STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BARSTOW EDUCATION ASSOCIATION, Charging Party,	)	Case No. LA-CE-3481
v.	)	PERB Decision No. 1164
BARSTOW UNIFIED SCHOOL DISTRICT, Respondent.	)	August 7, 1996

Appearances: Lawrence B. Trygstad, Attorney, for Barstow Education Association; Atkinson, Andelson, Loya, Ruud & Romo by Ronald C. Ruud, Attorney, for Barstow Unified School District.

Before Caffrey, Chairman; Garcia and Dyer, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Barstow Education Association (Association) to a PERB administrative law judge's (ALJ) proposed decision (attached). The unfair practice charge alleged that the Barstow Unified School District (District) denied Association member Judy Webber (Webber) her right to union representation and retaliated against her because of her participation in protected conduct. The ALJ found that the District did not violate section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA).[1]

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

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

The Board has reviewed the entire record, including the unfair practice charge, the proposed decision, the Association's exceptions and the District's response thereto. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them in accordance with the following discussion.

DISCUSSION

The Association offers three exceptions to the ALJ's proposed decision, which are discussed in turn. The District responded to the Association's exceptions by supporting the ALJ's conclusions.

Exception One

The Association excepts to the ALJ's conclusion that the District's filing of a police report did not adversely affect Webber's employment status with the District. The Board need not reach the merits of this exception, however, since the charging party in a discrimination/retaliation case must prove that the employer's conduct was motivated by the employee's exercise of protected activity. (Novato Unified School District (1982) PERB Decision No. 210, at p. 6.) The ALJ properly found that the Association failed to prove any connection between Webber's

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> 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.

protected conduct and the District's filing of the police report. Therefore, our analysis ends.

Exception Two

Exception two challenges the ALJ's conclusion that the May 4, 1995 meeting did not involve "either an investigatory or disciplinary element that required the right to representation contemplated by the Weingarten[2] rule." The Association argues that under the facts, any teacher would reasonably fear discipline.

The Board agrees with the ALJ; the Association did not present evidence sufficient to support a finding that the May 4, 1995 meeting was either investigatory or disciplinary.

Exception Three

In a related exception, the Association objects to the ALJ's conclusion that the May 4, 1995 meeting "did not present the type of 'highly unusual circumstances' which would have entitled Webber to union representation under the Redwoods[3] standard." The Board also agrees with the ALJ on this point; the Association did not present evidence sufficient to support a finding that the May 4, 1995 meeting presented highly unusual circumstances.

Based on the record before us, the Board concludes that the Association has not shown that the District violated EERA.

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[2]NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689].

[3]Redwoods Community College Dist. v. Public Employment Relations Bd. (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523] (Redwoods).

ORDER

The unfair practice charge and complaint in Case No. LA-CE-3481 is hereby DISMISSED.

Member Dyer joined in this Decision.

Chairman Caffrey's concurrence begins on page 5.

CAFFREY, Chairman, concurring: I concur in the finding that the Barstow Unified School District (District) did not deny Judy-Webber (Webber), a member of the Barstow Education Association (Association), her right to union representation and did not retaliate against Webber because of her participation in protected conduct. Therefore, the District did not violate sections 3543.5(a) and (b) of the Educational Employment Relations Act (EERA) and I concur in the dismissal of the unfair practice charge and complaint in Case No. LA-CE-3481. I write separately to express some additional thoughts.

On appeal, the Association excepts to the administrative law judge's (ALJ) finding that the District's filing of a police report about Webber's tape recording of the May 4, 1994, meeting did not adversely affect Webber's employment status with the District. In reaching that conclusion, the ALJ notes that under the Board's test for unlawful retaliation, the adverse action taken against the employee cannot be speculative, but must constitute actual harm under an objective standard. (Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde USD).) In response, the Association argues that "It is self evident that filing false criminal charges against an employee is adverse action."

In my view, the intimidation and coercion resulting from an employer's intentional filing of a false police report against an employee may well constitute adverse action within the Board's Palo Verde USD standard. If the false report is filed because of

the employee's protected activity, it would constitute an extremely serious violation of EERA's prohibition against retaliation and discrimination.[1] It has not been established by the evidence presented in this case, however, that the District intentionally filed a false police report against Webber, primarily because the District Attorney's office filed a complaint against Webber subsequent to the District's report. Under these circumstances, I am unable to conclude that the District's action constituted adverse action against Webber. Additionally, I agree with the ALJ's conclusion that the Association has not demonstrated that the District's action in filing the police report was motivated by Webber's participation in conduct protected by the EERA.

I also wish to comment on the ALJ's holding that Webber's request for representation at the May 4 meeting was itself EERA-protected conduct, even though Webber had no right to that representation. I want to state clearly that this holding should not be interpreted as a conclusion that a request for union representation constitutes EERA-protected conduct in all cases, irrespective of whether the employee has the right to that representation or the other circumstances of the case.

