl's and Superintendent Deasy's discussion during the meeting:

> That exchange was, I would say very tense. Dr. Deasy talked about the data. He talked about his decision to transform the school because of the data. He said something had to happen. Alex Caputo-Pearl kind of bantered with him back and forth. And at one point, Dr. Deasy just said -- No, Alex Caputo-Pearl said that, why weren't we asked about it before you made this decision. And he said, well, Mr. Caputo-Pearl, he said, do you inform your parents before you make a decision about what's going to happen in your classroom, and Caputo-Pearl didn't answer. And Dr. Deasy said, and I don't have to inform you of what I'm going to do when it comes to the best interest of my students, and the room fell silent. And I think probably at that point, everybody could cut the tension with a knife.

E. Superintendent Deasy's Meeting With GCEP Board Members in February 2013

King and Grimsby both testified about attending a meeting at the District's offices in or around February 2013 to discuss GCEP's role in the school given the Magnet conversion. Neither King nor Grimsby indicated that Corley attended this meeting and there is no other information in the record to place him there. Donna Muncey was present but it appears that Bartleson was not. Grimsby was asked directly whether Superintendent Deasy made any statements about UTLA, and she responded "No." Grimsby said that Superintendent Deasy specifically called Caputo-Pearl a "trouble-maker" at the school. She took this to mean that Superintendent Deasy disapproved of the Social Justice Academy as being "more of a political thing" that the Superintendent "just didn't like." Grimsby also testified that Superintendent Deasy connected Caputo-Pearl to telephone calls made to Sacramento to complain about the Magnet conversion plan or Superintendent Deasy in particular.[16] Grimsby was upset by

[16] Bartleson testified that he was informed of complaints made to the State Department of Education (DOE), but that the DOE did not identify the complainant. Caputo-Pearl

Superintendent Deasy's comments about Caputo-Pearl. She had known Caputo-Pearl for several years through her roles in GCEP and the Crenshaw Cougar Coalition, and as a parent of students in his classes. When she left the meeting, Grimsby felt it important to warn Caputo-Pearl that Superintendent Deasy was out to get him. Grimsby and Caputo-Pearl had a telephone conversation later that same day about the Superintendent's comments during the meeting. King testified that during the meeting Superintendent Deasy specifically said Caputo-Pearl and unidentified "others" in the Union were impediments to moving forward or a roadblock to progress at Crenshaw High School.

F. Faculty Meeting in Spring 2013

At a faculty meeting held during the spring semester in 2013, Caputo-Pearl raised several issues with Corley regarding teachers' concerns over access to instructional materials and poor communication from administration over scheduling matters, as well as issues related to teachers' concerns over the Magnet conversion process. Caputo-Pearl said that Corley got upset, became defensive and said to him, "You're trying to set me up." Several other teachers who were present at this meeting testified about it. According to Special Education teacher Tracy McKinney, Corley raised his voice in response to Caputo-Pearl, walked toward him and avoided answering his question by saying, "We're not going to talk about this." Teachers Tiff and Lewis also testified that Corley seemed upset and "cut off" Caputo-Pearl from talking. Ms. Brown testified that she had never observed any "exchanges" between Caputo-Pearl and Corley, and that it was "not [Corley's] personality" to raise his voice, but she was not questioned about whether she was actually present at the faculty meeting at issue. Corley generally denied ever raising his voice to Caputo-Pearl during meetings and said they had a

admitted to calling the DOE because he was concerned that Magnet conversion could jeopardize the school's SIG funding.

very cordial relationship. He was not questioned regarding their interactions at any particular meeting.

UTLA-Sponsored Activities in Response to the District's Magnet Conversion Plan

Teachers were understandably concerned about having to apply to continue working at the Crenshaw High School site after the Magnet conversion. They were worried about losing jobs that many of them had held for years, building strong community ties. Several teachers, including Garcia and Caputo-Pearl, had moved near Crenshaw High School specifically to become more involved in the local area. As described below, UTLA sponsored a number of events to publicize awareness of the District's plan within the community and to spur parent action in response.

A. Leafleting

Teachers periodically gathered in front of Crenshaw High School before school started during the spring of 2013 to hand out leaflets regarding the Magnet conversion process to parents as they were dropping off students at school. Sometimes the leaflets described meetings that were scheduled to discuss teachers' concerns over the process. Teacher McKinney described the teachers' purpose in doing so as "to bring community awareness to the magnetization process." Teachers testified to regularly seeing administrators outside, including Corley, while they were leafleting in front of the school.

B. Press Conferences

Caputo-Pearl helped organize two press conferences to discuss concerns about the Magnet conversion. Several teachers attended the press conferences and, as discussed further below, some of them spoke during the event or were interviewed by the press afterward. Both conferences were held in front of the Crenshaw High School in late December 2012 or early

January 2013 and were attended by print and television media outlets. Corley and other administrators, including Bartleson, were present and took notes during the press conferences.

C. Attendance at District Board Meetings

Teachers attended District Board of Education (BOE) meetings during November 2012 and January 2013 as a group, many wearing blue t-shirts that signified opposition to what the teachers believed to be reconstitution of the school. The BOE took action at the January 2013 meeting to formally approve the Magnet conversion plan for Crenshaw High School and two other schools submitted for conversion that year. A few Crenshaw High School teachers, as will be discussed below, publicly addressed the BOE. Corley attended these BOE meetings.

D. Attendance at Meetings of the Crenshaw Cougar Coalition

As previously noted, the Crenshaw Cougar Coalition was meeting regularly on the Crenshaw High School campus during the 2012-2013 school year and several teachers participated in the meetings on a consistent basis. According to Caputo-Pearl, the group met in what was called the Parent Center. In previous years they had met in the library. Caputo-Pearl believed that the District allowed the group to meet on campus. Corley, however, testified about seeing teachers and community members meeting on campus several times in the relevant time period but he had not authorized them to do so.[17] Ordinarily, he would need to approve a request for any meeting held on school property, but he had not received any such requests in these instances. Corley observed the following teachers as being at these meetings: Caputo-Pearl, Mr. Brown, James Altuner, Creasia, Roberts, Tiff, and Courtney Stanton-Gomez. Corley said that he made no attempt to disband these meetings because he "wanted to respect the teachers' right to assemble." Corley described going into one of these meetings for

[17] Corley did not identify that these were meetings of the Crenshaw Cougar Coalition, but it is clear from the testimony of other witnesses that they were.

a few moments because he noticed people entering a campus building after school and he wanted to see what was going on. He said that it appeared the purpose of the meeting was to encourage community members to be against the Magnet conversion. He reported staying for five or ten minutes and then leaving. Caputo-Pearl similarly testified that Corley entered a meeting of the Crenshaw Cougar Coalition, took notes, and stayed for only around five minutes. Self-described "parent activist" Kahllid Al-Alim also testified that Corley entered a meeting that he attended in the Parent Center, took a few notes, and then left after a few minutes.

Al-Alim described being granted a meeting in Superintendent Deasy's office with some other community leaders at some point during the conversion process to discuss his worries that teachers might lose their jobs at Crenshaw High School in the conversion and requested a method for parents to petition for teachers to keep teaching there. Al-Alim expressed to Superintendent Deasy that the Parent Center at Crenshaw High School was under-developed and needed full-time staff. The Superintendent responded, "well yeah, that's because it's being used for a political purpose." Al-Alim responded to Superintendent Deasy that while parents and students often held meetings there, it was not true that these meetings were somehow political. Al-Alim testified that Superintendent Deasy expressed that the parents and teachers utilizing the center were plotting to get rid of Corley and to disrupt the Magnet conversion. Superintendent Deasy did not name any particular teachers that he thought were plotting in this manner during the meeting with Al-Alim.

The Selection of Magnet Themes

Bartleson was the District administrator tasked with primarily overseeing the conversion process. He had a team of about 30 people assisting him in various ways. The year before, he had done the same thing at another District site, Westchester High School. Bartleson explained that his experiences in that process informed his approach at Crenshaw High School. The existing staff at Westchester High School had to apply and be selected to work in that school after the Magnet conversion.

The District wanted input from parents and students regarding the academic focus of the new Magnet schools at Crenshaw. Students were surveyed twice during the school year regarding their academic interests to start to focus in on potential Magnet themes. In order to solicit input from parents and interested community members, Corley held twice-monthly meetings beginning in January 2013 and continuing through the spring called "Coffee With the Principal." Bartleson also attended these meetings. Parents were also surveyed over what kinds of academic themes they would like to see in the new Magnet schools. As a result of the feedback received from students and parents, a comprehensive "Crenshaw High School Plan" document was created and three Magnet themes were finally selected: Visual and Performing Arts (VAPA), Science, Technology Engineering, Math and Medicine (STEMM), and Business Entrepreneurship and Technology (BET). Bartleson testified that while there was some support for Social Justice and Law, it was not among the most three popular choices and therefore was not selected as a Magnet theme. UTLA supporters and officials, including then-President Warren Fletcher, and members of the Crenshaw Cougar Coalition attended some of these meetings and expressed opposition to what they termed the reconstitution of the school.

District witnesses testified to their belief that UTLA and its supporters were generally opposed to the Magnet conversion.

"Coffee With the Principal" meetings also yielded criteria that the community was looking for in teaching staff for the Magnet schools. According to Bartleson:

> They wanted those teachers to teach culturally relevant materials, they wanted the teachers to submit weekly lesson plans, they wanted teachers to follow the curriculum that was established that the principal and the administrators had established, participate in professional development, do extra[-]curricular activities. Those are the things that come to mind.

The Application, Interview, and Selection Process for Employees Seeking a Position in the Magnet Schools

A. Administrators

Despite having been recently hired as the Crenshaw High School principal, Corley had to apply to be the principal of the new Magnet schools, like all other staff desiring a position within them. There were 10 other applicants for that job. In February 2013, Corley was interviewed by a large panel of stakeholders that included teachers, parents, community members, and alumni, as well as Bartleson, who served as the Superintendent's designee. The same panel interviewed all 10 applicants. Corley was the panel's choice and Superintendent Deasy then approved his selection. The Superintendent always has the final say over the selection of principals.

After the selection of principal was made, applicants for assistant principal were interviewed by a panel having similar composition in terms of the representation of stakeholder groups that were involved in the interviews for principal.[18] Corley made the final hiring

[18] It is not clear whether Bartleson participated in the interviews of assistant principal candidates.

decisions for assistant principals. Only one of the assistant principals who was employed at Crenshaw High School applied for a position in the Magnet schools. That person was selected.

B. Teachers and Classified Staff

a. Teacher Applications

It was announced in February 2013 that the interview process for teachers desiring a position in one of the Magnet schools would occur in April 2013. Bartleson asked the District's Human Resources staff to provide instruction to teachers explaining the application process. Teachers were told that if they applied for but were not selected for a position in the Magnet schools they would become "displaced" from Crenshaw High School, but would remain employed by the District and retain their base salary, benefits, and seniority levels. Human Resources staff also held workshops for teachers on résumé writing and interviewing techniques, including holding mock interviews. Teachers were told that if they were interested in submitting an application, to prepare a résumé and cover letter indicating their interest in the specific Magnet programs offered and to which Magnet school they were applying, and to submit those to Corley and/or Bartleson.

b. Teacher Interviews

Bartleson arranged and coordinated all of the interviews for existing Crenshaw High School staff that were applying for positions in the Magnet schools.[19] Interviews were conducted by a panel. Neither Bartleson nor Corley participated in the interviews as panelists. Human Resources staff conducted training sessions for the community members, parents,

[19] Bartleson's involvement with the interview process itself only extended to Crenshaw High School employees who were applying to work in the Magnet schools. As further discussed below, after the internal staff selections were made by Corley, external candidates were permitted to apply for positions in the schools. Bartleson and his team had no involvement with external candidates.

students, alumni, UTLA representatives, and administrators who did serve as panel interviewers. Panelists were informed that interviews should last approximately 30 minutes. The questions to be asked during the interviews were shared with the panelists during their interviewer training and had been derived from the criteria developed during the "Coffee With the Principal" meetings. Bartleson was present at Crenshaw High School on all of the days that interviews were held to manage the process and escort candidates to their interview rooms. Interviews took place after school during the first three weeks of April 2013. Bartleson testified that a community group within Crenshaw, the Black Education Coalition, approached him and Chang during the conversion process to suggest that after the interviewers marked their rating sheets, they should place them in a sealed envelope that would then be given to the principal. Bartleson explained that this suggestion stemmed from that group's desire to "avoid politics in the decisions." Bartleson agreed with the suggestion and presented it during "Coffee With the Principal" meetings without opposition. That method was adopted. Thus, panelists did not discuss their impressions of candidates with each other during the interview process.[20]

c. Teacher Selection

Corley had the final say over the selection of all staff, including teachers, who were chosen to work in the Magnet schools. Bartleson testified that he provided no input regarding staff selection. Human Resources Interim Deputy Chief Ignagni testified that principals are vested with the authority to make staffing selections for their schools. Corley testified that he did not have any input from or conversations with Superintendent Deasy over whom should be

[20] The parties stipulated during hearing that they would not seek to introduce testimonial or documentary evidence about the scores or ratings of candidates that were generated by the interview panels.

selected to work in the Magnet schools. No contrary evidence was presented, despite the testimony of several teachers who said they did not know who made the final decision or simply did not believe that it was Corley's ultimate responsibility. UTLA witness Al-Alim, who served as a panel interviewer, confirmed that Bartleson told panelists during their training that Corley would have the final say over staff selections. Final staff selection decisions were made for internal candidates before external candidates were considered.

