

The Board has reviewed the entire record in this case, including the transcript, exhibits, proposed decision, District's exceptions, and the responses thereto filed by the Livingston Elementary School Teachers Association, CTA/NEA (Association). The Board finds the ALJ's findings of fact and conclusions of law are free of prejudicial error and adopts them as the decision of the Board itself consistent with the following discussion.

DISCUSSION

The District's exceptions focus on the central issue in this case -- the ALJ's determination that the decision not to rehire Laura McKibbin (McKibbin) and David Cordeiro (Cordeiro) was based on their protected activity. In reaching this conclusion, the ALJ appropriately relied on the Board's decision in Novato Unified School District (1982) PERB Decision No. 210 (Novato), where the Board set out the elements of a prima facie case of discrimination or retaliation.

In order to state a prima facie case under Novato, the charging party must show that the employee has engaged in protected conduct about which the employer is aware and that the employer took adverse action against the employee because of the exercise of protected activity.

discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

In general, if direct proof of a connection or nexus between the protected activity and the adverse action is unavailable then the charging party must rely on circumstantial evidence and inferences draw from the record as a whole.

Novato further instructs that once the charging party has established a prima facie case, including a nexus between the protected activity and the adverse action, the burden shifts to the employer to show that it would have taken the adverse action regardless of the employee's participation in protected activity.

In the present case, there is no dispute that both McKibbin and Cordeiro engaged in protected activity about which the District was aware. McKibbin expressed her concern about class size to the principal and the District board of trustees; Cordeiro addressed the principal and the District superintendent regarding a class assignment.

In reaching his conclusion that the District's decision not to rehire the two probationary employees was unlawfully motivated, the ALJ relied on statements made by the principal at a meeting on June 8, 1990. We agree with the ALJ's conclusion that the principal's statement warning probationary teachers about associating with employees who voiced complaints is strong evidence that the District's decision not to rehire McKibbin and Cordeiro was connected to their protected activity.²

²The District argues in its exceptions that the superintendent's evaluation of the principal, in which he said that the principal had "had the pleasure of housing many of the District's malcontents," is irrelevant to the inquiry regarding the District's motivation for its rehire decision. While the

Circumstantial evidence lends further support for finding an inference of unlawful motivation.³ We agree with the ALJ's conclusion that McKibbin and Cordeiro suffered disparate treatment as evidenced by the fact that, unlike other probationary teachers who did not receive tenure, their evaluations were not "less than satisfactory" or "needs improvement." In addition, we agree that the record includes substantial evidence of inconsistent and/or contradictory justifications for the District's decision not to rehire McKibbin and Cordeiro. In this regard, we note that the superintendent's reasons for not rehiring the two teachers are not reflected in any of the evaluations McKibbin and Cordeiro received.

We also agree with the ALJ's finding that the District departed from established procedures. The District came to its decision not to rehire McKibbin and Cordeiro a few weeks before

superintendent's evaluation did not identify McKibbin or Cordeiro by name, both were sufficiently associated with the group of teachers who voiced concerns that they can reasonably be assumed to be among the employees to whom the superintendent was referring. Moreover, the sarcastic tone of comment suggests that the District superintendent did not enjoy dealing with employees who voiced their concerns about working conditions and is therefore relevant to the question of motivation.

³The District takes exception to the ALJ's finding of a reasonable connection between McKibbin's and Cordeiro's activities in the fall and the District's decision not to rehire them in January and February. While the Board may not agree with the ALJ's conclusion, evidence establishing disparate treatment, inconsistent and/or contradictory justifications, and the departure from established procedures supplies sufficient proof from which to infer unlawful motive. Moreover, as the Board has repeatedly said that timing between protected activity and adverse action is insufficient, in itself, to demonstrate unlawful motive, the ALJ's reliance on timing as support for inferring unlawful motivation is not prejudicial.

the notice of non-reelection was prepared. This practice was at odds with the policy of evaluating probationary employees over the year. From this evidence, we conclude that the ALJ reasonably inferred that the District's rehire decision was unlawfully motivated by the employees' protected activity.

Having concluded that the Association met its burden of establishing a prima facie case, it is incumbent on the District to show that it would have decided not to rehire McKibbin and Cordeiro regardless of their participation in protected activities. In this regard, the ALJ found that the District's assertion that McKibbin and Cordeiro were not rehired because of the District's quest for teaching excellence was pretextual. We agree. There is no evidence that these two employees were only marginally satisfactory or otherwise weak when measured against the policy of excellence.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, including the administrative law judge's proposed decision which we have attached, we find that the Livingston Union School District (District) violated section 3543(a) and (b) of the Educational Employment Relations Act (Act) when it refused to rehire Laura McKibbin and David Cordeiro because of their protected activity.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Laura McKibbin (McKibbin) and David Cordeiro (Cordeiro) because of their exercise of protected rights in speaking to supervisors about work-related problems and by electing not to rehire these employees and thereby terminating their employment with the District.

2. Interfering with the right of the Livingston Elementary School Teachers Association, CTA/NEA, to represent its members by discriminating against employees who participated in protected activity.

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

1. Within thirty-five (35) workdays following the date this decision is no longer subject to reconsideration, reinstate McKibbin and Cordeiro as teachers at the Livingston Middle School.

2. Within thirty (30) workdays of the reinstatement of McKibbin and Cordeiro as teachers in the District, reimburse each of them for lost wages and benefits retroactive to the first day of service for teachers during the 1991-92 school year. The amount of compensation shall be reduced by any unemployment compensation or wages that either may have earned during the period since the commencement of the 1991-92 school year. The amount due to them shall be augmented by interest at the rate of 10 percent per annum.

3. Within thirty-five (35) days following the date this decision is no longer subject to reconsideration, post at

all school sites and all other work locations where notices to employees are customarily placed, copies of the Notice attached hereto as an Appendix. The notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the Notice is not reduced in size, altered, defaced, or covered by any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Member Camilli joined in this Decision.

Member Caffrey's concurrence begins on page 8.

CAFFREY, Member, concurring: Section 3543.5(a) of the Educational Employment Relations Act (EERA) prohibits discrimination against an employee for engaging in conduct protected by the EERA. In order to prove an allegation of discrimination, the charging party bears the burden of showing that: (1) the aggrieved employee engaged in protected activity; (2) the employer knew of the employee's protected activity; and (3) the employer took adverse action motivated by the protected activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato).)

The party alleging discrimination must make a prima facie showing of unlawful motivation by demonstrating a nexus or connection between the protected activity and the adverse action. Absent direct evidence, indications of unlawful motivation have been found in many aspects of an employer's conduct. (Departure from established procedures and standards, Santa Clara Unified School District (1979) PERB Decision No. 104; timing of the action, North Sacramento School District (1982) PERB Decision No. 264; disparate treatment, State of California (Department of Transportation) (1984) PERB Decision No. 459-S; shifting justifications and cursory investigation, State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; a pattern of antagonism toward the union, Cupertino Union Elementary School District (1986) PERB Decision No. 572.)

