STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ISIS VILLAR AND LOS ANGELES CITY AND COUNTY SCHOOL EMPLOYEES UNION, LOCAL 99, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,	)	
Charging Party,	)	Case No. LA-CE-2243
v.	)	PERB Decision No. 659
LOS ANGELES UNIFIED SCHOOL DISTRICT,	)	March 16, 1988
Respondent.	)	

Appearances; Geffner, Goldstein & Paule by Jeffrey Paule for Isis Villar and Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO; O'Melveny & Myers by Virginia L. Hoyt for Los Angeles Unified School District.

Before Hesse, Chairperson; Craib and Shank, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by both parties, the Los Angeles Unified School District (District) and Isis Villar and Los Angeles City and County School Employees Union, Local 99, SEIU, AFL-CIO (Local 99), to the attached proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act)[1]

[1]The EERA is codified at Government Code section 3540, et seq. Unless otherwise specified, all statutory references are to the Government Code. Sections 3543.5(a) and (b), provide as follows:

by: (1) retaliating against Isis Villar for engaging in protected activity by giving her a "meets performance standards," rather than an "exceeds performance standards" rating on her annual performance evaluation and, (2) discouraging employees from contacting their union for assistance through implied threats of adverse action. At the conclusion of the hearing, Local 99 moved to amend the complaint to conform to proof, asserting that Villar was removed from her position as noontime aide director in retaliation for protected activity and that Betty Ross also received a reduced rating on her performance evaluation because of her protected activity. The ALJ refused to allow either amendment.[2]

We have reviewed the entire record, including the proposed decision, the parties' exceptions thereto and responses to the exceptions, and, except as noted below, we affirm the proposed decision and adopt it as the decision of the Board itself. Specifically, we reverse that portion of the proposed decision

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> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organization rights guaranteed to them by this chapter.

[2]The denial of the amendment regarding the evaluation of Betty Ross was not excepted to; consequently, it is not before us and we do not consider it here.

finding a violation based on Villar's performance evaluation rating.

DISCUSSION

Local 99's Exceptions

Local 99 contends that the ALJ erred by failing to grant its proposed amendment concerning Villar's removal as noontime aide director. This allegation was included in Local 99's original and amended unfair practice charges and was dismissed by the PERB regional attorney who reviewed the charge. Local 99 chose not to appeal the dismissal of this allegation to the Board. At the outset of hearing, Local 99 assured the ALJ that this allegation would not be pursued as an independent violation, but that the matter would be covered as background evidence relevant to the allegations contained in the complaint issued by the regional attorney.

Local 99 argues on appeal that the amendment should be granted irrespective of the failure to appeal its dismissal and the assurances that the matter would be pursued only to provide background evidence. Local 99 first points to the ALJ's statement that the matter appeared to be fully litigated. Next, Local 99 asserts that, while it had no basis to appeal the partial dismissal at the time it was issued, evidence provided at the hearing revealed for the first time facts curing the deficiencies of the unfair practice charge. This "newly-discovered evidence" concerned Coldwater Canyon Elementary School Principal Dr. Pamela Worden's "policy of

prohibiting employees from exercising their right to contact the Union for assistance in employment-related matters."

As noted by the ALJ and by both parties, a critical requirement for the consideration of Unalleged violations is that the matter be fully litigated. Santa Clara Unified School District (1979) PERB Decision No. 104; see also, Rivcom Corporation v. Agricultural Labor Relations Board (1983) 34 Cal.3d 743. At the outset, we disagree with Local 99's assertion that the ALJ concluded that the matter was fully litigated. Although the ALJ stated that it "appeared" that the matter was fully litigated and that a violation had been established, she went on to state (as the reason for denying the amendment) that the District may well have proceeded differently absent Local 99's specific denial that the issue would be pursued as an independent violation. Thus, the ALJ did not conclude that the matter had been fully litigated. We agree that the District may have been prejudiced by Local 99's specific denial that the matter would be the basis for an independent violation.[3] 3

[3]In addition, we find dubious Local 99's claim that evidence revealed at the hearing was not previously available. The evidence concerning Worden's alleged aversion to employees contacting their union came chiefly from the testimony of Charging Party Isis Villar and Local 99 Representative Sally Ramirez and was based on events occurring prior to the filing of the charge.

The District's Exceptions

The District contends that the evidence fails to support the ALJ's credibility determinations and that, as a whole, the record does not support the conclusion that Villar's evaluation was affected by her exercise of protected activity. The District also claims that, even if the evidence is sufficient to sustain a finding of a nexus between the protected activity and the evaluation, there is no evidence to support the conclusion that Villar would have been treated differently absent her protected activity. The District also takes issue with the ALJ's finding that the District interfered with Local 99's rights and with the ALJ's proposed order to the extent the order requires a notice posted at all schools in the District. Since the incident in question occurred at the Coldwater Canyon Elementary School, it is the District's opinion that the notices should be posted only at that school,

a. Villar's Performance Evaluation

Once a charging party has made a prima facie showing sufficient to support the inference that the exercise of rights granted by the EERA was a motivating factor in the action complained of, the respondent is then given the opportunity to show that its action would have been the same regardless of the exercise of protected rights. See Novato Unified School District (1982) PERB Decision No. 210. We find merit in the District's contention that the weight of the evidence demonstrates that (even assuming the presence of unlawful

motive) Villar's evaluation would have been the same in the absence of protected activity.

The crux of the adverse action complained of is that Villar received an evaluation for the 1984-1985 school year which gave her an overall "meets standards" rating as opposed to the "exceeds standards" rating she had received in prior years. However, the rating given Villar by Worden is the same as that recommended by Villar's classroom teacher, Burton Govenar. The recommendations that Worden received from Govenar gave Villar an "exceeds standards" rating in one category, "quality of work," and a "meets standards" rating in all others.[4] Worden's evaluation did not diverge from those recommendations. Further, of the twelve evaluations of aides for the 1984-1985 school year admitted into evidence, six contained an overall rating of "meets standards" and six contained an "exceeds standards" rating. Four of the six aides with overall "exceeds standards" ratings were given an "exceeds standards" rating in all categories by their classroom teachers. Of the six aides who received overall "meets

[4]The form onto which Governar's recommendations were typed prior to Worden's review differed from the form Govenar actually filled out in one respect. On Govenar's handwritten form, "quality" and "quantity" of work were combined in one category and he gave Villar an "exceeds standards" rating. The form this was transferred to separated "quality" and "quantity" into two separate categories. Apparently due to a clerical error, the combined rating was transferred as an "exceeds standards" for "quality of work" and a "meets standards" for "quantity of work." In any case, it was the typed form which was reviewed by Worden.

standards" ratings, all but Villar received more than one "exceeds standards" rating from their classroom teachers.

Given the evidence noted above, we are unable to conclude that, even if Worden harbored animus toward Villar, such animus affected Villar's evaluation. In order to find a violation we would have to conclude that Govenar and Worden acted in concert to discriminatorily rate Villar below the level she deserved. Contrary to the ALJ's speculation that Govenar's evaluation may have been tainted by the same non-job-related factors which influenced Worden, we find no evidence in the record to support an inference that Govenar was unlawfully motivated in providing his recommendations. Indeed, Govenar testified that Villar's performance had deteriorated somewhat from the previous year and there was no evidence presented concerning Govenar's knowledge of, views of or reactions to Villar's protected activities.

b. Worden's Comments

Citing testimony favoring its position, the District maintains that the evidence in the record does not support the conclusion that its agent, Pamela Worden, made statements that in any way interfered with Local 99's statutory organizational rights. While we affirm the finding that the District unlawfully discouraged (through implied threats) the bilingual education aides from seeking the assistance of Local 99, given the ALJ's sparse analysis; we find that some explication is required.

First, we must emphasize that credibility determinations play a vital role in the consideration of this allegation. While we are free to consider the entire record and draw our own conclusions from the evidence presented, we will afford deference to an ALJ's findings of fact which incorporate credibility determinations. Santa Clara Unified School District (1979) PERB Decision No. 104. This appears to us to be a classic instance where deference is appropriate. Here, Isis Villar and Betty Ross testified that Worden made comments at various meetings of the bilingual education aides which are alleged to constitute interference with statutory organizational rights. The District's witnesses, including Worden and Virginia Goddard, denied the accuracy of Villar's and Ross' testimony regarding the manner in which Worden's statements were made.

