

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN HOWARD LEONARD,)
)
 Charging Party,) Case No. S-CE-879
)
 v.) PERB Decision No. 687
)
 COTTONWOOD UNION SCHOOL DISTRICT,) June 27, 1988
)
 Respondent.)
)
 _____)

Appearances; Kathryn Burkett Dickson, Attorney, for John Howard Leonard; Bandell, Swanson and Jahr by L. Alan Swanson for Cottonwood Union School District.

Before Porter, Craib and Shank, Members.

DECISION

PORTER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Charging Party, John Howard Leonard (Leonard), to the proposed decision, attached hereto, of a PERB administrative law judge (ALJ). The ALJ dismissed Leonard's complaint alleging that the Cottonwood Union School District (District) reassigned him from a principal position to a teaching position because he refused to prevent teachers from joining the union, thereby violating subdivisions (a) and (b) of section 3543.5 of the Educational Employment Relations Act (EERA).¹

¹EERA is codified at Government Code section 3540 et seq. Section 3543.5 provides, in pertinent part:

Having reviewed the exceptions of Leonard, the District's response to exceptions and the entire record in this case, we determine that the findings of fact in the proposed decision are free from prejudicial error, and we therefore adopt them as the findings of the Board itself. We affirm the ALJ's conclusions of law consistent with our discussion herein.

The crux of Leonard's theory is that his reassignment was the District's reprisal taken against him, due to his refusal to accede to the District's demand to discourage unionism at East Cottonwood School. Leonard's demotion, in turn, had the effect of interfering with, restraining and coercing teachers in the exercise of their rights protected pursuant to EERA section 3543.⁶ Thus, the ALJ describes Leonard's theory as

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.

2 EERA, section 3543 provides, in pertinent part:

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations

an amalgamation of two discrete rights or forms of protected activity under EERA: (1) Leonard's right to refuse to interfere with teachers' choices about union membership; and (2) the right of teachers to freely choose membership in a union without fear of reprisal from the District.

Leonard's theory is borrowed from precedent established under the National Labor Relations Act (NLRA). Supervisors are excluded from protection under the NLRA. (29 U.S.C, secs. 152(3), 152(11) and 157.) While supervisors are not protected, an adverse action taken against one may, nonetheless, constitute a violation if it is motivated by the supervisor's refusal to commit an unfair labor practice, or if the adverse action interferes with the rank and file's exercise of their organizational rights. (Belcher Towing Co. v. NLRB (5th Cir. 1980) 614 F.2d 88 [103 LRRM 2939] enforcing in part Belcher Towing Co. (1978) 238 NLRB 446 [99 LRRM 1566].) The underlying rationale of this rule is not for the protection of the supervisor, but rather, to dispel the fear of nonsupervisory employees that the employer will take similar reprisals against them if they continue to support a union. (Russell Stover Candies, Inc. v. NLRB (8th Cir. 1977) 551 F.2d 204 [94 LRRM 3036] enforcing Russell Stover Candies, Inc. (1976) 223 NLRB 592 [92 LRRM 1240].)

We do not find NLRA precedent instructive in the instant case. The ALJ found, and we agree, that Leonard is a

supervisor.³ Unlike the NLRA, under EERA, supervisors are not excluded from the definition of "employees," and are thus protected. (EERA sec. 3540.1, subd. (j).) Thus, under EERA, there is no distinction made between rights enjoyed by employees and those of supervisors. Just as any employee under EERA may assert as protected conduct the right to refuse his or her employer's demand to prevent unionization, so may a supervisor.

Although Leonard, as a supervisor, may assert the right to refuse to accede to his employer's demand to prevent unionization, this record reveals a failure of proof as to the alleged facts. The ALJ included in his findings:

There is no evidence indicating how Leonard refused to prevent unionization or committed unfair practices. There is no demand from the employer that he prevent unionization or commit an unfair practice after the 1981 settlement agreement, save for the inference that may be drawn from Babiarz's request for the performance evaluations of the four activists following the 1982 election. Leonard "dragged his feet" on the request and only delivered the evaluations along with those of all of the teachers, as

³We agree with the ALJ that the evidence was insufficient to support a finding that Leonard was either a confidential or a management employee within the meaning of EERA section 3540.1, subdivisions (c) and (g), respectively. We question, however, the propriety of continuing to interpret subdivision (g) of section 3540.1—which provides the statutory definition of a management employee—in the conjunctive, despite that the statute is expressly written in disjunctive language. (See Lompoc Unified School District (1977) EERB Decision No. 13.) We find it unnecessary to reach this issue, however, in light of the District's failure to file cross-exceptions, as well as the fact that the evidence clearly demonstrated Leonard's supervisory status.

requested by the board the following year. Absent further action by Babiarez on the request or the evaluation, there's no conclusion that an unfair practice had occurred.

We agree with the ALJ that the record contains no evidence of Leonard's refusal to commit any unlawful activity. Concerning Babiarez's request of Leonard for the evaluations of the four union activists, contrary to Leonard's assertion of a refusal to provide such, he neglected to even tell Babiarez of his intent not to provide the evaluations and the reasons therefore. Eventually Leonard provided the evaluations, along with those of the other teachers. When Babiarez requested Leonard to post articles pertaining to unionism at East Cottonwood, the evidence in the record demonstrates only Leonard's compliance with the request.⁴ The record, in short, does not portray an individual who took an affirmative stand against Babiarez's anti-union sentiments. Inarticulated objections and silent reluctance do not constitute a "refusal" to commit unlawful activity. Further, the record is devoid of evidence that the District's decision to demote Leonard was influenced by input received from Babiarez. The record demonstrates that the District reassigned Leonard because of dissatisfaction with his performance as an administrator.

⁴We further affirm the ALJ's conclusions that Babiarez's actions in requesting the evaluation of the four union activists, as well as asking Leonard to post articles concerning unionism, were not sufficient to give rise to a violation under EERA.

ORDER

We affirm the ALJ's dismissal of the unfair practice charge and the complaint in Case No. S-CE-879 is hereby DISMISSED.

Members Craib and Shank joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



JOHN HOWARD LEONARD.)
)
 Charging Party.)
) Unfair Practice
 v.) Case No. S-CE-879
)
 COTTONWOOD UNION SCHOOL DISTRICT.) PROPOSED DECISION
) (5/6/36)
 Respondent.)
 _____)

Appearances: Kathryn Burkett Dickson, Esq., for John Howard Leonard; Bandell, Swanson and Jahr by L. Alan Swanson, for Cottonwood Union School District.

Before Gary M. Gallery. Administrative Law Judge.

PROCEDURAL HISTORY

John Howard Leonard filed this unfair practice charge against the Cottonwood Union School District (District) on March 28, 1985. Leonard charged that the District reassigned him from a principal position to a teaching position because he allowed teachers at his school to become union members. A complaint was issued on May 10, 1985, stating that Leonard, an employee of the District within the meaning of section 3540.1(j) of the Government Code, was demoted because he failed to prevent teachers working under his direction from joining an employee organization, thereby denying Leonard's rights and the

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

rights of employees working under him, in violation of section 3543.5(a).¹

The District in its answer on May 23, 1985, denied violations of the EERA, denied that Leonard was an employee under the EERA and affirmatively alleged that Leonard was a management employee and had no standing to file the unfair practice charge. A settlement conference was held without success. The formal hearing was held on August 21-23, 1985, at Redding, California. Post-hearing briefs were filed on November 12, 1985 and the matter submitted as of that date.

FINDINGS OF FACT

The Cottonwood Union School District is an employer within the meaning of the EERA. The District operates two schools. East Cottonwood and West Cottonwood. East Cottonwood serves the K-4th grade level and West Cottonwood serves 5th grade through 8th grade. The schools are located about a mile from each other.

¹This section is a part of the Educational Employment Relations Act (EERA or Act), Government Code sections 3540 et.seq. All references are to the government code, unless otherwise stated. Under 3543.5(a) it is an unfair practice for the 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.

The District, under a five-member board of trustees, has a superintendent, and a principal in each of the two schools. Longevity of service of both board members and staff is notable. Board chairman Jim Rickert (chair for 10 years) has been on the board since fall of 1964. Edward Petersen has been on the board for 18 years. Dennis Powers, the remaining board member to testify, has been on the board since 1981. It appears the other board members have been on the board at least since that time. Joe Babiarez, the superintendent at all times material to this case, retired effective June 1985 after 40 years of service as superintendent. Ken Osborn, who served as principal of the West Cottonwood School for several years prior to Babiarez's retirement, was appointed superintendent to succeed Babiarez.

Leonard served as principal at East Cottonwood from 1964 until June 1985.