[1]Moreover, the intentional filing of a false police report may itself be a crime (Penal Code 148.5).

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

BARSTOW EDUCATION ASSOCIATION,	)	
	)	
Charging Party,	)	Unfair Practice
	)	Case No. LA-CE-3481
v.	)	
	)	PROPOSED DECISION
BARSTOW UNIFIED SCHOOL DISTRICT,	)	(2/16/96)
	)	
Respondent.	)	
	)	

Appearances: Lawrence B. Trygstad, Attorney, for Barstow Education Association; Atkinson, Andelson, Loya, Ruud & Romo, by Ronald C. Ruud, Attorney, for Barstow Unified School District.

Before W. Jean Thomas, Administrative Law Judge.

PROCEDURAL HISTORY

This case commenced when the Barstow Education Association (BEA) filed an unfair practice charge against Barstow Unified School District (District) on October 12, 1994. The charge, in essence, alleged that in 1994 the District engaged in conduct against Judy Webber (Webber), a bargaining unit member, and BEA, that violated the Educational Employment Relations Act (EERA or Act).[1] The charge was amended on February 1, 1995, to add additional allegations of unlawful conduct.

After an investigation of the amended charge, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on February 8, 1995.[2] It

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2]On February 8, 1995, BEA withdrew specified allegations of the amended complaint without prejudice.

alleged that the District, through its agents James Ostrander (Ostrander), principal of Barstow High School (BHS), and William Schmitt (Schmitt), assistant principal, violated section 3543.5(a) and (b),[3] by (1) interfering with Webber's right to union representation; (2) replacing her with another teacher because of her protected activity; and (3) filing a police report against Webber and causing a criminal complaint to issue against her.

The District answered the complaint on March 1, 1995, wherein it denied any violations of EERA.

Informal discussions were held in March and April 1995, in an unsuccessful attempt to reach voluntary settlement.

A formal hearing was conducted by the undersigned on June 20, 21 and 22, 1995. Post-hearing briefing was completed on October 10, 1995, after which the case was submitted for proposed decision.

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[3]Section 3543.5 states in pertinent part as follows:

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

FINDINGS OF FACT

Background

The parties stipulated and it is found that, within the meaning of EERA., the District is a public school employer, and BEA is an employer organization and the exclusive representative of an appropriate certificated unit of District employees. At all times relevant to the charge, BEA and the District were parties to a collective bargaining agreement (CBA) with a term effective from October 3, 1990 through June 30, 1993.[4]

Webber has been employed by the District as a teacher for more than 25 years. She has taught art classes at BHS for the past six years. Webber's immediate supervisor is Shirley Lester (Lester), an assistant principal at BHS.

For many years prior to 1985, Webber was an active BEA member. From 1985 to 1994, she was a member of the Barstow Federation of Teachers, Local 3258 (BFT), a non-exclusive employee organization. During the 1993-94 school year, Webber served as the BFT president. The exact nature of her BFT activities in 1993-94 is unclear. At the time of the hearing, Webber purportedly was the alternate BEA site representative at BHS.

Ostrander is a 29-year District employee. He served as a BHS assistant principal for six years, and for the past five, has been its principal. Ostrander and Webber have known each other

[4]By its terms, the CBA continued in full force and effect "from year-to-year until such time as a new or modified Agreement is reached by the parties."

since the early 1970's, when both were active in BEA. Ostrander admitted that, based on his past experience, he did not particularly like Webber because of her tendency to accuse administrators of harassment and to misrepresent or distort their conversations with her. Ostrander denies any knowledge of Webber's BFT affiliation or activity until he learned of it during the hearing. He normally deals with the designated BEA representatives concerning certificated unit matters at BHS.

Schmitt has been an assistant principal at BHS for four and one-half years. He has known Webber for the same length of time. One of his responsibilities as assistant principal is to handle student discipline problems.

Complaints About the BHS Site Council Selection Process

On September 13, 1993, Lester distributed a memo to the teaching staff regarding the selection of four teacher representatives to serve on the BHS school site council for the 1993-94 school year. The school site council is composed of representatives of teachers, classified staff, administrators, students and parents. One function of the BHS site council is to decide on the school staff inservice days. The names of nominees were due to Lester by September 17.

On September 22, Webber sent Lester a memo, listing what she viewed as serious irregularities in the selection process for the teachers' representatives. Webber specifically stated that the selection process had not been conducted in accordance with the legal requirements of the Education Code, i.e., an election by

secret ballot, since the end of the 1989-90 school year. Webber requested a quick response from Lester since the first school site council meeting was scheduled for the next day. The memo showed that copies of it were sent to Robert Rittman, BFT representative, Shirley Hora, BEA representative, District Superintendent Dr. Joseph Spaulding (Spaulding), and the District board of trustees.