The record presents two dramatically different versions of Worden's demeanor at the time of her statements. The ALJ specifically credited the testimony of Villar, Ross and Local 99 Representative Sally Ramirez and discredited the version offered by the District's witnesses.[5] The transcript itself provides us little, if any, basis upon which to depart from this conclusion. Thus, we adopt the ALJ's credibility determinations based upon her observation of the witnesses'

[5]Contrary to the District's assertions, the ALJ did provide rationale for her credibility determinations, including her observations concerning the witnesses' demeanor.

demeanor and appearance.[6] We now examine the credited testimony to determine if an unfair practice was committed.

In an unfair practice case involving an allegation of interference, a violation will be found where the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify the actions by proving operational necessity.[7] Carlsbad Unified School District (1979) PERB Decision No. 89. See also, Novato Unified School District (1982) PERB Decision No. 210. Statements made by an employer are to be viewed in their overall context (i.e., in light of surrounding circumstances) to determine if they have a coercive meaning. Sacramento City Unified School District (1985) PERB Decision No. 492; John Swett Unified School District (1981) PERB Decision No. 188. See, also, NLRB v. Gissel Packing Co. (1969) 395 U.S. 575 [71 LRRM 2481]; NLRB v. American Tube Bending Co., Inc. (2d Cir. 1943) 134 F.2d 993.

Villar and Ross testified that on two occasions during meetings with the bilingual education aides Worden, while upset

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[6]The Board does note, however, that during the ALJ's examination of Worden her questions were, at times, unduly argumentative, conclusory and leading. While, on the whole, we do not find the ALJ's conduct improper, nevertheless, due to the need for decorum and strict adherence to neutrality, we do not approve of this manner of questioning.

[7]Although the ALJ analyzed the interference issue only as a violation of Local 99's rights under EERA section 3543.5(b), we find that it is more accurately analyzed as a violation of employee rights under section 3543.5(a) and, derivatively, a violation of section 3543.5(b) (see fn. 1).

and irritated, told the aides that she wanted them to come to her first with their problems before involving the union or others from the outside. Villar testified that on one occasion Worden was shaking her finger at the aides as she spoke. Similarly, Ross testified that, based upon Worden's voice intonations and general manner, Worden appeared angry.

Villar and Local 99 Representative Sally Ramirez also testified that, at a meeting they had with Worden, she angrily voiced her disapproval that Villar had not come to her first before seeking union assistance (Ramirez testified that, in fact, in that instance Villar had discussed the matter previously with Worden before seeking Local 99's assistance). Ramirez also stated that in a phone conversation Worden, sounding upset, emphatically reiterated her desire that employees come directly to her with problems because "she didn't like them to go outside of her jurisdiction." Villar also testified that Worden called her a "troublemaker" for bringing in the union. In crediting this testimony, the ALJ specifically found that Worden conveyed the message even if she did not use the exact word "troublemaker." While this was not spoken in the presence of the other aides, it nonetheless serves, along with the other comments attributed to Worden, to set the backdrop for evaluating what the aides could reasonably understand Worden's statements to mean.

Finally, it is important to note that the operative events in this case took place amid widespread concern and tension

among the education aides about job security. Education aides are covered by a collective bargaining agreement and are entitled to a wide range of fringe benefits, whether they are full-time or part-time employees. There is another classification, teacher assistant, that is not in the bargaining unit and does not enjoy the same benefits and protections. The duties and responsibilities of teacher assistants are very similar to those of education aides and the assistants are less expensive to employ. There was evidence that the District had been employing increasing numbers of teacher assistants and a decreasing number of education aides.

Worden's preference for hiring teacher assistants was well known to the aides. The aides were under the impression that Worden had the authority to eliminate the aide positions and replace the aides with teacher assistants. Although Worden told the aides at one point that their jobs were safe while she was the principal, she also mentioned that she might transfer to another school and that the aides might consider applying for an available six-hour teacher assistant position in order to guarantee continued employment.

Considering the circumstances described above, in conjunction with the credited testimony concerning the manner in which Worden's statements were made, we conclude that the statements would reasonably tend to discourage the aides from seeking the aid of Local 99 for fear of retaliatory action. On that basis, we affirm the ALJ's finding that the statements

violated EERA sections 3543.5(a) and, derivatively, section 3543.5(b).

We emphasize that there is nothing inherently unlawful in Worden's expressed policy that employees first come to her to try to resolve any complaints and problems they might have. Our conclusion is based solely on the manner in which she made the comments in light of surrounding circumstances. Here, we find that the educational aides could reasonably understand Worden's remarks as implied threats of adverse action if they first consulted their union.

c. Posting at All Schools

Lastly, the District objects to the ALJ's order requiring posting of a notice to employees at all school sites in the District. The District views the order as overbroad and suggests posting at Coldwater Canyon Elementary School only is more appropriate. We disagree. First, we note that the respondent in this case is the District, though the unlawful activity was carried out by its agent at one particular school. The purpose of a posting requirement is to inform all who would naturally be concerned (i.e., employees of the District, as well as management and supervisory personnel who carry out District policies) of activity found to be unlawful under the Act in order to provide guidance and prevent a reoccurrence. The furtherance of the central purpose of the EERA, harmonious labor relations, depends upon awareness of what the statute demands of all parties. In light of our

remedial authority under the EERA (see, particularly, sections 3541.3(i) and 3541.5(c)), we find that the purposes of that Act are best effectuated by district-wide posting in cases such as the instant one.

CONCLUSION

In sum, we reverse the finding of a violation with regard to Isis Villar's 1984-1985 performance evaluation rating and affirm the finding that certain statements made by Dr. Pamela Worden, an agent of the District, unlawfully carried implied threats of adverse action should the education aides persist in seeking the assistance of their employee organization, Local 99. In addition, we affirm the refusal to allow an amendment to add an allegation concerning Villar's removal as noontime aide director and affirm the propriety of district-wide posting of the order.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

Denying to employees and to the Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO, rights guaranteed by the Educational Employment Relations Act by discouraging employees, through the use of implied threats, from seeking assistance of their employee organization.

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

(1) Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to employees are customarily placed, 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 insure that the Notice is not reduced in size, altered, defaced or covered by any other material.

(2) Written notification of the actions taken to comply with this Order shall be made to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

Chairperson Hesse and Member Shank 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-2243, Isis Villar and the Los Angeles City and County School Employees Union, Local 99, Service Employees International Union (Local 99) v. Los Angeles Unified School District, in which all parties had the right to participate, it has been found that the District violated Government Code sections 3543.5(a) and (b) by interfering with its employees' rights to seek the assistance of their employee organization and with Local 99's right to represent employees.

As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

A. CEASE AND DESIST FROM:

1. Denying to employees and to Local 99 rights guaranteed by the Educational Employment Relations Act by discouraging employees, through the use of implied threats, from seeking the assistance of their employee organization.

Dated:

Los Angeles Unified School District

By_____
Authorized Representative

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 BY ANY MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ISIS VILLAR AND LOS ANGELES CITY AND COUNTY SCHOOL EMPLOYEES UNION, LOCAL 99, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-2243 PROPOSED DECISION **(12/31/86)**

Appearances: Geffner & Satzman by Jeffrey Paule, Attorney for Isis Villar and Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO; O'Melveny & Myers by Elaine M. Lustig and Virginia L. Hoyt, Attorneys for Los Angeles Unified School District.

Before Barbara E. Miller, Administrative Law Judge.

I. PROCEDURAL HISTORY

On September 18, 1985, Isis Villar and the Los Angeles City and County School Employees Union, Local 99, Service Employees International Union, AFL-CIO (hereinafter Charging Party, SEIU, Union or Villar) filed an Unfair Practice Charge with the Public Employment Relations Board (hereinafter PERB or Board). The Charge, which was amended on October 30, 1985, alleges that the Los Angeles Unified School District (hereinafter Respondent or District) retaliated against Villar for engaging in protected activity by reducing the rating on her annual performance evaluation and by removing her from her position as a noontime aide director.

The Charge was investigated by a staff attorney for the PERB and on November 25, 1985, a Complaint issued simultaneously with a Partial Dismissal. The Complaint alleged that the District had violated section 3543.5(a) and (b) of the Educational Employment Relations Act (hereinafter EERA or Act).[1] The General Counsel dismissed the allegation pertaining to Villar's removal as a noontime aide director finding the facts alleged in the Charge were insufficient to state a prima facie case. The Charging Party did not exercise its right to appeal the Partial Dismissal to the Board itself.

