

OVERRULED IN PART by County of Santa Clara
(2017) PERB Decision No. 2539-M



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALISAL TEACHERS ASSOCIATION,)
CTA/NEA,)
)
Charging Party,)
)
v.)
)
ALISAL UNION ELEMENTARY SCHOOL)
DISTRICT,)
)
Respondent.)

Case No. SF-CE-2052
PERB Decision No. 1412
October 10, 2000

Appearances: California Teachers Association, by Ramon E. Romero, Attorney, for Alisal Teachers Association, CTA/NEA; Lozano Smith by Kristina A. Markey, Attorney, for Alisal Union Elementary School District.

Before Dyer, Amador and Baker, Members.

DECISION

BAKER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Alisal Union Elementary School District (District) to a proposed decision of a PERB administrative law judge (ALJ). In the proposed decision, the ALJ found that the District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)¹

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

when it issued a letter of reprimand to Donna Leonard (Leonard) in retaliation for her protected activities.

After reviewing the entire record in this case, including the unfair practice charge and complaint, the hearing transcript, the proposed decision and the filings of the parties, the Board affirms the ALJ's finding of a violation for the reasons presented below.²

PROCEDURAL HISTORY

This case commenced on May 5, 1999, when the Alisal Teachers Association, CTA/NEA (Association), filed an unfair practice charge against the District. After investigation, on June 10, 1999, the PERB general counsel issued a complaint against the District. The complaint alleges that Leonard exercised rights guaranteed by the EERA by serving as the Association's secretary, president-elect, president, and past president, as well as site representative. It is further alleged that Leonard has filed grievances and unfair practice charges against the District. In addition, it is alleged that Leonard served as a representative for the Association's president in a series of meetings concerning work performance. On or about March 16, 1999, the District took adverse action against Leonard by issuing her a letter of reprimand concerning her work performance. It is

this subdivision, "employee" includes an applicant for employment or reemployment.

²The District's request for oral argument is denied.

alleged this action was taken because of Leonard's exercise of protected rights and violated section 3543.5(a) and (b).³

The District filed its answer on July 2, 1999, denying any violation of EERA. A settlement conference did not resolve the dispute and a formal hearing was held on November 4 and 5, 1999. Post-hearing briefs were filed on January 11, 2000, and the matter was submitted for a proposed decision. After receiving the proposed decision, the District then filed exceptions and the Association responded.

FINDINGS OF FACT

Leonard is an employee and the District is a public school employer, both within the meaning of EERA.

Leonard has been employed by the District for 18 years, teaching first grade about fourteen years, and a first and second grade combination the rest of the time, except for her first year when she taught fifth grade. Leonard has been at the District's Steinbeck Elementary School (Steinbeck) since it opened in 1990. With the exception of the first principal, who served for four years, and the second principal, who served two years, the school has had a different principal every year.

³EERA section 3543.5(b) states:

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

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

Leonard has been very active in the Association. She has served as a professional relations chair, secretary, and president. She has been a school site representative for the last three years. Steinbeck has two site representatives.

Leonard has represented teachers in disputes with the District, and the Association has represented her in extensive litigation with the District. In the 1993-94 school year, the fourth year following the opening of Steinbeck, Leonard filed 13 grievances against the principal. This conflict led to an unfair practice charge filed against the District by the Association. There have been several other charges against the District filed by the Association on Leonard's behalf.⁴

Leonard was involved in January of 1999 in another charge filed on behalf of Ken Anderson (Anderson), president of the Association. She attended one meeting on his behalf on January 22, 1999, with Reuben Pulido and Donna Kiernan. Leonard testified that she also appeared on behalf of Carol Bernett regarding an evaluation, some time in October of 1998. Robert Mayfield (Mayfield) has been the District's personnel director for five years. He has attended all of the proceedings involving Leonard before PERB, both formal and informal. Alfonso Anaya (Anaya) has been the District superintendent since July 1, 1998.

⁴For example, the Board adopted an ALJ's proposed decision holding that the District had interfered with Leonard's right to respond to a disciplinary memo in Alisal Elementary School District (1998) PERB Decision No. 1248.