Once an inference of unlawful motivation is established, the burden of proof shifts to the employer to demonstrate that it would have taken the adverse action regardless of the employee's

protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].)

In this case, the Livingston Elementary School Teachers Association, CTA/NEA has established a prima facie discrimination violation by satisfying the elements of the Novato test. There is sufficient evidence to establish unlawful motivation on the part of the Livingston Union School District (District) by demonstrating a connection between the protected activity and the decision not to retain the two probationary teachers.

The burden then shifts to the District to prove it would have decided not to retain the two probationary teachers regardless of their participation in protected activity. Upon review of the record, including the transcript, exhibits, proposed decision and the District's statement of exceptions, I find the District has failed to meet its burden of proof.

I therefore concur with Chairperson Hesse's decision that the District violated section 3543.5(a) and (b) of the EERA when it decided not to retain probationary teachers Laura McKibbin and David Cordeiro.

APPENDIX



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

After a hearing in Unfair Practice Case No. S-CE-1431, Livingston Elementary School Teachers Association. CTA/NEA v. Livingston Union School District, in which all parties had the right to participate, it has been found that the Livingston Union School District violated the Educational Employment Relation Act (Act), Government Code section 3543.5(a) and (b). The District violated the Act by refusing on March 15, 1991, to rehire Laura McKibbin and David Cordeiro as teachers for the 1991-92 school year. It has been found that these actions were motivated by an intent to retaliate against Laura McKibbin and David Cordeiro for their participation in protected activity.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Laura McKibbin (McKibbin) and David Cordeiro (Cordeiro) because of their exercise of protected rights in speaking to supervisors about work-related problems and by electing not to rehire these employees and thereby terminating their employment with the District.

2. Interfering with the right of the Livingston Elementary School Teachers Association, CTA/NEA, to represent its members by discriminating against employees who participated in protected activity.

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

1. Within thirty-five (35) workdays following the date this decision is no longer subject to reconsideration, reinstate McKibbin and Cordeiro as teachers at the Livingston Middle School.

2. Within thirty (30) workdays of the reinstatement of McKibbin and Cordeiro as teachers in the District, reimburse each of them for lost wages and benefits retroactive to the first day of service for teachers during the 1991-92 school year. The amount of compensation shall be reduced by any unemployment

compensation or wages that either may have earned during the period since the commencement of the 1991-92 school year. The amount due to them shall be augmented by interest at the rate of 10 percent per annum.

Dated: _____ LIVINGSTON UNION SCHOOL DISTRICT

By: _____
Authorized Agent

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



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LIVINGSTON ELEMENTARY SCHOOL)	
TEACHERS ASSOCIATION, CTA/NEA,)	
)	
Charging Party,)	Unfair Practice
)	Case No. S-CE-1431
v.)	
)	PROPOSED DECISION
LIVINGSTON UNION SCHOOL DISTRICT,)	(5/29/92)
)	
Respondent.)	
_____)	

Appearances; California Teachers Association, by A. Eugene Huguenin, Jr., for Livingston Elementary School Teachers Association, CTA/NEA; Atkinson, Andelson, Loya, Ruud & Romo, by Paul M. Loya, for Livingston Union School District.

Before Gary M. Gallery, Chief Administrative Law Judge.

PROCEDURAL HISTORY

In this case, the employer's decision to not rehire two second-year probationary employees is alleged to have occurred because of their protected activity.

On May 10, 1991, the Livingston Elementary School Teachers Association, CTA/NEA (LETA), filed an unfair practice charge against the Livingston Union School District (District). In response, and after investigation, the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on June 25, 1991, against the District, alleging violations of section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).¹ The complaint charged the

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise stated, all statutory references are to the Government Code. In relevant part, section 3543.5 provides:

It shall be unlawful for a public school employer to do any of the following:

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

employer with not re-employing Laura McKibbin (McKibbin) and David Cordeiro (Cordeiro) for the following year because, those employees engaged in protected activity. McKibbin, it was alleged, twice complained to school Principal Emily Shoemaker (Shoemaker) about class size and addressed the school board on October 11, 1990, about this matter. Cordeiro, it was alleged, expressed concern to other teachers about students having keys and finding an unsupervised classroom. It was further alleged that Shoemaker told Cordeiro he should not have spoken to faculty about the matters, but rather to her. It is further alleged that Cordeiro told Shoemaker he was not qualified to teach a class she had assigned to him, and that he went to the superintendent on the issue.

The District's timely-filed answer denied violations of the EERA and raised certain affirmative defenses that will be addressed in this decision.

A settlement conference did not result in settlement. Formal hearing was held on November 21 and 22, 1991, and on

(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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

December 18, 1991. Post-hearing briefing was completed on April 14, 1992, and the matter submitted as of that date.

FINDINGS OF FACT

Charging party is an employee organization within the meaning of section 3540.1(d). The District is a public school employer within the meaning of section 3540.1(d). Laura McKibbin and David Cordeiro were employees within the meaning of section 3540.1(j).

For all times relevant, Harold Thompson (Thompson) has served as district superintendent. Henry Escobar (Escobar) has been assistant superintendent since the beginning of the 1989-90 school year. Prior to the 1990-91 school year, two schools within the District, the Selma Herndon School (Grades 4 - 6) and the Livingston Intermediate School (Grades 7 - 8) were located on the same campus. Each school had a principal and a secretary. Victoria Zuber (Zuber) was principal at Selma Herndon, and in the 1989-90 school year, her first year with the District, Emily Shoemaker was principal of the intermediate school. Shoemaker was preceded by Escobar, who became assistant superintendent. Mary Pickford (Pickford) was a half-time vice principal under Shoemaker. Zuber's secretary was Diane Linen (Linen), and Jeanette Aha (Aha) was secretary to Shoemaker.

Rebecca Cleckler (Cleckler), a 7th and 8th grade teacher was president of LETA for the 1989-90 and 1990-91 school year.

Among several new teachers hired for the 1989-90 school year, were Laura McKibbin and David Cordeiro.² McKibbin had one term of student teaching at the District prior to her hire in 1989. Although new to the Livingston school, Cordeiro had some 13 years teaching experience.

McKibbin was hired as a physical education and english/language arts class teacher in Grades 7 - 8 . Cordeiro was hired as a music teacher for Grades 4 - 8 . In his first year, at Shoemaker's request, Cordeiro also taught one 8th grade history course.

Terry Wilcox (Wilcox) was a half-time resource teacher and half-time special reading class teacher in 1989-90.