The Respondent filed its Answer on December 23, 1985, denying all the material allegations in the Charge/Complaint. Thereafter, on January 13, 1986, an informal conference was held. When the parties were unable to resolve their disputes, the matter was scheduled for formal hearing.

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[1]The EERA is codified at Government Code section 3540, et seq. Unless otherwise specified, all statutory references are to the Government Code. Section 3543.5(a) and (b), provide as follows:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

A pre-hearing conference was convened on February 20, 1986, and the formal hearing was conducted on February 27, March 17-18, April 3, and April 22, 1986. When the hearing concluded, the Charging Party indicated its intention to move to amend the Complaint to conform to proof, alleging that it had been established that Villar was indeed removed from her position as noontime aide director because of her protected activity and that Betty Ross, an education aide, had also received a reduced rating on her performance evaluation because of her protected activity. The question of whether to allow the amendment or to make a finding on the aforementioned issues was left to post-hearing briefs which were timely filed. The case was submitted for proposed decision on September 29, 1986.[2]

II. FINDINGS OF FACT

A. Overview

During the 1984-85 school year, Isis Villar and Betty Ross held positions in the classification of bilingual education aide at the District's Coldwater Canyon Elementary School. During that year, Virginia Goddard, a teacher, served as the school's bilingual coordinator and Dr. Pamela Worden was the newly appointed principal. Although it is not clear if all the changes which took place at the school during the 1984-85

[2]The briefing schedule in this matter was extremely protracted due to a substitution of attorneys after the close of the hearing.

school year were attributable to Worden, it is undisputed that changes took place.

Prior to Worden's employment, Coldwater Canyon only employed education aides to assist in the classroom. After Worden was hired, the school began to hire teacher's assistants in lieu of education aides and many aides were anxious throughout the school year about the potential elimination of their positions. Prior to Worden's employment, the classroom teacher and the bilingual coordinator were primarily responsible for the evaluation of the education aides and in that and other areas, after Worden's arrival, Goddard's responsibilities diminished considerably. Worden, took singular responsibility for the aide's performance evaluations.

Prior to Worden's arrival, aides, who usually worked only three hours per day, were allowed to flex their time in order to accommodate doctor's appointments or other compelling personal business. Not long after Worden arrived, aides were prohibited from flexing their time and Worden told the employees that Isis Villar was to blame for the more rigorous timekeeping procedures.[3] Similarly, aides were no longer allowed to take breaks and Worden suggested Villar and the Union were responsible. Prior to Dr. Worden's arrival, witnesses noted that the relationships between the education

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[3]The change was instituted after Villar, with the help of the Union, demanded payment for extra hours worked on the Jewish holidays.

aides were positive and the atmosphere was congenial. After Worden's arrival, tensions ran high.

B. Isis Villar and Her Protected Activity

Although the District admits that Villar engaged in protected activity, a description of Villar and that activity is necessary in order to trace the development of her relationship with Pamela Worden and this Unfair Practice Charge.

As noted above, Villar is a bilingual education aide. She has worked for the District and been assigned to Coldwater Canyon as a bilingual education aide since 1976. Since the 1982-83 school year, Villar has assisted a sixth-grade classroom teacher, Burton Govenar. Villar assumed the assignment in the sixth-grade classroom at the urging of the former principal, Charles Strole, who asked her to take the assignment because of her special abilities. Villar holds a Doctorate in Civil and Criminal Law and a Doctorate in Philosophy and Humanities obtained from the University of Havana in Cuba. She is fluent in English, Spanish, and other languages. Although District policy mandates that Villar should be working with Spanish-speaking students in reading and Spanish only, the uncontroverted testimony indicates that Villar is responsible for teaching Spanish-speaking students all subjects with the exception of English as a second language. Govenar does not speak Spanish.

In addition to her duties and responsibilities as a bilingual education aide, Villar was appointed by SEIU to serve

as the steward for the education aides at Coldwater Canyon. Although the record is unclear as to whether or not she received that appointment in October 1983 or October 1984, the record does reflect that the District was properly notified of her appointment as steward and she was introduced to Worden by Sally Ramirez, the SEIU representative responsible for Coldwater, as the shop steward.[4]

Villar was selected as Union steward as a result of her leadership abilities, because she got along with and was well-regarded by other employees in the unit, and because she was quite articulate. In addition to serving as steward, prior to the 1984-85 school year, Villar served as the on-site representative and spokesperson for the education aides. During the 1984-85 school year, Villar continued to serve as the representative and spokesperson for the teachers' assistants as well. At times relevant hereto, Villar was also the chairperson of the school's advisory committee.

Villar's first documented difficulty with Worden was in October 1984. Earlier in the school year, Virginia Goddard approached Villar and several other aides and asked them if they would work additional time for additional compensation on

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[4]Worden denied knowing that Villar was a steward. Ramirez' testimony is credited because, as will be discussed below, when Worden was told of Villar's stewardship, Worden was agitated, hostile, and upset. Accordingly, I have concluded that Worden's ability to recall the details of the meeting in question was impaired. Moreover, knowledge of Villar's stewardship is attributable to Worden.

the Jewish holidays when several teachers and at least one education aide would be absent from school. Based on the representation regarding additional compensation, Villar agreed to assume the assignment. Thereafter, however, she was not compensated and when she approached Goddard to discuss the matter, she was ultimately told that Worden was requiring that she take time off in lieu of compensation.[5] Villar decided to meet with Worden.

At that meeting, Worden told Villar it would be unlawful to pay her for the work she had performed since she only served in a three-hour position. Villar explained to Worden that aides were allowed to work up to 79 hours per pay period without becoming eligible for certain District benefits, and that, accordingly, she wanted to be paid. According to Villar, Worden was very hostile during this initial meeting. When asked to elaborate, Villar testified as follows:

> Well, she started like telling me that she was the principal and she always had the final say in matters concerning the school. That [in] telling her I had the right to work up to 79 hours, I was implying that she didn't know what she was doing.

Finding the matter could not be resolved with Worden directly, Villar contacted Sally Ramirez. Ramirez determined that, before filing a formal grievance, it would be appropriate to meet with Worden. The meeting commenced and Ramirez told

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[5]The District apparently wanted Villar to take a personal necessity day off. Since such days are charged against accumulated sick leave, Villar was not interested.

Worden why it was taking place. According to Ramirez, Worden reacted in the following manner:

> Her reaction was that she felt very upset with the fact that the aides would have gone outside of her jurisdiction to an outside person. She felt that in her school, any problem that arises should — everyone should come directly to her and not — and no need to go outside of her jurisdiction and she did not care for that at all. And she wanted me to know that right off.
>
> And for me to tell the employees this, that she had an open-door policy and that there was no need for them to go to the union.

Worden apparently expressed her displeasure with the presence of outsiders on more than one occasion during the course of that first meeting. Nevertheless, after a second meeting, the issue regarding compensation for the Jewish holiday was resolved to Villar's satisfaction and there was no need to file a formal grievance.

Not long thereafter, Villar believed she was being short-changed in some of her paychecks. She approached Goddard who told her to go to the office manager. The office manager denied responsibility for the shortage in Villar's paycheck and apparently stated any problems were attributable to Worden, who supervised the payroll. Accordingly, Villar again met with Worden.

Based on Villar's description, the meeting was not particularly satisfactory. Worden apparently indicated that an adjustment would be made, but it might take some time. Villar was insistent that an emergency adjustment could be made and

she did not want to wait for her money. Villar ended the meeting by indicating that she was going to contact the union. According to Villar, Worden was again upset.

Based on the testimony of several witnesses, and Worden herself, it is clear that Worden did not like being overstepped. She believed that all problems should be brought to her attention first so that she would be in a better position to resolve them. Although there is nothing inappropriate about that philosophy, given Worden's level of agitation, described by witnesses and displayed on the witness stand,[6] the undersigned has concluded that her displeasure was not merely philosophical. During one of these various meetings, Villar testified that Worden told her she was a troublemaker and that she was creating problems for Worden by bringing the Union into the school. Ramirez[1] recollection is somewhat but not materially different. She testified that Worden indicated Villar had a reputation for being a troublemaker. Worden denies calling Villar a troublemaker. Based on the comments of witnesses and Worden's own description of her reaction to the Union being brought in, it is concluded she conveyed the idea that Villar was a troublemaker whether or

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[6]Throughout her testimony, Worden, although poised, was abrupt and at times overly assertive. By her tone and physical demeanor she displayed hostility while being questioned or challenged by the undersigned and counsel for the Charging Party. As questioning progressed she became defensive and made several nonresponsive, gratuitous negative comments about people she apparently did not perceive as members of her team.

not she used that precise term.