This case arises out of Leonard's conflict with a parent of a new first grade student in the 1997-98 school year. The student shall be called Paul Smith⁵ (Paul). According to Leonard, Paul had problems during the course of the school year. Mrs. Smith visited Leonard's class in June of 1997 to review the setting for her son the next year. This was not uncommon.

When school commenced in the fall, Mrs. Smith visited the classroom two or three times a day, every day, according to Leonard. This was unusual. Other parents visited the classroom, but not so frequently. Those parents would sit and observe the class in session. Mrs. Smith, however, insisted on talking to Leonard every day.

Leonard's class starts at 8:30 a.m. and ends at 2:30 p.m. Most students arrive between 8:00 and 8:20 a.m. There is some socializing by the students and then at 8:30 the bell rings. Leonard then does "calendar" and roll call.

According to Leonard, Paul and his mother consistently arrived between 8:30 and 8:50 a.m. Paul would talk to other students and Mrs. Smith would interrupt the "calendar" to talk to Leonard. Mrs. Smith would say she could not get Paul to do his homework, or sit and focus on his work, or she would talk about Paul's little brother, whom she brought along. She would stay about ten minutes, said Leonard.

⁵Paul Smith is a pseudonym, given to protect the privacy of the student and his parents. The parents in this case shall be referred to as the "Smiths" and the mother as "Mrs. Smith."

Leonard spoke to Mrs. Smith about Paul's late arrivals but the latter complained that she and Paul were both "night persons" and had trouble getting started in the morning. Leonard contended the District policy on reporting tardiness was unclear, so she didn't always report Paul tardy.

The Newsletter

For the last five years, Leonard has sent her students' parents a weekly newsletter describing events and circumstances at the school. She has never been criticized for the contents of the newsletter.

On September 2, 1997, Leonard hand wrote on her newsletter that she was missing a calculator, and asked parents to check their child's back pack. At the same time Leonard told the students that there would be no repercussions if the calculator were returned. She also announced that the class would not use calculators until the missing unit was returned.

On October 10, 1997, Mrs. Smith came to Leonard with the calculator. Leonard described Mrs. Smith as crying and her main concern was that she didn't want anyone to know Paul had taken the calculator. Leonard said her agreement with Mrs. Smith was that she would not tell anyone that Paul had taken the calculator. Leonard said she never did relate who took the calculator. She did announce to the students in class that the calculator had been returned.

On October 13, 1997, Leonard wrote in the weekly newsletter:

I want to begin by thanking the parent who returned the calculator. You are setting a

good example for your child. It took a great deal of courage to come forward with your child and return it. Thank you!

The newsletter also contained an article about dogs in the classroom. Because Principal Tom Cranson (Cranson) had shared with her a complaint on the matter, she showed Cranson the newsletter before sending it out. He did not say anything about the calculator comment.

Leonard testified she wanted to praise Mrs. Smith because the District operates under a set of "praise builder" principles to "right wrongs and praise people." These principles are part of the District's program to develop a positive learning environment for the children.

Leonard testified that, at the time, she did not have any reason to believe that anybody had any knowledge of who had stolen the calculator. However, Leonard's credibility is seriously undermined by her testimony about an event that occurred a year later. A parent, Judy Donovan (Donovan), came to Leonard and asked what Mrs. Smith had to do with the calculator. Leonard described her personal reaction of surprise and that she told Donovan she thought everyone knew that Paul had taken the calculator because "Mrs. Smith was in my room with the calculator, the door was open, the windows were open [and] there were parents in the area, so since -- they were there and they saw her handing me the calculator." She then testified that Donovan had told her that Mrs. Smith was telling other parents about the calculator.

Leonard also testified that she did not hear any complaints about this reference until October of 1998, a year later. The principal at the time, Alicia Escobar (Escobar), told Leonard about the complaint. Yet, Leonard also testified that at a meeting in May with Mrs. Smith and Cranson, Mrs. Smith complained that Leonard had told others Paul had taken the calculator.

The May 8, 1998, meeting

On May 8, 1998, Mrs. Smith wrote Leonard a note stating she needed a conference with Leonard.⁶ Before Leonard could respond, she was called to a meeting in Cranson's office. At that meeting, Mrs. Smith told Leonard that a student had told her that Leonard had stated her son had stolen the calculator. From this point on, Leonard said, their relationship soured.