Leonard's Role as Principal

As principal, Leonard was in charge of the East Cottonwood School. Babiarez's office was at the West Cottonwood School campus and the superintendent would visit the East school campus for 5 to 10 minutes a week. There were no regularly scheduled staff meetings between Leonard and Babiarez. There were 59 employees, including 22 teachers, at the East Cottonwood School. According to Leonard, his duties included supervision of teachers, placement of students, scheduling

recesses, textbook ordering.² supply ordering, maintenance³ and supervision of the plant, program writing and evaluation of special projects such as the School Improvement Program (SIP).⁴ Leonard addressed pupil problems, parent relations. PTA. and seeing that "toilets get unplugged." He also arranged for lunch distribution, transportation safety, dismissal of kindergarten classes, kindergarten registration, back-to-school nights and open house. Leonard was, he said, "essentially in charge of what happened there." He was the sole administrator at East Cottonwood.

Leonard denied that he determined the direction the District would go. what its goals were for teaching, how many

²Regarding textbooks, the District sent a list of books available, and the principal and the teachers determined which books to order. Babiarz made final approval of the list. Leonard said sometimes one school or the other needed more than the ADA allotment. The District superintendent would make whatever adjustments he thought appropriate.

³Regarding maintenance of East. Leonard would contact Babiarz concerning a perceived need and Babiarz had the final say.

⁴Leonard had been responsible since 1973 for seeing that the SIP for East Cottonwood was written, along with a budget which was submitted to the county and then to the board for approval. The budget is related to the average daily attendance (ADA). Evaluations were based upon test information and he would fill out county forms and return those to the county office. Leonard recommended to the board approval of the SIP budget. He and teachers also reviewed and wrote up the federal Title I and II programs, and submitted them to the board for approval after approval by the superintendent. He also determined how the money was to be spent, consistent with the board-approved budget.

schools it would have or who should be hired in top level positions. The superintendent and the Board was responsible for those things, he said. All of his budgets and programs were reviewed and approved by the superintendent and the board. New buildings or additions to buildings had to be approved by the superintendent and the board.

The District presented no evidence of duties unique to Leonard as a principal within the District. Petersen testified that teachers' salary recommendations came from the superintendent. He assumed that the recommendations followed deliberations with the principals.

East Cottonwood has done well in at least one area of education. The third grade students have ranked over the 88th percentile in the State in the California Assessment Program Achievement test for the last 12 years.

The 1981 Unfair Practice Charge

In September 1981 the Cottonwood Teachers Association, CTA/NEA (CTA or Union) filed an unfair practice charge against the District, naming Babiarcz, Leonard, and Osborn as Respondents. The charge alleged that at a September 4, 1981 meeting, the three met with three teachers and Babiarcz threatened the teachers with reprisals for having joined CTA contrary to promises he said they had given him the prior

year.⁵ Separate allegations of surveillance and search of the chapter president's desk were set forth against Leonard. Also alleged were discriminatory transfers of CTA members from East Cottonwood.

From the testimony at the hearing in the instant case by Leonard. Osborn and Nicole Kure, a teacher interviewed by Babiarz, it is found that Babiarz did encourage the teachers in 1980 not to join CTA for at least a year. When Babiarz learned that three of the teachers had joined CTA. said Leonard, he requested that Leonard speak to them. Leonard said he spoke to one teacher who said that she thought it was a professional organization and she was interested in the insurance programs. Apparently this did not satisfy Babiarz. who, against Leonard's advice, demanded that a meeting be arranged. Babiarz did call them to a meeting in September 1981, and accused them of having reneged on a promise not to join CTA. Babiarz's conduct led to the filing of the above-described unfair practice charge. As a result of a settlement conference, the parties executed settlement agreements wherein the District, through its "administrators." regretted wrongdoing regarding rights of

⁵Leonard testified that in 1980. the District hired five new teachers. He sat in on interviews with Babiarz. Babiarz spent some time with the teachers telling them of the dangers of unionism to the District and asked that they wait a year before joining CTA. There were no promises, said Leonard, by the teachers not to join CTA.

employees to join CTA and assured them of the District's commitment to recognizing employee rights to partake in EERA activities. The District further agreed to a PERB-conducted election for representation by CTA. The unfair practice charge was withdrawn.

Regarding the unfair practice charge, Petersen said the board had not been aware of the seriousness of the matter and when it occurred, "we in essence said what was needed to be done apparently has been done, [that] is our three administrators were reprimanded by PERB at that time, and we assumed that the kinds of things there were alleged and apparently supported would be terminated." The board, said Petersen, told the the administrators that it was over and that they did not want any more of that activity.

In the spring of 1982, there was a PERB-conducted election whereat the teachers at both schools voted against exclusive representation by CTA.

Teachers' Concerns

In the fall of 1981. at the same time the unfair practice was filed against the District, teachers at East Cottonwood provided members of the board of trustees with a draft memorandum of their concerns. Petersen testified that the board discussed the matter in executive session and determined that he and Board Member James Seale would meet with the teachers and Leonard. They did. At that meeting, Leonard was

asked to leave so the teachers could speak more freely. Then, the board members and the teachers went over the list of concerns point by point. At the conclusion of the meeting, Petersen and Seale stopped by Leonard's office and "overviewed the list with him."

Three separate documents were submitted by the District as exhibits of the teachers memorandum (District Exhibits 2, 3 and 4). Mary Jo Montagnor, a teacher, testified that District Exhibit 2 was a draft and the other documents (Districts 3 and 4) were the same list of concerns but in prioritized order.

The memorandum listed the following:

(1) Fear by many teachers of targeted "reprisals for expressing professional opinions interpreted (or misinterpreted) as disloyal or critical" - the teachers "expected" the administration to afford them the professional courtesy of listening to suggestions that involve students, staff and schools without the reprisals, harassment or ridicule some had been subjected to in the past; (2) Changes in teaching assignments in which teachers believed themselves misplaced and which appeared to show a pattern of reprisal and/or harassment; (3) Supplies locked and ditto paper rationed, causing inefficiency in teacher preparation time - the teachers asked the administration to trust them with a key; (4) Considerable inconsistency in enforcement of rules and in disciplinary actions taken with children - they asked for consistent and

uniform disciplinary procedures throughout each grade level;

(5) Inconsistency in dealing with special children - however, the memo expressed the "general staff opinion" that the fault was with the psychologist; (6) Frequent classroom changes throughout the first weeks of school, often necessitated by poor original student placement; (7) Homogeneous student placement practice unfair to teachers and students as well;

(8) Scheduling of parent-administration-teacher conferences during class time; (9) Difficulties experienced with parents who demand parent-teacher conferences immediately to discuss grading rationale and teachers suggested scheduling minimum days just before issuance of reports to accommodate conferences; (10) Administration discouragement of enrichment workshops and seminars by "ridicule" of workshop "teaching staff" and program value and lack of cooperation by failure to post information on such programs and failure to give release time to attend; (11) Physical improvements to be considered as a working list and not as a "cognizant list" - these included a grassy area on the playground, covered cement play area, water and sinks in the 1968 wing, black top area and filling of ditches near the playground;⁶ (12) Reduction of workday for aides affecting health and dental benefits; (13) Lack of clear delineation of laws, rules and regulations insofar as students.

⁶Also included in this list was reference to third and fourth grade planning period each day.

teachers, parents, and administrators are concerned and a request for a synopsis of relevant laws; (14) Lack of recognition to the East Cottonwood teachers as opposed to West Cottonwood staff for success in State teaching programs; (15) Recent "apparent administrative policy" to require as a precondition to favorable consideration for employment declining to join CTA or talk to its members - reference was made to the unfair practice charge filed with PERB and referred to earlier in these findings.

During this time, the board held a closed session with Leonard and Babiarz to discuss the list.⁷ The board did not provide Leonard with any written communications with regard to the matter because, said Petersen, the list was explicit about the concerns and needed resolutions. There were, admitted Leonard, two closed session meetings with the board on the memorandums. The board directed Babiarz to work with Leonard on the problems. Leonard established monthly meetings with the teachers to resolve those concerns and others they could bring up. The teachers reported to the board in writing of the outcome of these meetings. Notes were provided to the board of the meeting of October 26, 1981, and a second meeting on October 27, 1981.

⁷while Petersen acknowledged that the memo referred to the "administration," and this meant Babiarz as well as Leonard, he viewed the "overriding" problem as the relationship between Leonard and the teachers.

Later, in May 1982. a list was forwarded to the board by the teachers outlining the issues and resolutions. This memorandum noted the following: some teachers' residual apprehensions of reprisal, harassment or ridicule for their opinions; failure to announce summer school positions; great improvement in the supplies and ditto paper problem; lack of a uniform discipline code; the problem of the school psychologist was not solved; some student classroom changes appeared to be frivolous, made in order to placate parents; attempts to initiate heterogeneous placement through teacher recommendations; positive effort to schedule parent-administration-teacher conferences, and bulletin space provided for posting of professional notices.