During the 1989-90 school year, the parties went to impasse on negotiations for a successor agreement.³ The teachers, under the auspices of LETA, conducted meetings and demonstrations in front of the District office, where mediation was taking place. They carried signs and had a letter writing campaign to the board of trustees. In the spring, they had a march through Livingston. They spoke at board meetings. Cleckler, as noted, was president of the LETA.

²The other teachers hired as first year probationary teachers in the 1989-90 school year were Janet Bartholomew (Bartholomew), Sandy Cardoza (Cardoza), Robin Salley (Salley), and Mary Ann Reynolds (Reynolds).

³Thompson had always handled negotiations for the District prior to the 1989-90 school year. The parties had never reached impasse in prior negotiations. For 1989-90 and 1990-91, the District hired outside counsel to do the negotiations for the District.

Cordeiro participated in the marches, sit-ins and attended one board meeting. A picture in the local newspaper showed Cordeiro carrying a picket sign among a line of picketers.

A successor agreement was reached on March 29, 1991. The existing collective bargaining agreement, as amended, was extended to June 30, 1992, with reopeners on salary, fringe benefits and three articles for each party for the two intervening years.

During the course of the first year of Shoemaker's stewardship, a difference of opinion emerged among the teachers as to Shoemaker's abilities. Informal alliances developed as to her managerial and organizational abilities. In one group, dissatisfied with Shoemaker, were Cleckler, Wilcox, Cordeiro, McKibbin, Bartholomew, Cardoza and Reynolds. While not mentor teachers that year, Cleckler and Wilcox were helpful to the new teachers who were part of the group. These teachers perceived Shoemaker as incompetent.

At a general session of the faculty, sometime in the spring of 1990, during a discussion on the cohesiveness of the faculty, Cordeiro spoke up and referred to the A and the B group reflecting the division among the teachers.

Also, in the spring of 1990, some 20 teachers appeared before the board of trustees to relate discontent with Zuber, as principal of Selma Herndon. Cleckler attended the executive session with a number of the teachers.

Evaluations

Shoemaker provided first year evaluations of both McKibbin and Cordeiro during the 1989-90 school year.

The evaluation forms are standard for the District and used consistently during relevant time periods. Six categories: Student Achievement, Instructional Skills, Classroom Management, Personal and Professional, and Adjunct Duties, are rated from 1 (Outstanding) to 5 (Unsatisfactory). Possible overall ratings are "Satisfactory," "Improvement Needed" or "Unsatisfactory."

McKibbin was evaluated by Shoemaker on January 12, 1990. The overall rating was "Satisfactory" and she was rated 3 (Meets Districts Standards) in all categories. Shoemaker's overall evaluation was that "McKibbin's overall teaching performance is satisfactory. In her first semester of teaching, she is proving herself to be serious about her teaching and has demonstrated a commitment to professional growth." McKibbin was "encouraged to continue to learn new instructional skills and to continue to contribute to the school's progress through her active participation in school programs."

Janet Bartholomew's first year evaluation by Shoemaker was the same as McKibbin's in rating and overall evaluation and additional comments.

Bartholomew was not active in association meetings or activities in her first year. She was unsure of the effect union activities would have on her employment, and she had small children.

In January and April 1990, Shoemaker rated Cordeiro a 2 (Exceeds District Standards) in all categories. Her written comments were that his "overall teaching performances exceeds district standards." The overall rating was "Satisfactory".

In the spring of 1990, Thompson told Cordeiro he was pleased Cordeiro was returning the next year. He thought Cordeiro was doing a satisfactory job.

Escobar was also pleased with Cordeiro's work. On April 6, 1990, Escobar wrote to Cordeiro in support of his efforts on the spring band concert. Escobar was impressed with the students' performance, and their good conduct. Escobar wrote, "You have not only provided them with good music instruction, but you have taught them to be well disciplined responsible students."

On June 8, 1990, the last day the teachers were to work in the 1989-90 school year, a breakfast meeting was held at a local restaurant for all first year teachers. The meeting was called by Howla Mitchell (Mitchell), the mentor teacher program director. Mentor teachers also attended. The purpose was to recognize both the new teachers who had survived the first year and the mentor teachers who helped during the year.

As noted, Cleckler and Wilcox rendered much assistance to some of the new teachers. They had not volunteered to serve as mentor teachers, however, and thus were not invited to the breakfast.

Some of the first year teachers thought attendance was voluntary. Thus, because teachers such as Cleckler and Wilcox

had not been invited, those new teachers determined not to attend the meeting. However, they were advised that attendance was mandatory and so they attended.

At the meeting, which commenced in cordial fashion, Mrs. Reynolds inquired about the length of that workday, the last day teachers were to work. Shoemaker became upset and said that it was going to be a certain way, and that they could discuss it back at the school. Also, a teacher expressed concern about the absence of Cleckler and Wilcox.

These issues caused the meeting to turn tense. Shoemaker announced that all the new teachers were to assemble in Mitchell's room at the school immediately following the breakfast meeting.

At the second meeting, Mitchell was excused. Mary Pickford, the assistant principal, was also in attendance. All the first year teachers who were returning the following year were there, Bartholomew, McKibbin, Robin Sally, and Cordeiro.

Various accounts of what transpired at that meeting were reduced to writing by three of those in attendance within a few days of the event.⁴

These accounts reflect that Shoemaker was very firm about the new teachers associating with those that supported the

²⁴ Cleckler was told of the comments by Shoemaker that noon. She contacted Bill Walley (Walley), CTA field representative, who encouraged the teachers to write their observations down on paper. Within a week, Cleckler had all the statements. Three statements were introduced into evidence. (Charging Party's Exhibit Nos. 5, 11 and 15.)

school, as opposed to those that did not. She called the latter group "bitchers." Shoemaker quoted from some legislation, regarding tenure and indicated she was the person to decide on their tenure. A senate bill empowered the principal to release probationary teachers without stating a reason. She emphasized the need for teamwork. She again referred to the "bitchers" and asked that the teachers be aware of who they associated with in the next school year. Shoemaker stated that that was more important than classroom dealings. Shoemaker noted that she had no problems with the instruction methods of all the new teachers at that time.

At hearing, Shoemaker denied using the word "bitchers." She may have used the word "grippers," she said. Her interest in the discussion, she said, was to get the teachers to problem solve face-to-face, not to "take people off guard, not to do it in a forum where there can't be a solution." Save for her denial of the use of the term "bitchers," Shoemaker did not deny the assertions made by the teachers in the written comments.

Within a week or ten days, Walley and Cleckler met with Thompson about the comments by Shoemaker. Thompson gave the teachers' letters little credit. Thompson's position was that if the District wanted to release teachers, the letters wouldn't have any bearing. The District could release teachers without a reason.