Cranson testified that he met with Mrs. Smith and Leonard in late May. Mrs. Smith later did not feel the issue was resolved. Mrs. Smith contacted the interim superintendent and the principal. It was decided to move Paul to a different classroom. Mrs. Smith was given the District complaint procedure and forms and told to complete them if she felt the problem was not resolved.

On June 2, 1998, Paul was transferred to Barbara Romaine's first grade classroom which was located next door to Leonard's classroom.

⁶Leonard did write a response offering to meet with Mrs. Smith at 7:45 a.m. Although she often meets with parents after school, she did not extend that opportunity to Mrs. Smith.

This move was apparently precipitated by a dispute between Leonard and Mrs. Smith, when the latter, present in the classroom, suggested a correction to a student in the spelling group. Leonard told her she would deal with the group. Mrs. Smith did it again and Leonard called the administrative office. Mrs. Smith was requested to come to the administrative office. About the same time, Paul began to cough, and Leonard asked him if he wanted to go to the nurse's office. He did and left the classroom.

Cranson gave Leonard a note directing her to transmit Paul's personal belongings to Mrs. Romaine's classroom. Leonard did send some of Paul's personal belongings to the next classroom, but not Paul's Father's Day art project. She did not send the art project, she testified, because it used a cigar box, was not complete, and didn't have a name on it.⁷ On cross-examination, she admitted she destroyed Paul's Father's Day project on June 2, the day Paul left her classroom, because it was incomplete.

Because his birthday was June 3, Paul was absent that day. On June 4, Paul was in Mrs. Romaine's classroom next door and some of his belongings were already there, pursuant to Cranson's

⁷Leonard knew it was Paul's art project because he had done an earlier project involving a cigar box. Mrs. Smith had objected to the room mothers who had provided the boxes. For the Father's Day project, Paul had pasted some items on the box, but Leonard did not consider it finished. Paul did not finish the project, Leonard testified, because he had to leave the classroom due to his coughing. Leonard also testified that Mrs. Smith did see the Father's Day project as she walked into the class room the day Paul was working on it. At that time Mrs. Smith did not say anything to Leonard about the project.

direction. On June 5, 1998, Mrs. Smith left a note for Leonard specifically asking for the Father's Day project. She also requested some other art work. Leonard did not have the other art objects. And, of course, the Father's Day project was already disposed of.

The last day of class was June 9, 1998. Under Leonard's prior practice, unfinished projects were thrown away. Leonard's practice is to start cleaning the classroom a week before school is out. District policy is to have the room cleaned the day after school is out. To assure the room is clean, the principal signs a check-out form to that effect. Leonard has been cleaning the classroom the last week of school for as long as she has been with the District.

The District does not have a policy on student work disposition. Leonard denied she had an inconsistent policy on the issue. Leonard has never been told she could be punished for not returning student work. She has had no prior complaints on her practice.

At the hearing, Leonard denied she had difficulty getting along with Mrs. Smith. Yet, in an October 3, 1999, letter to District Trustee Gary Karnes (Karnes) about the Smith complaint, she cited several alleged transgressions by Mrs. Smith: abuse of her children, entering the classroom while testing was under way and giving answers to pupils, and "disrupt [ing] her teaching on a daily basis." Leonard further asserted that Mrs. Smith "caused turmoil in my room all year with the other parents."

Report Card

Grading for students is done on the quarter system. No written comments are made at the end of the first quarter, although there is a parent teacher conference in November where the student's progress is discussed.

During this parent-teacher conference with the Smiths, Paul's report card and maturity was discussed. Leonard felt Paul was a little immature for first grade. He had trouble paying attention in class, disturbed other children and acted inappropriately in class.

In January 1998, at the end of the second quarter, Leonard wrote on Paul's report card the following:

[Paul] still needs to work on staying focused and not distracting the others sitting near him. He also needs to work on getting to school early enough to get himself oriented. He usually arrives at school between 8:30 and 8:50.^[8] He comes in, we are cleaning and ready to start class. He is still in the frame of mind to visit with his classmates ... but he has arrived too late to do that. Then he spends calendar/journal time trying to talk to everyone around him. He loses out on crucial instruction and he prevents others from participating. I would like to see him try to get to school by 8:15 so that he can get the social interruption out of his system and be ready to learn.