On September 29, Ostrander sent a memo to Webber asking that she meet with him in his office on the afternoon of September 30. The memo did not disclose the purpose of the meeting.

Webber received the memo on September 29, shortly after noon. She responded that same day to Ostrander by a memo that read as follows:

> Board policy affords me with 48 hour notice and written reason for meeting as well as representation. Please, respond giving 48 hours notice for meeting, specific written reason for meeting, and allowance for representation.
>
> If this meeting has anything to do with the two recent letters to you requiring a response on your part, I have received no response to date on either matter. Should this meeting have to do with either of these, it is my opinion that I should have written responses before any meeting should occur.
>
> Until board policy is observed and written responses to previous complaints answered, I will be unable to meet with you at 2:10 p.m. on Thursday, September 30, 1993.

Within an hour after he received Webber's memo, Ostrander re-sent his same September 29 memo to Webber. Webber responded later that afternoon with a second memo which read:

> I will not attend any meeting with you at any time unless I receive at least 48 hours notice [sic], specific written reason for meeting, and proper representation for such meeting.
>
> I consider a second notice after your having my initial response blatant harassment.

Both memos showed copies to the same people listed on Webber's September 22 memo to Lester.

On September 30, Lester distributed a ballot to the teachers for the election of their school site council representatives. The ballot listed 13 nominees, including Webber. The deadline for returning the ballot was October 4.

On October 1, Webber sent a memo to Ostrander and Lester complaining that the site council selection process was still improper for the reasons that she listed. The memo also charged Ostrander with failing to observe board policy R4107, ¶11,[5] with regard to Webber's September 29 memo. On the same date, Webber

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[5]Board Policy R4107, ¶11, reads:

> Certificated Employee Representation
>
> Whenever any employee is required to appear before the Superintendent or his designee, the Board or any committee member, representative or agent thereof, concerning any matter which could adversely affect the continuation of that employee in his office, position or employment, or the salary or any increments pertaining thereto, then he shall be given prior written notice, at least forty-eight (48) hours, of the reasons for such meeting or interview and shall be entitled at his request to have a representative present to advise him and represent him during such meeting or interview.

sent separate memos to Spaulding and the District board complaining of Ostrander's "negligence" with respect to following board policies and laws covering the site council election and employer responses to employees' complaints.

Lester announced the outcome of the teachers' site council selection on October 5. Webber was one of the four elected representatives.

Ostrander testified that he cannot remember the reason he had asked Webber to meet with him on September 30, 1993, but he thinks it may have had something to do with her site council selection complaints. He is certain it did not involve discipline. Thus he viewed the references in Webber's memos to the provisions of board policy R4107 as inapplicable to the meeting that he wanted to have with her.

Ostrander also maintains that the language used in the September 29 memo was his standard method of summoning a teacher to meet with him unless he did it verbally. Although Ostrander viewed Webber's refusal to meet with him on September 30, as insubordination, he did not consider taking disciplinary action against her.

Ostrander denies that he was concerned or perturbed because Webber sent copies of her September 29 memos to the District superintendent and the board. He described this action as "standard operating procedure" for Webber.

Ostrander did not respond to Webber's second September 29 memo, nor did he meet with her. However, according to him,

Lester and he responded to Webber's site council complaints by changing the teachers' selection process right away.

A few days later, in response to Webber's October 1 memo to Superintendent Spaulding, Robert Myers (Myers), assistant superintendent, personnel services, went to Webber's classroom to speak with her and give her some documents. When Myers asked Webber to step outside with him for a brief chat, she refused. The documents he gave to her were a District grievance form, a complaint form and board policy R4017.1(a) (Complaints Concerning School Personnel). In an accompanying memo, Myers suggested that Webber select the appropriate form, complete it and direct it through the proper channel. Myers also offered to assist Webber if she needed help. A copy of Myers' memo was sent to Spaulding and Ostrander.

The May 4, 1994, Incident

Stacy Harris (Harris) was a student in Webber's first period senior art class.

On April 22, 1994, Webber referred Harris to Schmitt's office for placement in the BHS behavior modification center (BMC) for two days because of Harris' alleged rude and disrespectful conduct toward Webber during class on April 22. Harris refused to take the referral and walked out of the classroom. Webber wrote a second referral about the student's insubordination and defiance of her first directive to see Schmitt.

The following Monday (April 25), Schmitt went to Webber's classroom during the first period and informed her that Harris' father wanted a parent-teacher conference with Webber as soon as possible, and suggested April 27. Webber told Schmitt she did not want to talk about it at that time and Schmitt left the room.