Corley testified that in addition to his own observations of and interactions with Crenshaw High School teachers who were applying for positions in the Magnet schools, he also considered feedback he received from his administrative team (assistant principals and instructional specialists) regarding their own experiences with the internal applicants during the 2012-2013 school year. Corley testified in general that he personally observed teachers during the 2012-2013 school year around four times. He said that he visited everyone around the beginning of the year in September and again in or around November. As a part of the Magnet conversion process, all teachers were observed by a group of District administrators, including Corley, in February or March. Bartleson was also present for those observations. Finally, Corley testified to visiting all classrooms again in April or May. Corley's testimony in this regard is disputed by all of the teachers who testified. At most, the teachers recall his visiting them twice during the year and some could not remember him observing them at all.

Corley and the other Crenshaw High School administrators met weekly during this time period. He testified as follows about the criteria he considered during the teacher selection process:

> We looked at the quality of teacher, the instructional practice. We were -- We were moving towards a more rigorous program and so we wanted them to be willing to participate in additional professional development so that they would be prepared to

> provide rigorous instruction. We looked at their willingness to follow Crenshaw High School and District policies. And then finally, I reviewed specifically the Stakeholder feedback that was given during the interview panels.

Other than that final statement above, the District did not introduce any evidence showing that the feedback given from interview panels played any particular role in Corley's decision not to select the teachers that are at issue in this case.

Regarding the degree to which a teacher's overall employment record was taken into account during his decision-making process, Corley testified that it only played "some" role and clarified:

> A. . . . But I made my evaluations strictly off of my experience with individuals. If they had some egregious things in there from the past that were -- they weighed more heavily, but my final decision was based on my experience. I think that's the fairest way to evaluate someone.
>
> Q Okay. And when you say, my experience, do you mean from your personal observations?
>
> A No, I mean from the time that I have worked with them and observed them, not just personal, but also feedback that I received from other administrators, any comments or issues that arise with parents. My whole experience with them at the school site.

Notably, all of the teachers at issue here had a consistent history of receiving a rating of "Meets Standards" on their performance evaluations, which is considered a positive assessment of performance. Approximately 51 percent of Crenshaw High School teachers who applied to work in the Magnet schools were selected for positions therein.

d. <u>Information Provided to Teachers That Were Not Selected for Positions in the Magnet Schools</u>

Teachers who were not selected for a position in the Magnet schools were informed of such by letter in mid-April from Corley. The letter did not provide any specific reasons that

the teacher was not selected. Many teachers testified to sending e-mails to Corley and/or Bartleson asking for specific reasons that they were not selected and never receiving a response to their inquiries. GCEP board member Grimsby testified that she asked Corley during a community meeting held after the selections had been made for the reasons or criteria that some teachers had not been given positions in the new schools. Corley responded that the reasons were private and could not be disclosed. Only one teacher, McKinney, testified that Corley said in a faculty meeting in April 2013 that teachers wanting individual results of the selection process could receive them by e-mail. Then, she testified that a week later he changed his mind and said no reasons could be provided. No other teacher was questioned regarding this particular faculty meeting and no others testified about Corley making such statements. As McKinney's account on this point is different than all of the other witnesses who testified, I do not credit her statements on this issue.[21]

The District's Human Resources staff held informational meetings for teachers who did not receive positions in the Magnet schools. It was explained that if teachers did not apply for and receive positions in other District schools that had openings, they would be considered displaced and assigned to the District's contract pool without the loss of their base salary, benefits, or seniority. The contract pool is not viewed by teachers as an advantageous assignment. Teachers in the contract pool receive teaching assignments early in the morning through an automated telephone system, in a way that is similar, if not identical, to the manner in which substitute teachers receive their daily assignments. Thus, there is a daily level of unpredictability regarding where a contract pool teacher may have to report to work and what kind of teaching assignment may be required. Teachers in the contract pool are regularly

[21] I do not find that McKinney was testifying untruthfully. Rather, it seems most likely that she misunderstood the communication she testified about.

forced to teach outside of their areas of expertise and grade level. If a teacher in the contract pool does not receive a teaching assignment through the automated system, they report to a base school where they could be assigned any number of tasks. One teacher described working as a hall monitor. Several teachers testified to feeling a level of disrespect by school staff when they were assigned to the contract pool, as if they had done something wrong or were no longer considered to be good teachers.

e. Classified Staff Selections

Classified employees working at Crenshaw High School had to apply and be interviewed for a position in the Magnet schools, similar to the above-discussed process for teachers. Human Resources staff did not provide the same workshops for classified employees as they did for certificated employees. Corley made the final classified staff selection decisions. Approximately 50-55 percent of former Crenshaw High School classified staff were selected for positions in the Magnet schools.

Employees at Issue in the Charge

1. Cathy Garcia

Garcia was a Math teacher at Crenshaw High School from 2003-2013. As discussed previously, she served as the UTLA chapter chair during the 2012-2013 school year and, for this reason, weekly UTLA lunch meetings were sometimes held in Garcia's classroom. Before that, she had served as a UTLA chapter co-chair since 2008. Garcia voiced her criticism of the Magnet conversion plan during public and private meetings with District officials stating, for instance, that the timeline for the conversion was unrealistic, questioning whether the District was violating a recent side-letter agreement with UTLA promising no new reconstitutions, and other critical comments previously discussed. Garcia also attended one of the two UTLA press

conferences regarding the Magnet conversion. She did not speak during the press conference itself, but afterward was interviewed by a Spanish language television station, where she translated in Spanish some of the remarks made by Caputo-Pearl in English during the conference. Garcia regularly wore red to support UTLA and posted materials on the UTLA bulletin board that was located adjacent to Corley's office. Garcia also made announcements regarding UTLA matters over the public address system until Corley halted that practice in the fall of 2012.[22] Corley was present for much of these activities, including the press conference and meetings with faculty and GCEP.[23]

Garcia was absent for a significant portion of the 2012-2013 school year for medical reasons. Her absences began sporadically in the fall of 2012. Sometimes she took off a few consecutive days during that period, another time a consecutive week. By January 2013, Garcia requested and was approved for an extended medical leave that lasted until around April 7, 2013.

Garcia applied for a position in the Magnet schools by submitting a résumé and letter of intent to Corley. Garcia then participated in an interview, but ultimately was not selected as a teacher for the Magnet schools. As noted previously, teachers that were not selected for a position were informed of such by a letter from Corley that did not provide any rationale for the decision. Garcia received this letter.[24]

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[22] The issue of the public address system will be discussed in more detail in a later section of the proposed decision.

[23] Because there is no dispute that Corley was present during the UTLA press conferences, it is presumed that he was aware when a teacher discussed herein attended them.

[24] Unless otherwise noted, all of the teachers at issue received the same generic rejection letter.

Corley testified about the reasons he did not select Garcia to be a teacher in the Magnet schools. First, Corley noted that during one of his observations of a Math class, the students were reading a book that did not appear to be directly Math-related, but he could not specifically recall the name of that book. He did not take notes during his observation. Corley also said he had other reports of students in Garcia's class reading books or novels that were not part of the Math curriculum. Since the Math proficiency rate was so low at Crenshaw High School, teaching from books that were not specific to Math content concerned Corley. He never raised the issue with Garcia. Corley testified generally that he did not raise every teacher performance issue or concern that he or his administrative staff observed at Crenshaw High School during the 2012-2013 school year because of the overwhelming volume of more serious and pressing issues facing the struggling school during that year, on top of the time consuming Magnet conversion. He said simply that there was not enough time to document and follow-up on every performance concern.

Garcia testified during UTLA's rebuttal case that she assigned a book called "Flatlands" in her Geometry class that was written by a mathematician during the 1800's from the perspective of geometric shapes. She introduced the text as cross-curricular material under the new state common core teaching standards.

Second, Corley testified to his concern of what he described as Garcia's excessive absences before she had requested an extended medical leave. Corley stated that a long-term substitute could not be secured during that period because administration did not know how long Garcia would be absent for any given time as she was calling in day-by-day. As a result, a changing rotation of substitutes had to be secured to cover her classes, which negatively

impacted student learning and was especially damaging in the low performing area of Math. Garcia was never reprimanded for poor attendance.

Garcia applied for and received a temporary contract Math teaching position at the District's Maywood Academy High School for the 2013-2014 school year. She taught Math there during the summer to increase her chances of receiving a permanent offer. Traveling to Maywood Academy High School added about 10 miles to Garcia's daily commute.

2. Meredith Smith

Smith was a Math teacher at Crenshaw High School from 1991-2013. During the 2012-2013 school year she taught in the Gifted Magnet program. Thus, her students were advanced in Math. She also served as Athletic Director from August 2012-March 2013. Smith regularly attended UTLA lunch meetings and wore red on Tuesdays.[25] Smith also identified herself as a member of the Crenshaw Cougar Coalition, but it is not clear whether Corley observed her at those meetings as Smith was not one of the teachers Corley identified as having attended after-school meetings with parents. Smith was not asked about whether she ever saw Corley during a meeting of the Crenshaw Cougar Coalition. Smith spoke during the UTLA press conference in January 2013 over her concerns about teacher retention during the Magnet conversion process. She leafleted before school in the spring of 2013. Corley was often seen at the student drop off area during teachers' leafleting activities.[26]

[25] Smith served as UTLA chapter co-chair in 2004 and a few years after that. There is no information in the record that Corley was aware of such remote Union activity on Smith's part.

[26] Because there is no real dispute that Corley was regularly outside during the student drop off period, it is presumed that he was aware of the teachers discussed herein who participated in leafleting.

Smith applied for a position in the Magnet schools and participated in the interview process. She was not selected. Smith asked Corley if she could see the results of the interview panel but never received a response to her e-mail inquiry in that regard.

Corley testified to several reasons for not selecting Smith for a position in the Magnet schools. First, he highlighted his misgivings over her performance as Athletic Director. He removed her from that position in March 2013 due to performance issues. In short, it was alleged that Smith allowed a parent to coach, did not adequately supervise student athletes, failed to set up a sound system, and allowed a volunteer coach to enter campus after she had been informed that the volunteer was banned from doing so because of concerns regarding his conduct with female students. Smith generally denied the allegations during her testimony. She responded in writing to Corley at the time. She was not issued any written reprimand.

Next, Corley discussed an issue of the décor in Smith's classroom. According to Corley, safety code violations due to Smith's classroom decorations resulted in Crenshaw High School receiving a citation. The citation was not produced for the record. Corley also said that Smith refused to remove items from her classroom. Smith admitted that she was informed about a violation due to some hanging items. Smith said she removed those items. Smith denied ever being told about any lighting or electrical violations and stated that she was not asked to fix anything in that regard.