With regard to the physical improvements, the memo noted that the grassy area was an important teacher concern, the uncovered cement play area under construction was a definite improvement, sinks had been ordered for the 1968 wing and. finally, that the problem of a planning period for third and fourth grade had not yet been solved. The teachers expressed their assumption that the matter of CTA membership had been resolved and concluded with the observation: "As a result of the concern and support of the board, communications between the administrator and teachers has improved. While many positive steps have been taken, many items await closure such

as teacher placement, discipline, psychologist, grass and teacher planning time."

The Charging Party also introduced a letter dated November 17, 1982, purportedly from the faculty at East Cottonwood, generally indicating improvement in the relationship between administration and staff. Leonard testified that the letter was given to him by a teacher who told him that the letter was also going to the board. There is no corroborating evidence, however, that the board did receive the letter.

Toward the end of the 1981-82 school year the board sent to the East Cottonwood faculty a letter acknowledging the list of concerns submitted by the teachers. The board noted that it had expressed its deep concern to the administrators that the conditions continue to be addressed and rectified. The board noted that its intention was to periodically review the issues with "our leadership people in the months ahead."

1982 Pay Raise

In September 1982, Babiarz informed Leonard that the board had approved only a \$500 raise for Leonard. Leonard had previously gotten substantially higher increases, averaging over \$2,100 a year salary increase from 1973. According to Leonard, Babiarz told him that the lower amount was granted because the board was unhappy that teachers were joining CTA.

Leonard did not ask the board or any members the reason for the variation in the salary raise."

Petersen denied that the action of the board had anything to do with CTA activity. There was, he said, no discussion of the unfair practice charge. Rather, the amount of the raise reflected the issues raised in the letters from the East Cottonwood teachers. Because of these problems, the board could not evaluate Leonard's performance as satisfactory as the other administrators. The next year Leonard got a \$1,000 raise. Babiarz was given a substantial raise in both 1982 and 1983. Those raises were granted to Babiarz, said Petersen, because of his long service with the District, some years of which were underpaid, and the District was trying to make it up to him before his pending retirement.

Babiarz and Unionism

The superintendent had little room for unionism in his District. According to Betty Washburn, a District witness, when collective bargaining came into being, Babiarz stated to the teachers that he would fire anyone who joined unions. This was corroboration of the testimony of Ramona Phillips, another teacher at East Cottonwood. Most of the teachers, presented by both sides, testified about the common knowledge of Babiarz's

Under cross-examination, this action of the board is the only factor that Leonard could point to as evidence of the board's dissatisfaction with his position on teachers joining the union.

anti-union feelings. As noted, Babiarz solicited new employees to defer joining the CTA for a period of time. In 1981 he confronted three teachers about having reneged on what he perceived to be promises not to join the Union. This was not a new attitude. Nikki Sass, a District witness, testified that 11 years ago she asked Babiarz whether she should join AFT or CTA and he told her he didn't encourage her to join, but rather wait a year to get settled in. There is no evidence that, after the unfair practice charge was settled, Babiarz engaged in such conduct again. However, Babiarz continued to talk to Leonard about the teachers who joined CTA.

In 1982 he sent a note to Leonard with an article on teachers' strikes. He requested its posting on the bulletin board noting that the "public reads the board a great deal too," and that "teacher strikes are news." He sent Leonard a note indicating Phillips had joined CTA and the dues were \$230 a year. He sent another note which pertained to negotiations. Babiarz wrote, "hope it never happens, because it would be one big mess." Babiarz told Leonard that he was going to tell the teachers they could save \$230 a year if they dropped out of CTA. Babiarz told Leonard he did not care if they filed another unfair practice charge against him. He said, "What can they do to me now?"

Babiarz's confidence in his own immunity was not simply his own view. At least one board member, Petersen, likewise was aware of his seeming invulnerability. Petersen was asked:

- Q. Isn't it true that you told Ramona Phillips that even though Joe Babiarz was presenting real problems to the District, that they couldn't fire him, that you couldn't fire Mr. Babiarz because he had been in the District some 38 or 39 years?
- A. I'm trying to -- I have had conversations with Ramona Phillips over the years because Ramona and Frank are personal friends of ours. I don't think that the way that sentence is stated is what I may have said. I'm sure that I may have said something to the effect that if we talked about that issue that obviously when you deal with an administrator for many, many years, nearly 40, you have a great concern about, at that point in time, doing an attack on them. Just as we had a great concern for Howard Leonard because of his length in the District, and painstakingly came to our decision.

Babiarz sent articles against unionism to Leonard and directed him to post them on a bulletin board next to Leonard's office. This occurred even after the 1981 unfair practice charge. Leonard testified that there were over a hundred such articles.

Following the election in 1981, Babiarz wrote to Leonard and asked for the evaluations of the four teachers who were union activists leading up to the election. Leonard said "he dragged his feet" on that request and gave the evaluations only after the board had called for all of the evaluations of both schools' teachers.

Leonard testified that discussions of the dangers of unionism took place with board members present. Leonard never observed such a discussion at board meetings but "in the general course of conversations, at different times, the problems of unionism was discussed on an informal basis, yes, with board members present." Yet, Leonard admitted that no member of the board has ever made any anti-union or anti-CTA statements. Neither the board nor its individual members has ever expressed any anti-union views directly or indirectly in his presence. At the time of the formal hearing in this matter Leonard did not know if the board of trustees harbored any anti-union or anti-CTA bias.

Teachers' Evaluations

In 1983 the board requested copies of the evaluations of all teachers in both schools in the district. According to Petersen, the board was ascertaining the quality of evaluation by its administrators. At a board meeting in May 1983 where the evaluations were discussed, Babiarz criticized Leonard for ratings he gave teachers on their dress.⁹ During the discussions of these evaluations, admitted Leonard, there was no singling out of teachers on the basis of CTA membership.

⁹Several teachers confirmed that Babiarz took umbrage at female teachers wearing pants. Babiarz believed teachers who wore pants should not get more than an average rating.

SB 813

Sometime in the spring of 1984 the issue of longer day and longer workyear was addressed. Babiarz wanted to add an hour to each day for the K-4 grades. Leonard said he worked with his teachers and they developed a plan that would meet the requirements of the new law and yet avoid having pupils spend an additional hour at school. He presented his plan to the board, and the board adopted it, he said.

What was viewed by Leonard as evidence of his leadership on this issue was viewed as just the opposite by Petersen, and apparently by the rest of the board. Petersen cited the lengthening of the school day issue as evidence of Leonard's inability to come to a decision. Leonard testified that "we had worked cooperatively and at some time to develop a schedule so that youngsters could be dismissed within 5 minutes of the time they had previously been dismissed." The board, said Petersen, was getting mixed signals from Leonard over a period of three months. While recalled to testify in rebuttal, Leonard did not respond to the testimony of Petersen on this point.

Leonard's Demotion

In June 1984, at a closed session, the board told Leonard that he was going to be relieved as principal. Babiarz was not at that meeting. A member of the board mentioned that it was only after difficult discussions. Leonard did not ask for and

was not given reasons for the board's action. He said that the chairman mentioned that they had missed the March deadline to effectuate the decision in the next school year.

Sometime in the spring of 1984. Leonard told the board of Babiarz's conduct with regard to unionism. Leonard said he went into some detail about the September 1981 meeting with the teachers that gave rise to the unfair practice charge.

Petersen said this came after the board had told Leonard of their decision to remove him as principal. Placing the blame on Babiarz, said Petersen, was an indication that Leonard did not comprehend the problem of his own performance.

Petersen testified that the board determined, in the spring of 1984, to reassign Leonard. Babiarz, said Petersen, was not involved in the decision. Petersen said that because of Leonard's inability to communicate to the board and act in a decisive manner, and because of the long-term problems alleged in the teachers memorandum, the board had come to the end of the line. He said that because of Leonard's inability to communicate with the board of trustees, as evidenced by several years where, meeting after meeting, the board received no definitive recommendations and answers from Leonard, and because of the 1981 teachers concerns, the board determined that it had a serious personnel problem and it had to "bite the bullet." There was, said Petersen, no discussion of the prior unfair practice charge, unionism and CTA. nor of teachers in or out of CTA.

Petersen testified that Babiarz had not been involved in the decision to demote Leonard. He said the board initially asked Babiarz to work with Leonard on the problems of leadership and nonresponsiveness on issues. The board had discussions with Babiarz about Leonard's performance. Rickert testified that Babiarz provided evaluations and the board decided to demote Leonard. Babiarz made no recommendation about Leonard's demotion, he said. Powers stated. "After three and one-half years of evaluating the situation. I think our determination, upon recommendation, our evaluation and dealings with Mr. Babiarz. . . ." the board decided to demote Leonard.