The Livingston Middle School

A five-year plan envisioned the Selma Herndon and Livingston Intermediate Schools being merged to form the Livingston Middle School. Because Zuber had encountered opposition from teachers in her school, she was to be reassigned. Thus, it was decided to implement the merger for the 1990-91 school year. Zuber's position as principal was eliminated. The 4th grade was assigned to another campus.

Shoemaker was made principal of the new school. During the summer of 1990, Shoemaker, who was in charge of the merger, worked on all the logistics of creating a new Grades 5 - 8 middle school.

The 1990-91 School Year

Cardoza and Reynolds did not return for the 1990-91 school year. Because she was allocated only one secretary for the middle school, Shoemaker designated Diane Linen to be the school secretary. Linen was bilingual, and there is a high percentage of Spanish speaking parents in the community. Aha was assigned to the library, at her regular salary, to fill the position of a staff member who had passed away. Wilcox was no longer a resource teacher.

During the second year, there came to be a "coffee klatch" of teachers who joined Aha in the library lounge for coffee, either before school, or at other times. This group, which included Cleckler, Bartholomew, McKibbin, Cordeiro and Wilcox,

also shared lunch together at the 5 - 6 grade campus and not at the regular teachers lounge.

The division of teachers, according to Cleckler, reflected alliances of those teachers that supported Shoemaker and those that did not. There was, said Cleckler, a strain between the two groups.

Cleckler filed a grievance on September 4, 1990, asserting a contract violation by an alleged increase in student contact time and decrease in teacher preparation time by 15 minutes. Among 33 teachers listed as affected were Cordeiro, McKibbin, Bartholomew and Salley.

Cleckler met with Shoemaker at the informal first level of the grievance procedure. The dispute was ultimately resolved.

On September 18, 1990, Shoemaker caused to be distributed to the teachers a rather extensive collection of materials relating to teacher evaluation. On the cover memo, Shoemaker made assignments for the evaluation of teachers. She also noted that four teachers, McKibbin, Cordeiro, Bartholomew and Salley were second year teachers to be evaluated.

Cleckler was concerned about whether the evaluation document had been adopted by the District. Cleckler called Janet Martin, a member of the school board, to find out if the District had adopted the evaluation document.

On September 28, 1990, Cleckler was preparing to file a grievance on the document when she was summoned to a meeting at Shoemaker's office to discuss her call to the board member.

Prior to that meeting, Cleckler and John Kirby, grievance chair for LETA, met with Shoemaker in mid-afternoon of September 28 to discuss the evaluation document. Cleckler filed a grievance with Shoemaker at the meeting. Cleckler expressed concern about language in the document that required "measuring support for school causes." On the whole, Shoemaker contended the document did not reflect anything not grounded in the contract or school policy.

Later that day, Cleckler met with Thompson and Shoemaker per their request. At Cleckler's request, Walley and Kirby also attended.

At that meeting Thompson was upset that Cleckler had called the board member about the evaluation document. He and Shoemaker were unhappy that Cleckler had not come to them first. They professed that the proper procedure was to have come to Shoemaker first, and then to Thompson. Cleckler said she was gathering information. Thompson stated he didn't like the way she proceeded to get things done. There were only two or three problems in the District, said Thompson, and she was one of them. He thought she was a negative influence and she created problems. Thompson alluded to the way in which she handled the class size issue.

Laura McKibbin

Sometime during the early part of the 1990-91 school year, McKibbin, representing the 7th grade, commenced service on a leadership team composed of representatives of each of the grades

at the school. An initial purpose was to establish lines of communication between the teachers and the administration. The team was designed to evolve into a site-based management program the administration was implementing.

During the opening months of school in the 1990-91 school year, there was a problem of over-sized classes. McKibbin was upset and visited Shoemaker about it. Under Cleckler's coordination, McKibbin and three other teachers spoke to the board of trustees about the situation around October 8, 1990.

On October 11, at a meeting with Shoemaker, McKibbin again spoke on class size. Shoemaker told McKibbin she was unprofessional for taking what they had discussed and "mixing it all up and bringing it to the board." Shoemaker stated that class size was only a problem because McKibbin "didn't know how to teach a large class. . ." Shoemaker asserted that there were strategies she could show McKibbin so a meeting was set up for October 16. That meeting was later canceled by Shoemaker.

Shoemaker observed McKibbin's physical education class on November 20, 1990. While supportive of the program organization, and the execution of warm-up exercise and large group instruction components, the observation commented on McKibbin's tone of voice. Her voice, said Shoemaker, tends to get "thinner" as she speaks louder, and she seems to be "unsure of her control." Shoemaker also wrote, ". . . as an aside, I notice you use your P.E. voice in your English/Language Arts classroom. While very

appropriate for PE, it is not the most effective for classroom. I'll help you."

McKibbin's last evaluation, dated January 14, 1991, was done by Shoemaker. The overall rating was "Satisfactory," with 3's in all categories except for Personal and Professional. Shoemaker gave McKibbin a rating of 3-. Shoemaker wrote under this category, that McKibbin "is continuing to develop professionally. She has become a member of the school's Leadership Team, representing Grade 7 teachers in making school-wide decisions. Even though progress has been made in joining school wide efforts, i.e. participating on the Leadership Team, general attitudinal support for school programs still needs improvement." (Underscoring added.)⁵

In the significant categories, Instructional Skills and Classroom Management, no discernable problems were noted. Under the former category, Shoemaker wrote that McKibbin used "direct teaching strategies with emphasis on demonstration and guided practice." After noting that McKibbin demonstrated "satisfactory understanding and use of this methodology," Shoemaker wrote that that method was "especially well-suited for the physical education classes." Under Classroom Management, Shoemaker wrote:

⁵McKibbin testified she asked Shoemaker for an clarification of the comment on the support of school programs. Shoemaker related overhearing McKibbin talking with other teachers about the messy conditions in staff restrooms caused by students. Shoemaker told McKibbin that if she had a problem with the restrooms, she should talk to Shoemaker instead of other staff members.

In P.E. classes, Laurie McKibbin uses classroom management strategies specifically [sic] developed for the physical education classes. She seeks office support in cases where she feels she needs additional support. Her classroom management skills in her English/language arts classes are satisfactory to support the instructional program.

David Cordeiro

Sometime in the fall of 1990, Cordeiro spoke with Diane Linen and a District maintenance supervisor about the break-in at a teacher's office. Cordeiro made reference to the absence of any action if the teacher was someone that Shoemaker liked, but if among the other group, the teacher would be in trouble.

Shoemaker then came to his room where he was visiting with Kirby. Shoemaker asked Kirby to leave and spoke to Cordeiro about his comments on her showing favoritism and the existence of the A and B groups he had alluded to the past year. Shoemaker suggested that he should not encourage the division. If he had a problem with the administration, he should come to her. She told him to watch what he said.