As the school year progressed, Worden and Villar clashed on any number of issues. Villar and Worden spoke privately about the question of replacing education aides with teacher's assistants, a move favored by Worden and opposed by Villar. (See pages 14-22, infra.) In addition, Villar "overstepped" Worden when, after Worden removed Villar involuntarily from her position as noontime aide director, Villar responded by bringing in the Union, contacting members of community, and writing to the President of the School Board and the Superintendent. In response to these various activities, Worden was actively displeased with Villar.

C. The Noontime Aide Director's Assignment

Isis Villar held the non-bargaining unit position of noontime aide director from 1974 until March 27, 1985, when she was involuntarily removed from that assignment by Pamela Worden. Although the duties and responsibilities of a noontime aide director were never fully detailed by any of the witnesses, the job apparently entails the supervision of children in the lunch line, while they are eating lunch, and on the playground in between lunch and classes.

In the more than ten years she served as noontime aide director, there is no evidence that school administrators ever criticized Villar's job performance. Pamela Worden and Janie Taylor, the Assistant Principal who eventually assumed responsibility for supervision of noontime aides, testified

that they spoke with one another and expressed some displeasure over the fact that Villar did not move around the lunch area and playground area more while executing her noontime aide director responsibilities. On any given day they might have told Villar to move around but there is no dispute that they never called Villar in to speak with her about perceived deficiencies in her job performance. In other words, Worden may have said "Isis, don't you think you should move around" but she never said "Isis, you are not properly performing your job as noontime aide director."

In March 1985, the Vice-Principal suggested that Villar let the smaller students eat first. Accordingly, Villar had to hold back students in the upper grades and make sure discipline was maintained while they were waiting in line. Villar testified that on March 22, one particular line had been very rebellious, with students jumping, yelling and banging on the walls of the library. Accordingly, she made that particular line wait until the very end. One student, who was irritated with having to eat last, came out of the line, pushed Villar, and hit her on the shoulder with his fist. He then started shouting obscenities and tried to poke her eye with his finger. After Worden arrived on the scene, the student repeatedly indicated that he was going to punch Villar in the mouth.

This incident took place on a Friday. Villar worked her regular assignment the following Monday, Tuesday, and during

breakfast on Wednesday.[7] Thereafter, she was called to Worden's office and told that she was being temporarily suspended from her noontime duties because of Villar's expressed concern for her safety. Isis Villar never told Pamela Worden that she was concerned for her safety.[8]

Understandably, Villar complained about being removed from her position as a noontime aide director. She indicated that she had never had problems in her eleven years in the position, needed the money, and, if Worden was so concerned about her safety, why didn't she remove her from recess duty as well.

Worden testified that the suspension was only designed as a temporary until matters "cooled down."[9] The student,

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[7]Worden testified that she did not speak to Villar immediately because Villar was not at school on Monday. the attendance records for Villar's regular education aide assignment reflect that she was in attendance.

[8]Villar, had, however, sent a letter to John Greenwood, the President of the Board of Education on March 25, 1985. In that letter, Villar criticized Worden and suggested that if she, Villar, had not insisted upon the police being called, the student, who was suspended for one day, would not have been disciplined at all. Villar pointed out that Worden was, by her "extreme leniency," encouraging other students to engage in rebellious behavior. That letter is part of the official PERB file and notice was taken of that file. The letter was not, however, introduced into evidence.

[9]It is not clear whether Worden conducted any kind of investigation of the March 22 incident. She testified that she did talk to the student and unnamed others. According to Worden, the student claimed that Villar had been threatening him because of his behavior and he had pushed her away. Worden, who seemed to think that Villar, by her manner, incited students, appeared to believe that Villar was in the wrong even though the student was a habitual truant who had been

however, left the school within two weeks after the March 22 incident and Villar was never restored to her assignment. According to Villar, Worden suggested that if Villar initiated Union involvement, the temporary action would become permanent. Villar did contact the Union and a grievance was filed.

Worden denied that the filing of the grievance resulted in the suspension becoming permanent. She testified that she did not restore Villar because she was satisfied with the work of the replacement and saw no need to replace a satisfactory-employee with a merely adequate employee. Her testimony is not credited for the following reason. Worden indicated that she had asked Taylor if she could manage the lunch period without Villar, with a substitute. There is no evidence that a replacement was employed for that first week. Moreover, even if such a replacement had been employed, one week of service is hardly enough time to reach the conclusion that such an employee should continue to fill a position Villar held for approximately 11 years.

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previously suspended because of threats and altercations concerning other children.

Worden did not give her apparent belief that Villar was partially at fault as a reason for the suspension. Similarly, she never gave any indication that Villar was being removed because of dissatisfaction with her job performance; the only reason given was Villar's alleged fear for her safety. At the time of the suspension, however, Villar denied that she had any continuing concern in that regard.

D. Education Aides versus Teaching Assistants

For quite some time, the District had employed teacher assistants as well as education aides. The position of education aide is in the bargaining unit represented by SEIU. Education aides, even those who do not work full-time, are covered by a collective bargaining agreement and are entitled to a wide range of fringe benefits, including, but not limited to, vacation, sick leave, and holidays. Education aides are part of the merit system and have a vested right in their continued employment.

Although the duties and responsibilities of a teacher assistant were never made entirely clear, they apparently do not differ, in great measure, from the duties and responsibilities of an education aide. The position of teacher assistant, however, is not a bargaining unit position. Incumbents are not considered merit system employees, can be terminated at the will of the employer, and have no rights to any of the fringe benefits afforded by the District.

Since the creation of the position of teacher assistant, a pattern has developed whereby the District employs an increasing number of teacher assistants and a decreasing number of education aides. Although the reallocation of duties and responsibilities and the elimination or creation of positions is not the issue in the this unfair practice proceeding, employees' concerns about the potential elimination of their positions colored all the events discussed herein.

Education aides at Coldwater Canyon were acutely aware of the fact that their positions might be eliminated and that, as a practical matter, teacher assistants might be employed to replace them. Their concerns were heightened during the 1984-85 school year given the employment of Worden who favored, allegedly for budgetary reasons, the utilization of teacher assistants.[10] Throughout his long tenure, Charles Strole employed no teacher assistants while during her first year, Pamela Worden hired between 10 and 12.

Not long after Worden began hiring teacher assistants, education aides began expressing concern regarding the status of their positions. In the fall of 1984, Union representatives began visiting the school site and meeting with the employees. Newly hired teacher assistants complained that they were a captive audience during the Union meetings and tension began to develop between members of the hitherto homogeneous and harmonious paraprofessional staff. Several aides testified that Worden expressed her preference for teacher assistants and indicated that future hires would be within that classification. According to Villar, some education aides began to get "panicky," asking her, in her capacity as steward, whether or not they would soon be terminated.

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[10]Although teacher assistants were generally allowed to work more hours than education aides, because they had no benefits, their employment cost the District considerably less per hour.

Villar spoke to the Union and also contacted the bilingual education office in downtown District headquarters. After speaking to Manuel Ponce and Lupe Torre, Villar learned that the District had no intention of eliminating bilingual aides, but particular hiring patterns were left to the discretion of the school principal. Villar met with Worden, who reaffirmed her preference for teacher assistants because their employment facilitated budget management. Apparently no definitive information was provided with respect to the retention or elimination of education aide positions.

Sometime thereafter, at a regular meeting of Worden, the education aides and the teacher assistants, evidence of tension appeared, although it is not entirely clear if position allocation was the catalyst. At that meeting, on April 24, 1985, Worden announced that she had been approached by some teacher assistants and informed that education aides had been criticizing her. According to Villar, Worden indicated that such action meant that education aides were judging her and she did not like being judged. Moreover, she indicated that if the aides persisted in judging her, she would reciprocate and judge them. Worden indicated they ought to keep in mind that evaluation time was arriving and she had the final say in that process.

At that meeting, when asked what aides should do if they had any questions or doubts, apparently about the security of their positions, Worden indicated that the aides should come to

her. In that school, she noted, no one had any authority whatsoever except for her. She was in command. Nothing further was said at that meeting with respect to replacing the education aides.[11]

The next meeting where the question of education aides and teacher assistants arose was called by Virginia Goddard, on a day when Worden was not at the school site. Goddard had learned that some education aides were having a meeting at Villar's home and, for reasons she could never articulate, the notion of such a meeting was of sufficient concern to Goddard that she immediately called a meeting of the aides during regular working hours.