At the June term, Leonard wrote:

[Paul] is very immature. He needs to start taking responsibility for himself and his

⁸Leonard admitted Paul's tardiness could not be verified by the school attendance record. However, that Paul did have a timeliness problem was confirmed by Mrs. Smith when she told the District's investigator, described below, that she had difficulty getting Paul to school because he was unhappy in the classroom.

actions. He also needs to work on staying on task and not disturbing other students.

The District's policy on report card format was changed for the 1999-2000 school year. The new report card requires the teacher to rate the student under a category called "Personal and Social development", the student's timeliness in arriving at school, respect for others and their property, whether the student practices self control, accepts responsibility for his/her own behavior, resolves conflicts peacefully, works independently, and whether the student does his/her best work and completes homework neatly and on time.

The Smith Complaint

On September 24, 1998, Mrs. Smith filed a written complaint against Leonard. Leonard learned of the complaint around Halloween. She requested a copy of the complaint but the District refused to provide it.

The Smith complaint was a nine page single-lined document which began with the calculator incident. It went on to describe other events, including, in detail, the confrontation in the classroom between Mrs. Smith and Leonard over the former's rendering assistance to students in a project and Leonard taking umbrage to the point of calling the administrative office. It also stated, "Her remarks as stated in his report card are rude and inappropriate. I am asking the district to have all of her remarks stricken from the record." Mrs. Smith further recommended the District dismiss Leonard.

On November 17, 1998, the District's attorney notified Ramon Romero (Romero), Leonard's counsel, about a meeting set for December 9, 1998, at which Barbara Cornett (Cornett) would interview Leonard. A copy of the complaint was enclosed. Cornett had been hired by the District to investigate the Smith's complaint against Leonard.⁹

According to Cornett, Mayfield indicated to her that there had been some negative interactions between the District and Leonard and they wanted to be sure that the investigation was done by someone who had no contact with those interactions.

According to Leonard, hiring an outside investigator was unprecedented. Normally, the principal investigates potential discipline of teachers. This was confirmed by Mayfield. He further testified the principal would make a recommendation to him and he would then consult with legal counsel and advise the superintendent. The superintendent then makes the decision.

Both Mayfield and Anaya testified that the District went outside to get an investigator because Cranson, the incumbent principal, had moved to the central office as coordinator of special education services. Escobar, Cranson's successor, was new to the school site and unfamiliar with the circumstances.

⁹Cornett retired in 1992 after 31 years in the Salinas Union High School District in a number of different positions. After her retirement she did some investigations for different school districts. It appears she did one teacher complaint investigation in a community college setting. She did not do investigations in the high school district before her retirement, but she did parent complaints for about ten years while she was director of special education.

Anaya testified that at the time the District commenced its investigation of the complaint, Escobar was still an interim principal. She had no prior experience as a principal.

Mayfield testified these investigations are extremely time-consuming, which was also a factor in deciding to go outside the District. Yet, Mayfield could not cite a single time when the District went outside in 10 or 12 complaints against teachers that were investigated. All those investigations were done by school principals.

Leonard was interviewed by Cornett on December 9, 1998. Leonard was represented by Romero. The interview lasted about an hour and one-half to two hours. Prefatory remarks in Cornett's final report indicate she interviewed Mrs. Smith twice by telephone and twice in person; Cranson five times, four by telephone; Escobar three times, twice by telephone; the student's current teacher and two parents of students taught by Leonard. Leonard was interviewed only once, and was never contacted about information derived by Cornett from interviews subsequent to Leonard's, including Mrs. Smith's.

Cornett issued her report on December 20, 1998. She recommended that Leonard be issued a "directive" letter indicating the need to develop a consistent policy on the care and disposal of classroom possessions and work of students.¹⁰ She recommended that Leonard be "reprimanded" for disposing of

¹⁰The District does not have a policy on the disposal of student possessions.