There were no prior written evaluations of Leonard, said Petersen. because Babiarz was not adept at written evaluations. They had asked Babiarz to work on the situation after the 1981-82 problems, but had required nothing in writing, prior to 1984.

They asked Leonard for a letter of resignation several times. The board was determined to remove Leonard in a non-public manner to save him embarrassment. It did not want to fire him publicly, said Petersen.

Later, before November. Leonard was asked to give the board a letter. He understood it to be a letter of resignation or request for reassignment.

On November 21, at a closed session, the board presented Leonard with a written evaluation.¹⁰ There was no discussion of the evaluation, said Leonard, and he asked no questions

¹⁰The Evaluation is set forth in full:

1. Mr. Leonard, you do a satisfactory job with parents and are interested in the students and their achievements. You spend much time with students at recess and during the Physical Education classes. However, we feel that you should be supervising and not be spending the time as a teacher. The school has more than enough personnel for its operation, but they do need dynamic leadership.

2. All of your satisfactory accomplishments were taken into consideration, but despite these points, your essential and main duties are working with staffs in supervision and evaluations.

3. Your ability to lead and evaluate the staff is inadequate. You are unable to create staff enthusiasm, motivation and at the same time keep and instill confidence in your position as the Principal. Your authority, as the Principal, has been eroding over the past years. This we have endeavored to point out in our meetings with you, time and time again.

4. We, the board, have held a number of closed sessions with you during the past two years.

5. Two of the board members met with you and the staff on two occasions last year. The board has held a number of closed sessions as follow-up meetings with you. We see no improvement in your total ability to continue to administer the school. You always give us the same impression; there are no problems and everything is satisfactory. Since you do not even recognize or accept the deficiencies we have been discussing and endeavoring to point out to you, there will be no degree of improvement.

6. The board and the Superintendent must get involved in school decisions and enforcements which belong at the Principal's level, who is the immediate on site administrator. This is your essential duty! Your weakness was again evident this year, when it came time for you to lengthen the kindergarten, first and second grade class schedules to meet the requirements

about it. The chairman did tell him that they wanted the letter by the December board meeting. He responded, he said, that he thought that he had until February, and the chairman said that he wanted it earlier so they could start looking for someone else.

Petersen. Rickert and Powers testified about the problems they saw with Leonard's performance. From 1982 on. said Petersen, the board saw an increasing inability of Leonard to respond to questions from the board. On issues regarding physical facilities, such as the play yard, carpets and sinks at the East School, Leonard was not prepared to make recommendations. Teachers were coming from the school directly to Babiarz and the board for resolution. Said Petersen,

As we asked for recommendations, they were either not forthcoming or very hesitatingly, and I would say grudgingly forthcoming, was the problem. It's a problem of do we present cogently and strongly and in an effective way recommendations for those factors affecting the school. And our contention is that the frustration that we had to deal with over the years was again and again, Howard did not effectively and cogently and strongly respond. And we were left on the limb wondering where he was.

of SB 813. You are unable to render firm and decisive decisions involving possible controversial matters.

7. All of the board members have lost confidence in your ability to administer, supervise and evaluate staff. We feel you have lost your effectiveness in pursuing our standards, as the Principal of the East Cottonwood Grade School, in grades kindergarten through the fourth grade.

Powers testified that at one board meeting a teacher from East Cottonwood stood at the back of the room expressing concern about the black top area at East School.

Petersen said that carpeting in some rooms at East Cottonwood became an issue and Leonard could not develop a specific recommendation. Finally, Babiarz intervened and had carpeting installed. Leonard, in rebuttal, testified that he, Leonard, and the custodians preferred tile floors for maintenance and cleanliness, but he was not sure if he ever told the board his position. Other issues where Leonard's management was deficient, testified Petersen, included drapes, playground equipment, fencing and grassy areas for the school.

The matter of use of the school psychologist's time was a problem. Referred to in the 1981 teachers letter of concerns, it surfaced again in 1984, after the board had made its decision to relieve Leonard. Still another problem was the use of the music teachers' time, brought to the board's attention by the teacher representative who attended the board meetings.

Leonard did not take a stand on the issue of the mentor teacher program, in conjunction with SB 813, said Petersen. Babiarz was against it, Osborn was in favor of it, and Leonard said not much at all. It was a matter of contrasting examples of leadership, said Petersen.

During board discussions of the teachers' evaluations, while there were no pointed comments of Leonard's evaluation techniques, there were discussions about the absence of constructive criticisms by Leonard. The board's attorney wrote Leonard a letter at some point indicating the need to tighten up on evaluations.

Rickert testified that Leonard never seemed to have any problems at the school. He drew his judgments about lack of communication between Leonard and his teachers from discussions in the community where he operated a butcher shop.

On cross-examination. Rickert testified that the statement in the November evaluation regarding Leonard's time spent with students at recess came from patrons of Rickert's butcher shop. Rickert did not draw any conclusions about the matter from his limited exposure to the school, but from the comments of people in Cottonwood. He could not identify the persons who made the comments. While Rickert never discussed this specific matter with Leonard personally, he did ask Leonard the more general question of what he did with his time at the school. Leonard did not respond. Said Rickert. "I'm not trying to be smart, but he doesn't answer. He just mumbled. I'm sorry.

Howard, but that's the way it is, and I couldn't get a clear response from him."

Rickert had three children who attended the school and he knew Leonard as a parent. Leonard had "nothing but good things to say about children" and that was one of his good points. One of Leonard's satisfactory qualities, as noted, said Rickert, was that Leonard never "said anything bad about anybody." Rickert felt Leonard could not communicate with the board; Leonard would talk for an hour and Rickert would not understand what he was talking about. Leonard's method of criticism of teachers was lacking in that he would not try to help them out. This was a general feeling that he got from people in the community. He could not identify any teacher whom he felt did not get help from Leonard.

Powers testified that, when he came onto the board in 1981, it seemed obvious to him that Leonard's staff showed a lack of respect for him. He picked this up by the attitude of the number of teachers from East Cottonwood School that appeared at the board meetings. He named three teachers he thought showed this lack of respect although he could recall no specific comments. His view was fueled by the continued presence of teachers from that school at board meetings.

But it would was pretty obvious to me that we had always a bunch of people from East Cottonwood, the staff at East Cottonwood. coming to our meetings with concerns and whatever that I felt should have been

handled at the site level. And then we didn't have any problems with teachers coming in and bypassing our administrator at West and directing things to the superintendent and the board.

There were more teachers coming to board meetings from the East School, over and above the usual representatives from each of the two schools, who he sensed were not happy with things at East School. He cited an example of lack of communication where the teachers' request for a full-time physical education teacher was denied by the board. Thereafter, Leonard failed to tell the teachers that the board had denied the request, and the teachers returned wanting to know about the issue.

All three board members testified that the decision to relieve Leonard was unrelated to teachers at East joining CTA.

The December 19, 1984, Board Meeting

This meeting was held in the West Cottonwood gymnasium, unlike usual meetings, to accommodate the large crowd in attendance. After demand by members of the audience for the reasons for the proposed reassignment of Leonard to a teaching position, the board took the position that it could not speak to the particulars of Leonard's case because it did not have a release from Leonard to discuss the matter in public. Leonard then executed a release.

From the board members themselves and those who testified at the hearing about what was said, there is little conflict. The audience was in support of Leonard and his retention as

principal. Several people spoke on behalf of Leonard. A favorable survey of families with children at East and of the aides employed there was presented. Yet the board remained firm. The reasons for Leonard's removal, articulated at the meeting, included a statement by one board member that Leonard could not "stir the soup." One board member stated that he couldn't remember the reasons. Petersen testified Leonard, said that "Leonard lacked leadership and that time and again the board had looked to him for leadership and found it lacking."

The thrust of this case turns upon the statement of the board chairman, Mr. Rickert. He stated. "His leadership is too weak. When 99 percent of the teachers at his school have joined the union, and no teachers at the other school have joined, that tell's you something about his leadership."¹¹

By way of explanation Rickert testified:

- Q. Okay. It seems a fair reading of the statement I just read to you that you're implying something about the relationship of leadership of an administrator and employees belonging to unions. What do you mean, or did you mean that inference?
- A. No. my statement, in my probably limited way, was trying to compare the two schools with the same school board, the same superintendent, the same salary schedules, the same benefits, the same everything, and yet in one school we had turmoil, a complete lack of communication between our administrator

¹¹Rickert did not deny making the statement. He testified that he might have said the majority of the teachers.

and ourselves, and the administrator and the teachers; and at the other one we had open communications, with no problems that I knew of whatsoever with our communications.