Witnesses' recollections regarding the May 17 meeting differ but, again, Villar's general recollection is credited.[12] According to Villar, balancing the school budget

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[11] Villar's testimony regarding the meeting on April 24, 1985, is credited. Villar's recollection of specific details was usually quite good. Moreover, Worden did not deny making the statements and Irene Moder, an education aide who has recently had her differences with Villar, seemed to recall some of the statements Villar attributed to Worden, although Moder could not specifically recall the context in which the statements were made.

[12] Villar's testimony is supported by Betty Ross and inferentially by Irene Moder. Moreover, Villar took notes at the meeting and those notes were signed by three other aides. To the extent the testimony of Goddard and Moder differs from Villar's, it is not credited. Goddard was very nervous while testifying and repreatedly demonstrated that it would be inappropriate to do or say anything which could be perceived as challenging her superior, Worden. Moder too presented herself as a principal-pleaser who wanted a return to the days of harmony before Isis Villar started writing letters and bringing in the Union, and creating disharmony.

had been a matter of general concern. Since teacher assistants could be employed at a reduced cost, aides reasonably felt their jobs were in jeopardy.

At the meeting, Goddard assured the aides that she was on their side and fought a "hard battle" with Worden in order to retain their services. Although she had been on the brink of resigning from her assignment as bilingual coordinator, for the time being, their positions were safe. According to Villar, Goodard told the employees not to rock the boat. According to Moder, she was the one who said words to the effect "so you're telling us not to rock the boat." Whoever made the comment, the tenor of the meeting was clear. Goddard went on to say that if Worden got irritated, she might eliminate all the bilingual aides. Worden was described as intelligent, powerful, and influential. Aides were told that Coldwater Canyon was Worden's school and she could do whatever she wanted. Although employees could contact the union, write letters, or talk to anyone they wished, it would not do them any good because the school board was always going to side with the principal of the school.

Betty Ross described the meeting as follows:

> Now, at the meeting, Virginia Goddard said that we should stop rocking the boat because she — Dr. Worden has the right of terminating all of the educational aide' positions. And Virginia Goddard assured us that she has been doing everything in her power to have Dr. Worden accept the fact that we are very good aides and we have been working for the school for a long time, and that we should remain.

> But Virginia assured us that if we kept on continually rocking the boat, Dr. Worden has ways of eliminating the position.

After the meeting, many of the aides were quite agitated. Ross, who had transferred to Coldwater Canyon from Hazeltine Avenue Elementary when her education aide position had been eliminated, was particularly concerned. Ross recalled that Lorraine Jobes, a representative of the District office, had suggested that aides call her if they ever had any questions about their positions. Accordingly, Ross called downtown in an attempt to alleviate her concern.

When Worden returned to the school site the following week, she received word of the call to the District office and word of the meeting called by Virginia Goddard. Worden was quite displeased. Based on her own testimony, she explicitly and implicitly indicated her anger with Goddard for calling the meeting and her irritation at being confronted by representatives from the District at a time when she had insufficient knowledge to respond.

In order to set the record straight, Worden called a meeting on May 22, 1985, in her office. In a meeting everyone described as stormy, she indicated to the aides assembled that although she would prefer employing teacher assistants, as long as the aides wished to retain their education aide positions, they were safe, provided she was principal. She further indicated, however, that she might be transferring to a

position at Palos Verde and she could make no guarantee whether a successor principal would eliminate the education aide positions. Worden went on to point out that there was a six-hour teacher assistant position available and it might be wise for an education aide to apply for such a position, thereby guaranteeing continued employment. Finally, Worden indicated to the group her displeasure with the fact that someone had gone outside the school and called downtown expressing concern about the continued retention of education aides. Ross, who concluded Worden was blaming Villar for the phone call, volunteered the information that she was the one who had called downtown. After the meeting, Worden and Ross met to discuss the matter further.

Ross explained that she thought there was nothing inappropriate in calling downtown. She recalled Worden's response as follows:

> She said to me that she is always available at the school. I said you weren't here. I should have asked the office personnel and they should have contacted her and she would call me back. But I should never call anyone outside of her. In other words, I have to go through the channels of going to her directly.

According to Ross, Worden was visibly upset during this meeting. Although she ordinarily uses her hands a great deal, on this occasion her movements were less fluid. She was going through papers and you could tell that she was not at ease with

the situation. Ross also testified that the tempo of Worden's speech was noticeably changed.[13]

Worden and Ross had one additional meeting regarding the retention of education aide positions. According to Worden, she had been gardening over Memorial Day weekend and while gardening she does her best thinking. As Worden explained it, she was questioning Ross' level of concern about the potential elimination of her position and trying to ascertain the cause of Ross' concern. Worden understood that Ross' position had been eliminated at Hazeltine Elementary and concluded that the only reason for eliminating the position was the school's desire to get rid of Ross. Accordingly, Worden decided to meet with Ross to force Ross to recognize that she had not been wanted in the previous school and perhaps get her to see she might be repeating the pattern at Coldwater.

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[13]During the May 22 meeting between Worden and Ross, there was also a discussion about a policy, instituted by Worden, of prohibiting education aides from using compensatory time or flextime while teacher assistants were allowed some flexibility in scheduling. Ross asked why the new policy had been instituted and Worden responded as follows:

> She said that we were not — she was not able to accommodate us in this respect thanks to your friend Isis since Isis had gone ahead and brought the union into the picture, and since now that Sally Ramirez had come in, we could no longer take comp time because that was not according to the books and we had to go follow the books and rules because the union was on our backs.

At the meeting, Worden repeatedly asked Ross if she had made enemies at her previous school, if she had offended the principal, if she had been overly active in the union, etc. In front of Janie Taylor, Worden explained to Ross that she was obviously transferred because they wanted to get rid of her because the principal would never have "closed out" a position occupied by a valued employee.

Worden justified her conversation with Ross by stating that she was trying to get Ross to be introspective and perhaps get in touch with some traits that offended people and led to her premature removal from Hazeltine. In that way, Worden claimed, Ross might be able to avoid making the same mistakes and suffering the same fate at Coldwater. Whether Worden's statements were gratuitously malicious or motivated by her anti-union disposition, she was clearly suggesting that if Ross had been removed from one school because she made waves, she could easily be removed from another.

E. Villar's and Ross' Performance Evaluations

Background

There is no dispute that the process for the evaluation of education aides at Coldwater Canyon Elementary changed when Pamela Worden became principal. Prior to Worden's tenure, the principal essentially left the evaluation of aides to their immediate supervisor, the classroom teacher. Although the classroom teacher had unfettered discretion with respect to determining what the evaluation would say, the evaluation

itself was ordinarily signed by Principal Strole and Virginia Goddard.

In years past, teachers, with the principal's endorsement, had been quite positive in their evaluation of aides. For the 1982-83 and 1983-84 school years, all those aides for whom evaluations were admitted into evidence were rated as "exceeds work performance standards" in most categories. All received "exceeds" in the overall work performance evaluation. In the category of "work habits" Villar consistently received a rating of "meets work performance standards" but her overall rating was "exceeds." No comments were included on any of the rating sheets and there was no evidence as to whether or not training was provided to teachers or as to whether Strole articulated the standards he wanted teachers to utilize with respect to the evaluation of aides.

Early in the 1984-85 school year, based upon information Worden received during weekly or monthly staff training sessions, she concluded Goddard should not sign the evaluations. The District apparently believed that it was inappropriate to officially have a member of the rank-and-file certificated unit act in a supervisory capacity vis-a-vis a rank-and-file member of the classified unit. Although nothing in the EERA would preclude a certificated employee from acting in such a capacity, that was the District's position. No District policy, however, prevented classroom teachers from acting in precisely the same capacity as they had before Worden

arrived at the school. That is, teachers could still effectively recommend the content of the evaluation form. The only action precluded by District policy was Goddard's signature on the evaluation. Notwithstanding the latitude afforded by the District's policy, Worden wanted to have a greater say and more control over the evaluations.

Worden told Goddard early in the school year that Goddard would no longer take an active role in the evaluation process; that is, she would no longer sign the forms. Goddard did not seem pleased with the change which she viewed as an incursion into her authority. Worden also told the aides themselves of her increased role in the evaluation process and it is assumed she also communicated this information to the classroom teachers.