Later that day, Webber sent a memo to Schmitt criticizing the propriety of his visit in the presence of her students and his apparent failure to address her second referral regarding Harris. She suggested that Harris' minimum discipline be one week in BMC and a signed behavior contract before she could return to Webber's class. She also suggested two alternative dates for the parent conference and stated her intent to bring a representative with her.

Schmitt responded to Webber by a memo, dated April 26, explaining the reasons for his April 25 visit and apologizing for any problem that his visit may have presented for her. He also advised her of his actions regarding Harris' second referral.[6]

On April 27, Schmitt held the parent conference with Harris, her father and the BHS attendance counselor. Webber was not present. The student agreed to a "Drop/Fail" contract which was signed by Harris, her father, and Schmitt. Webber signed it later that day. The contract has numerous student performance requirements and states that if a student cannot abide by the contract, he/she will be put out of class (drop/fail).

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[6]Webber sent a memo response to Schmitt that same day, indicating that she was still awaiting an administrative response to Harris' second referral.

On April 29, Schmitt sent Webber a follow-up memo outlining the disciplinary measures imposed upon Harris, including his request that Harris formally apologize to Webber for her classroom misconduct. This memo also notified Webber that a parent conference was scheduled after class on May 3 and that Schmitt had directed Harris to return to class on Monday, May 2.

The morning of May 2, Webber sent Schmitt a memo stating that she had learned from her son, a non-BHS student, that Harris had apparently represented her (Webber) in a derogatory and defamatory manner to other students, in an attempt to undermine and discredit Webber during the May 3 parent conference. Webber further stated that she believed that Harris' conduct amounted to a violation of the drop/fail contract and that the student should not return to her class.

Later the same day, Schmitt told Webber by a memo that he had followed up on the "source of the rumor" about Harris' statements and found them to be incorrect. He assured Webber that no other students, except Harris, would be present at the May 3 conference.

Webber sent a second memo to Schmitt later that day, indicating her displeasure about his actions. She also told him not to return Harris to her classroom and that she would not be available for the May 3 parent conference.[7]

[7]Schmitt cancelled the conference after receiving Webber's second memo because he felt it would be "useless" without Webber present.

The next day Webber prepared an administrative referral to Schmitt noting that she was placing Harris on drop/fail status because of her continued defiance of Webber. Webber personally-delivered this referral to Schmitt before the beginning of the school day oh May 4.

Schmitt discussed the referral with Ostrander, who decided, after conferring with Myers, that Schmitt and he should go together to speak with Webber, prior to the first period, about the BHS drop/fail "policy"[8] as it pertained to Harris. Ostrander and Schmitt felt that an immediate meeting was necessary because Harris was expected to return to class that morning, and Ostrander wanted to speak with Webber before the students arrived.[9] Schmitt was to serve as an observer/ corroborator of the discussion between Ostrander and Webber.

Webber was not given prior notice of the administrators' visit. When they entered her classroom at approximately

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[8]There is no Districtwide drop/fail policy. Prior to May 4, the subject was mentioned in the BHS teacher's handbook, but the school's established practice was unwritten. According to Schmitt, (1) if a teacher requested that a student be drop/ failed, (2) a contract was in effect and (3) the parents had been contacted, the administration would drop/fail the student. If no contract was in effect, a contract would be made. Typically a student on a drop/fail contract receives one warning after the contract is in place, before being dropped from class and receiving a failing grade.

As of May 4, Harris had not received a warning about her alleged violation nor had there been a parent conference.

[9]It is unclear whether Harris attended Webber's class on either May 2 or May 3.

7:10 a.m., Webber was seated at her desk. Schmitt stood near the door and Ostrander went near Webber's desk.

Webber testified that Ostrander and Schmitt "stormed into her room without knocking." She characterized Ostrander's initial behavior as loud, threatening, and brash as he asked her, "What do you think you're doing? Don't you know you can't drop/fail students?" According to Webber, she felt "overwhelmed and trapped" by the situation, because it was unusual for two administrators to visit her classroom at the same time. She also felt that she was being "set up" for discipline.

Less than a minute after Ostrander and Schmitt entered the room, Webber took a tape recorder from her desk drawer and started recording. According to her, the recorder was in plain view, and Ostrander's demeanor changed after she started taping.[10] Both administrators deny seeing the recorder or being aware of it at any time during the meeting which lasted approximately five to six minutes.

Ostrander and Schmitt describe Webber as agitated, hostile and argumentative upon their entry, but she did not seem fearful or afraid. The conversation between Ostrander and Webber was heated. The following excerpt of their exchange is an example:[11]

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[10]A copy of the taped discussions is in evidence as respondent exhibit no. 1.