Finally, Corley said upon observing Smith's teaching, he noticed that she failed to differentiate her lesson plans based on student need. Smith would make statements to students like, "you guys should already know this, right?" Then she would move on with her instruction without waiting for any response from the students. Corley said this concerned him because after the Magnet conversion there would not necessarily be gifted students in Smith's

classroom. Particularly, because the Magnet schools were moving to a full inclusion model for Special Education, there would be students with widely varying levels of performance in the same classroom and teachers would need to modify lesson plans to ensure that all students were able to perform satisfactorily. Corley did not take notes during his observations. Smith was never informed of any teaching performance issue.

For the 2013-2014 school year, Smith secured a long-term substitute assignment at the District's Emerson Middle School. After that, Smith went into the contract pool.

3. Linh Cao

Cao was a Math teacher at Crenshaw High School from 2008-2013. She frequently wore red in support of UTLA. She leafleted and attended a UTLA press conference in January 2013. Cao also went to a BOE meeting during the Magnet conversion time period. Corley acknowledged Cao at the BOE meeting by nodding at her.

Cao applied for a position in the Magnet schools and was interviewed. She was not selected.

Corley testified regarding why he did not select Cao for a position in the Magnet schools. Corley said that Cao did not demonstrate good classroom management skills. Corley testified to a "lack of routine" for students upon entering Cao's classroom and that they would simply socialize for a few minutes without direction. Ms. Brown testified that around once per week she had to respond to a radio call asking for assistance with student discipline issues in Cao's classroom.[27] Students would wander in and out of Cao's classroom. Ms. Brown testified that compared to other teachers, assistance had to be frequently provided to Cao over student discipline matters. Cao was never reprimanded for classroom management issues.

[27] Ms. Brown also testified generally that she shared with Corley all of the performance issues that she testified about regarding the teachers at issue during the relevant time period.

Cao had a brief assignment in the contract pool until she accepted a contract position at the District's Carson High School in September 2013. She voluntarily resigned from that position a few weeks later for personal reasons. Around a month later, Cao took a teaching position outside of the District.

4. Kenneth Maxey

Maxey was a Physical Education (PE) teacher at Crenshaw High School from 1984-2013. He also taught Health. From 2006-2008, Maxey held the administrative position of Dean of Students, which has oversight over student disciplinary matters. Maxey holds an administrative credential in addition to his teaching credential. In approximately 2010, Maxey served as an assistant principal for three months. In every year that Maxey worked at Crenshaw High School, he held some sort of coaching position. Coaching positions are not permanent assignments, but are assigned on a year-to-year basis. An additional stipend is paid. The principal of the school has the final approval over coaching positions. In the 2012-2013 school year, Maxey was the assistant varsity football coach.

Maxey leafleted before school during the spring of 2013.[28] He said that he wore red every Tuesday during that time period and regularly attended UTLA lunch meetings. Maxey attended, but did not speak during, one of the UTLA press conferences at Crenshaw High School in January 2013.

Before Maxey applied for a PE teaching position in the Magnet schools, Corley approached Maxey and discussed with him his desire to create a position in the new Magnet schools that would oversee "in-house" student suspensions. Corley also told Maxey that the

[28] Maxey himself was a little unsure of exact dates at times, but other witnesses placed him at commonly attended events and there is no dispute of his participation in various protected activities.

PE department in the Magnet schools would be facing a budget cut. Corley asked Maxey to get back to him "asap" if he was interested in taking the in-house suspension position. Maxey testified that drawing upon his prior experience as Dean of Students, he knew that the in-house suspension position would be challenging, and he concluded that he did not want responsibility over students who had been a problem for other teachers. Maxey informed Corley that he was not interested in the new position. Maxey then applied for a PE position in the Magnet schools and was interviewed. Maxey was not selected as a PE teacher in the Magnet schools.

Corley testified to several reasons that Maxey was not selected for a teaching position in the Magnet schools. First, as he had also explained to Maxey, the PE department budget was being cut from four positions to three in the new Magnet schools.[29] At least one of those positions had to be filled by a female teacher in order to supervise the female students' locker room. As to the other two positions, Corley said that he felt the other two PE applicants had stronger, more structured PE programs than did Maxey, based on his own observations. Corley described that Maxey's PE classes often involved students being able to choose their own activities or "free play," which he did not think provided the most rigorous program. Corley testified to speaking about that particular issue with Maxey during the 2012-2013 school year. Maxey was not questioned about that during his rebuttal testimony.

Corley also gave unrefuted testimony about a conversation he had with Maxey during the relevant time period where Maxey told him that he was looking for a calmer experience in his remaining three to four years before he retired and that he was thinking of returning to coaching college-level basketball. Corley said that Maxey told him he was "on his way out."

[29] The budget cut was due to both declining enrollment and the ability of students in a Marines ROTC program to get credit for PE through that program.

Corley said that discussion also influenced his decision because he was looking to hire people for the Magnet schools that would be there long-term.

After being notified that he did not receive a teaching position in the Magnet schools, Maxey applied for and received a PE teaching position at the District's Foshay Middle School. Maxey also was awarded a position by Corley as assistant varsity football coach at the Magnet schools in the 2013-2014 school year and that position was continuing at the time of the hearing.

5. Margot Tiff

Tiff was a PE teacher at Crenshaw High School from 1993-2013. She was also the coach for the boys' and girls' tennis teams. Tiff actively participated in Union activities during the 2012-2013 school year. Tiff attended UTLA lunch meetings and regularly wore red. She attended at least one of the UTLA press conferences over the Magnet conversion. Tiff also attended with other teachers a BOE meeting over the Magnet conversion. Corley identified Tiff as being one of the teachers he recognized at a meeting with teachers and parents speaking out against the Magnet conversion after school (most likely, a meeting of the Crenshaw Cougar Coalition).

Tiff applied for a PE teaching position in the Magnet schools. She also applied for tennis coaching positions. She participated in an interview for the teaching position. She was not selected for a teaching or coaching position in the Magnet schools.

Corley testified about the reasons he did not select Tiff for a teaching position in the Magnet schools.[30] He noted that she had a high student failure rate, which was often for vague reasons, such as the student was not wearing white socks. Corley said that there were

[30] Corley was not questioned about Tiff's having applied for coaching positions.

numerous student complaints regarding Tiff's harsh treatment of them, and that he had never observed Tiff trying to develop a positive relationship with students.[31] Corley described a situation where he observed students rushing to get to the PE area before the bell rang and Tiff locking the gates and walking away as soon as the bell rang so that the late students would not be able to participate in class. Ms. Brown also testified to a high volume of student complaints against Tiff and a high student failure rate. Ms. Brown noted that Tiff often sent students to the office for discipline for relatively minor issues that Ms. Brown felt Tiff should have been able to handle herself. Ms. Brown said that Tiff's "[i]ntolerance to deal with students was a concern." Ms. Brown described that in her own personal interactions with Tiff, Tiff never had a pleasant demeanor. Tiff was never reprimanded for her interactions with students. Tiff testified that the practice of locking gates at the bell is known as a tardy sweep and is a widely accepted procedure to encourage timeliness.

Tiff was placed in the contract pool for the 2013-2014 school year. The following year, she began a long-term substitute assignment at the District's Virgil Middle School.

6. Cathy Creasia

Creasia was a Special Education teacher at Crenshaw High School from 2003-2013 and served as the department chair during the 2012-2013 school year. She taught Special Day classes in Algebra and Geometry. Special Day courses are for Special Education students who have not been "mainstreamed" for a particular subject, that is, assigned to classes with General Education students. The most common Special Day courses are Math and English.

Creasia was a UTLA chapter co-chair for the 2012-2013 school year. Creasia filled in for Garcia as chair while Garcia was on leave. In that capacity, Creasia represented teachers

[31] No written complaints were produced for the record and no students testified.

over disciplinary issues in meetings with Corley. Creasia leafleted with other teachers before school after the Magnet conversion was announced. Creasia personally raised concerns about teachers' working conditions with Corley during the 2012-2013 school year via e-mail and in-person conversations. One issue raised in that vein was regarding gates being locked that hindered teachers' ability to leave campus. Creasia leafleted and regularly wore red. She also attended UTLA lunch meetings and hosted at least two of those in her classroom in the 2012-2013 school year. Corley identified Creasia as one of the teachers he observed as being present at meetings with parents (likely, these were meetings of the Crenshaw Cougar Coalition).

Creasia communicated with Corley about her concerns for the Special Education department after the Magnet conversion. Corley announced in a meeting with Special Education teachers that the Magnet schools would be implementing a "full inclusion" model for Special Education, meaning that Special Education students would be entirely mainstreamed with General Education students. Since Creasia was a Special Day teacher, she was worried about whether there would be a position for her. Corley responded that administration was still trying figure out the structure of the Special Education department in the new Magnet schools.

Creasia applied for a position in one of the Magnet schools, but she did not participate in the interview process. She gave as her reason for not interviewing that she had child care responsibilities during the interview times and because she was not sure, given the information about the structure of the Special Education department, whether a position would even exist for her. She was not selected for a position in the Magnet schools.

Corley testified to several reasons why Creasia was not selected for a position in the Magnet schools.[32] First, Corley noted that Creasia had several late Individualized Education Plans (IEPs), which forced meetings with parents over those students' IEPs to have to be rescheduled and caused the district to be out of compliance with legal requirements. Late IEPs can result in a teacher being disciplined, but Creasia was not.

Danielle Frierson, the "bridge coordinator" for the Special Education department during the 2012-2013 school year, testified about general conditions within the department that year and also about concerns over specific Special Education teachers at issue in this case.[33] In the course of Frierson's duties, she had occasion to observe the teaching of all such teachers. Frierson discussed the issues she testified about with Corley during the relevant time period. In general, Frierson said the department itself was chaotic, in terms of being out of compliance with timely information in students' IEPs. Regarding Frierson being required to monitor the status of Creasia's IEPs, Frierson testified:

> She did not complete her IEPs. She didn't write them and it was kind of -- It was a battle to get her to write them. Not a physical battle, but it was -- I had to beg to get the IEPs done. I just reassigned her IEPs to other teachers because she refused to do them, or she did not do them.

Frierson had several occasions to e-mail both Creasia and Corley during the spring of 2013 regarding Creasia's IEP compliance issues. According to Frierson, Creasia missed all but one

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[32] Absent from those reasons was that Creasia failed to participate in the interview process. Thus, it is presumed that a lack of interview was not a contributing factor in Creasia's failure to be hired.

[33] A bridge coordinator's duties include overseeing compliance issues regarding IEPs and curriculum within the Special Education department and being present in IEP meetings with the Special Education teacher and parents. It is a position included within UTLA's bargaining unit, and has no supervisory authority. Nonetheless, the position seems to have a quasi-administrator quality because of the level of reporting to the principal about teachers' performance.

IEP meeting that school year and Frierson and Corley also corresponded via e-mail regarding that issue. Creasia was never disciplined for missing IEP meetings.

Another reason given by Corley for not selecting Creasia for a Magnet position was that she was observed alone in her classroom at times when she should have been supporting Special Education students in general education classes. Ms. Brown testified that one time she observed Creasia alone in her classroom with what appeared to be academic journal articles spread out on her desk. Ms. Brown surmised that Creasia was working on her dissertation since Creasia was at that time in graduate school pursuing a doctorate.

Creasia was placed in the contract pool during the 2013-2014 school year. In October 2014, she obtained a Special Education teaching position at the District's Obama Middle School.

7. Tracy McKinney

McKinney taught Special Education at Crenshaw High School from 2007-2013. She leafleted during the spring of 2013, frequently wore red in support of UTLA, and attended one of the UTLA press conferences criticizing the Magnet conversion. McKinney raised concerns with Corley over class sizes during the 2012-2013 school year and also complained about her teaching aide having been approved for extracurricular activities that kept the aide out of her classroom for extended periods of time.