On October 8, 1990, Shoemaker advised Cordeiro that he was to teach a language arts class, scheduled to alleviate an over class size problem in the 7th grade. Cordeiro was shocked, because he had been told he was hired to teach nothing but music. He asked for another solution. He told her he was not qualified to teach the class. She told him that a music class in first

period would be dropped so he could teach the class. There was nothing he could do, she said.⁶

Cordeiro met with Thompson that same day regarding the assignment. He related his same concern about being unqualified and being taken out of a music class. He then began expressing his concerns about Shoemaker's abilities. Thompson took notes, he said, while he related matters going back to January of 1990. He also reminded Thompson that he had supported Zuber in the prior year. Thompson related that he did not want a repeat of the Zuber experience.⁷

After leaving Thompson's office, Cordeiro encountered Escobar, told him of the problem and offered several alternatives.

The next morning Shoemaker asked him to her office and expressed disappointment that he had gone to Thompson. She told him the decision on the revised class assignment was still under consideration.

The change was scheduled to occur at the beginning of November. Anxious about the time to prepare for the new assignment and wrapping up the class that was to end, Cordeiro

⁶Shoemaker testified that Cordeiro at first agreed to take the class, and later changed his mind. This assertion is not credited in light of Cordeiro's immediate reaction in asking for other solutions, his claim of not being qualified to teach the course, and his immediate appeal to Thompson.

⁷Thompson could not remember if he took notes of Cordeiro's comments. In any event, consistent with his practice, he would have gone to the administrator and related the complaints as soon as possible. Cordeiro's comments, said Thompson, regarding Shoemaker's abilities, were "very unfavorable."

pressed her for a final decision. The week before the scheduled change, Shoemaker advised him that he would not be teaching the class.

Cordeiro's evaluator for the 1990-91 school year was Al Silveira (Silveira), assistant principal. Silveira replaced Pickford, who left Livingston Middle School one month into the 1990-91 school year. Silveira made a scheduled classroom observation on October 17, 1990, and reduced his reaction to writing. Cordeiro, he wrote, "provides a highly participatory learning environment." There was nothing negative in the observation.

On November 20, 1990, Shoemaker made an unannounced observation of Cordeiro's class. She wrote, "David, the students worked at your direction. You combined direct instruction strategies with coaching, and you combined whole group strategies with individual strategies." She commented that "drummers in back seemed less focused than other students." She requested he met with her to discuss the observation. She further asked him to compare student progress and level of performance from last year to this year. A post observation conference note on the November 20 visit noted that there were more 8th graders and fewer 7th graders in Cordeiro's first year, and that in the current year there were more 7th graders and fewer 8th graders. This change in ratio was confirmed by Cordeiro. In his judgement, the change in ratio of younger musicians caused the change in strength of the band between the two years. With fewer

8th graders, who were more experienced musicians, and more 7th graders, who were less experienced, the band did not have the same abilities as the prior year.

Shoemaker and Cordeiro met on December 7. According to Cordeiro she did not express any problems, except for concern about the percussionist walking around in the back of the classroom. Cordeiro said he explained the situation involving two unfriendly students and that he advised the one student to walk away from the antagonist. She seemed satisfied, said Cordeiro.

Cordeiro was presented with an evaluation by Silveira on January 15, 1991. The evaluation, dated the day before, gave an overall "Satisfactory," with ratings of a 2 on Classroom Management, and 3's on the other categories, except for Personal and Professional. There, Cordeiro was rated a 3-. Under this category, Silveira wrote "Mr. Cordeiro shares ideas and participates in school activities. He is actively involved with the school program. However, conversations between Mr. Cordeiro and Mr. Silveira, and between Mr. Cordeiro and Mrs. Shoemaker indicate a need for improvement in supporting school goals."

(Underscoring added.)

In Instructional Skills, with a rating of 3, Silveira wrote that Cordeiro "exposes his students to a variety of teaching techniques and new ideas. These techniques and ideas are beneficial to the students." Under Classroom Management

with a rating of 2, Silveira wrote, "Dave manages his classroom in a positive manner. He recognizes their accomplishments and their positive aspects."

Cordeiro said that Silveira had no problems with the evaluation. The one area discussed in depth was Personal and Professional. Silveira expressed concern of Cordeiro's lack of school goals, and cited an event having to do with a school mascot selection. Sometime in the fall the students had selected a school mascot. The selection was overturned by the administration, and Cordeiro had objected at a faculty meeting.

(Cordeiro also told Thompson about his thoughts on the matter on October 8.) Silveira expressed concern that Cordeiro had not supported school goals, that he talked about the issue outside of the school campus, and should have talked to Silveira if he had a concern. Silveira also commented on the strained relationship Cordeiro had with Shoemaker. Cordeiro said he used Silveira as a confidant, and "really stated a lot of things to him."

According to Cordeiro, there was no discussion of his continued employment with the District. Silveira, he said, suggested there was no problem. Silveira testified that he played no role in Shoemaker's decision to release Cordeiro.

In February of 1990, Escobar wrote to the board and Thompson regarding hiring practices. In March of 1991, before the March 15 date of non-rehire notice, the same memo, this time from Thompson and Escobar, went to the board. This memo states:

As I have discussed with the Superintendent and members of the board, I believe we should

continually seek to increase the level of excellence in our instructional staff. In the past we have retained some teachers who were "barely satisfactory" or believed to "not to have reached their full potential." The fact is that these individuals usually do not improve, to the contrary they become even less satisfactory having achieved the security of permanent status.

Under SB 813, and related legislation, the California Legislature has directed schools to stamp out mediocrity and pursue excellence in education by granting us the right to issue a notice of non-employment to any probationary teacher who does not meet the standards established by the district, even a teacher who may be satisfactory. This is an important tool (in my view the most powerful one) we have to improve the quality of instruction in Livingston. I hope we don't hesitate to use it!

On March 13, 1991, Shoemaker was evaluated by Thompson.

Thompson wrote:

Seems Emily has had the pleasure of housing many of the District's malcontents this year. Her recommendations for staff changes are well documented and thought out.

For at least four years prior to the spring of 1990, there had never been a probationary employee given a notice of non-rehire.

In the spring of 1990, two probationary employees, were given notice of non-rehire. Both were evaluated by Zuber. One had an overall evaluation of "Unsatisfactory," and the other's overall evaluation was "Improvement Needed." Later that same school year, a third probationary employee was released. His overall evaluation was "Improvement Needed."

Bartholomew's January 14, 1991, evaluation, by Silveira, had four 3's and one 2 (Classroom Management). The overall rating was "Satisfactory." Her numerical ratings were exactly the same as Cordeiro's, save for the 3- he got in Personal and Professional.