[11]Webber prepared a transcript of the May 4 tapings which is in evidence as charging party exhibit no. 9.

OSTRANDER: (inaudible) Okay. When you quit talking, I want you to listen. Now tell me when you're done.

WEBBER: I am going to respond to whatever you say.

OSTRANDER: Okay. Now can I tell you what I'm going to say?

WEBBER: Please.

OSTRANDER: Now. My understanding is.

WEBBER: And by the way I am here with two administrators with no representative present and no time to get one.

OSTRANDER: Well, I don't think you need one.

WEBBER: Yes, I do need one.

OSTRANDER: Well, that's your decision when I finish saying what I'm going to say.

WEBBER: So you're not going to allow me representation present despite the Stull Act?

OSTRANDER: Uhhh. I'm not going to talk about your employment.

WEBBER: You are talking about my employment ——

OSTRANDER: No. I'm talking about ——

WEBBER: Because you're talking about interference with a contractual duty.

OSTRANDER: No. I'm talking about your refusal to meet with a parent that

> you want to drop fail his child from class. You didn't refuse once. You refused twice.[12]

As the conversation ended, Webber stated to Ostrander, "I'm sick. I'm going home." Ostrander replied, "That's your decision. Make sure that you report to the office."

After Ostrander and Schmitt left her room, Webber went to the teachers' lounge where she found Clair. She told Clair what had just transpired and allowed Clair to listen to the tape while she telephoned the superintendent for an appointment.

After leaving Webber's classroom, Ostrander went to the school office to request substitutes for Webber's classes. He arranged for Jim Davis (Davis), a BHS teacher, to cover the first period and an outside substitute was called for the rest of the classes.

As Ostrander was leaving the administration building to return to Webber's classroom and ensure that the first period class had coverage, he again encountered Webber. Webber requested to go to her first period class. Ostrander told her that she could not because he had arranged for Davis to cover the class. At that point, Webber turned on the tape recorder, held it toward Ostrander and began recording their conversation. Once Ostrander saw the tape recorder, he refused to make any further comments as he walked away from Webber. Webber started sobbing

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[12]Schmitt never spoke during this visit except when a student entered the room and Webber asked her to get Mary Clair (Clair), a BEA site representative. The student asked, "What room?" and Schmitt told her where to look for Clair.

uncontrollably as they neared her classroom. Shortly thereafter, she had an asthma attack and left the school due to illness.

Later that morning, Ostrander was informed by a staff member that Webber had been observed in the faculty lounge with Clair listening to a recording of their earlier conversation. Ostrander immediately telephoned Myers and the Barstow Police Chief to inquire about whether Webber's taping was illegal. Both Myers and the police chief advised him that the conduct was possibly illegal.

During Ostrander's conversation with the police chief, he requested an investigation and a report of the taping incident. Ostrander testified that he requested the report because he wanted "objective documentation" of the incident. Ostrander had contacted the police numerous times about student incidents occurring on campus, but prior to May 4, he had never made a complaint about a teacher.

A Barstow police officer commenced an investigation on May 5. Between May 5 and May 13, he interviewed seven individuals, including Webber, and the police department obtained the tape from Webber.

The officer's report of his investigation was submitted to the San Bernardino County District Attorney's (DA) office for review and disposition.

In mid-July 1994, the DA's office filed a misdemeanor complaint against Webber, charging two counts of recording a confidential communication in violation of Penal Code section

632 (a).[13] Following proceedings in the San Bernardino County-Municipal Court, Barstow Division, the complaint was dismissed, on the DA's motion, on January 12, 1995, for insufficient evidence.

According to Ostrander, after the initial police investigation, he, Myers, nor any other District official had contact with the DA's office about the taping incident until late June 1994. At that time, Ostrander was informed by telephone that the DA had decided to file a complaint and asked to testify as a witness. He did request, and obtained, a copy of the tape. Several months later, he was notified that the case against Webber was dismissed.

ISSUES

1. Did the District interfere with and deny to Webber the right to union representation during the May 4, 1994, meeting, in violation of section 3543.5(a) and (b)?

2. Did the District take adverse action against Webber on May 4, 1994, by replacing her with another teacher prior to her first period class? If so, was this action in retaliation for Webber's participation in protected activity?

3. Did the District make a police report of the May 4, 1994, taping incident with the intent of causing criminal proceedings to be taken against Webber in reprisal for her protected activities?

[13]Penal Code section 632 (a) makes it unlawful for any party to record a confidential communication without the consent of all parties to that confidential communication.

CONCLUSIONS OF LAW

A. The May 4 Meeting

Section 3543 provides, among other things, that public school employees have a right to ". . . participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . ." Section 3543.1(a) provides that "Employee organizations shall have the right to represent their members in their employment relations with public school employers, . . ."