- Q. Which school had communication problems?
- A. The East Cottonwood School had communication problems.
- Q. Do you -- in your mind, when you made this statement that I just read to you. was there any relationship between the allegation that Mr. Leonard's leadership was weak and your belief that his teachers, many of them had joined the California Teachers Association?
- A. Well, I felt that they needed someone, they needed help.

This statement by Rickert, along with the 1982 salary increase as explained by Babiarz, is the pinpoint of Leonard's contention that the board removed him from the principalship because of the teachers' union activity. One witness for Leonard, however, interpreted the meaning of the statement consistent with Rickert's explanation. Nicole Kure testified that the remark "... made it look like or that they had surmised that therefore the teachers at East joined because of Mr. Leonard and the teachers at West did not feel that they needed it." While their expressed reasons for the reassignment were not acceptable to the audience, the board nonetheless, after a two-hour closed session, announced that the reassignment was to stand.

Later, in January, Leonard asked that the comments given by the board be inserted in the minutes. That request was

refused. Rickert said he'd never had a request like that before and that he denied the request under advice of counsel. Later, the board sent to Leonard a written statement of the reasons for his reassignment.

12

12That statement, dated January 23, 1985 provided:

In accordance with your request and the provisions of Education Code Section 44896. the following is a written statement of the reasons for your transfer from an administrative to a teaching position:

The Board has received serious allegations from your teachers over the years regarding your inconsistent personnel relations and your inadequate leadership. You failed to timely take action on these allegations. You took action only after repeated direction from the Board. You have failed to carry out your duties as a principal. You have increasingly refrained from seeking the support and counsel of the Superintendent. You have failed to recognize your own faults and inadequacies and have wrongfully blamed others or denied that any faults or inadequacies exist. Your follow through on parental complaints to the Board has been evasive. You have not been willing to take a stand nor make any decisions on key issues, including the implementation of the provisions of Senate Bill 813. You have been evasive and noncommittal in response to the Board's questions regarding issues facing East Cottonwood School. You have refused to deal with the problems and issues pointed out to you by the Board of Trustees and indeed deny that there are any problems or inadequacies in your performance. Your ability to lead, supervise and evaluate the staff is not satisfactory. You cannot adequately make administrative decisions and properly enforce the decisions which belong at the principal's level. You fail to

Several teachers testified on behalf of Mr. Leonard. Nicole Kure, who was no longer teaching at the District, testified that Leonard was an honest administrator and good leader. She had no difficulties with his decision-making. Kure corroborated the nature of the 1981 meeting with Babiarz. Leonard gave her high performance evaluations but every year he rated her only fair on her dress because her dress wasn't professional enough for the District. She felt Leonard was very responsive to teachers' concerns at the meetings that began in 1981 following the unfair practice charge.

Emagale Snider testified that Leonard presented no difficulties as an administrator.

Ramona Phillips, one of the writers of the letters to the board regarding problems at East, testified that conditions at the school improved substantially after the letters to the board in 1981. Leonard was responsive and supportive of the teachers. ¹³

create staff enthusiasm. You fail to motivate the staff. You fail to implement the direction from the Board for improved and increased communication with your teachers.

In conclusion, the Board of Trustees has, unanimously, lost faith in your ability to serve as an administrator of the District.

¹³Phillips testified that the teachers were asked to write the letter to the board. It is not clear who asked the teachers.

Phillips, a friend of Petersen. called Petersen before the December meeting to inquire about Leonard's demotion. Petersen refused to discuss the particulars, because of confidentiality, but did tell her that the board would not change its mind about removing Leonard. Leonard, she said, never said anything bad about the board or Babiarz; "In fact, he went exactly the opposite. He went out of his way to stand behind the Board and the administration."

Paula Mattos, an aide, testified that Leonard was very supportive of the aides and responsive to their concerns.

Dana Byers. a teacher at East Cottonwood and one of the teachers interviewed by Babiarz in 1981, testified that Leonard was very supportive of the teachers and gave fair and honest evaluations. She joined CTA in part because of Babiarz attitudes as an administrator. She hesitated in joining because of his speech at her interview. Byers testified that, at a meeting regarding the longer day issue, a board member whom she could not identify, said that the teachers "really didn't have any say" on the issue.

Carol Taff. a teacher's aide at East Cottonwood. a parent of children in the school and for 14 years an active member of the PTA, testified that Leonard is a great leader, good student disciplinarian and able to create staff enthusiasm.

In addition to Board Members Petersen, Powers and Rickert, several teachers testified on behalf of the District. They

were: Betty Washburn, 18 years with the school; Nelva Denbo. 9 years; Mary Jo Montagnor. 18 years; Kathy Columbo, 6 years; Jacqueline Long. 20 years; and Nikki Sass, 11 years with the District.

Several of these teachers annunciated at least four general problems with Leonard's principalship. These problems were a lack of coordination of curriculum among the grades, lack of coordinated textbook selection, lack of homogeneity in classes (excess of low achievers in a class) and problems with Leonard's pupil disciplinary practices. They also complained about lack of support for the teachers, lack of follow-through, and of poor evaluations by Leonard.

While these teachers were paid by the District for their time preparing to testify, it appears that they first came forward to volunteer their services in support of the District's case and then were advised of the availability of compensation. I make no findings on these complaints, however, as the board, not the teachers, took the action against Leonard. Moreover, the specific complaints by the teachers did not form the basis for Leonard's demotion. Rather, as discussed supra, the board issued its evaluation of Leonard, and the evaluation was the basis for the demotion, not the teachers' complaints.

STATEMENT OF ISSUES

The issues in this case are (1) whether John Howard Leonard had standing to file an unfair practice charge against the

Cottonwood Union School District, and (2) whether the Cottonwood Union School District governing board assigned Mr. Leonard to a teaching position in retaliation for his exercise of rights protected under the Educational Employment Relations Act.

CONCLUSIONS OF LAW

John Howard Leonard's Standing to Bring an Unfair Practice Charge.

The District's answer, by way of affirmative defense to the complaint, asserted that Charging Party was without authority under law to bring the unfair practice charge against the Respondent. As a separate defense the District affirmatively alleged that the Charging Party is a management employee within the meaning of Government Code section 3540.1(g). In its opening brief the Respondent reaffirmed its contention that Charging Party is a management employee and further alleges, for the first time, that Charging Party is without standing to bring the unfair practice charge because he is a confidential employee within the meaning of Government Code section 3540.1(c).

Both contentions must be rejected. Government Code section 3540.1(g) defines management employee as "any employee in a position having significant responsibilities for formulating district policies or administering district programs." In interpreting this provision PERB has held that

an employee can be found to be managerial only if it is established that the employee had significant responsibilities for both the formulation of district policy and the administration of district programs. Lompoc Unified School District (1977) EERB Decision No. 13.¹⁴ See also Franklin-McKinlev School District (1979) PERB Decision No. 108.

As was stated in Hartnell Community College District (1979) PERB Decision No. 81;

The formulation of policy contemplates the exercise of discretionary authority to develop and modify institutional goals and priorities. The administration of programs contemplates effective implementation of the policy through the exercise of independent judgment. Thus, managerial status contemplates those persons who have discretion in the performance of their jobs beyond that which must conform to an employer's established policy.

In the present case there is no evidence demonstrating what, if any, judgments regarding District policies Leonard was entitled to exercise. Indeed, there is no evidence suggesting Leonard had any role at the District level. At most it appears that he was in charge of the federal programs at East Cottonwood School. He prepared the budget and submitted it to the superintendent, who amalgamated it into his budget for presentation to the board. Leonard, in addition, completed

¹⁴Prior to January of 1978 the PERB was known as the Educational Employment Relations Board or EERB.

forms promulgated by the County Office of Education concerning such federal programs and returned those to the County Office of Education. It appears all of this was done within the policies and procedures adopted by the board of trustees of the Cottonwood School District.

Leonard, as principal of the East Cottonwood School, did not have significant responsibilities for formulating District policies or administering District programs. While Cottonwood is an extremely small school district, with only a superintendent and the two site principals as administrators, there is no evidence showing what role, if any. Leonard had in formulating District policies or administering District programs. As is discussed below, Leonard's role was related solely and strictly to the East Cottonwood School.

The District's contention that Leonard was a confidential employee¹⁵ is rejected because the District has failed to timely assert this contention in defense of the charge. See PERB regulation section 32644. For the first time, in its opening brief, the District asserts that Leonard was a confidential employee. No such contention was raised in its

¹⁵Section 3540.1(c) provides that:

"Confidential employee" means any employee who, in the regular course of his or her duties, has access to, or possesses information relating to, his or her employer's employer-employee relations.

answer or at the formal hearing in this matter. That defense is accordingly waived.¹⁶

Rather, the evidence justifies a finding that Leonard was in fact a supervisory employee under Government Code section 3540.1(m). Supervisory employee means:

. . . any employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend such action, if, in connection with the foregoing functions, the exercise of that authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

PERB has held that the satisfaction of the any one of the supervisory criteria enumerated in the statutory definition is sufficient to make an employee a supervisor. See footnote 4 in San Rafael City Schools (1977) EERB Decision No. 32.