McKinney applied for a Special Education teaching position in the Magnet schools and participated in the interview process. She was not selected to teach in the Magnet schools. McKinney asked Corley and Bartleson to provide her with the reason for her non-selection but she never received a response from them.

Corley testified about the reasons that he did not select McKinney for a position in the Magnet schools. First, he cited an incident during the 2012-2013 school year that was also confirmed by both Frierson and Ms. Brown. Corley, Ms. Brown, and Frierson were visiting classrooms one day with a group of District Special Education administrators. As the group approached McKinney's classroom, they observed her outside of it. Frierson asked if it was McKinney's conference period and McKinney said "oh no," and began to walk away. Frierson explained that they were there to observe McKinney's classroom, and McKinney said she would be right back. Frierson said to McKinney, "shouldn't you be in your classroom?" Then, McKinney turned around to come back to her room. Frierson used her own key to access the room.[34] Upon entering, Frierson observed a teacher's aide eating sunflower seeds while the students socialized. McKinney entered and said, "okay kids, change of plans," then started a lesson. According to Ms. Brown, she wrote a memo over the incident and had a discussion with McKinney about it. The memo was not produced for the record, and McKinney denied that she received any verbal or written counseling over leaving her students unattended. Corley said he had been advised of more than one incident of McKinney leaving her classroom while students were present. McKinney generally denied ever doing so inappropriately.

Corley and Frierson also described that McKinney appeared to be using instructional materials that were not appropriate for high school grade levels, but appeared more geared toward the seventh or eighth grade levels. Corley also observed that students did too many independent work sheets without instruction from McKinney. McKinney was never informed of any deficiencies regarding her instructional levels.

[34] Frierson had keys for all of the Special Education classrooms.

For the 2013-2014 school year, McKinney applied for and received a permanent position at another Magnet high school in the District, the Academy of Medical Arts in the Carson Complex. Ms. Brown wrote McKinney a letter of recommendation after McKinney was not selected for the Magnet schools.

8. Christina Lewis

Lewis was a Special Education Math teacher at Crenshaw High School from 2004-2013. Lewis was active in the Union during the 2012-2013 school year by regularly attending UTLA lunch meetings, wearing red, and leafleting. As previously discussed, Lewis was the teacher to whom BOE member LaMotte replied a sharp retort to Lewis's comment during a faculty meeting regarding students' coming to Crenshaw High School with grade school level proficiencies. Lewis also spoke during a UTLA press conference and was interviewed by the press after a BOE meeting. Her comments were regarding the Magnet conversion having a negative impact on the Extended Learning Cultural Model and that the process itself was a disservice to teachers. Lewis saw Corley during and after the BOE meeting.

Lewis applied for a Special Education teaching position in the Magnet schools and participated in the interview process. She was not selected. Lewis twice asked Bartleson for an explanation over her non-selection but never received a response.

Corley testified about the reasons he did not select Lewis to teach in the Magnet schools. First, Corley did not think Lewis's instruction had a high level of rigor. He believed that her lessons were not grade-level appropriate curriculum, but were geared toward elementary students. Frierson also shared that impression, but that was Frierson's only criticism of Lewis's teaching.

Second, Corley heard Lewis publicly express her opposition to the full inclusion model of Special Education that was to be implemented in the new Magnet schools. During the time period leading up the conversion, the District's Special Education division visited Crenshaw High School to hold an informational meeting for parents. Special Education teachers and Corley also attended this meeting. According to Corley, Lewis was one of three Special Education teachers who stated during the meeting that Crenshaw's Special Day students would not be able to handle full inclusion and that the model would not work. Lewis admitted that she was opposed to full inclusion and that she articulated her opposition. Corley testified as follows regarding how teachers' opposition to full inclusion influenced his selection decision:

> I wanted to make sure that teachers who were being a part of whoever [sic] were going, wanted to do what we were doing. And if they had no interest in what we were doing, then it wasn't an appropriate fit for where we were going as a school.

Lewis applied for several Special Education teaching positions within the District soon after she was informed that she had been selected to teach in the Magnet schools. She was provided a letter of recommendation from Ms. Brown. Lewis was offered and accepted a position teaching Science for Special Education students at Los Angeles High School beginning in the 2013-2014 school year. Lewis had to undergo 50 hours of unpaid training to move from teaching Math to teaching Science. The new location added many hours to her weekly commute.

9. Chandra Roberts

Roberts was a Special Day class teacher during the 2012-2013 school year. She taught at Crenshaw High School from 2000-2013. During the relevant time period, Roberts was active in the Union by frequently wearing red, leafleting, and attending UTLA lunch meetings. Roberts is also one of the teachers Corley mentioned observing at meetings with parents (i.e.,

the Crenshaw Cougar Coalition). Roberts attended a UTLA press conference in the spring of 2013 and spoke afterwards to a journalist. As previously discussed, Roberts raised a concern to Corley about the Special Education department after the Magnet conversion during a faculty meeting to discuss the District's plan for the school. Roberts testified that she visited Corley's office between five and seven times after the conversion plan was announced to inquire about the District's plan for training for teachers in the full inclusion model of instruction.

Roberts applied for a Special Education teaching position in the Magnet schools and participated in an interview. She was not selected to teach in the Magnet schools. Roberts asked Corley for an explanation over why she was not successful, but she never received a response.

At hearing, Corley explained why he did not select Roberts. First, Corley noted that he had several times observed Roberts showing videos during class time and he believed it was excessive. Although Roberts was never formally reprimanded over the issue, Corley testified to having a discussion with Roberts about it. According to Corley, Roberts explained that she wanted the students to view a video before doing projects and activities related to what they were viewing. But Corley did not think that was a strong strategy since the students were not taking notes while watching. Roberts testified during UTLA's rebuttal case. When she was questioned whether "anyone" ever spoke to her about the use of videos in her instruction she said, "no."

Next, Corley identified Roberts as the second of the three teachers in the Special Education department's meeting with parents who expressed opposition to the full inclusion model.[35] Corley said that Roberts, "stood up at the meeting and stated to the parents that this

[35] The third teacher was Cathy Creasia.

is a mistake, it's not going to work. The students in our Special Day classes will not be able to make it." Corley said this bothered him because he wanted to select teachers for the Magnet schools who had high expectations for student achievement, and the "discussions around that comment were that Special Education students cannot, students with disabilities cannot." Corley said his priority was to "make sure we filled the school with people who truly believed that students could learn." Roberts denied that she told parents the full inclusion model would not work. Rather, she said that she told them it would take "a lot of training" and because the District would not describe what training was going to be used or available that "it's going to be very difficult."

Corley also noted that Roberts had often been late to school. Ms. Brown confirmed that Roberts was late on average once per week during the 2012-2013 school year. According to Ms. Brown, she and Roberts had a conversation about tardiness at the sign-in counter one day when Roberts was late, where Roberts asked if it was a new policy of Superintendent Deasy's for teachers to sign-in when late and Ms. Brown replied that it was in the UTLA contract for teachers to be on time to work. Roberts was never disciplined for tardiness. Ms. Brown also observed Roberts making necklaces in her classroom during instructional time while students were present and working independently. Roberts was making the necklaces while chatting with another teacher that Ms. Brown believed may have been on her conference period. Ms. Brown said she knew the necklaces were for Roberts's personal use because Roberts told Ms. Brown she was making the necklaces to sell. During rebuttal, Roberts admitted to making jewelry but denied doing it during instructional time. I credit Ms. Brown's testimony over Robert's because it was more detailed and therefore more believable. Roberts was never disciplined over the necklace issue.

Finally, Corley noted that he had received reports from campus staff that Roberts had been releasing students early. Corley testified that he had a conversation with her about it and she said she would make sure that did not happen again. She did not receive any written counseling. Roberts denied the conversation occurred but admitted that campus staff frequently had to return students to her room who would leave without permission.

Roberts was placed in the contract pool during the 2013-2014 school year. She testified that she was scheduled for an interview at the District's Adams High School for that year, but when they saw that her résumé said she had worked at Crenshaw High School, they did not even want to conduct it saying that she would not be a good fit at their school. Roberts insisted on completing the interview, but did not receive an offer from Adams. The following school year, Roberts obtained a Special Education teaching position at Obama Middle School.

10. Lynn Turner

Turner was not available to testify in the hearing. Thus, there is no information in the record regarding her employment history with the District. Caputo-Pearl testified that Turner, who was also known by the last name Burns, was among the "most active" Union members at Crenshaw High School. Garcia testified that Turner attended one of the UTLA press conferences over the Magnet conversion.

It can be fairly presumed that Turner applied to work in the Magnet schools, but was not selected, because Corley testified to the reasons that she was not chosen. He also testified to reviewing her application materials, although these were not introduced. It is similarly not clear whether she was interviewed. Corley testified that Turner was often absent from required faculty meetings and after school events, such as parent conferences and back-to-school night. Since one of the criterion for selection in the Magnet schools was teachers' willingness to

participate in additional professional development, Turner's absence from these required events concerned him. He expressed his disapproval over her absences to her verbally during the year in question, but he never issued her any written reprimand. Corley also testified to his observations of Turner's teaching. He said he was concerned with a lack of rigor in her instruction and the fact that she also did not have a good relationship with several students. Some students had to be removed from Turner's class due to complaints of students not being able to work effectively with her. There is no evidence of any discipline against Turner in this regard. There is also no evidence of Turner's employment after she was not selected for a position in the Magnet schools.

11. Sandra Luna

Luna was a Landscaping teacher at Crenshaw High School from 2010-2013. Unlike the other teachers at issue, Luna was employed by the Adult Education division of the District under an annual renewable contract. Her position was part of the ROP curriculum. ROP classes are offered depending on the funds available and at the school's discretion, according to Luna. Luna holds Career Technical Education (CTE) credentials in the areas of Natural Resources and Agriculture, Business and Finance, and Information Technology.

Luna participated in UTLA activities during the 2012-2013 school year. She leafleted, attended UTLA lunch meetings, and wore red every Tuesday. In September, October, and November 2012, Luna e-mailed Corley about needed supplies for her Landscaping class. She did not receive a response. If she saw him and verbally reminded him about the issue, Corley would say something like, "I'll get to it Ms. Luna." Luna also spoke regarding her concern over Special Education students during the October 2012 faculty meeting held to announce the Magnet conversion.

Luna applied for a Landscaping teaching position in any of three new Magnet schools, but noted that the STEMM Magnet was her first choice.[36] She participated in the interview process. Luna was not offered a position in the Magnet schools. Luna e-mailed Corley asking for an explanation but she did not receive a response.

Corley explained at hearing why Luna was not selected to teach in the Magnet schools. Corley testified that Landscaping was no longer offered as a class in the new Magnet schools. He said that there was not going to be an ROP position in the new schools for which Luna was qualified. Corley explained that there were only to be 2.5 ROP positions to be offered in the new Magnet schools: a Sports Therapist for the STEMM Magnet, a Graphic Designer for the VAPA Magnet, and a someone who could teach both Computer Information Systems and Accounting for the BET Magnet. He did not believe that Luna's credentials qualified her to teach any of those classes. Corley said he never had a discussion with her about whether her CTE credentials would have qualified her to teach Computer Information Systems and Accounting because she was asking to teach something else. At any rate, even if she had been qualified to teach the Computer Information Systems part of the course, he did not believe she was qualified to also teach Accounting and it was a joint class that could not be separated for budget reasons. Corley selected Mr. Brown to teach that course because of Mr. Brown's extensive contacts in the business community that could provide internship opportunities for students.

Luna's employment with the District effectively ended when she did not receive a position in the Magnet schools because her contract expired at the end of the 2012-2013 school year. As she was not a permanent teacher, she was not displaced and assigned to the contract

[36] Luna emphasized in her letter of interest that her Landscaping class was applicable to any and all of the three Magnet schools.

pool as were other teachers at issue who were unable to secure a new permanent position at a District school. Luna looked for other Landscaping ROP positions within the District but there were none. She was also not able to find any other kind of District ROP position. Luna said she contacted the District's Human Resources department many times for assistance but did not receive any. She ultimately secured employment outside of the District in May 2014.