When it came time to evaluate the aides, Worden claims she had no conversations with the teachers, no conversations with Goddard, and did nothing to set the process in motion. Nevertheless, Goddard circulated copies of the evaluation forms to all the teachers, the forms were, apparently without direction, returned to either Goddard or Worden, and then Goddard and a support staff employee transferred the teachers' comments onto a typed final evaluation form. Goddard then presented the typed forms to Worden for her signature and Worden declined to sign until she had an opportunity to review the evaluations.

Worden's Approach to the Evaluation Process

In order to fulfill her duties and responsibilities as principal and in order to gain information necessary for the evaluation process, Worden claims that she visited classrooms several times a week during her early tenure at Coldwater. She testified that during those visits she had an opportunity to observe the aides at work. Although the questioning of Worden was not particularly precise on this issue, it appears to the undersigned that Worden made a point of visiting classrooms in order to get to know the faculty, the students, and the aides. She did not, however, time her visits to correspond to the brief period during the day when the education aide might be in the room. Accordingly, I conclude that her ability to evaluate the aides was not based on the extensive exposure she claims. On the other hand, I conclude that Villar's testimony that Worden was only in her classroom once is also suspect and the truth is probably somewhere in between.

Worden claimed that she usually spoke with the faculty and shared information when she returned from staff meetings at District offices. She also indicated that she spoke with Rodie Greenberg, the campus leader of the faculty association, on a daily basis. Nevertheless, she also claims that she did not speak with the faculty in general or with Burt Govenar in particular about the evaluation of education aides. Worden was not asked, and accordingly did not deny, whether she spoke to the faculty or the aides about the expectations she had for the

job performance of aides.[14] She readily admits that she did not talk with either Betty Ross or Isis Villar about their job performance, or perceived deficiencies, any time during the school year.

Worden did not have any written standards for the evaluation of education aides. She did, however, claim to have standards. Most of them were subjective. Worden was quite interested in the attitude of the aide when working with children. She wanted them to radiate warmth and have positive intonations in their speech. If children asked about the aide when she was sick or ran to meet her and hug her during recess, Worden considered those things positive reflections on the aides' effectiveness.

In order to merit a rating of "meets job performance standards," Worden wanted the aide to have a thorough knowledge of all materials, have a good understanding of children's performance and ability, and be dependable. In order to rate an "exceeds" the aide had to be able to work at all grade levels, have a special relationship with other members of the staff, and a special attitude. Worden's model aide would work late and come in early. That aide would have a good relationship with office staff and would be willing to pick up

[14]Worden's testimony that she did not talk to Govenar about Villar's evaluation is not credited. Worden admitted that when she talked to Villar about her evaluation she deliberately avoided reference to Govenar's comments because he asked not to be involved in any controversy.

a ringing telephone even when it was not her job to do so. The model aide would be willing to do out-of-class work, would have a greeting for all, and would remember birthdays.

On the District evaluation form, education aides were rated in the following categories: 1. quality of work; 2. quantity of work; 3. work habits; 4. relationships with others; 5. additional job-related factors; and 6. overall work performance. Worden stated that her primary concern in the evaluation of the aides was their relationship with others. She noted that the aide must work with adults and with an emotionally immature commodity, children. For the evaluation, it appeared that their relationship with adults outside the classroom was of paramount concern. Next, she thought dependability and work habits were the most important. Of great concern in that category was attendance.

Worden admitted that she did not have fixed standards for ranking aides in these categories. For example, Gloria Piangerelli was frequently absent. She was not marked down in work habits and in fact was rated as "exceeds" because she suffered from a chronic heart condition and Worden thought it admirable that she worked at all. Betty Ross, on the other hand, was absent a number of days during the year, primarily because she had two extended bouts of the flu. Although the teacher for whom Ross worked thought her work habits exceeded job performance standards and specifically commented that Ross

worked even when she was ill, Worden downgraded Ross in that category.[15]

In other instances, Worden would give an aide the highest ranking in the two categories she considered most important and yet not give them an overall "exceeds." She always had some justification for deviating from her alleged standards. For example, one aide had received "exceeds" in all categories from the teacher. Although Worden kept the high marks for work habits and relations with others, she marked the aide down in all other categories. Although that type of rating would ordinarily still rate an "exceeds", Worden testified that in this instance, the aide was not sufficiently proficient in English. Another aide received only "meets" in every category but relationships with others and ended up with an "exceeds" evaluation, while another received an "exceeds" only in the category of work habits and ended up with an overall rating of "exceeds".

In summary, Worden appeared to look at each aide individually and used standards which seemed appropriate for that aide. If she personally liked the aide, the aide fared

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[15]If Worden had taken the time to look at Ross' record with the District she would have recognized that Ross' absences for illness in the 1984-85 school year were unusual. She then could have ascertained whether they were attributable to an extraordinary situation which warranted the special treatment afforded Piangerelli.

well in the evaluation process. If she and the aide had their differences, there is no evidence that Worden tried to look beyond her personal reactions and evaluate the aide objectively. For example, Worden did not think that Ross worked with other aides or went out of her way for others. When Ross pointed out that she had done the inventory of aide materials and had undertaken the training of several aides, Worden did nothing to find out whether her own assessment had been incorrect.

Another example concerned whether or not Ross had given a test to a student in a timely manner. Worden concluded she had not and considered the matter of such importance that she used it to justify marking Ross down in one category. When Ross suggested that Worden's information was incorrect, Worden did nothing to verify it.

Perhaps equally telling is the fact that Worden denies any effort to meet with the teachers who worked with the aides on a daily basis. She undercut their recommendations without making any attempt to ascertain what standards they used. Worden claims she discussed the evaluations at length with Goddard but Goddard testified that only the best aide, Lucy Fajardo, was discussed. In this regard, I credit Goddard[1]s testimony. Based upon all descriptions of the way Worden conducted herself in meetings it is concluded that if she did mention other aides to Goddard, it was to tell her, not discuss with her, how they were being rated.

In other words, it is concluded that the evaluation process was not fair. That does not, however, answer the question of whether the evaluations of Ross and Villar were retaliatory. A closer look at their evaluations and the process is necessary to answer that question.

Villar's Evaluation

Prior to Worden's arrival at Coldwater, Villar had regularly received an overall rating of "exceeds." Worden's overall rating of Villar was that she met job performance standards. Although Worden modified many of the evaluations prepared by Goddard based on teacher input, she did not make any changes in the evaluation for Villar.

Govenar testified that he believed that Villar's performance was not as outstanding as it had been in previous years and he had marked down her overall rating because her work habits had deteriorated. He thought she was absent more often and that she caused difficulties because she did not make timely reports as to whether she would be in on a particular day. Govenar also marked Villar down in the category of relationships with others. He testified that people had expressed concerns to him about Villar's attitude out of class and her performance as a playground supervisor. He was also told that Villar was taking breaks when she wasn't supposed to and he had heard disparaging rumors about letters and

lawsuits.[16] In terms of the mechanics of her classroom performance, he continued to rate her as "exceeds."

On the official form prepared by Goddard and her assistant, Villar was marked as "exceeds" only in quality of work. Govenar had marked her as "exceeds" in quality and quantity of work when it was combined as one category on the form he had been given. When his comments were transferred to the final form, she was inexplicably marked down in the category of quantity of work. Worden, however, stated that she would have marked her down anyway.

Worden tried to explain the basis for her rating of Villar in the category of quantity of work. Worden indicated that she did not believe that students exited from Villar's program quickly enough and that must have been a result of Villar*s not preparing enough alternative ways for them to grasp concepts necessary before they could be main streamed into English speaking classes. Worden's explanation did not ring true. It sounded as if she were reaching for a justification rather than

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[16]Although the contract between the Union and the District did not provide break time for aides, aides traditionally were afforded such a benefit at Coldwater. After Villar complained about other contract infractions, however, the District decided to eliminate break time. Moder specifically admitted blaming Villar for the less favorable working conditions. From the way the information was communicated to Govenar, he apparently concluded that Villar was taking unauthorized breaks. There is absolutely nothing in the record to support that belief.

simply admitting that a mistake had been made. Her entire explanation of the rating in the category of quantity of work sounded like an appropriate articulation of a basis for evaluating the teacher, not the bilingual aide. Villar received a "meets" in the category of work habits because of her absences. She also got a "meets" in relationships with others, apparently because Worden did not see her as outgoing.