The evidence here does not show what authority, if any, Leonard had to hire, transfer, suspend, lay off, or to

¹⁶Moreover. there is insufficient evidence to establish Leonard as a confidential employee. The District's post-hearing brief cites several PERB cases relating to secretaries or principals whose duties included having access to materials relating to negotiations. There is no evidence in this case, however, that Leonard had access to any information relating to negotiations. Petersen did testify that Babiarcz made recommendations on teachers' salaries and he "assumed" such recommendation came after deliberations with the principals. This assumption is insufficient to establish Leonard's involvement in negotiations.

discharge employees. Clearly his role as a principal, providing performance evaluations and assigning work to teachers and aides point to supervisory status. Leonard's role in the 1981 response to the teachers' complaints about conditions at East Cottonwood School reflect his authority to adjust teachers' grievances. In these areas Leonard displayed an independent discretion beyond a routine or clerical nature that justifies a finding that, in fact, he was a supervisory employee.

Section 3540.1(j) defines a public school employee as:

. . . any person employed by any public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees.

Having found Leonard to be a supervisory employee, it is necessary to examine the statutory rights given to him under the EERA to determine whether the District's action in assigning Leonard to the teaching position was a violation of that Act.

Under section 3543.5(a) the employer is precluded from imposing reprisals or threats of reprisals and from discriminating against an employee because of the exercise of his or her rights under the Act. A part of those rights is articulated in section 3543. which guarantees the right to participate or to refuse to participate in the activities of employee organizations.

In this instance the Charging Party argues for a violation on the ground that the board assigned Leonard to the teaching position because he refused to accede to the District's efforts to mitigate union activities by rank and file teachers. Charging Party asserts that "discriminatory acts against supervisory personnel based upon the supervisor's refusal to commit unfair labor practices are themselves illegal precisely because of the coercive effect such acts have upon employees in the exercise of their employment rights." citing Sanchez v. California Unemployment Insurance Appeals Board (1984) 36 Cal.App.3d 578, and Gerry's Cash Markets. Inc. d/b/a/ Gerry's IGA (1958) 238 NLRB 1141, 1151. Charging Party asserts that Babiarz's unceasing anti-union comments and adverse actions against Leonard and his teachers, combined with the board's anti-union rationale for firing Leonard have a natural and obvious chilling effect on the teachers. On this premise. Charging Party relies on Carlsbad Unified School District (1979) PERB Decision No. 89. holding that the transfer of a union activist would have the natural and probable consequence of causing other employees reasonable fear that similar action would be taken against them if they engaged in organizing efforts, and thus such transfer would be in violation of the exercise of employees' right of self organization and unlawful interference within the meaning of section 3543.5(a).

Two forms of protected activity are advanced by Charging Party in this case. These are Leonard's right to refuse to interfere with teacher's choices about union membership and the right of teachers to freely choose membership in a union without fear of reprisal from the District. Both, contend Charging Party, were violated in this case.

PERB has yet to address the rights of supervisors under the EERA where the employer directs the supervisor to engage in conduct that may be unlawful. But see Regents of the University of California (1984) PERB Decision No. 449-H. Under the National Labor Relations Act (NLRA), which excludes supervisors from coverage, the NLRB and the courts have found unfair practices where the employer took action against the supervisor for refusing to commit unfair labor practices or for failing to prevent unionization. See generally Morris. The Developing Labor Law. 2nd edition, page 132. This is so because, as stated in Inter-City Advertising Co. (1950) 89 NLRB No. 127. [26 LRRM 1065]. reversed on other grounds (CA 4, 1951) 190 F.2d 420 [28 LRRM 2321], the discharge of a supervisor for refusing to aid in an employer's campaign against a union unlawfully interferes with, restrains and coerces the non-supervisory employees involved. Thus, the NLRB principle

is an amalgamation of the two discrete rights urged by Charging Party to have been present in this case.¹⁷

In Carlsbad, supra, as noted. PERB observed the chilling effect upon fellow employees resulting from the transfer of a union activist, and ruled that such conduct was interference within the meaning of section 3543.5(a). It is appropriate to apply the NLRA protection to supervisors, within EERA. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Thus, as under the NLRA, a "passive" activity protected by the EERA is the supervisor's restraint from engaging in unlawful conduct to prevent rank and file employees from unionizing. If it is determined that the board took action against Leonard because he refused to commit unfair practices against employees or refused to prevent employees from unionizing, then relief can be afforded under EERA.

In order to determine whether Leonard was demoted for participating in protected activities one must apply the test

¹⁷There is no evidence indicating how Leonard refused to prevent unionization or committed unfair practices. There is no demand from the employer that he prevent unionization or commit an unfair practice after the 1981 settlement agreement, save for the inference that may be drawn from Babiarz's request for the performance evaluations of the four activists following the 1982 election. Leonard "dragged his feet" on the request and only delivered the evaluations along with those of all of the teachers, as requested by the board the following year. Absent further action by Babiarz on the request or the evaluations, there is no conclusion that an unfair practice had occurred.

of Novato Unified School District (1982) PERB Decision No. 210. In Novato, the Board held that a party alleging discrimination or reprisal has the burden of making a showing sufficient to demonstrate that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains.¹⁸ Unlawful motive is the specific nexus required in the establishment of a prima facie case. In recognition of the fact that direct evidence of motivation is seldom available, unlawful motivation may be demonstrated circumstantially and from the record as a whole. Carlsbad Unified School District, supra; Republic Aviation Corp. V. NLRB (1945) 324 U.S. 793 [16 LRRM 620]. If the charging party is able, by direct or circumstantial evidence, to raise the inference that the employer was motivated to take adverse personnel action by its knowledge of the employee's protected activity, the burden shifts to the employer to demonstrate that it would have acted as it did regardless of the employee's participation in protected activity. Novato, supra; Wright Line. A Division of Wright Line. Inc. (1980) 251 NLRB 1083 [105 LRRM 1169]; NLRB v. Transportation Management Corp. (1983) U.S. _____ [113 LRRM 2857]; Martori Brothers

¹⁸In order to prevail, the charging party must prove the charge by a preponderance of the evidence. PERB regulation 32178.

Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721.¹⁹

To justify such an inference, the charging party must prove that the employer had actual or imputed knowledge of the employee's protected activity. Novato Unified School District. supra; Moreland Elementary School District (1982) PERB Decision No. 227. Such knowledge, plus other factors cited by PERB in Novato and amplified in subsequent cases, may support the inference of unlawful motive. Factors which may support an inference are: the timing of the employer's conduct in relation to the employee's performance of protected activity. North Sacramento School District (1982) PERB Decision No. 264; the employer's disparate treatment of employees engaged in such activity, San Leandro Unified School District (1983) PERB Decision No. 288; its departure from established procedures and standards when dealing with such employee, Novato, supra; and/or the employer's inconsistent or contradictory justifications for its actions. State of California. (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.

Where the charging party has introduced evidence that may suggest an inference of unlawful motivation, the employer's

¹⁹The construction of similar or identical provisions of the NLRA, as amended. 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, 12-13.

case-in-chief evidence may rebut the inference, thereby avoiding the necessity of proving that the employer would have made the same decision in the absence of protected activity. California State University, Sacramento (1982) PERB Decision No. 211-H.

Finally, the mere fact that an employee is participating in union activities does not immunize the employee from routine employment decisions. Martori Brothers Distributors v. Agricultural Labor Relations Board, supra. 29 Cal.3d 721. Rather, once employee misconduct is demonstrated, the employer's action.

. . . should not be deemed an unfair labor practice unless the Board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. Ibid.

Application of the foregoing principles to this case leads me to the conclusion that the board of trustees were not unlawfully motivated in removing Leonard from the position he held at East Cottonwood School. As will be seen in the analysis that follows. Charging Party's contention of an inference of unlawful motivation from evidence is either rejected or is negated by the employer's rebuttal evidence.

Charging Party's threshold contention is that the nexus required in unlawful motivation cases is found in Rickert's statement regarding union membership of teachers at East Cottonwood School. The District argues that, while one

interpretation of the statement could be that the board took action against Leonard because the teachers had joined the union at East Cottonwood and had not at West Cottonwood. a different interpretation could also be made. That is. the teachers at East Cottonwood School joined the union because they were dissatisfied with Leonard, whereas few teachers had joined at West Cottonwood because teachers were not dissatisfied with Principal Osborn. Rickert himself testified that he meant a reflection on Leonard's leadership by the comment. As he stated, he was trying to compare the two schools with the same board, same superintendent, same salary and benefits, the same everything; yet, at one school, they had turmoil and a general lack of communication. At the other school there were no problems. At least one teacher, Kure. drew the same interpretation. Rickert's statement meant the board had surmised that teachers at East had joined because of Leonard's job related deficiencies and the teachers at West did not feel they needed to join.