12. Alex Caputo-Pearl

Caputo-Pearl has been a teacher at the District since 1997. He was employed at Crenshaw High School from 2001-2013 within the Social Studies department. He taught a variety of classes, including: Government, Economics, United States History, World History, and CAHSEE preparation.

Caputo-Pearl's Union positions and activities during the timeframe at issue, as well as his leadership and programmatic contributions to Crenshaw High School, have been thoroughly discussed in preceding sections of the proposed decision. In addition to what has already been described, Caputo-Pearl also met with Corley in a representative capacity on a regular basis in October and November 2012 to raise teachers' concerns over employment conditions. Caputo-Pearl discussed with Corley in these meetings topics such as teachers' lack of access to instructional materials, technology issues, issues surrounding the school calendar and teachers' attendance at school events, and committee functions. Corley abruptly ended the practice of meeting with Caputo-Pearl in late-November 2012 without explanation. In December 2012, Corley again, without explanation, ended a years-long practice of UTLA representatives being able to use the school's public address system to announce lunch meetings and other events. At hearing, Corley explained that he restricted use of the public address system during school hours "consistent with District policy," but that it was available

for use before and after school. Corley also mentioned that, if he received a text message from Caputo-Pearl stating that they needed to announce a meeting, Corley would make the announcement for UTLA. Caputo-Pearl also attended BOE meetings about the Magnet conversion with his fellow teachers and wore Union t-shirts and insignia during the 2012-2013 school year.

Caputo-Pearl applied for a position in the Magnet schools and participated in the interview process. He was not selected. Caputo-Pearl sent e-mail messages to both Corley and Bartleson asking for an explanation regarding his failure to receive a teaching position in the new Magnet schools. Caputo-Pearl did not receive a response from either of them.

Corley testified about several reasons why he did not pick Caputo-Pearl to teach in the Magnet schools. First, Corley believed that Caputo-Pearl was showing too many videos. Corley noted a lack of student engagement during the video watching. Corley noticed on one visit to Caputo-Pearl's classroom that students did not appear to have text books with them. When Corley asked a student about that, the student replied that they did not bring the book to class. Corley never communicated with Caputo-Pearl about the videos or text book issues. Corley also thought that the posted student work in Caputo-Pearl's classroom was stale, being up to four months old. Corley had a school-wide policy that posted work should be current. Caputo-Pearl admitted that Corley discussed that issue with him one time.

Finally, Corley testified that the "significant" factor in his decision not to hire Caputo-Pearl to teach in the new Magnet schools was a rumor that Caputo-Pearl had awarded extra-credit to his students for their completion of surveys over either the Magnet conversion, or about Corley's practice of calling parents with a recorded message on Sunday evenings. Corley said that a student named "J" had made such a statement about the survey credit in

January 2013.[37] Corley never talked to Caputo-Pearl about this allegation nor did any investigation. Corley admitted that he did not actually know whether Caputo-Pearl had given credit of any kind to his students for their completing surveys. Corley said that he was in the process of writing up Caputo-Pearl, but was not able to complete that process due to a personal medical issue in Corley's family. Corley's testimony on this point was not entirely clear on whether he intended to issue a written reprimand to Caputo-Pearl on the survey issue, or if it was over something else. Ms. Brown testified to her awareness of the survey credit issue. Ms. Brown said that she thought the issue was resolved based on her belief that either Corley, or an assistant principal, Douglas Meza, had talked with Caputo-Pearl about it. Meza testified, but was not questioned about whether he ever discussed with Caputo-Pearl his giving extra credit for surveys.

During cross-examination, Corley was asked about his earlier testimony over Mr. Brown's community connections and to explain why he thought those connections could provide opportunity for students. Corley's response to that question (the first response in the excerpt below) led to questioning over his comparative familiarity with community connections cultivated by Caputo-Pearl:

> A Mr. Brown had developed an extensive list of partnerships and relationships in regard to internship opportunities, job shadowing, corporate visits that exposed our students to activities that are specifically aligned to the goals of the BET Magnet Program.
>
> Q Okay. Now, are you familiar with similar programs that Mr. Caputo-Pearl presented or helped bring into the school?
>
> A Not to the extent that I'm familiar with those.
>
> Q You're not familiar with any of them?

[37] The student's name is redacted from the record for privacy.

A Not like -- Not like I know these, no.

Q Are you familiar -- I'm not asking you about comparing them with Mr. Brown. Are you familiar with any of them?

A I knew there were some groups that came in to do some work, but I never -- I didn't know specifically all what they were doing, no.

Q And what groups are you talking about?

A I heard about the Sierra Club, and I had one conversation with one of the groups, I forget the name, the name of the group, but it was community action -- I forget the exact title of the group, but one of them I did have a conversation with.

Q Are you familiar with the Ford Foundation as it relates to Crenshaw?

A Yes.

At that point, Corley described that he had actually met with Caputo-Pearl and Ford Foundation representatives and had several conversations with those people during the 2012-2013 school year to discuss the Extended Learning Cultural Model and other educational programs.

Caputo-Pearl applied for and received a teaching position in the District's Frida Kahlo High School for the 2013-2014 school year. At Frida Kahlo, Caputo-Pearl taught most of the History/Government classes he taught at Crenshaw, and several others that he had never taught before, such as, Expository Composition, World Literature, and PE. There was no lead teacher position available for him at Frida Kahlo as there had been at Crenshaw. Frida Kahlo was not a recipient of SIG funds. During the 2014-2015 school year, Caputo-Pearl began full release time for his duties as UTLA president.

Other Crenshaw High School Employees Not Directly at Issue in the Charge

Witnesses for both parties were questioned over the level of Union activism of other former Crenshaw High School employees who were not at issue in the charge and who were selected by Corley to teach in the Magnet schools. Of those employees, Altuner and Mr. Brown were discussed most frequently. Neither of them testified. Corley testified to observing both Altuner and Mr. Brown at after school meetings with parents that, in context, were likely meetings of the Crenshaw Cougar Coalition. Altuner was a UTLA chapter co-chair or vice chair during 2012-2013. Garcia testified that Altuner attended one of the UTLA press conferences. Several UTLA witnesses, including Smith and Cao testified that Mr. Brown frequently leafleted with teachers before school. Cao remembered Mr. Brown speaking up at a faculty meeting over the conversion. Lewis recalled Mr. Brown attending a BOE meeting regarding the Magnet conversion. Roberts remembered Mr. Brown speaking at one of the UTLA press conferences. After he was hired as a teacher in the Magnet schools, Altuner served as the UTLA chapter chair. Mr. Brown was selected as a lead teacher in the BET Magnet.

ISSUE

Did the District retaliate against twelve UTLA activists because of their Union activities by failing to select them for positions in the new Magnet schools?

CONCLUSIONS OF LAW

The complaint in this case alleges that the District failed to select the twelve employees at issue for positions in the Magnet schools because of their Union activities and affiliation. It is unlawful for a public school employer to:

> [i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees because of their exercise of rights guaranteed by this chapter. *For purposes of this subdivision, "employee" includes an applicant for employment or re-employment.*

(Cal. Gov. Code, § 3543.5, subd. (a), emphasis added.)

The traditional test for determining whether prima facie evidence exists that an employer has violated the above subdivision of EERA is set forth in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) as follows: the charging party must show that (1) the employee exercised rights under EERA, (2) the employer had knowledge of the exercise of those rights, (3) the employer took adverse action against the employee, and (4) the employer took the action *because of* the exercise of those rights. (*Id.* at pp. 6-8.) The charging party bears the initial evidentiary burdens of production and persuasion. (*City of Oakland* 2014) PERB Decision No. 2387-M, pp. 16-17.)[38] Only if a prima facie case is established does the burden shift to the respondent to prove by a preponderance of evidence that it had an alternative non-discriminatory reason for the challenged action. This burden includes proving that the respondent, in fact, acted because of an alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31 (*Palo Verde*).)

[38] That case was decided under the Meyers-Milias-Brown Act. (Cal. Gov. Code, § 3500 et seq.) When interpreting EERA, it is appropriate for PERB to derive guidance from court and administrative decisions interpreting the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.) and parallel provisions of California labor relations statutes. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12-13; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608 (*Fire Fighters*). Precedent interpreting the NLRA is persuasive, not controlling, authority. (*Los Angeles Unified School District* (1976) EERB Decision No. 5 [before January 1978, PERB was known as the Educational Employment Relations Board or EERB].)

During hearing and in its brief, UTLA repeatedly emphasized that it was not challenging the District's decision to convert Crenshaw High School into Magnet schools, but only the allegedly discriminatory *manner* that employees were selected for positions in the new Magnet schools. As the evidence shows, the decision of the District to convert to a full Magnet program necessarily required that all employees, from top administration down, apply for positions in the new schools. The uncontroverted evidence demonstrated that the District has, for decades, in all situations such as the one at issue, consistently applied a competitive application and selection policy. While PERB has recognized as a viable theory of discrimination that an employer who harbors animus toward a smaller subset of union activists within a larger group could demonstrate that animus by laying off the entire group (see, e.g., *Cupertino Union Elementary School District* (1986) PERB Decision No. 572, p. 5), the evidence does not bear out such a theory here. Although Superintendent Deasy made several remarks showing his disdain for Union activism at Crenshaw High School, particularly that of Caputo-Pearl, the District put forth ample evidence of the reasons that the conversion decision was made at the time that it was.[39] Especially as the relationship with GCEP was concurrently under review, coupled with evidence of consistently low student performance, the decision itself and the timing thereof is not suspect under the circumstances. Given the amount of District resources required to effectuate the conversion and the fact that the vast majority of teachers not selected for Magnet positions would remain employed by the District, it is highly improbable that the District would have expended such effort simply to lessen the concentration of UTLA activists at one school.

[39] The testimony over Superintendent Deasy's statements made outside of the hearing fall within the party admission exception to the hearsay rule. (Cal. Evid. Code, § 1220; *Bellflower Unified School District* (2014) PERB Decision No. 2385, p. 11.) I therefore will consider those statements herein for their truth.

However, the wording of the complaint can be interpreted as challenging the decision to convert Crenshaw High School to a full Magnet program because it alleges as adverse actions the fact that the former positions of the employees at issue were eliminated. Because UTLA did not present its case as challenging the Magnet conversion decision itself, something that necessarily required a competitive application process after *all* employment positions in the former school were eliminated, I deem that allegation to have been withdrawn from the complaint. Furthermore, because there was a competitive hiring process underway for the Magnet schools, the employees at issue were treated as applicants for employment, and it is the non-selection or failure to hire these twelve employees in the Magnet schools that is the actual action alleged to be unlawful, an analysis under a test for discriminatory refusal to hire is warranted. As further discussed below, although the test for discriminatory refusal to hire as adopted and applied by the National Labor Relations Board (NLRB) has been acknowledged and discussed by PERB in previous cases, it does not appear to ever have been formally adopted by PERB.

Discriminatory Refusal to Hire

PERB has confronted the issue of a retaliatory refusal to hire in only a handful of cases. In the first of those cases, *Santa Clara Unified School District* (1979) PERB Decision No. 104 (*Santa Clara USD*), the Board reversed a Hearing Officer and found that the district had discriminatorily refused to hire a long-term substitute teacher in a permanent teaching position. There, the substitute teacher had sought out the permanent position, taken additional course work in the subject matter to ensure she had the proper credential, began teaching the courses on a substitute basis, and was told by the school principal that she was a "shoo-in" for the permanent position. When the school principal announced that the position would only be a

60 percent position instead of full-time, the substitute teacher consulted the union for advice and the union representative approached the assistant superintendent on the teacher's behalf. The assistant superintendent then advertised the position and initiated competitive selection procedures to fill the position. The principal spoke with the substitute teacher and instructed her that in the future, she should come to him with workplace concerns first, rather than going to the union. Ultimately, another teacher was hired to fill the position sought by the substitute, though she continued to work in the district as a substitute teacher.