Paul's classroom work. She further recommended that Leonard's comments in the report card be altered to Mrs. Smith's satisfaction. Cornett did not refer to specific sections of the report card that should be removed because, she stated, she did not have sufficient background on Paul to make a final determination. Cornett noted that Paul's then current teacher, Mrs. Nancy Carroll (Carroll), also thought Paul was "immature" for his age.

During the investigation, Cranson told Cornett that Leonard was an extremely skillful classroom teacher. Cornett did not ascertain whether Leonard had ever been disciplined before.

Mayfield did not recall whether he reviewed the report with Cornett. He was unaware whether Leonard had ever been warned about the contents of newsletters.

On January 15, 1999, Mayfield served Leonard with a draft "Letter of Reprimand", as a result of the Smiths' complaint and investigation by Cornett. The letter commenced with the following:

This letter is a formal reprimand and directive regarding Mr. and Ms. [Smith's] complaint and District investigation concerning several inappropriate and negative events during their son's enrollment in your first grade class in the 1997-1998 school year.

Leonard met with Mayfield on February 16, 1999, to review the draft.

On March 16, 1999, Mayfield issued to Leonard the District's "findings" relative to the Smiths' complaints and to "serve as a

statement of our concerns about your inappropriate and negative conduct." The letter then went on to address in more detail three issues, described as "Inappropriate Newsletter Content", "Destruction of Student's Classroom Work" and "Inappropriate Report Card Remarks." In connection with the newsletter content issue, Mayfield wrote:

I conclude that teachers should not make student discipline a public matter.^[11] While communication with parents is critical, you should take care in what you write in your newsletters. The return of the calculator may have been noted, but the reference to the parent and child was unnecessary and potentially embarrassing. Your statement thanking the parent for coming forward with their child to return the calculator could result in curiosity about the child's identity and circumstances surrounding the return of the calculator.^[12] In the setting of the small and close-knit community at Steinbeck school, the identity of the child and circumstances regarding the return are likely to be known causing public embarrassment and humiliation to the child and the parents.

Regarding the destruction of student's classroom work, Mayfield reiterated the circumstances of Paul's transfer and the subsequent request by his mother for the art project relating to the Father's Day gift. Leonard had told Cornett that she had no consistent policy on disposing of children's classroom work. She

"Mayfield was unaware whether there had been student discipline. He admitted other terminology would have been more appropriate.

¹²Mayfield did not determine whether in fact anyone expressed curiosity.

began cleaning out the classroom in the last week of class.

Mayfield wrote:

During our February 16, 1999 [,] meeting you stated that you perceived no problem in disposing of [Paul's] Father's Day gift because Ms. [Smith] was a difficult parent who had previously objected to the use of a cigar box for a different art project, and because [Paul] had not finished work on this project which was also made out of a cigar box.

The District expects its certificated employees to exercise good judgement and to remain professional, especially when interacting with a parent who is perceived as "difficult." Disposal of [Paul's] art project because his mother had previously objected to the use of the same component on a different art project does not conform to our standard of professionalism. You should have informed District Administrators of the potential problem between yourself and the parent regarding the art project so the District could have assisted you in resolving the problem to the satisfaction of all concerned.

Furthermore, [Paul] was attending class literally right next door to yours. His work, complete or not, could easily have been returned to him. Your teaching experience should have made you aware that many parents treasure and retain their childrens' classroom work, especially artwork. Furthermore, you threw away [Paul's] Father's Day project before Father's Day, and before [Paul] had a chance to show it to his father. You should have known, and the District expects you to know, that a Father's Day present, especially one created by a child, is important to that child. We expect that you would have recognized that importance and kept the artwork to be transferred to [Paul's] new first grade class. Given the situation, the timing, and statements made

during the investigation, your actions appear to Mr. and Mrs. [Smith] as vindictive.^[13]

You are directed to develop a consistent policy on the care and disposal of classroom possessions and work of your students. This policy, upon my approval, shall be communicated by you to the parents of your students.^[14]

Regarding the report card, Mayfield wrote:

Written reports on report cards should be expressed in positive terms and should address factual information.^[15] Generally, the comments on [Paul's] report are positive and address his academic progress throughout the year. However, there are several negative comments which may not have been based on facts which should not have been included on the report card.^[16]

The paragraph in the report of January 1998 describes in detail [Paul's] 'late' arrival at school each day at around 8:30-8:45 a.m. and reaches conclusions about his disruptiveness and 'frame of mind to visit his classmates' instead of paying attention, which may not

¹³Mayfield did not draw a conclusion that Leonard's action was vindictive, but was observing only that the Smiths thought her actions were. Cornett did not think vindictive is a word she would use to describe the situation.