While the statement is subject to either interpretation, I am inclined to credit Rickert's version of his comments. Overall, he was a credible witness, and there is no reason to disbelieve him on this point.²⁰ His demeanor on the witness

²⁰Rickert's testimony on the source of information about Leonard's time spent at recess was addressed elsewhere in this decision. His explanation of his written response to a recall

stand leads me to believe he harbored no unlawful motive when he made the statement in question. Moreover, I conclude that it is highly unlikely that Rickert, who is chairman of the board, would make such a statement in a public forum if, in fact, unlawful motive was present. While the words were obviously not well-chosen, I cannot attribute an unlawful motive to Rickert based upon this evidence.

Despite this conclusion, the fact remains that at a board meeting to review the demotion of the East Cottonwood School principal, the board chairman did comment on the teachers at that school joining the union. Under these circumstances, a continued analysis of the Novato principle is appropriate.

The balance of Charging Party's arguments in support of an inference of unlawful motivation focuses on contentions of inconsistent or contradictory justifications for the board's action. The evidence simply fails to support these contentions.

While the reasons for the board's actions could have been more fully explained, they were not inconsistent or contradictory. Similarly, other criteria such as timing, disparate treatment, or departure from established procedures

petition undertaken after Leonard's removal was vague and showed ignorance of the particulars of federal programs. In light of the political nature of recall petition, I do not conclude that Rickert was otherwise an unbelievable witness because of the generalizations he set forth in his written response to the petition.

and standards, are not substantiated by Charging Party, nor is there evidence to apply such criteria. For example, if the PERB-conducted election in spring 1982 was the instigating factor, then CTA membership in 1981-82 was remote from the board's action in 1984. Leonard testified that in 1982 Babiarz told him the board was unhappy with teachers joining CTA. That was the supposed reason for Leonard receiving a raise of only \$500. Yet the board did not take action to reassign Leonard until 1984. two years later. In the interim the board gave Leonard, in 1983, a \$1,000 raise. If union membership at East Cottonwood School was irking the board in 1982, what changed in 1983 to prompt them to provide a \$1,000 raise in 1983?

Charging Party devotes much attention to the evidence of Babiarz's anti-union attitude in support of an inference that the board of trustee's harbored unlawful motivation in reassigning Leonard. The evidence does support a finding that Babiarz harbored strong feelings about unionism. For the following reasons, the evidence in this case does not justify a conclusion that the board's decision was tainted by Barbiarz's anti-union sentiments.

Charging Party argues that the employer is tainted by the anti-union statements or acts of the supervisors whether or not the acts are specifically authorized, citing Babbitt Engineering and Machinery v. Agricultural Labor Relations Board (1984) 152 Cal.App.3d 310; National Labor Relations Board v.

LaSalle Steel Co. (7th Cir. 1949) 178 F.2d 829. cert, denied 339 U.S. 963; Vista Verde Farms v. Agricultural Labor Relations Board (1981) 29 Cal.3d 307.

PERB has adopted "historically accepted labor relations principles of agency authority and principal liability" in cases arising under EERA. Antelope Valley Community College District (1979) PERB Decision No. 97. There, PERB acknowledged that, under both NLRB and California common law. the principal's liability will attach under apparent authority where reasonable reliance was made by third persons or employees upon the authority of the agent, based upon conduct of the principal. Thus. here, the District board of trustees would be liable for Babiarz's conduct if it were reasonable for third persons to believe he was conducting himself with the authority of the board. But reliance on such principles in this case is misplaced.

In Konocti Unified School District (1982) PERB Decision No. 217. the PERB found that, even assuming a superintendent harbored anti-union animus, such would not be automatically imputed to the board of trustees, the body which took the ultimate action. The Board distinguished Antelope Valley, which had been relied upon by the hearing officer, since in Konocti, there had been no approval of the managers who were responsible for the conduct in question. Here, there is no evidence that the board approved Babiarz's conduct in 1981. nor

was it aware of the continued conduct of Babiarz after the settlement agreement was executed.

In the first place, aside from the 1981 conduct of Babiarz, which was arguably an unfair practice. Babiarz's conduct in asking Leonard to post articles against unions following the settlement of that case was not necessarily unlawful. In Rio Hondo Community College District (1980) PERB Decision No. 128. the Board held:

. . . an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA.

As noted by the District, PERB held, in Los Angeles Unified School District (1985) PERB Decision No. 514:

. . . an employer may harbor adverse feelings toward an employee organization so long as it refrains from taking action against any employee because of the exercise of rights guaranteed by the Educational Employment Relations Act (EERA).

Here the articles posted by Leonard at Babiarz¹ request constitute no threats of reprisal or promise of benefit, but were addressed to unionism generally. Leonard testified that Babiarz talked to him about the dangers of unionism and his anger at teachers joining CTA, but there is no evidence that Babiarz made any contact with teachers who did join CTA. There is no evidence of any action against teachers taken by Babiarz after the 1981 settlement agreement.

More to the point, however, is the absence of any evidence connecting the board's decision to Babiarz's views on unionism. By Leonard's own testimony, his only inklings of the board's view on the subject of unions were Babiarz's statement to him that the board was unhappy that the teachers had joined CTA, and the related statement of Rickert at the board meeting on December 19, 1984. While the discussion of unionism came up when board members were present, there was no evidence presented to show that the board was influenced by Babiarz's anti-union attitude. In fact, credible witnesses testified that there was no mention of CTA membership; instead the discussion focused on the work-related shortcomings of Leonard. As to the pay raise situation, Leonard did nothing to seek or clarify the basis for the board's action. He did not inquire of the board or any member as to the basis in fact for granting the pay raise of only \$500. The board's position, as explained by Petersen, was that the 1981-82 problems at the East Cottonwood School indicated performance problems and that Leonard did not merit a higher raise.

Lastly, the 1983 raise of \$1,000 severely undercuts Leonard's testimony that Babiarz said the board awarded only a \$500 raise in 1982 because of increased CTA membership. Further, Leonard's failure to bring this matter to the board's attention at the time leaves doubt that he was convinced of the rationale offered by Babiarz for the lesser raise. In any

event, Leonard could not describe any board sentiment to corroborate such a basis for the difference from prior raises.

Charging Party cites the board's failure to investigate his charges against Babiarz in the spring of 1984 relating to the latter's anti-union attitude and continued pressure on Leonard about teachers joining CTA. Yet, it is clear that Leonard did not go to the board to complain about Babiarz's conduct; rather, when the board advised Leonard of their determination to relieve him as principal at East, his response was to attack Babiarz. In the absence of evidence to connect Babiarz's anti-union sentiment to the board's decision, it cannot be concluded that Babiarz was the issue. Leonard's performance as principal was the issue. As the board saw it, Leonard was not facing the issue.

Charging Party takes umbrage at the board's failure to investigate Babiarz's conduct following Leonard's complaints about Babiarz's relationship with Leonard. Yet the 1981 matter did not address that relationship, but rather the administration's pressure on the teachers to defer joining CTA. As Petersen testified, the dynamics of the relationship between Babiarz and Leonard was not addressed in the 1981 charge. In addition, Leonard testified that it was not until the spring of 1984 that he went into detail about the September 1981 meeting with the teachers. He complained of no post-1981 conduct by Babiarz. The 1981 matter had been resolved. Absent

testimony by Leonard that he complained about post-1981 conduct by Babiarz. the board cannot be faulted for failing to investigate such conduct.

It must also be noted that, at the time, the board was aware of Babiarz's pending retirement. It is clear that his 39-year tenure with the District weighed heavily on the circumstances. Babiarz was going to retire, and the board knew that fact. No useful purpose would have been served by directing an inquiry into his job performance.

The November 21 Evaluation

Charging Party argues that the November 21, 1984 performance evaluation is unsubstantiated. He characterizes the evaluation as raising two "incidents" which are not supported by the evidence. The first "incident," argues Charging Party, that of too much time spent with children, was suspect because none of the teachers who testified on behalf of the District mentioned this as a problem. Babiarz spent very little time at East Cottonwood School, thus could not be aware of Leonard's activity. Finally, only one board member, Rickert, responded to this point. Rickert testified that the comment was based upon remarks of members of the community whom he could not identify. For these reasons Charging Party concludes the criticism is unfounded.