In holding that the employer had violated the statute by refusing to hire the substitute teacher because of her union-related activity, the Board found that the employer's refusal to hire her was inextricably bound to her decision to seek assistance from the union. The employer urged the Board to consider the actions of the school principal and the superintendent separately—the principal claimed that he urged the teacher to consult with him before the union in order to "avoid commotion" caused by the union's involvement, while the superintendent's decision to advertise the position was ostensibly made in order to "select a more qualified candidate." The Board rejected this argument, stating,

> Both administrators are agents of the District, and therefore their conduct necessarily inheres to the District. Contrary to the hearing officer's analysis, the Board does not view [the principal's] and [the Assistant Superintendent's] refusal to hire [the teacher] as severable actions when considered for purposes of determining the unlawful nature of the District's activity. Rather, the Board will consider facts and incidents compositely and draw inferences reasonably justified therefrom.
>
> Therefore, after review of the totality of evidence presented the Board finds that the District's conduct, subsequent to the [union's] involvement on [the teacher's] behalf, compels the conclusion that the District's consideration of such protected activity improperly infected its decision concerning the filling of the vacancy.

(*Santa Clara USD, supra,* PERB Decision No. 104, p. 14.)

Santa Clara USD, supra, PERB Decision No. 104 was decided before PERB established the analytical framework for discrimination cases in *Novato, supra*, PERB Decision No. 210 and before the NLRB's burden shifting test in *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083, affd. (1st Cir. 1981) 662 F.2d 899, cert. denied (1982) 455 U.S. 989 (*Wright Line*) was adopted by the federal courts. Thus, the Board's analysis ended without shifting the burden to the employer to show a legitimate, non-discriminatory reason for failing to hire the charging party.

A decade after the Board's decision in *Santa Clara USD, supra*, PERB Decision No. 104, the Board held that applicants for employment were not entitled to statutory protection as "employees" under the statute. (*Hacienda La Puente Unified School District* (1989) PERB Decision No. 741.) At the time, EERA section 3543.5, subdivision (a) did not include the phrase "For purposes of this subdivision, 'employee' includes an applicant for employment or re-employment." In response to the Board's exclusion of applicants from coverage under EERA, in 1989, the California Legislature amended EERA section 3543.5, subdivision (a) to include the additional phrase, "For purposes of this subdivision, 'employee' includes an applicant for employment or re-employment," thus extending protection from retaliation to applicants for employment.

In a case involving a charging party appearing on his own behalf, the Board applied the *Novato* standard for refusal to hire cases arising under the Dills Act, but also acknowledged that the NLRB standard for refusal to hire cases required a showing that the applicant was or might be expected to be a union supporter, the employer was aware of the applicant's sympathies, and that the employer refused to hire the applicant because of those union sympathies. (*State of California* (2002) PERB Decision No. 1484-S, proposed dec., pp. 19-

20.) The Board noted, "The requirement that an applicant actually submit an application for an available position is an important factor in establishing a prima facie case under a discriminatory refusal to hire theory." (*Id.* at proposed dec., p. 19.) Thus, the Board concluded that the charging party failed to establish that the State had taken any adverse action against him because there was no evidence that the State employer was hiring or that that charging party had submitted an application for any vacant position. The Board went on to note,

> The process for hiring State employees is a formal one. Ordinarily, a position must be announced, applications must be submitted, and other well-established competitive steps must be followed. None of these events occurred here. Nor is there evidence that other applicants were hired in positions for which [the charging party] was qualified.

(*Id.* at proposed dec., p. 24.)

Since then, the Board has not had occasion to refine the test for a discriminatory refusal to hire under EERA.[40] Accordingly, it is appropriate for PERB to look to the decisions of the NLRB and other federal precedent when determining whether an employer has unlawfully refused to hire an applicant. (*Fire Fighters, supra*, 12 Cal.3d 608.)

The NLRB has long considered applicants for employment to be covered under the NLRA due to the statutory proscription against discrimination in the hiring of employees. (See *Nevada Consolidated Copper Corp*. (1940) 26 NLRB 1182.) And while the NLRB has consistently extended coverage under the NLRA to applicants for employment, the elements of

[40] In a more recent case arising under the Higher Education Employer-Employee Relations Act (Cal. Gov. Code, § 3560 et seq.), *Trustees of the California State University* (2008) PERB Decision No. 1970-H (*CSU*), the Board adopted a portion of the proposed decision of an Administrative Law Judge (ALJ) that cited to the NLRB's test under *FES (A Division of Thermo Power)* (2000) 331 NLRB 9 in the remedy section of a discriminatory refusal to hire case. That case is further discussed below.

a prima facie allegation of discrimination against an applicant for employment under the NLRA have been the subject of inconsistent decisions over the years. In *FES, A Division of Thermo Power* (2000) 331 NLRB 9 (*FES*), the NLRB clarified the allocation of burdens for both the charging party and the respondent to an allegation that the respondent refused to hire an applicant for employment:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

(*FES*, *supra*, 331 NLRB at p. 12; footnotes omitted.)

The above standard is consistent with PERB's own treatment of retaliatory failure to hire cases and will provide an appropriate framework for addressing the claims in this case. Accordingly, this test shall be applied to the facts of this case to determine whether the District

discriminatorily refused to hire any of the 12 teachers at issue who applied for a position in the Magnet schools.

1. The District Was Hiring

There is no dispute as to this element of the above test. It is clear that the District was seeking to fill all certificated and classified positions within the new Magnet schools at the time of the alleged unfair practice.

2. The Applicants Had Requisite Experience or Training

With the exception of Luna, as further discussed below, there is no dispute that all of the other teachers at issue here were fully qualified to fill available teaching positions within the new Magnet schools. Therefore, this element of the above test is met for 11 of the 12 discriminatees at issue.

Regarding Luna, it is clear from her testimony and the documentary evidence that she sought to continue teaching Landscaping in the new Magnet schools. Luna's letter of intent submitted with her application only discussed the Landscaping course and its suitability for inclusion in any of the three Magnet schools. The letter of intent did not state that she was applying for any other teaching position, ROP or otherwise. The letter of intent did not discuss Luna's qualifications to teach other ROP courses that may have been planned or offered. It is undisputed that Landscaping was discontinued as a course offering in the new Magnet schools. It is undisputed that ROP course offerings are left entirely to the discretion of the school's management. Thus, it does not appear that the District was hiring for the position Luna sought. It is further not clear from the evidence presented that Luna's CTE credentials would have allowed her to teach any of the ROP courses that were to be offered in the Magnet schools. Even if they did, under the circumstances, since Luna only indicated her interest in continuing

to teach Landscaping, and had only ever taught Landscaping at Crenshaw High School, it is not clear how Corley would have been expected to know that. Under these facts, this element of the test for discriminatory refusal to hire is not met for Luna and the Union therefore has not made a prima facie showing. Accordingly, allegations in the complaint regarding Luna are hereby dismissed.

3. Union Animus Contributed to the Decision Not to Hire the Applicants

a. Legal Standards

The determination of this element of the discriminatory refusal to hire test requires evidence showing that the respondent was unlawfully motivated in its hiring decision. Because direct evidence of unlawful motivation is rare, PERB typically looks for circumstantial evidence to reveal a respondent's true motivation. In order to assist in this assessment, PERB has developed a set of nexus "factors." In addition to close timing between protected conduct and adverse action, one or more other factors demonstrating unlawful motivation must be present to adequately show a connection between them: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 6); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara USD, supra*, PERB Decision No. 104, p. 20); (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, p. 15); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 19; (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, p. 10) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland*

Unified School District (1990) PERB Decision No. 786, pp. 13-14); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, pp. 15-16;); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District* (1982) PERB Decision No. 264, p. 22).

b. Analysis

As a threshold matter, the District does not dispute and I find that the numerous concerted activities described herein that were undertaken by employees in response to the District's Magnet conversion plan, such as: leafleting, wearing symbolic colors or clothing to show union solidarity, participating in press conferences and meetings with parents to discuss working conditions, attending, en masse, meetings of the BOE to protest the Magnet conversion's effect on working conditions, etc. were classic expressions of protected union activities under EERA. The record is clear that Corley and other District officials were aware of these activities by the employees at issue and believed generally that UTLA was officially opposed to the Magnet conversion. All of the employees' activities were close in time to the non-selections.

UTLA's chief arguments regarding evidence of the District's unlawful motivation in this case is that since the District never stated its reasons for not selecting the employees at issue at the time of the decision, and for the first time at hearing provided numerous, mostly performance-based reasons, over which none of the subject employees had received formal discipline or negative performance assessments, that shows a discriminatory motive.[41] Next,

[41] UTLA makes a related argument that since the District made no effort to reveal information from the employee interviews, that the selection process itself was a sham. I disagree. Corley testified that he took the raters' information into account when making his selections, but also provided detailed testimony about his own experiences with the internal applicants having the most bearing on his decision-making process. That is a reasonable

UTLA argues that Superintendent Deasy's statements showing his union animus must be imputed to the putative decision-maker, Corley, and further argues that it is illogical that Superintendent Deasy would not have been involved in the staffing decisions for the Magnet schools since Superintendent Deasy made the decision to convert Crenshaw High School to a full Magnet program. These arguments are addressed in turn below.

i. Lack of Reasons Given for the Non-Selections

As noted above, PERB often finds a respondent's lack of justification to an employee for its action indicative of an unlawful motive. However, that is not always the case. In *City of Alhambra* (2011) PERB Decision No. 2161-M, the Board found that an employer's refusal to inform a probationary employee of the reasons he was being let go did not support an inference of unlawful motivation under the circumstances. Citing to NLRB case law finding that a vague statement such as employees did not "fit into the scheme of things,"[42] did not necessarily show discriminatory intent, the Board held, "we find an employer's failure to offer justification at the time it took action is not a reliable indicator of discriminatory intent unless the employer was required by law, policy, or past practice to give a reason." (*Id.* at p. 17.)

In this case, the District refused to explain its selection rationale to employees, even if they asked. It never deviated from that practice, simply ignoring the sometimes repeated requests for an explanation. The consistency of the action in this regard implies a conscious decision to keep the deliberative process confidential. There was no evidence presented that

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position and does not imply that the selection process was pretense. For the employees at issue, Corley testified that he had reasons for his decisions distinct from anything that came out of the interviews. That does not also imply that for every other internal applicant, the interview performance may have had more or less influence over Corley's decision.

[42] *BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling & Transfer Station & Chauffeurs, Teamsters & Helpers Local Union No. 150, Int'l Bhd. of Teamsters, AFL-CIO* (2005) 345 NLRB 564, at pp. 570, 575.

the District has a policy or practice to inform applicants for employment with the reasons that they were not successful, which would have required disclosure of the reasons under *City of Alhambra*. Under the circumstances, especially given that the District acted at all times consistently, I do not find the lack of justification to employees for their non-selection to be a reliable indicator of unlawful motivation.

ii. Union Animus

As an initial matter, UTLA's argument that Superintendent Deasy "must" have had input over staff selections in the Magnet schools is based entirely on conjecture. UTLA presented no evidence that a Superintendent is routinely involved in site staffing decisions in the District, or that Superintendent Deasy was involved in the decisions in this case. Bartleson's and Corley's testimony over who made the final hiring decisions was credible. Ignangi testified that principals are always vested with the authority to make staff selections at their schools. There is no compelling reason to find that anyone other than Corley was responsible for the selection of employees in the Magnet schools.

As to the issue of animus toward UTLA, the evidence presented by UTLA showing that Superintendent Deasy harbored ill will toward UTLA activists at Crenshaw, albeit primarily if not exclusively directed toward Caputo-Pearl, was persuasive. Grimsby and King were witnesses with no particular interest in the outcome of the case and therefore no obvious motivation to exaggerate. Their testimony regarding Superintendent Deasy's statements regarding the Union and Caputo-Pearl was compelling and believable. Ms. Brown's testimony over Superintendent Deasy's acrimonious exchange with Caputo-Pearl during a faculty meeting was also telling. PERB has recognized that not every expression of frustration or anger by a manager who is the object of employees' criticism is evidence of an unfair practice.