Sometime after the first of January 1991, the teachers were expected to sign and return letters to the District, indicating whether they intended to return the following school year. The District's administration was aware of LETA's encouragement to teachers to not turn in the intent letters.

The Non-Reelection

By memo to Escobar, dated February 25, 1991, Shoemaker made recommendations on staffing for 1991-92. Shoemaker recommended, among other things, that Cordeiro and McKibbin be released from service. On the memo, she noted that Cordeiro had checked "doubtful" to return on his intent letter and that McKibbin "turned intent letter in but took it back at the urging of another teacher."

The decision to terminate McKibbin and Cordeiro was initiated by Shoemaker. According to Shoemaker, she had three meetings with Thompson and Escobar, totaling about an hour and a half, over a two-week period prior to the end of February. At these meetings they discussed her recommendations regarding McKibbin and Cordeiro.

Escobar testified that decisions not to rehire typically are the result of many meeting throughout the year, during which the

administrators ask for reports on how teachers are doing, particularly for teachers coming up for reelection recommendations. There is a lot of input, and "no surprises." In this instance, Shoemaker consulted with him at least three times to go over criteria and role expectations.

These role expectations included the references to which Cleckler had taken umbrage when initially confronted with the document presented by Shoemaker in September. Specifically, Cleckler was concerned on how to measure whether the teacher "develops good staff morale and loyalty to the school," or "Represents accurately and supports the district or school in conversations with the public."

Shoemaker also testified that another part of the decision-making process is the role of the assistant superintendent who is in charge of personnel and responsible for staff development. The assistant superintendent, she said, works and observes in new teachers classrooms.

Shoemaker recommended that McKibbin not be rehired because in the two years of employment McKibbin had not attained the level of excellence required by the District's goal of creating a teaching staff of excellence.⁸ Ratings of "Satisfactory" performance do not imply that the employee will be recommended

⁸Shoemaker's exposure to the District's philosophy on hiring for excellence came from discussions with Thompson and Escobar. She had not read any policy nor did she get any documents on the policy. She did not attend any board meetings where the policy was discussed. While Shoemaker has attended executive sessions of the board, she did not attend the board session where the decision not to rehire McKibbin or Cordeiro was made.

for employment. Shoemaker's assessment of McKibbin's problem was that McKibbin felt she was controlled by the students. Shoemaker did not see McKibbin developing the leadership and authority needed for middle-grade students. Shoemaker said she believed McKibbin lacked maturity and self-confidence. According to Shoemaker, during her discussions with Thompson and Escobar she asked if McKibbin could be brought back a third year. The answer was no.

Shoemaker recommended that Cordeiro not be rehired based upon Silveira's recommendation, and her own assessment of Cordeiro's performance. She said the "musicality" of the students had seriously reduced in the second year. She believed she had given him credit in his first year for the previous program. She had not seen his music education theory put into practice. Classroom management problems continued and she felt the band program was deteriorating. Shoemaker was under the impression that the band population has dropped and that she further understood that it climbed to three times that under the new teacher, Maureen Whittaker (Whittaker).⁹

Escobar, said Shoemaker, concurred with both recommendations.

⁹The parties submitted a stipulation (Charging Party's Exhibit No. 40) making a comparison of the class sizes of the bands under Cordeiro and Whittaker. The stipulation does not contribute to any findings necessary for this decision.

Although Bartholomew made many complaints directly to Shoemaker, she was rehired and gained tenure with the District at the beginning of the 1991-92 school year.¹⁰

Cleckler and Kirby, permanent teachers under Shoemaker, were given very high ratings in the various categories. Cleckler was the LETA president, and Kirby the grievance chairman. Wilcox also got high ratings.

Robin Salley was rehired and thus granted tenure for the 1991-92 school year.

By March 15, 1991, McKibbin, Cordeiro and Kathy Hill (Hill) received notice from the District that they were not to return the following year.¹¹

The Notice of Non-reelection for McKibbin and Cordeiro stated:

You are hereby given notice that the governing Board at its meeting of March 12, 1991, took action not to reemploy you for the 1991-92 school year. This notice of non-reelection is provided pursuant to the requirements of Education Code Section 44929.21(b).

After getting this notice, Cordeiro attempted to meet with Thompson, who at first was unavailable. Escobar told Cordeiro that he had nothing to do with it. Meeting with Thompson later

¹⁰The District contends that Bartholomew's activities with the union increased in her second year. The record suggests that she may have attended a few more LETA meetings after school. She did, as many other teachers did, directly address the principal about classroom needs.

¹¹Hill's non-reelection came from Katy Berkeley at the Yomato Colony Elementary School. Her overall rating on evaluation was "Improvement Needed."

that day, Cordeiro asked for an explanation of his non-rehire. Thompson said the District could take the action for any reason and that he did not have to give a reason. "It was in the best interest of the District" to take the action, and the District followed the Education Code, said Thompson.

Cordeiro later met with Shoemaker, who suggested that "he look deep inside of himself." The District did not have to give a reason, she said, and that "it was in the best interest of the District." Escobar would not discuss the matter with him.

McKibbin complained to Escobar about the manner in which the termination had occurred. Shoemaker suggested that she look deep inside for an explanation.

Shoemaker served on an interview committee, chaired by Escobar, to select a replacement for Cordeiro. The person selected was president of the teachers union at the school district she worked at in the preceding school year.

ISSUE

Was the District's non-reemployment of Laura McKibbin and David Cordeiro in retaliation for their exercise of protected activity?

CONCLUSIONS OF LAW

In order to prevail, the charging party must establish that the two employees were engaged in protected activity, the activities were known to the employer, and that the employer took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210.) Unlawful motivation is

crucial to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato, supra, and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the employer. Among such circumstances, arguably present here are: the timing of the adverse action in relation to the exercise of the protected activity (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employees (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); inconsistent or contradictory justification for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S), or employer animosity towards union activists (Cupertino Union Elementary District (1986) PERB Decision No. 572).

Once an inference is made, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employees' protected activities. (Novato, supra, PERB Decision No. 210; Martori Brothers Distributors, v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) Once employer 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.)

Here, both McKibbin and Cordeiro undertook protected activities in the fall of 1990, preceding Shoemaker's decision to release them from service. McKibbin presented concerns directly to Shoemaker concerning class size, and then, in conjunction with Cleckler's (thus LETA's) presentation, she spoke directly to the board of trustees. Subsequently, she again spoke to Shoemaker about the class size issue. Acting on her own, concerning the problem of class size, was protected activity. (See Pleasant Valley School District (1988) PERB Decision No. 708.) The District concedes this point. Certainly, acting in concert with LETA was protected activity.