The term "matters of employer-employee relations" has been held to specifically include the right of representation, upon request, at an employer's investigatory interview if the employee reasonably believes the interview might result in disciplinary action. (Rio Hondo Community College District (1982) PERB Decision No. 260, adopting the rule of NLRB v. Weingarten, Inc. (1975) 420 U.S. 251 [88 LRRM 2689] (Weingarten).) However, the employee's right to union representation when meeting with an employer during an investigatory interview is not absolute. Absent the discipline element, the right of representation is to be granted only in highly unusual circumstances. (Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523] (Redwoods).)

BEA charges that both Webber and BEA itself were denied rights provided by EERA when Ostrander denied Webber's request for union representation during the meeting on May 4, 1994. BEA

argues that Webber had a reasonable belief of impending disciplinary action at the meeting because she had refused on two occasions to meet with a parent. Alternatively, it argues that, even absent the disciplinary element, Webber was entitled to representation because the May 4 incident presented "highly unusual circumstances."

The District takes the position that the evidence fails to show that Webber's belief was reasonable that the May 4 meeting would result in discipline, or that the meeting involved the kind of circumstances that gave rise to her right to union representation.

This issue presents several subissues that must be addressed to determine whether Webber's representational rights were interfered with or denied. First, was the May 4 meeting for a disciplinary purpose which the employee reasonably perceived as a possible pre-disciplinary inquiry? Second, did the employee request union representation during the meeting? And third, if such request was made, did the employer persist in conducting the meeting without representation or otherwise infringe on the employee's right to representation?

It is undisputed that Webber requested union representation during the May 4 meeting. However, the parties dispute whether the meeting was the type of investigatory or disciplinary interview that is contemplated by the Weingarten rule.

Although Webber had no pre-warning that Ostrander and Schmitt were coming to her classroom to speak with her, it is

obvious from the initial remarks of Webber and Ostrander that the conference concerned a student problem. Despite the confrontational nature of his remarks, Ostrander made it clear to Webber that student Harris would remain in her class until a parent conference was held to discuss drop/failing Harris. Even though Webber may have felt that she was being "set up" for discipline because of the presence of the two administrators, none of Ostrander's comments hinted at possible discipline against Webber because of her actions concerning Harris.[14] In fact, Ostrander specifically told her that he was not there to discuss her employment and Webber subsequently was not disciplined in any way as a result of the May 4 meeting.

It is thus concluded that the meeting did not involve either an investigatory or disciplinary element that required the right to representation contemplated by the Weingarten rule.

Even so, the meeting must be further analyzed to determine if it presented the type of "highly unusual circumstances" which would have entitled Webber to union representation under the Redwoods standard.

The circumstances of this case are distinguishable in several respects from those found in the Redwoods case. In Redwoods, a District vice president scheduled an interview with a clerical worker which later resulted in a letter of reprimand being placed in the employee's file. In this case, Ostrander and

[14]In fact, the only threat was made by Webber who said she was going to be sick if the student returned that day.

Schmitt were the school site administrators who were both Webber's immediate superiors. Additionally, it was not unprecedented for Ostrander and Schmitt to go together to a classroom to discuss a student's performance and/or classroom behavior with the teacher. Although they had never visited Webber's classroom together prior to May 4, Schmitt credibly testified that, on several occasions, he had accompanied Ostrander to a classroom to resolve a student problem. However, it is not known whether any of these conferences occurred under circumstances like the May 4 situation. Finally, the May 4 meeting concerned use of the BHS drop/fail policy as it pertained to one of Webber's students rather than her work performance or a contemplated performance evaluation.[15]

It is thus determined that the meeting did not present the type of "highly unusual circumstances" which would have entitled Webber to union representation under the Redwoods standard.

B. Webber's Replacement By a Substitute Teacher

BEA maintains that the District unjustifiably barred Webber from her classroom following the May 4 meeting in retaliation for (1) her union activities on behalf of BFT, (2) her complaints about the 1993-94 BHS site council election procedures, and (3) her request for union representation during the May 4 meeting itself.

[15]Webber received a "satisfactory" performance evaluation from Lester in early June 1994.

The District responds by asserting that Webber's replacement on May 4 was not an "adverse action" under EERA and, in any event, the decision had absolutely no relationship to any claimed protected activities.

To prove an unlawful discrimination/retaliation allegation, the charging party bears the burden of showing that the aggrieved employee engaged in protected activity; the employer knew of the activity; and that the employer took an adverse action against the employee because of such activity. The adverse action cannot be speculative, but rather, under objective standards, must constitute an actual harm to the employee. (Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde).)