There were no explanatory comments on Villar's evaluation. Worden indicated that she preferred making comments on evaluations because it made them more personal and she thought words were more communicative than categorical ratings. Worden refrained from saying anything on Villar's evaluation, however, because she didn't want to make any comments that might be misconstrued. Worden testified there had been so many phone calls and letters about Villar coming across her desk during the school year that she didn't want to open any new subjects for disagreement.

Ross' Evaluation

In her 1982-83 and 1983-84 evaluations, Betty Ross was ranked as "exceeds work performance standards" in all categories. In 1984-85, her teacher gave her those same ratings but they were dramatically changed by Pamela Worden, who marked Ross down in work habits, relationships with others, and her overall rating. As previously noted, in work habits, the teacher had written "Always tried to be here, even if ill. Very dependable." Worden, claiming that Ross' supervising teacher had never worked with an aide and did not know how to

evaluate, marked Ross down and wrote in "attendance average." In the category relationship with others, the teacher had written "good relationship with students and with teacher." Worden marked Ross down in that category and wrote down "Needs to work on positive relationships with other staff members."

This last comment requires some background information. Ross and other aides had been at odds with Rodie Greenberg the previous school year regarding some comments allegedly made by Greenberg. Fences had been mended between Greenberg and the Spanish-surnamed aides, but not between Greenberg and Ross. Ross testified that her attempts to be friendly had been spurned by Greenberg. Even when they saw each other at a wedding and Ross said hello, Greenberg acknowledged Ross' husband only. Worden, however, seemed to hold Ross singly responsible for any rift. Worden admitted that Greenberg spoke to her almost daily and that Greenberg frequently made disparaging remarks about Ross. Worden further admitted that she never tried to talk to Greenberg about Ross and she never directly discouraged her from bad-mouthing Ross. Yet, in evaluating Ross, Worden admitted that she held it against her that fences had not been mended with Greenberg. Worden suggested that, since Greenberg was a powerful influence at the school, it was incumbent upon Ross to make amends. Worden tried to describe other ways in which Ross' relationships with others left something to be desired but she could not come up with anything specific.

III. ISSUES

A. Did the Respondent violate Government Code section 3543.5(a) when it rated Isis Villar's work performance during the 1984-85 school year as "meets work performance standards"? Did it also violate section 3543.5(b)?

B. To what extent, if any, can matters outside the scope of the unfair practice complaint pertaining to the performance evaluation of Betty Ross be considered in this unfair practice proceeding?

C. To what extent, if any, can matters outside the scope of the unfair practice complaint, which were dismissed by the regional attorney but not appealed to the Board itself, pertaining to the removal of Isis Villar as a noontime aide director, be considered in this unfair practice proceeding?

IV. CONCLUSIONS OF LAW

A. Isis Villar's Performance Evaluation

It is alleged that the District violated section 3543.5(a) by discriminating and retaliating against Villar because she engaged in protected activity. The retaliation addressed in the unfair practice complaint pertains to the overall performance rating on Villar's 1984-85 job performance evaluation. In order to prevail in this action, Villar and the Union must establish that she engaged in protected activity as defined under the Act, that the employer knew of such activity, and that such activity was a motivating factor in the issuance of the performance evaluation. Novato Unified School District (1982) PERB decision No. 210. In Novato, the Board noted that

"unlawful motive is the specific nexus required in the establishment of a prima facie case." The Board noted further, that direct proof of unlawful motivation is rarely possible. Accordingly, unlawful motivation may be established by circumstantial evidence and inferred from the record as a whole.

In the instant case, the Charging Party has no difficulty establishing the first two prongs of the Novato test as the District admitted Villar engaged in protected activity and its knowledge of such activity is not disputed. As set forth at length above, Villar was the union steward, the leader of the paraprofessionals at Coldwater Canyon, had numerous discussions with Worden regarding the status of education aides versus teacher assistants, was the spokesperson for aides regarding pay for the Jewish holidays and was perceived by Worden as a troublemaker who was frequently overstepping the principal and going to outsiders such as the Union and the Board of Education.

In terms of unlawful motivation, knowledge of protected activity as well as other factors may support the inference of such motivation. Other factors include the timing of the employer's conduct in relation to the employee's protected activity, the employer's disparate treatment of the employee, the employer's departure from established procedures and standards, the employer's inconsistent or contradictory justifications for its action, failure to offer justification to the aggrieved employee at the time the adverse action was

taken, or the proffering of exaggerated or vague and ambiguous reasons for the action. Novato, supra; North Sacramento School District (1982) PERB Decision No, 264.

In the instant case, knowledge of Villar's extensive protected activity was on Worden's mind while she was filling out the evaluation form. In explaining why she put no comments on Villar's evaluation, Worden made the following comments:

> [B]y the time that this evaluation was written, there had been many things that I had seen cross my desk, coming from Mrs. Villar — . . . through regional people, through district people, through phone calls, through all kinds of things . . . I thought rather than have anything misunderstood, I felt it better — . . . I felt it best not to say anything . . .

The matters which came across Worden's desk concerning Villar, which are part of the record, are complaints about non-payment for the Jewish holidays and being shortchanged in paychecks. Both those complaints involve Union representation. Other matters involving Villar pertained to the dispute over the employment of teacher assistants and visits by the Union to the school. In addition, Worden received copies of the letters to the President of the Board of Education and regional administrators concerning aide safety and Villar's position as noontime aide director. Finally, there was further Union involvement over Villar's removal from the noontime aide director's position, which was followed by her filing of a grievance.

There is no contention by the District that any of the above-mentioned activities were not protected. Although Worden testified that she recognized the right of employees to communicate with outsiders with respect to their grievances, she openly admitted being displeased with such behavior when it preceded attempts to resolve differences by dealing directly with her. It is concluded that Worden was not pleased when her employees called outsiders or administrators, regardless of when they were called, because she expressed displeasure when Villar called Sally Ramirez even though Villar had gone to Worden first. Since Villar's activity was protected, and since Worden admits that she found such protected activity disagreeable, an inference of unlawful motivation is established.

An inference of unlawful motivation is raised by other facts as well. For example, there is evidence of disparate treatment in that Isis Villar was the only education aide in the 1984-85 school year who had no comments on her evaluation. Moreover, the standards articulated for the evaluations of aides were vague or ambiguous and, generally, were not consistently applied.

Once the Charging Party establishes a prima facie showing adequate to support the inference that the exercise of rights guaranteed by the EERA was a motivating factor in the adverse personnel action, the burden shifts to the District to prove that its action would have been the same despite the protected activity. Novato, supra. In the District's defense, the

evidence strongly suggests that the standards used by Worden were different from those employed by Strole, and employees could not automatically expect a rating of "exceeds job performance standards." In addition, there is some support for the District's position that Villar's job performance in the 1984-85 school year was not as exemplary as it was in previous years, because Govenar, who had rated her the previous two years, gave her a lower rating in 1984-85. Nevertheless, Worden made it clear that her evaluation was completely independent of Govenar's. Moreover, the undersigned is not convinced Govenar's evaluation was not tainted by the same non job-related factors which influenced Worden.

In the last analysis, it cannot be concluded that the District established that Villar would have received the same evaluation even had she not engaged in protected activity. Worden's standards were too illusory for her to convince the undersigned either that Villars activism did not impact upon her evaluation or that job-related considerations led to her evaluation. Although there might have been permissible subjective factors which led to Villar's evaluation, the District did not meet is burden in establishing them. Accordingly, it is found that the District retaliated against Villar when it issued her 1984-85 performance evaluation.

Since Villar's protected activity involved seeking Union representation and filing a grievance, the District's action

also violated section 3543.5(b). By her verbal admonitions and her actions, Worden repeatedly discouraged employees from seeking Union representation and interfered with the Union's ability to carry out its statutory right and responsibility to represent employees.

B. Betty Ross' Evaluation

1. The Rules for Unalleged Violations

The PERB has long held that, under limited circumstances, allegations regarding violations not set forth in the Charge/Complaint may be considered in the disposition of an unfair practice proceeding. In Santa Clara Unified School District (1979) PERB Decision No. 104, the Board held that an Unalleged violation may be reached if: (1) it is intimately related to the subject matter of the complaint; (2) the facts are part of the same course of conduct; and (3) the Unalleged violation is fully litigated and the parties have had the opportunity to examine and cross-examine the witnesses on the issue.