Likewise, Cordeiro engaged in legitimate protest of what he perceived to be an inappropriate assignment. Shoemaker wanted him to accept a teaching assignment for which he was not qualified to teach. He explained the problem, and she indicated he had no recourse. He then followed the appropriate procedures and discussed the matter with Thompson, Shoemaker's superior. The next day Shoemaker chastised Cordeiro for going to see Thompson. Seeking redress about a classroom assignment is engaging in protected activity. (Pleasant Valley School District, supra).

In both cases, Shoemaker immediately reacted to the employee's activities. She called McKibbin unprofessional, and

chastised Cordeiro. The District attempts to limit Shoemaker's responses to McKibbin's written document. She stated that Shoemaker charged her with "mixing it all up and bringing it to the board." The District argues that Shoemaker was upset about misrepresentations to the board made by McKibbin. The record does not support this narrow interpretation. Shoemaker was unhappy that McKibbin went to the board about class size.

The admonishment given by Shoemaker at the end of the prior school year cannot be ignored. The new teachers were advised that they should not associate with the "bitchers" or "grippers" if they wanted to get good evaluations the next year, necessary to obtain tenure with the District. The "bitchers" or "grippers" could only have been those people like Cleckler who spoke up on issues of concern to the organization she represented. Shoemaker wanted unquestioned support and did not like teachers to go over her head on issues. Loyalty and support of school goals was a factor in the evaluation of teachers, enunciated in the document distributed by Shoemaker in September of 1990. These factors were acknowledged by Escobar as used in evaluations.

McKibbin continued her association with Cleckler by participating in the October 8 presentation to the board of trustees, despite the warning by Shoemaker. McKibbin, by the same presentation, demonstrated disloyalty to Shoemaker.

Cordeiro likewise chose to question Shoemaker's decision on the class assignment. His conduct was within the realm of being

a "bitcher," or "griper." As Silveira wrote, and acknowledged in testimony, Cordeiro needed to improve support for school goals.¹²

The District takes umbrage at any conclusion that the February 25, 1991, memo to Escobar from Shoemaker on staffing for the subsequent school year, and which noted the release of McKibbin and Cordeiro, stated the reasons for their non-rehire. The memo also made reference to their respective actions with respect to the letters of intent. This document, argues the District, cannot be construed as expressing reasons for non-rehire. Because I do not rely on the document for findings here, the argument is not addressed.

The record evidence supports the inference that both probationary employees were released for protected activities. While the timing is not dispositive, there is a reasonable connection between the fall activities of McKibbin and Cordeiro, and the District's January and February reaction. Shoemaker's advice to the teachers the prior year, about associating with the "bitchers" as influencing the tenure decision made any actions during the entire second year logically connected to the decision not to rehire.

Importantly, however, other grounds for inferences are present here. The District elected to not re-hire two

¹²Silveira's basis for the observation was Cordeiro's reaction to the mascot decision of the administration. Cordeiro's position on the "mascot" issue does not constitute protected activity. However, it was not the only basis for the criticism. It cannot be ignored that Shoemaker was upset because Cordeiro went over her head on the class assignment.

probationary teachers whose evaluations were satisfactory. Only three teachers in the last six years had not gained tenure status. In all three cases, the evaluations of the teachers were either "less than satisfactory," or "needs improvement." Thus, the two employees suffered disparate treatment.

Likewise suggesting unlawful motivation is the inconsistent or contradictory justification for the action taken. Shoemaker's proffered explanation for both McKibbin's and Cordeiro's non-rehire are either inconsistent with or contradict the documentation and appraisals of work performance given to each of the two employees.

With respect to McKibbin, Shoemaker recommended non-rehire because, given the District's philosophy on striving for excellence, McKibbin fell short because she "felt controlled by students," "lacked the leadership and authority for middle grade students," and lacked "maturity" and "self-confidence."

These reasons are not reflected in any review of McKibbin's work. At most, in the observation Shoemaker undertook in November 20, she expressed the view that McKibbin's tone of voice suggested that she was not in control. On the other hand, she then commented that McKibbin's voice was good for PE, but not necessarily for the language arts class. Neither the observation of November 20, 1990, nor the evaluation of January 18, 1991, reflect concern for McKibbin's lack of leadership or authority over middle grade students, nor reflect concern for maturity and or self-confidence. Rather, in Instructional Skills, for which

McKibbin received a 3, Shoemaker wrote that McKibbin demonstrated satisfactory understanding and use of a described methodology that was "especially well-suited for the physical education classes." In Classroom Management, an area that should reflect class control, and level of leadership as well as self-confidence, Shoemaker rated McKibbin as "Meeting District's standards." Nothing stated there suggests concern for class control or lack of self-confidence. Indeed, Shoemaker stated that McKibbin seeks office support when needed. Shoemaker further stated that McKibbin's classroom management skills in the english/language arts classes were satisfactory. Finally, Shoemaker arranged to meet with McKibbin to instruct her on dealing with classroom management, and then cancelled the session.

With respect to Cordeiro, Shoemaker recommended non-rehire based on Silveira's recommendation, the "musicality of the students" had lessened the second year, his failure to put into practice his music education theory, continued classroom management problems and her perception that the band program was deteriorating.

These contentions are not supported by the documentation of the observations by Silveira and Shoemaker, or by the evaluation given Cordeiro by Silveira. Silveira's first observation, on October 17, 1990, praised Cordeiro for his "highly participatory learning environment." Shoemaker's November 20, 1990,

observation contained no negative reflections save for her observation of drummers who seemed less focused than other students. Their meeting on December 7 gave no indication of her concerns, and his explanation of the students behavior seemed to satisfy her. Silveira's evaluation of Cordeiro contained no hint of reduction of musical ability of students, or failure to put into place music education programs. Rather, Silveira was complimentary of Cordeiro's instructional skills, in that Cordeiro exposed his students "to a variety of teaching techniques and new ideas." Contrary to Shoemaker's explanation for the recommendation for non-rehire, as Cordeiro's "classroom management problems," Silveira rated Cordeiro as exceeding District standards in this category, and wrote that Cordeiro "manages his classroom in a positive manner."

Finally, Shoemaker testified that her recommendation to release Cordeiro was based in part on Silveira's recommendation. Yet Silveira testified that he played no role in Shoemaker's decision to release Cordeiro.

It must also be noted that Thompson's evaluation of Shoemaker sheds further insight on the nature of the grounds for non-rehire. Thompson called special attention to Shoemaker's confrontation with "malcontents" during the 1990-91 school year. It is clear that his disposition towards Cleckler reflected dissatisfaction with her activities on behalf of LETA. Certainly, McKibbin and Cordeiro, both taken to task by Shoemaker

for having gone either to the board or to Thompson, fell within the group of "malcontents."