Upon a showing of protected conduct and adverse action, the party alleging discrimination must then make a prima facie showing of unlawful motivation. Under Novato Unified School District (1982) PERB Decision No. 210 (Novato), unlawful motivation, within the meaning of section 3543.5(a), occurs where the employer's action against the employee was motivated by the employee's participation in protected conduct.[16]

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^Indications of unlawful motivation have been found in many aspects of an employer's conduct. Words indicating retaliatory intent can be persuasive evidence of unlawful motivation. (Santa Clara Unified School District (1979) PERB Decision No. 104 (Santa Clara.) Other indications of unlawful motivation have been found in an employer's timing of the action (North Sacramento School District (1982) PERB Decision No. 264); failure to follow usual procedures (Santa Clara); shifting justifications and cursory investigations (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); disparate treatment of a union adherent (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); and a pattern of antagonism toward the union (Cupertino Union Elementary School

Once the charging party has made a prima facie showing sufficient to support an inference of unlawful motivation, the burden shifts to the respondent to demonstrate that it would have taken the same action even in the absence of protected conduct. Ultimately, the employee must show that "but for" the protected conduct, he or she would not have suffered the adverse action. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 729-30 [175 Cal.Rptr. 626] (Martori Brothers).) In applying the Novato test, the trier of facts is required to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee "but for" the exercise of protected rights.[17]

Regarding the first prong of the Novato test, the District disputes that Webber engaged in activities that are arguably protected by EERA.

While it is clear that Webber was the BFT president during the 1993-94 school year, her other representational activities on behalf of BFT, if any, were minimal.

Individual employee activity directed against a supervisor's performance has been protected in the private sector when its purpose was to further a legitimate interest in the employees' working conditions. (Dreis & Krump Mfg. Co. v. NLRB (7th Cir.

District (1986) PERB Decision No. 572).

[17]See Martori Brothers; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enf. in relevant part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].

1976) 544 F.2d 320 [93 LRRM 2739].) It is a fact that Webber initiated her complaints about the site council selection process as an individual teacher, and not as a union activist. Nonetheless, her challenge of the BHS process was protected because its purpose was to protect the rights of all BHS teachers to democratically elect their site council representatives. (See State of California (Department of Transportation) (1982) PERB Decision No. 257-S.) Additionally, her protests were not made in a vacuum. She sent copies of her September and October 1993 memos to representatives of both BEA and BFT and there is no indication that these representatives disagreed with her action.

Finally, Webber did seek union representation at the May 4 meeting. Irrespective of whether she was legally entitled to representation, she nonetheless exercised her right to seek support and assistance from her chosen representative in connection with an employment matter.

All of these activities involve rights encompassed by section 3543 and are found to be protected conduct within the meaning of EERA.

The District definitely had knowledge of Webber's participation in some of these activities. Ostrander and Schmitt may not have been aware of Webber's status as the 1993-94 BFT president. However, Ostrander did know about her site council complaints. In fact, Ostrander's role as the site administrator in connection with the site council selection process was the main focus of her complaints. Ostrander also had first-hand

knowledge of Webber's request for union representation during the May 4, 1994, meeting since she made the request directly to him.

This evidence of the employer's knowledge of the employee's protected conduct is enough to satisfy the second prong of the Novato test.

Prima facie evidence of some adverse action is also required to support a claim of discrimination/reprisal under the Novato standard. (Palo Verde.) In determining whether an adverse action actually resulted in some harm or injury to the employee's employment, an objective test, rather than the subjective reaction of the affected employee, is used. (Palo Verde; Newark Unified School District (1991) PERB Decision No. 864.)

Ostrander's decision to request a substitute teacher for Webber was made after Webber told him during their meeting that she was "sick" and "going home." Webber's stated intention to leave the school occurred a few minutes before her first period class was to begin. Thus, Ostrander had the responsibility as the school principal to either ensure that Webber's classes were covered by a substitute teacher or to cancel the classes. He opted to arrange for substitute coverage for the day.

When Ostrander subsequently encountered Webber for the second time and she requested to return to her classroom, he refused her request because, in his opinion, she was incapable at the time of teaching her class due to her emotional state. Webber even acknowledged that when he refused her request, she

"began to lose it," started sobbing, and shortly thereafter left school for the day due to illness.

Though Webber felt that she was harmed by Ostrander's decision to replace her with a substitute for her first period class, BEA presented no evidence that his decision caused harm or actual injury to Webber's employment status with the District. Her use of sick leave on May 4 did not jeopardize her position with the District.

For these reasons, it is concluded that the District's replacement of Webber with a substitute teacher on May 4 did not amount to an "adverse action" within the meaning of EERA. Having made this determination, the Novato analysis may properly end.

However, even assuming, arguendo, that Webber's replacement amounted to an adverse employment action, BEA still would not prevail because it has failed to establish a nexus between this action and Webber's protected conduct.