(See *City of Oakland, supra*, PERB Decision No. 2387-M, pp. 24-25, and the cases cited therein.) However, Ms. Brown's account of Superintendent Deasy's reaction to Caputo-Pearl's accusations over his anti-union motivations went beyond just an expression of anger at a personal attack. Superintendent Deasy essentially communicated to Caputo-Pearl and the rest of the teachers present at the faculty meeting that he, as Superintendent, could not be called to task by a teacher or the Union. When the whole record is considered, it is apparent that Superintendent Deasy had animus toward Caputo-Pearl's advocacy on behalf of UTLA and Crenshaw High School employees. The question is whether Superintendent Deasy's union animus can be imputed to Corley as the decision-maker in this matter.

As discussed previously, the Board in *Santa Clara USD* found that administrators' separate reasons for taking action could not be parsed out and since both were agents of the employer and therefore their conduct necessarily inhered to the employer. (*Santa Clara USD, supra*, PERB Decision No. 104 at p. 14.) More recently, the Board set forth a rule for determining when it is appropriate to impute animus from an official of the employer to the decision-maker. In *Regents of the University of California (Los Angeles)* (2008) PERB Decision No. 1995-H (*Regents*), the Board rejected a union's argument, citing NLRB authority, that a supervisor's unlawful motivation is imputable to the employer even if the official who takes the adverse action is unaware of the supervisor's animus. In rejecting the NLRB's approach, the Board stated:

> In *San Bernardino City Unified School District* (2004) PERB Decision No. 1602 (*San Bernardino*), a director of classified personnel removed a substitute teacher from a phone calling system's bank of substitute teachers based on the recommendation of an assistant affirmative action officer, whose investigation revealed that the teacher used physical force on a student. The ALJ's proposed decision in *San Bernardino* would have imputed the director's knowledge of the substitute teacher's union activities

> to the affirmative action officer in the absence of any evidence that the officer was aware of the teacher's protected activity. The Board did not affirm that portion of the proposed decision and specifically found that the imputation of knowledge under those circumstances was not warranted. (*San Bernardino*, at p. 25, fn. 22.) Therefore, under PERB precedent, one individual's experience will not be imputed to another unless it is warranted under the circumstances.

(*Regents*, *supra*, PERB Decision No. 1995-H, p. 13.) The Board concluded in the *Regents* case that since the decision-maker was not aware of the other officials' unlawful motivation and had not consulted with them over the layoff decision at issue, animus could not be imputed to the decision-maker under those circumstances. (*Id*. at pp. 13-14.)

Under the rationale in *Regents*, *supra*, PERB Decision No. 1995-H, Superintendent Deasy's union animus can only be imputed to Corley over Superintendent Deasy's statements of which Corley was aware. There is no evidence that Corley was present for the GCEP meeting where Superintendent Deasy made disparaging statements about Caputo-Pearl being a trouble-maker and the Union being an impediment to progress at Crenshaw High School. Likewise, there is no evidence that Corley was aware of the telephone call between Superintendent Deasy and King where the Superintendent blamed UTLA and its activists for his need to end the GCEP MOU. However, Corley was present during faculty meetings where Caputo-Pearl and Superintendent Deasy exchanged heated words over the Magnet conversion process and the Superintendent's strong reaction to Caputo-Pearl's advocacy in that setting can be reasonably imputed to Corley.

Additionally, some of Corley's own actions may also show union animus. The fact that Corley abruptly ended, without explanation, his practice of regularly meeting with Caputo-Pearl over teachers' employment concerns at Crenshaw High School followed closely by his elimination of the Union's access to the school's public address system shows that he may have

harbored some ill will toward the Union and its representatives. His explanation over why he cut off access to the public address system at the time he did was not particularly plausible. Corley testified to allowing unauthorized after school meetings to take place on campus even though he asserted that was in violation of District policies. It is not clear why the public address policy would require adherence where the other did not. Corley also had a somewhat heated exchange over the Magnet conversion and employment concerns with Caputo-Pearl in a faculty meeting according to the testimony of several Union witnesses. Their specific testimony over that incident is credited over Corley's general assertion that he enjoyed a good relationship with Caputo-Pearl and Ms. Brown's assessment of Corley's generally polite nature.

UTLA also notes that Corley was prone to surveillance of Union activities by video recording employees asking questions during the faculty meeting, and taking notes at press conferences and at a meeting of the Crenshaw Cougar Coalition. In *Lake Tahoe Unified School District* (1999) PERB Decision No. 1361, warning letter, p. 2, the Board cited to the NLRB's stance on unlawful surveillance:

> The National Labor Relations Board (NLRB) has generally found that an employer has engaged in unlawful surveillance when the employer photographs or videotapes employees or openly engages in recordkeeping of employees participating in union activities. (*F.W. Woolworth Co.* (1993) 310 NLRB 1197.) The mere observation of open, public union activity on or near the employer's property, however, does not constitute unlawful surveillance. (*National Steel & Shipbuilding Co.* (1997) 324 NLRB 499.)

Under the above standards, the note-taking at the press conference, being an observation of open, public union activity on the District's property, would not constitute unlawful surveillance. Likewise, the video recording was done in a faculty meeting called by the employer, not in a UTLA meeting. The reasons for the recording were undisputed and

believable. The fact that some employees may have felt uncomfortable asking questions while being recorded at a meeting of the employer does not transform Corley's actions into unlawful surveillance. However, Corley's popping in and taking notes for a few minutes at a meeting of the Crenshaw Cougar Coalition, where employees were speaking out against the Magnet conversion, is questionable. That action would reasonably tend to chill employees' speech and Corley's reasons for doing so were not explained. The fact that he felt the need to record something about that meeting may indicate animus toward union activities.

On whole, there is a sufficient inference of union animus by the District to suggest that it may have been discriminatorily motivated in its selection of staff for the Magnet schools. Even though the evidence suggests the strongest prima facie case as to Caputo-Pearl, since the other 10 employees were also engaged in concerted activities against the Magnet conversion plan and there is a specter of animus against such activities by Corley, I find the Union has met its prima facie burden for all employees still at issue. Thus, under the standard set forth in *FES*, *supra*, 331 NLRB 9, the burden shifts to the District to show that it would not have hired the remaining applicants even in the absence of their union activity or affiliation.

4. Burden Shift

Since the *FES* discriminatory refusal to hire standard employs the *Wright Line* burden shifting analysis that PERB adopted in *Novato*, it is appropriate to analyze the District's burden under the same framework used in the *Novato* retaliation test. (*Novato*, *supra*, PERB Decision No. 210.) Where there is evidence that the respondent's action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal.3d 721, 729-730 (*Martori Bros*.).) The "but for" test is "an

affirmative defense which the respondent must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) As discussed above, in *Palo Verde*, the Board clarified that in order for a respondent to meet its burden, it must show both that it had and acted because of an alternative, non-discriminatory reason. (*Palo Verde*, *supra*, PERB Decision No. 2337, p. 31.)

In assessing the evidence, PERB's task is to determine whether the respondent's "true motivation for taking the adverse action was the employee's protected activity." (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3, citations omitted; see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 23.) Further, PERB "weighs the respondent's justifications for the adverse action against the evidence of the respondent's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 14 (*Baker Valley*).) If PERB determines that a respondent's action was not taken for an unlawful reason, it has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 17.)

a. <u>The District's Defense as to: Cathy Garcia, Meredith Smith, Linh Cao, Kenneth, Maxey, Margot Tiff, Cathy Creasia, Tracy McKinney, Christina Lewis, Chandra Roberts, and Lynn Turner</u>

UTLA urges PERB to find that the District's performance-based reasons for not selecting the above-named employees at issue were pretextual and illegitimate because these teachers had never received formal discipline or negative performance evaluations for the reasons highlighted by Corley during the hearing and he did not formally document his concerns by either note-taking during his observations and/or sharing those concerns with the employees. UTLA also points out a factual dispute between the subject teachers and Corley

regarding the number of times Corley allegedly observed their classes and argues that Corley's testimony was not credible.

As to the latter assertion, in evaluating the credibility of the testimony of witnesses, the ALJ may rely on observational factors, such as, demeanor, manner, and attitude, and non-observational factors, including those specified in Evidence Code section 780. (*Palo Verde*, *supra*, PERB Decision No. 2337, p. 28.) Non-observational credibility factors in Evidence Code section 780 include: the extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which he or she testifies; the existence or non-existence of any fact testified to by the witness; the existence or nonexistence of the witness's bias, interest, or other motive; and a statement made by the witness that is inconsistent with any part of the witness's testimony at the hearing. Based on the above standards, I find no reason to conclude that Corley's testimony was not generally truthful and credible, even though I have made and will make below some adverse rulings against the District. I also find no reason to doubt the veracity of the Union's witnesses on the issue of the frequency of Corley's observations. The factual dispute regarding the number of observations could be explained a number of ways. For example, there is no information in the record showing that any of the subject teachers were in a formal evaluation cycle during the 2012-2013 school year. Accordingly, all of Corley's classroom observations appear to have been informal. It is conceivable that a quick, pop-in visit by Corley may not have made a lasting impression on the teacher under the circumstances. In any event, I do not find that the factual dispute in this regard casts doubt over the truthfulness of Corley's testimony.

As to the argument that Corley's stated reasons for not selecting the above-named teachers were pretextual, I am not persuaded. Corley's explanation for the reason that he was

unable to document every performance concern that was raised in his mind during his busy first year at Crenshaw High School, especially given the massive restructuring that the Magnet conversion planning entailed, was reasonable under the circumstances.[43] Even if Corley's failure to document his stated concerns before he relied on those concerns during his selection process was a poor personnel practice, PERB has found that "numerous instances of poor personnel relations and personnel practices" to be "insufficient evidence to discredit [an] employer's stated motive for the actions[,]" where there was no evidence of the employer's treatment of an employee inconsistent with past practice or of disparate treatment. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H, proposed dec., pp. 48-49.) There was no evidence of disparate treatment or that Corley deviated from past practice regarding the above-named employees, and there is nothing in the record that causes me to believe that Corley did not think the performance concerns that he testified about regarding them were genuine.

In several instances, such as Corley's stated concerns over Garcia (absences), Cao (classroom management), Tiff (stern demeanor toward students and excessive failure rate), Creasia (late/incomplete IEPs, missed IEP meetings, not accompanying Special Education students to General Education classes, and doing personal work during instructional time), McKinney (leaving students unattended and inappropriate grade-level curriculum) Lewis (lack of instructional rigor), and Roberts (tardiness and doing personal work during instructional time), they were corroborated by either Ms. Brown or Frierson, and in some cases by both

[43] In cases like *Baker Valley*, *supra*, PERB Decision No. 1993, the Board has found an employer's failure to document performance concerns that were later relied upon to support the non-reelection of probationary employees to be persuasive evidence that the employer acted for an unlawful reason. I do not find that rationale persuasive under this circumstance, where all positions in the school were being eliminated.

Ms. Brown and Frierson. There is no basis to doubt the testimony of either Ms. Brown or Frierson. To the extent that there were factual disputes between the accounts of the teachers and Ms. Brown and/or Frierson, Ms. Brown's and Frierson's more believable and detailed testimony is credited in each instance over the more general denials by the teachers. Likewise, Corley's testimony over times when he had discussed a particular issue with one of the employees in question was generally more detailed and believable than the employees' general denials that no one had ever addressed the issue with them.

UTLA also presented evidence attempting to show that Corley's performance concerns were baseless and therefore cannot be legitimate business reasons. For example, Garcia explained, very rationally, why she used the book, "Flatlands," in her geometry class. Garcia also explained that all of her absences were ultimately approved by the District. Creasia explained why IEPs can be late for reasons other than teacher error. Tiff explained why she felt justified in conducting tardy sweeps. But PERB's function is not to determine whether the employer's stated reasons for its actions are correct or justified.