In Santa Clara the charged violation was a discriminatory refusal to hire. The uncharged violation concerned remarks made during the conversation when employment was denied. In San Ramon Valley Unified School District (1982) PERB Decision No. 230, the Board reversed an administrative law judge's finding of a violation based upon Unalleged coercive statements. The alleged statements were introduced as evidence of illegal motive for the alleged violations, but there was no

indication at the hearing that the Charging Party was seeking a separate finding of an unfair practice based upon those statements. In fact the respondent in that case objected to the statements except as evidence of unlawful motive. The Board concluded that finding an unfair practice on that basis denied the District "its right to be fully informed of charges brought against it and to have a full and fair opportunity to defend such charges." (Id. at 10.) In Belridge School District (1980) PERB Decision No. 157, however, the Board did make a finding with respect to an Unalleged violation where the record showed the matter was fully litigated.

In the final analysis, a review of all the cases indicates that the primary issue in determining whether it is appropriate to make findings on an Unalleged violation is whether to do so would be fair.

2. The Application of Santa Clara to the Instant Case

Somewhat early in the formal hearing of this matter, the the parties were advised that the undersigned was interested in the evaluation of Betty Ross and had questions regarding the circumstances under which it was issued. Thus, the Respondent was on notice that an independent inquiry was being made. Also, the factors relevant to determining whether or not there was an inference of unlawful motivation necessarily required comparing Villar's evaluation and the process that led to issuance of the evaluations of other similarly-situated employees.

For the foregoing reasons, allegations pertaining to Ross' evaluation were fully litigated and each side had an opportunity to examine and cross-examine witnesses on the issue. Moreover, prior to the close of the hearing, Respondent was advised of the Charging Party's intention to move for an amendment to the Complaint. At such time, the Respondent was not precluded from calling additional witnesses on the question of Ross' evaluation and it elected not to do so.

Although the matter was fully litigated, it is still concluded that the Union should not be allowed to prevail. Ross protested her evaluation in June 1985, claiming it was issued in retaliation for protected activity. No satisfactory explanation has been given as to why she was not part of the original Unfair Practice Charge. Although what happened to Ross stems from the same factors that led to the discrimination against Villar, allowing an amendment to include Ross would do a disservice to the statute of limitation provisions of the Act. Regents of the University of California (UCLA). (1983) PERB Decision No. 267. Thus, notwithstanding the proof, the amendment will not be allowed.

C. The Position of Noontime Aide Director

The question of whether or not PERB should entertain an allegation pertaining to Villar's removal from the position of noontime aide director is complex and not easily resolved. The matter was raised in the original Unfair Practice Charge filed on September 18, 1985. The issue was elaborated upon in the

First Amended Unfair Practice Charge filed on October 30, 1985. By letter dated November 25, 1985, the board agent charged with responsibility for investigating the Unfair Practice Charge dismissed the allegations pertaining to the noontime aide director position and advised the Charging Party of its right to appeal the refusal to issue a complaint. The allegations pertaining to the noontime aide director position were dismissed because the Charge failed to specify the protected activity engaged in by Villar prior to her removal. The Charging Party elected not to appeal the partial dismissal.

On the first day of the formal hearing in this matter, counsel for the Charging Party was asked if the matter regarding Villar's removal from the noontime aide director position was going to be pursued as an independent violation. The discussion which took place on that matter is set forth, in relevant part, below.

> ALJ: Mr. Paule, you are not going to attempt to argue at some point in time that you have established an Unalleged violation with respect to the removal from the noon aide position, are you?
>
> MR. PAULE: Your honor, our position is that there were a number of incidents that took place that led to culmination of having the performance evaluation changed. The Regional Attorney has already ruled that as far as the removal from the Noon Aide Director position as being a separate and independent charge, the Regional Attorney has already ruled that it cannot be. However, it is our position that it is perfectly appropriate to still present evidence with respect to that to show a background to the eventual incident that

> occurred with respect to the performance evaluation.
>
> ALJ: Okay. I mean, this is — perhaps I should not discuss my own quandary in this matter. It is clear to me that if the regional attorney dismisses a charge and that dismissal is appealed to the Board, that I have no jurisdiction to reinvoke it. It is not entirely clear to me whether or not I could reinvoke the charge or make a finding on an Unalleged violation when that matter is not pending before the Board and therefore, I am not robbed of jurisdiction, and that's why I wanted to get you to answer directly rather than circuitously my question as to whether or not you intended to attempt to establish an Unalleged violation.
>
> MR. PAULE: Not as an independent allegation.
>
> ALJ: Okay.
>
> MR. PAULE: We are presenting evidence with respect to the removal as well as other incidents that go to background to add flavor, if you will, and to further support the eventual action that was taken with respect to the performance evaluation.

Notwithstanding the discussion set forth above, by the time the hearing concluded, the Charging Party was urging the undersigned to make a finding with respect to whether or not Villar's removal from the position of noontime aide director was in retaliation for her protected activity. Indeed, throughout the hearing, both sides submitted a substantial amount of evidence with respect to Villar's removal from the position. As set forth in some detail above, the evidence went far beyond what would have been necessary in order to provide background material or to establish the context in which the

evaluation was issued.

It appears to the undersigned that the matter was fully litigated and the Charging Party established that VILLAR was removed from her position as noontime aide director because of her protected activity. Nevertheless, it may be the Respondent would have proceeded differently if the Charging Party had clearly indicated its intention to move forward independently. Given the Charging Party's specific denial that the noontime aide director's position was an issue, the Unalleged charge should not be allowed.[16]

V. REMEDY

The District has been found to have violated section 3543.5(a) and 3543.5(b) of the EERA by discriminating against Isis Villar because of the exercise of rights guaranteed to her by the EERA. In retaliating against Villar, the District also denied and interfered with the rights of SEIU protected by the Act.

In section 3541.5(c) the PERB is given the power and authority to issue cease and desist orders and to order parties to take such affirmative action as will effectuate the purposes

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[16]Based upon the authority in Rivcom Corp. v. Agricultural Labor Relations Board (1983) 34 Cal.3d 743, it appears that the Board could entertain the Unalleged violation even though it was previously dismissed. Although it is unnecessary to reach that issue in this case, to avoid uncertainty in the future, if Regional Attorney dismissals are intended to preclude raising the issues at a future date, perhaps they should issue with a statement to that effect and "without leave to amend."

of the Act. Therefore, in the instant case, it is appropriate to order the District to cease and desist, in general, from conduct found to be in violation of the Act and to, more specifically, cease and desist from discriminating against, and interfering with, employees because of their exercise of rights guaranteed by the Act.

In terms of Villar's evaluation for the 1984-85 school year, it is determined that the evaluation should be removed from Villar's personnel file, and other official files where it might be kept, and destroyed. The questions then presented are whether and how to evaluate Villar. Worden has demonstrated that she did not fairly evaluate Villar in the past and there is serious question as to whether she could do so in the future. It may be equally difficult for someone else to become involved in the process at this late date. Nevertheless, Villar is entitled to an evaluation and the District must be required to separate its anti-union prejudice from the evaluation process. Accordingly, if Villar wants an evaluation for the 1984-85 school year, the District should develop non-discriminatory criteria for Villar's evaluation and designate an individual to conduct that evaluation in a manner free from anti-union bias.

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

indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the employer has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the employer's readiness to comply with the ordered remedy. See Placerville Union School District (1978) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Bd. (1979) 98 Cal.App.3d 580, 587 the California District Court of Appeals approved a similar posting requirement. NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

(1) Discriminating against, and interfering with, Isis Villar because of her exercise of rights guaranteed by the Educational Employment Relations Act.

(2) Denying to the Los Angeles City and County School Employees Union, Local 99, SEIU, AFL-CIO, rights guaranteed by the Educational Employment Relations Act.

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

(1) Remove and destroy the 1984-85 evaluation of Isis Villar from her personnel file and any other District file where it is maintained.

(2) If Villar wants an evaluation for the 1984-85 school year, the District must develop non-discriminatory criteria for that evaluation and designate an individual to conduct the evaluation without regard to Villar's protected activity.

(3) Within ten 10 workdays from service of the final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, 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 insure that the notice is not reduced in size, altered, defaced or covered by any other material.

(4) Upon issuance of a final decision, make written notification of the actions taken to comply with these orders to the Los Angeles Regional Director of the Public Employment Relations Board in accordance with his instructions.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento

within 20 days of service of this Decision. 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. See California Administrative Code, title 8, part III, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." See California Administrative Code, title 8, part III, section 32135. Code of Civil Procedure section 1013 shall apply. 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 California Administrative Code, title 8, part III, sections 32300, 32305 and 32140.

Dated: December 31, 198 6

Barbara E. Miller
Administrative Law Judge