The timing of these events, BEA suggests, have a direct cause and effect relationship. BEA argues that "but for" Webber's involvement in protected conduct, including her request for representation at the May 4 meeting, she would not have been refused permission to return to her classroom on May 4, despite her expressed desire to teach that day. Therefore, BEA insists, an inference of unlawful motivation can be drawn from the timing of Ostrander's action.

Although timing alone is not adequate to support an inference of unlawful motivation (Charter Oak Unified School

District (1984) PERB Decision No. 404), it may, along with other factors, constitute a basis for such a conclusion. (Moreland Elementary School District (1982) PERB Decision No. 227; Campbell Union High School District (1988) PERB Decision No. 701.)

The timing of the BFT presidency is not a factor here. Although Webber was still the local BFT local president on May 4, neither Ostrander nor Schmitt were aware of her BFT affiliation at that time.

Webber's site council complaints were made approximately seven months prior to the May 4 incident. Since those complaints were totally unrelated to the student behavior issue that gave rise to the May 4 events, it is difficult to draw an inference of unlawful motivation, absence the presence of other factors, from the timing alone.

However, the timing of Webber's request for union representation and her replacement by a substitute occurred within a very short time frame.

Unquestionably the impetus for Ostrander's decision was Webber's statement that she intended to go home because she was sick. It stretches credulity to conclude that his decision to replace her was motivated solely by her comments during their meeting about wanting a representative present. Only after Ostrander had initiated arrangements for substitute coverage did he learn from Webber that she had changed her mind about leaving school. Nothing in the facts establishes that Ostrander somehow knew beforehand that Webber had decided not to leave and

deliberately proceeded with arranging for substitutes as an excuse to prevent her from teaching classes that day.

There is no basis for concluding that the timing of Ostrander's decision supports an inference of unlawful motivation.

C. Ostrander's Report to the Police

BEA charges that Ostrander filed a false report to the police about Webber's alleged May 4 taping in reprisal for her exercise of the protected right to request representation during their May 4 meeting. And further, it contends, as a result of this action, Webber was forced to defend herself in criminal proceedings thereby incurring substantial legal expenses and lost time from work.

It has already been determined, supra, that Webber's request for union representation was protected conduct even though the right to such representation was not found to attach during the May 4 meeting.

Secondly, the "knowledge" prong of the Novato test was satisfied because Webber's request was directed to Ostrander, her school principal.

However, BEA has not established, by an objective test, that Ostrander's action adversely affected Webber's employment status with the District. (See Palo Verde.)

Obviously from BEA's point of view, the police report triggered the criminal proceedings which resulted in substantial personal and financial consequences for Webber. But this

subjective review is not controlling in determining whether actual harm occurred at the hands of the District.

First of all, the police department investigation and the report of the taping incident had no direct adverse impact on Webber's employment interest with the District. It caused no change in her teaching duties, her wages, hours or other major conditions of employment.

Secondly, the District played no role in the DA's decision to file criminal charges against Webber. This decision was made by an entity that was independent of Ostrander or any other District official. Therefore, the consequences of that decision upon Webber cannot be attributed to the District.

After the initial request for an investigation and a report, no District official initiated communications or other interactions with the Barstow police or the DA's office to encourage or influence the prosecution of Webber. Ostrander's telephone contact with the DA's office in late June had no bearing on the DA's decision to initiate proceedings against Webber.

Assuming, for the sake of argument, that Ostrander's report to the police was adverse to Webber's interest, the evidence simply does not support a finding that Ostrander was motivated by Webber's participation in conduct protected by EERA.

Other than the timing of the report, which started the day after the May 4 taping was discovered, there is no direct or circumstantial evidence to establish the required proof of

unlawful motivation. Even Ostrander's admission that he does not particularly like Webber is insufficient evidence of unlawful motive, unless a nexus to her protected conduct is established. While the propriety of his decision to report the taping incident might be questioned, no linkage was established for concluding that Webber's protected activity motivated his action.

For all the reasons discussed above, it is concluded that BEA has failed to prove a prima facie case of reprisal for protected activity under the Novato standard.

SUMMARY

After a thorough examination of the evidence presented at the hearing and the briefs filed by the parties, it is determined that BEA has not met its burden of proving that the District violated section 3543.5(a) or (b) by (1) denying to Webber the right to union representation during the May 4 meeting with Ostrander and Schmitt, her site school administrators, or (2) retaliating against her because of her participation in protected conduct. Therefore the charge and its accompanying complaint must be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is hereby ordered that Unfair Practice Charge LA-CE-3481, Barstow Education Association v. Barstow Unified School District, and the companion complaint are DISMISSED.

Pursuant to California Code of Regulations, title 8, section 323 05, 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.)

W. JEAN THOMAS
Administrative Law Judge