In *California State University, Long Beach* (1987) PERB Decision No. 641-H (*CSULB*), the Board noted that there was some evidence of animus toward the union by the supervisor of an employee who had suffered adverse action. However, the record also showed that the supervisor believed, rightly or wrongly, that the employee was a poor worker, would not improve with time, and required more supervision than was necessary. (*Id.* at proposed dec., p. 49.) PERB said its role was not to decide whether the supervisor was justified in his belief that the employee was in fact a "problem employee," but instead to determine the likely basis for the employer's conduct. The Board concluded that the supervisor's beliefs about the employee's work habits, rather than union animosity, was the primary motivator. (*Id.* at

proposed dec., pp. 53-54.) In another case with similar facts to those here, where employees in an entire division of an employer, including many union activists, were forced to apply to continue working for their employer due to a reorganization, the ALJ noted that "[s]ome reasons for the hiring decisions may seem petty or unfair, and some may not have been well communicated to the employees, but they do not appear pretextual." (*Regents of the University of California* (1999) PERB Decision No. 1354-H, proposed dec., p. 59.)

Similarly, in this case, the above-named employees may dispute that Corley was correct in his assessments of their performance, but whether he was correct or not is not the point of PERB's inquiry. As stated above, PERB's role is to suss out the true motivation for the conduct. An employer may take action for a number of incorrect reasons that are not necessarily unlawful. PERB has also recognized that a desire to staff a school with superior employees is within the right of a school district employer. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561, p. 4 (*Bellevue*).) In that case, two probationary employees who had overall satisfactory performance ratings were non-reelected. The two employees at issue had, with all other teachers at their site, participated in a concerted work-to-contract action. The union argued that since their performance was satisfactory, the teachers' non-reelection must have been because of their participation in union activities. Despite prima facie evidence of retaliation, the Board agreed with the ALJ that the employer had met its defense by showing that even though satisfactory, the teachers' performance had not met the employer's standards of superiority. (*Ibid.*) The Board further found that because there was no showing that the two employees were leaders of the teachers' protest or were especially active in the campaign, the union's theory that the employees were targeted as being part of a union stronghold was speculative and unsupported. (*Id.* at pp. 2-3; proposed dec.,

p. 41 ["no evidence of protected conduct that [was] unique to [the discriminates]".)

By all measures, Corley's concerns about the above-named employees appeared to be genuinely held. As discussed above, many of those concerns were corroborated by members of his administrative staff. In other instances, Corley had previously shared some concerns with the employee, as was the case with Smith (student supervision issues when she was Athletic Director), Turner (absences from required school functions, lack of rigor in instruction, and student relationships), Roberts (use of videos and early release of students), and Maxey (unstructured PE program).[44] Thus, rightly or wrongly, Corley had and acted upon non-discriminatory reasons for not selecting the above-named employees. I draw no conclusions on whether he was correct or incorrect in his individual assessments of these teachers. His desire to staff the school with what he viewed to be the best fitting employees for the programs in the new Magnet schools is also in accord with the rationale in *Bellevue, supra*, PERB Decision No. 1561.[45] Also as in *Bellevue*, the above-named employees here

[44] Corley's testimony regarding Turner was unrefuted since she did not testify. As to Maxey, Corley's explanation over why he was not selected to teach PE was really less over any performance concern than it was due to fewer positions being available. Furthermore, the fact that Corley intended to offer Maxey a newly created position and actually allowed him to serve as a football coach in the new Magnets undercuts the theory that Corley harbored animus toward Maxey's UTLA activities.

[45] Likewise, regarding the statements made by Creasia, Lewis, and Roberts that the full inclusion model of Special Education would never work and/or that Special Day students would not be able to perform in that model having influenced Corley's decision not to hire them, PERB has found that the desire to conduct an educational program according to the employer's own judgment, where an employee was opposed to those objectives, provides a non-discriminatory reason for adverse action. (*CSULB, supra*, PERB Decision No. 641-H, proposed dec., pp. 54-55.) Although under EERA an employee has a protected right to voice complaints on educational policy (see *Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 19), the comments here that influenced Corley's decision were teachers' questioning students' ability to perform. Under *Bellevue*, *supra*, PERB Decision No. 1561 and *CSU*, *supra*, PERB Decision No. 1970-H, Corley's desire to staff the school with employees who supported the program in the new Magnets was justified.

participated in roughly the same amount and kind of protected activities that employees who were ultimately selected for Magnet positions—for example, Altuner and Mr. Brown—also participated in. While a discriminatory motive is not disproved by an employer failing to weed out every union adherent in the workplace (see *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 7), in this instance none of the above-named employees played any unique role in UTLA's campaign as compared to employees who were selected for Magnet positions. This provides further evidence that it was likely Corley's stated concerns which motivated his decision not to select the above-named employees for Magnet positions rather than their involvement in Union activities.

For all of the reasons stated above, the District has met its burden regarding the non-selection of Garcia, Smith, Cao, Maxey, Tiff, Creasia, McKinney, Lewis, Roberts, and Turner. The allegations in the complaint regarding those employees are therefore dismissed.

b. The District's Defense as to: Alex Caputo-Pearl

Unlike the employees previously discussed, Caputo-Pearl's role in UTLA's protests over certain aspects of the District's plan for Magnet conversion was unique because of his visible leadership in organizing the press conferences, the tenor of his public comments against the plan, and open criticisms of Superintendent Deasy's union animus. Actions by Corley found here to signal union animus were almost exclusively in reaction to speech or representational activity by Caputo-Pearl. In *Bellevue*, the ALJ distinguished a case relied on by the union, *Livingston Union School District* (1992) PERB Decision No. 965 (*Livingston*). The ALJ in *Bellevue* said about *Livingston*:

> There are some similarities between *Livingston* and this case, but there are also significant differences. The probationary teachers in *Livingston* engaged in several acts of protected conduct that put them directly at odds with the principal. Indeed, the principal

> referred to a faction of the faculty which included the probationary teachers as "bitchers" or "gripers," a district official commended the principal for the way she dealt with the "malcontents," and the principal indicated who the teachers associated with was more important than their performance. In contrast, [the *Bellevue* employees at issue] engaged in no protected conduct, which set them apart from other teachers. All teachers in this case engaged in precisely the same conduct. . . . And there is no evidence of labels attached to [the *Bellevue* employees at issue] such as "bitcher" or "griper."
>
> [¶. . .¶]
>
> Plainly, the circumstances underlying the Board's decision in *Livingston* are different from the record in this matter. While the failure to make the reelection standard absolutely clear may suggest an unlawful motive that leads to a finding that a nonreelection decision is truly pretextual, those circumstances are not present here. Thus, I find that *Livingston* does not compel a finding that the District violated EERA when it decided to nonreelect [the *Bellevue* employees at issue].

(*Bellevue*, *supra*, PERB Decision No. 1561, proposed dec., pp. 48-49.) The Board agreed with and adopted the analysis of the ALJ. (*Id.* at pp. 2-3.)

Like the employees in the *Livingston* case, Caputo-Pearl's actions put him directly at odds with Corley and Superintendent Deasy. (*Livingston*, *supra*, PERB Decision No. 965.) It is conceivable that Corley, having witnessed Superintendent Deasy's tense interactions over the Magnet conversion with Caputo-Pearl would have been influenced by Superintendent Deasy's obvious disdain over Caputo-Pearl's sharply worded advocacy on behalf of teachers. And while Corley seemed to sincerely believe some of his stated reasons for failing to consider Caputo-Pearl for a position in the Magnet schools, such as Corley's criticism of the amount of videos shown by Caputo-Pearl during instruction and the age of the posted student work in his classroom, the one factor Corley labeled as the most "significant" in his decision was highly suspect. Corley admitted that he did not know whether Caputo-Pearl had actually given credit

for students' completion of surveys. He further admitted that he took no steps to verify the truth of the student's comment in this regard and did no investigation. Ms. Brown was familiar with the rumor, but she testified to her belief that it had been resolved by Corley having spoken with Caputo-Pearl about it. Corley admitted that he never even took that basic step. Yet, Corley also gave vague testimony over his intent to initiate discipline against Caputo-Pearl, but was unable to do so because of personal hardship. I find that Corley's intention to discipline Caputo-Pearl over an alleged infraction that he had taken no steps to verify the truth of provides evidence that this reason for Caputo-Pearl's non-selection was pretextual.

Furthermore, Corley's initial testimony over his lack of familiarity with educational programs initiated by Caputo-Pearl at Crenshaw High School was at odds with Corley's later admissions that he had personal familiarity with those programs because he met with Caputo-Pearl and officials from the Ford Foundation and thoroughly discussed them. His testimony in this regard and attempt to bolster the comparative contributions of Mr. Brown with Caputo-Pearl's just did not ring true. I find this as further evidence that Corley's reasons for not selecting Caputo-Pearl were a pretext.

Based on the whole record, it appears that "but for" Caputo-Pearl's UTLA adherence and protected activities, he would have been selected for a teaching position in the Magnet schools. When weighing the evidence of the District's retaliatory motive in Caputo-Pearl's case against its stated reasons for failing to hire him, the evidence tips in favor of finding that an unlawful motivation was the true reason for the District's action. (*Baker Valley*, *supra*, PERB Decision No. 1993, p. 14.) Thus, the District has failed to meet its burden regarding Caputo-Pearl and the allegations in the complaint regarding him are sustained.

All other allegations in the complaint are hereby DISMISSED.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5(c) states:

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

It has been found that the District violated EERA by discriminatorily refusing to hire Caputo-Pearl as a teacher in the Magnet schools. It is therefore appropriate to order the District to cease and desist from retaliating against employees for their union activities. (*Baker Valley*, *supra*, PERB Decision No. 1993, p. 16.) Since Caputo-Pearl was considered as an applicant, but was not hired in the Magnet schools for discriminatory reasons, the appropriate remedy is to order the District to offer Caputo-Pearl the position he applied for in the Magnet schools or, if that position no longer exists, then to offer a substantially similar position. (*CSU*, *supra*, PERB Decision No. 1970-H, proposed dec., p. 28; *Stamford Taxi, Inc.* (2000) 332 NLRB 1372, 1375-1376.) It is also appropriate to order the District to pay Caputo-Pearl back pay for any loss of earnings that resulted as a result of his failure to be hired at the Magnet schools, augmented with interest at a rate of 7 percent per annum. (*CSU*, *supra*, PERB Decision No. 1970-H, proposed dec., p. 28; *Journey Charter School* (2009) PERB Decision No. 1945a, p. 2.)

Finally, it is appropriate to order the District to post a notice incorporating the terms of this order at all locations where notices to unit employees are usually posted. Posting of such a notice, signed by an authorized representative of the District, provides employees with notice that the District acted in an unlawful manner, must cease and desist from its illegal action, and

will comply with the order. In addition to physical posting of paper notices, the notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in the certificated bargaining unit. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 43-45.) It effectuates the purposes of PERB-enforced statutes to inform employees of the resolution of this controversy. (See *Omnitrans* (2010) PERB Decision No. 2143-M, proposed dec., p. 19.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5, subdivisions (a) and (b). The District violated EERA when it refused to hire Alex Caputo-Pearl as a teacher at Crenshaw Magnet High School for a discriminatory reason.

Pursuant to Government Code section 3541.5, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representative shall:

A. CEASE AND DESIST FROM:

1. Discriminating against certificated employees because of their union activities.

2. Failing to select Alex Caputo-Pearl for a teaching position at Crenshaw Magnet High School.

3. Interfering with the right of certificated employees to be represented by United Teachers Los Angeles.

4. Interfering with the right of United Teachers Los Angeles to represent its members.

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

1. Within ten (10) work days of the service of a final decision in this matter, offer Alex Caputo-Pearl the teaching position for which he applied at Crenshaw Magnet High School, or if such a position no longer exists, then a substantially similar position. If applicable and at the request of United Teachers Los Angeles, the effective start date of the position may coincide with the end of Mr. Caputo-Pearl's term as United Teachers Los Angeles president.

2. Within ten (10) workdays of a final decision in this matter, make whole Alex Caputo-Pearl for losses which he suffered as a result of the District's refusal to hire him at Crenshaw Magnet High School, including paying him back-pay augmented at an interest rate of 7 percent per annum, from the beginning of the 2013-2014 school year until the date of the offer of the new position, subject to any mitigation.

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

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 to the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on United Teachers Los Angeles.

Right to Appeal

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
E-FILE: PERBe-file.Appeals@perb.ca.gov

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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)