¹⁴Mayfield does not know of what practices other teachers have regarding classroom materials disposal. The District does not have a policy on what teachers are required to do. As far as Mayfield knows, Leonard is the only teacher required to adopt a policy.

¹⁵While the report card used was unique to Steinbeck, Leonard had never been directed to cast her remarks in such a manner. Mayfield is unaware that such a rule is written anywhere. Nor is he aware that teachers have been verbally told that policy. He did not know if Leonard has been informed of that policy.

¹⁶Leonard has never been advised by the District which comments might not have been based upon fact. Mayfield testified that, to him, the matter was inconclusive, that they did not know which comments were not based upon fact and therefore used the term "may".

have been based on fact.^[17] In the June 1998 report paragraph, you judge [Paul] as 'immature.'^[18]

I conclude that these types of comments and concerns are better addressed during parent conferences rather than on first grade report cards.^[19] As stated above, written reports on report cards should be expressed in positive terms and should address factual information. Your comments should be directed toward the age level and ability of the individual student.

Without notifying Leonard, Mayfield altered Paul's report card by deleting what Mayfield thought was objectionable.

Mayfield did not know if Leonard had problems before this letter. Nor did he give consideration to her 18 years employment with the District in this instance. He did not determine if she had ever done these things before. Mayfield testified that he did not consider the letter discipline.

Mayfield admitted that the complaint and letter, located in Leonard's personnel file, could be used in discipline matters later against her interests. He did not know the rationale for the letter being inserted into her personnel file.

The decision to place the letter in Leonard's file was by Anaya. Mayfield had no recollection of any meetings or discussions with Anaya about the matter. Anaya thought placing a

¹⁷Leonard has never been advised why the District questioned her assertion of lateness.

¹⁸Leonard said she has cited a student as immature in report cards a number of times and this practice has never been called to question.

¹⁹Leonard testified that she did address these issues during parent conferences.

negative letter into a personal file was discipline. Later, he testified that the way Leonard's letter was written it was not disciplinary. It was a letter of "concern."

Cornett considered the letter to be discipline. The only recommendation she made for discipline was regarding the student's art work. Anaya was motivated to bring closure to the complaint by the parent to avoid litigation.

Board policy 4118 (a) sets forth the grounds for discipline. The board policy calls for progressive discipline, in relevant part, as follows:

2. Progressive discipline shall be utilized except for conduct which is of such a nature that injures or threatens to injure the safety of students or other employees or causes substantial disruption of the educational program.

a. Before issuing a verbal warning the principal or immediate supervisor shall first discuss and clarify specific acts and/or omissions with the employee.

b. If a verbal warning does not result in corrective conduct, a written reprimand shall be issued for a similar and separate action and/or omission. Reprimands shall not be based upon unsubstantiated evidence.

The District has a policy on parent-teacher concerns that suggests or encourages an initial conference between the teacher and the parent.

The relevant collective bargaining agreements (1996-98, and the successor 1998-2001) do not have discipline procedures. The grievance procedures do not end in binding arbitration.

On March 16, Leonard was served with a letter from Mayfield, dated March 12, 1999, that there was to be a closed meeting of the board of trustees on March 17, 1999. Mrs. Smith notified the District that she would not attend the March 17 hearing, so the session was canceled. No new hearing was scheduled.

ISSUE

The issue in this case is whether the District issued the March 16, 1999, letter to Leonard in retaliation for her protected activities.

In order to prevail on a retaliatory adverse action charge, the charging party must establish that the employee was 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 (Novato).) Unlawful motivation is essential 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 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. Such circumstances include: 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 employee (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 School 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 employee's protected activities. (Novato; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].)

The parties approach the case differently. The Association argues the application of traditional factors justifies an inference of unlawful motivation. The District argues that each of the events cited in the March 16, 1999, letter merited sanctioning Leonard.