Further, Thompson's praise of Shoemaker's decisions being "well documented and well thought out," as expressed in his evaluation of her performance, was hardly demonstrated in the decision to terminate two satisfactory performing employees. In this case, the decision to terminate the two employees can hardly be called "well documented," or "well thought out." None of the evaluations of the two employees reflects a problem with classroom ability. Indeed, Cordeiro's last evaluation gave him an "exceeds district's standards" for classroom management and he met District standards in all other respects. Likewise, McKibbin's evaluations gave no hint of deficiency giving rise to justification for non-rehire.

Significantly, in both cases, a minus rating was given to each, predicated upon their failure to support school goals. In other words, they associated with or were among the "bitchers."

Finally, the employer's departure from established procedures also gives rise to an inference. Here, while the assessment of a teachers performance was proclaimed by Escobar and Shoemaker to be a over-the-year process, to avoid surprises, no assessment of their performance, reflecting deficiency in support of non-rehire was developed in this case. Not until within a two week period of February 25 was there any discussion among the administrators that non-rehire recommendations would be made on the two probationary teachers.

That must have been a surprise to Escobar, who independently did not see McKibbin as having the deficiencies noted by Shoemaker.

The burden of proof now shifts to the employer to establish that it would have taken the action against the two employees, despite their protected activity. In the absence of such a showing, the employer will be found in violation of the EERA for failure to rehire McKibbin and Cordeiro.

The District contends that neither McKibbin nor Cordeiro would have been rehired, as both failed to demonstrate the potential for excellence that the District was striving to attain. Both Escobar and Shoemaker denied the decision to terminate the employees was based upon union activities, and asserted that the decision was made on the pursuit of excellence. The District asks, if Shoemaker was retaliating for union activities, why would she have requested a possible third year of probationary status for McKibbin, or recommended a former union president to replace Cordeiro?

The retention of teachers under a quest for teaching excellence is an admirable aim. However, it cannot be a shield for removing teachers who otherwise have engaged in protected activity. In this case, the memo suggested not retaining a teacher, even a teacher who might be satisfactory, if the teacher did not meet standards set by the District. Yet no evidence has been advanced by the District explaining what standards either McKibbin or Cordeiro failed to meet.

The gap between explanations given by Shoemaker as grounds for the recommendation for non-rehire versus what was outlined to the employees in their respective evaluations, set forth above, lead to the conclusion that their alleged failure to demonstrate excellence is pretextual. The evidence does not show that the District informed probationary teachers that satisfactory performance ratings should not engender rehire expectations. Indeed, unrefuted by Shoemaker was the assertion that at the June 8 meeting Shoemaker stated that who teachers associated with was more important than classroom dealings.

Rather, this concept standard of excellence was bantered about only by Escobar, Thompson and the board. Shoemaker may have discussed it with the two administrators, yet she never saw anything in writing about this standard. It does not appear to have been adopted by the board. The memo to the board expresses hope that whomever has the decision making power for hiring employees strive for excellence by not rehiring probationary teachers who "do not meet standards established by the District," even a teacher who may be satisfactory.

Moreover, the memo was critical of the practice of the District, in the past, to rehire teachers who were "barely satisfactory," or were believed to "not have reached their full potential." The evaluations of McKibbin and Cordeiro cannot be said to be marginally satisfactory, nearing "barely satisfactory" or expressed doubt that they "had not reached their full potential." Rather, on one point for which Shoemaker decided to

recommend Cordeiro's release, Classroom Management, Cordeiro's evaluator had rated him as exceeding District standards. As to McKibbin, Shoemaker's assertion that the teacher lacked self-esteem found no corroboration from Escobar.

Shoemaker may have inquired as to a possible third year of probationary status for McKibbin. Such inquiry does not mitigate against Shoemaker's decision that McKibbin not be rehired into a tenure position, a recommendation based upon McKibbin's activity found to be protected under the EERA. McKibbin would have, under the alleged proposal, been denied the right to tenure status, and as a probationary employee, still subject to Shoemaker's scrutiny for being a "bitcher."

Contrary to the District's contention, the record does not show that Shoemaker recommended the hire of a former union president to replace Cordeiro. Rather, a committee, of which she was a member, made that selection. It is not clear that Shoemaker was aware of the employee's prior union activity. Nonetheless, even if she were, the teacher assumed a probationary position with the District, where again, if she did not meet Shoemaker's notions of loyalty to the school, adverse action could be taken. In addition, how the District treats other employees engaged in union activities does not dispose of how it treated these two employees. In State of California (Department of Transportation), supra. PERB Decision No. 459-S, the PERB adopted federal precedent on this point. Stated PERB, "A discriminatory motive, otherwise established, is not disproved by

an employer's proof that it did not weed out all union adherents." (Citations omitted)

It is concluded that the District's decision not to rehire McKibbin and Cordeiro was based upon their participation in protected conduct. This action is a violation of section 3543.5(a). Because McKibbin's conduct included participating in the activities of the union, the District's conduct also is a violation of section 3543.5(b).

REMEDY

The PERB is empowered in section 3541.5(c) to:

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

Reinstatement is the appropriate remedy for discriminatory discharge. (McFarland Unified School District (1991) 228 Cal.App.3d 166 [279 Cal.Rptr. 26].) It also appropriate that Laura McKibbin and David Cordeiro be made whole for lost wages and benefits. The amount of back pay shall be reduced by earnings from other sources since the termination.

It is further appropriate that the District be directed to post a notice incorporating the terms of the order. A posted notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the

purposes of the EERA that the employees be informed of the resolution of the controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Livingston School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a) and (b). The District violated the Act when it terminated the employment of Laura McKibbin and David Cordeiro for their presentation of employment-related problems to their supervisors.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Laura McKibbin and David Cordeiro because of their exercise of protected rights in speaking to supervisors about work-related problems by electing not to rehire said employees and thereby terminating their employment with the District.

2. Interfering with the right of the Livingston Elementary School Teachers Association, CTA/NEA, to represent its members by discriminating against employees who participated in protected conduct.

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

1. Within ten (10) workdays of service of a final decision in this matter, reinstate Laura McKibbin and David Cordeiro as teachers at the Livingston Middle School.

2. Within thirty (30) workdays of the reinstatement of Laura Mckibbin and David Cordeiro as teachers in the District, reimburse each of them for lost wages and benefits retroactive to the first day of service for teachers during the 1991-92 school year. The amount of compensation shall be reduced by any unemployment compensation or wages which either Laura McKibbin or David Cordeiro may have earned during the period since the commencement of the 1991-92 school year. The amount due them shall be augmented by interest at the rate of 10 percent per annum.

3. Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced or covered by any other material.

4. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc., sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: May 29, 1992


GARY M. GALLE GALLERY
Chief Administrative Law Judge