The second unsubstantiated "incident" Charging Party finds in the evaluation is the criticism that Leonard failed to

render firm decisions involving possibly controversial matters, such as the implementation of SB 813. Charging Party finds this criticism suspect because, as Leonard testified, he and the teachers did take a stand and developed a proposal that was ultimately adopted by the board.

Neither argument is persuasive. The teachers were not asked about Leonard's time spent with children, and that they did not mention it as a problem does not mean that the board did not view it as a problem. Neither Powers nor Petersen were asked about the issue. Rickert's source of information on the issue was members of the community and is hearsay. Rickert's inability to name members of the community who complained about Leonard's time spent on recess might cast some doubt on the District's position; however, I am not inclined to draw that observation. Rickert did testify that he did ask Leonard, at board meetings, what Leonard did with his time over at East Cottonwood School. Rickert said he never got an answer from Leonard. Leonard did not testify, on rebuttal, about questions from Rickert regarding his time at East Cottonwood.

As to the SB 813 issue. Leonard correctly asserts that the board did adopt his proposal. From the board's perspective, however, Leonard gave them various signals as to the possible solution to the issue over the three months it took him to reach consensus with his teachers. That process, not his solution, they found exasperating. That the board adopted his

proposed solution does not refute the board's concern, as testified by Peterson, that getting to the solution was a frustrating process for the board.

Moreover. Charging Party's myopic rendition of the evaluation (only two "incidents") is undermined by the overall text of the evaluation. First it must be emphasized that concern about Leonard's performance was not new. The board had been meeting with its administrators over the years since 1983 to review Leonard's role as principal. Specifically, the board articulated its concern regarding Leonard's inability to lead and evaluate and motivate the staff. The board saw his authority as principal eroding. The board contended in the evaluation that it had had a number of closed sessions with Leonard over the past two years. Some were follow-up meetings as a result of the 1981 concerns of the teachers at East Cottonwood. Leonard did not. at the time the evaluation was given to him or at hearing, challenge the statement. The board saw no improvement in his total ability to serve as administrator of the school. Against this background Leonard always gave the same impression to the board, that there were no problems and that everything was satisfactory. Thus, the board had reason to be concerned. Petersen, an extremely credible witness, testified as to these observations of the board. Again, Leonard did not dispute the assertions at the time he received the evaluation.

The evaluation was written by Babiarz who evidenced anti-union animus. Yet Babiarz wrote the evaluation at the direction of the board; the content was not his, it was the board's. They told him what to place in the evaluation. In addition, the evaluation was prepared by Babiarz well after the board had notified Leonard of their decision to remove him as principal at East Cottonwood. While the evaluation may lack the specificity to satisfy Leonard, it does capture the essence of the board's apparent basis for action. As a result of the 1981 teachers concerns, the discussion Petersen and Seale had with the teachers, and the subsequent communications from the teachers, the board simply looked at Leonard's performance as principal more closely. As issues arose, for which the board expected the principals to have viewpoints or recommendations, they found Leonard not responsive. These issues dealt with conditions of the facility at East Cottonwood. such as the play yard, blacktop, fencing, grassy area, carpet, sinks and drapes. Other issues that surfaced were the mentor teacher program and the physical education teacher. While the board had ultimate authority on these matters, they expected, not without reason, to have the principal take a stand on such issues. Leonard did not react to these issues as the board thought a principal should. This scrutiny of his performance, along with the continued presence at board meetings of teachers from East Cottonwood with concerns about unresolved matters at

the school, culminated in the board's determination that they no longer had confidence in Leonard's performance as principal.

This is not to say that I find the board had just reason to reassign Leonard. It is not this agency's role to determine the propriety of trustees' action, but to ascertain whether unlawful motivation was behind the action. In Berry Schools v. NLRB (5th Cir. 1981) 653 F.2d 966 108 LRRM 2011. it was said;

The decision of the department chairman and the associate dean to evaluate Carper as below average may not have been a good or reasonable one, but so long as it was not in retaliation for protected activity the Board had no jurisdiction to question it.

See also Cerritos Community College District (1980) PERB Decision No. 141.

Charging Party discounts the testimony of the teachers on behalf of the District, charging evidence of a strong bias in that they were paid by the District for their work on the case and for their testimony. Further, Charging Party asserts their testimony related to stale facts and isolated and petty grievances. Paying overtime to teachers is unprecedented. However, I found the teachers' testimony persuasive or relevant only to the extent that they testified in corroboration of the documentary evidence submitted in conjunction with the memoranda sent to the board in 1981.

Charging Party cites Rickert's denial of Leonard's request to put the reasons for his demotion into the board minutes for the December meeting. While it is true that Rickert could not

recall ever denying a request for matters to be placed into the minutes, it is also true that the type of request presented to him by Leonard was unprecedented. The District had never had a request of this sort before and Rickert was uncertain of what he should do. Rickert said that he acted under advice of counsel. Given the unprecedented nature of the proceedings and the understandable uncertainty. I find no unlawful motive in these limited facts.

The Charging Party finds inconsistent the testimony of Powers, Rickert and Petersen regarding the involvement of Babiarz in Leonard's demotion. All three were, however, consistent on the crucial matter that the decision to relieve Leonard was made by the board. It is clear, given the relationship between the board, the superintendent and Leonard, that the board did discuss Leonard's performance with Babiarz. Petersen's testimony that the board discussed Leonard's performance with Babiarz is not inconsistent with his later testimony that Babiarz was not involved in the decision to demote Leonard. Getting feedback from Babiarz does not automatically thrust him into the decision-making process. Reading Powers' testimony. I do not conclude that Powers said that Babiarz recommended Leonard's demotion. Rickert noted that Babiarz only provided evaluations (he was not asked if he meant that the November 21 evaluation was provided by Babiarz), but was firm that Babiarz made no recommendation regarding

Leonard. Based on this evidence, I am unable to conclude that the testimony of these three District officials is inconsistent or that Babiarz unlawfully tainted the decision to demote Leonard.

Charging Party infers anti-union animus by the board's perceived "hostility" to organized input from teachers, citing Dana Byers' testimony regarding a board member's statement that teachers should not have anything to say about the workday schedule. Since Byers could not identify the board member, no unlawful motive can be inferred from such limited evidence.

Nor does the testimony of member Powers evidence hostility. Charging Party reads such a conclusion in his testimony that the presence of many teachers from the East School at board meetings indicated to him that teachers there were not getting results from the site administrator. By coming to the board, the teachers indicated a lack of respect for Leonard. The questions presented by the teachers to the board or to the superintendent at these meetings indicated to him that they were not satisfied with the site administrator.²¹ The Charging Party has confused legitimate board dissatisfaction with hostility.

²¹Charging Party argues that Powers testimony that teachers should go through the chain of command (through the principal, the superintendent and the board) is contradicted by teacher Nikki Sass's testimony that Leonard told the teachers they should go to him first, then to the superintendent and

Thus, under the Novato analysis outlined above, and as applied to the present case. I conclude there is insufficient evidence to infer unlawful motivation. No small part of this disinclination is based upon the failure of Charging Party to establish that Babiarz's anti-union conduct, in 1980 and 1981. was approved by the board of trustees. In addition, nothing that Babiarz did following the settlement agreement of 1981 appears to have violated the EERA and. thus, even if the board was aware of such conduct, no violation would be found. As noted, even assuming Babiarz harbored unlawful motives, there is simply no evidence to tie the board to condoning any of Babiarz's acts at any time. In the final analysis, the board determined to relieve Leonard as principal for reasons unrelated to his posture on teachers joining the union or union activity. Whether the board's decision was right, or based upon justifiable reasons, is not for this agency to determine. As was stated in Moreland Elementary School District (1982) PERB Decision No. 227,

[L]ack of 'just cause' is nevertheless not synonymous with anti-union animus. By itself, it does not permit such a finding. Disciplinary action may be without just cause where it is based on any of a host of

then to the board. Facially, there is no contradiction. Moreover, Powers' point is that the teachers' coming to the board outside of the chain of command was the indicia of the problem, that Leonard was not being responsive.

improper or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board it therefore without power to remedy.

In the present case, no unlawful motivation is inferred from the evidence; thus no violation is found. Accordingly, the unfair practice charge and complaint must be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this proceeding, it is hereby ordered that the unfair practice charge and the PERB complaint filed against the Cottonwood Union School District is DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 27, 1986, unless a party files a timely statement of exceptions. 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. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on May 27, 1986, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See

California Administrative Code, title 8. part III,
section 32135. Any statement of exceptions and supporting
brief must be served concurrently with its filing upon each
party to this proceeding. Proof of service shall be filed with
the Board itself. See California Administrative Code, title 8,
part III. section 32300 and 32305.

Dated: May 6, 1986

Gary M. Gallery
Administrative Law Judge