The Association cites the District's inconsistency regarding the nature of the March 16 letter. Mayfield testified that the letter was not a reprimand but a statement of the District's concern. Anaya first testified that the letter was a disciplinary document, then later contended that it was not a reprimand. Yet, the District's answer admits the March 16 letter was a reprimand, and the draft of the letter shared with Leonard on January 15 expressly stated that it was a letter of reprimand. Moreover, the letter, placed into Leonard's personnel file

charging her with "inappropriate and negative conduct," was adverse to her interest as a teacher in the District.

The Association finds further inference of unlawful motivation in the timing of the letter, as it followed a steady-stream of protected activities culminating in the issuance of two PERB decisions favorable to Leonard in the two-year period preceding the District's action complained of here. Further, the March 16 letter followed only two weeks after the Association filed another unfair practice charge in a dispute in which Leonard served as a representative for Association President Ken Anderson.

The Association next contends that the District departed from established procedures in its actions against Leonard. Whereas complaints were routinely investigated by the school principal, the District's employment of Cornett to investigate the Smith's complaint was unprecedented.

The complaint procedure directs that complaints be made directly by the complainant to the person complained about. Parents are encouraged to attempt to orally resolve problems with teachers personally. Here, contends the Association, the Smiths never discussed, nor were encouraged to discuss with Leonard the report card comments or disposal of student work prior to the discipline.

The Association further contends the District failed to follow its "progressive discipline" policy in issuing the March 16 letter. This policy requires prior notice that certain

conduct could result in discipline. Here, there was no notice to Leonard about newsletter content, disposal of student work or report card comments. The District has no rules on any of these issues. Further, argues the Association, Cornett, Mayfield and Anaya made no determination as to the practices of other teachers in any of these matters.

The Association contends the investigation by Cornett was not a fair and objective investigation. The complaint procedure requires reprimands to be based upon "substantiated" facts. Here, contends the Association, Cornett did not contact all the witnesses provided by Leonard and had no follow-up interview with Leonard after talking to other witnesses.

Without ascertaining the accuracy of Leonard's report card comments, Mayfield disciplined her for those comments. The Association contends the District violated the Education Code when it deleted some of Leonard's comments in Paul's report card.²⁰

The District treated Leonard differently, contends the Association, in that no other teacher has been subjected to standards regarding newsletter content, disposal of student work or contents of report cards. No other teacher has been required to develop a policy on the disposal of classroom projects and student work. Leonard was singled out on all three matters.

²⁰Both sides raise several good points on this issue, but we do not address it today because a ruling in favor of either party's position would not affect the outcome of this case.

In addition, the Association cites Anaya's rationale for placing the letter into Leonard's personnel file was to protect the District because the parent had requested the teacher be dismissed. Anaya wanted to demonstrate an "investigation was done and every appropriate action was taken to deal with the situation."

Another basis for inferring unlawful motivation, asserts the Association, is the cursory investigation undertaken by the District. The District had never worked with Cornett, did not investigate her work and did not ask her any questions about her report. Cornett did not interview other parents who had experiences with Leonard or Mrs. Smith. Cornett was unable to make any conclusive findings of Leonard's comments on the report card. Thus, the District's quick dismissal of Leonard's direct observations support the inference of unlawful motivation.

The Association further contends that the District violated its rights under EERA section 3543.5(b) in that, by violating Leonard's rights, it inherently denied the Association its right to represent its members.

Finally, the Association asks for its fees and costs in bringing the action plus 10 percent on the monetary remedy.

The District's defense is that all three issues addressed in the March 16, 1999, letter were justified. In each instance it is highly critical of Leonard's testimony regarding the issue.

With respect to the letter's comments on the newsletter article, the District contends that Leonard reneged on her

promise to not reveal who had taken the calculator. Yet, she did just that when she commended the parent for returning the calculator.

At the hearing, Leonard's testimony reveals her belief that other parents saw Mrs. Smith returning the calculator to her. Nonetheless, she publicly thanked the parent for having the courage to come forward with her child and the calculator. This clearly implied the child had taken the calculator.

The District contends Leonard's proffered reasons for her action to the investigator, Mayfield, the trustee, in her charge to PERB and at the formal hearing would support a conclusion that her action was vindictive against the Smiths.

The timing of Leonard's destruction of Paul's art project took place the very day Leonard called the administrative office and requested that Mrs. Smith be taken from Leonard's classroom. Leonard destroyed the project the same day it was started.

The District argues that Leonard's shifting justification for destroying Paul's art work is also grounds for concluding her action was vindictive against Mrs. Smith. Leonard told Cornett that Mrs. Smith had taken umbrage at an Easter project that used cigar boxes and therefore she thought Mrs. Smith would object to the Father's Day project using a cigar box.

If such were the case, the District asks, why would Leonard let Paul even begin working on such a medium. Leonard testified that she would have let Paul take it home, had he finished the project. Mrs. Smith had never said anything to Leonard directly

about the earlier cigar box project. Leonard also testified that Mrs. Smith had seen Paul working on the cigar box and did not say anything. Thus, perhaps, Mrs. Smith did not have any objection to the cigar box.

At the February 16, 1999, meeting, Leonard told Mayfield that she destroyed the Father's Day project because Mrs. Smith was a difficult person who had previously objected to cigar boxes, and because Paul had not finished the project.

The District observes that Leonard did not respond to Smith's June 5 memo asking for three projects. Leonard did not return any of them as, she stated, none of them existed.²¹ At the hearing, Leonard testified that she did not return the art work because it was not complete, didn't have a name on it, and since she was cleaning out the room, she threw it away.

The District contends the comments in the March 16 letter on the report card remarks by Leonard were justified and Leonard's report card comments may not have been justified. Leonard's comments, questioned by the District, related to Paul's arrival time, his "frame of mind" and having judged Paul as "immature."

The District faults Leonard on her varying descriptions of Paul's arrival record before Cornett (8:45, never by 8:30 a.m.), at hearing (first 8:50 to 9:00 a.m., then 8:30 to 8:50 a.m.) then to the trustee in October 3, 1999, letter, "seldom arrived at

²¹The District urges findings that Leonard destroyed other objects requested by Mrs. Smith. The facts are insufficient to make such a finding. Moreover, the March 16 letter focused on the Father's Day project.

school on time." Leonard's contention that Paul was usually late is not supported by Paul's attendance record which shows him tardy only nine times for the first half of school. The second term he was late 11 more times. Leonard admitted Paul's lateness habits as observed in the report card could not be substantiated by the attendance record, the District points out.

The District attacks Leonard's report card comment that Paul's tardiness caused a certain "frame of mind" or that he was immature. This view, according to the District was undermined by Paul's record for the next year as reported by Cornett. In her report, Cornett observed, "in a 180 degree reversal, his teacher this year, Ms. Carroll, describes Paul as 'an average student who is still somewhat immature for his age level. . . who has not been tardy this fall.'"

The District disputes Leonard's contention that she was engaged in protected activity by attacking her testimony regarding the Bernett and Anderson representations (the latter which meeting she attended was subsequent to the January 15 draft of the letter to Leonard). Thus, the District contends there was only the earlier unfair practice cases and her role as president in 1993-94.

The District contends there are no grounds for finding an inference of unlawful motivation. Citing PERB cases that found six months too long to connect for timing, the District contends here that the parent's complaint, received on September 24, 1998, was a year after the last unfair practice case had ended.

The District contends there is no evidence of disparate treatment produced by Leonard. The District finds no evidence of inconsistent or contradictory justifications for informing her the newsletter was inappropriate. Anaya's purpose in placing the letter in Leonard's personnel file was to protect the District in the event of a lawsuit.

The District contends the investigation was reasonable. It was reasonable to go outside the District for the investigation of the complaint because Cranson was no longer at the site and "the District had not replaced him." Cornett had no interest in the outcome of the case and was an experienced investigator.

Both sides present valid points in their arguments. It appears that the District had legitimate reasons for responding to Leonard's conduct. However, the District's response to that conduct, viewed altogether, raises an inference that it would not have issued the March 16, 1999, letter but for Leonard's protected activity.

Read by itself the newsletter item does not reveal the identity of anyone. Coupled, however with the facts as she knew them, Leonard failed to honor the agreement not to reveal who had taken the calculator.

Leonard knew other parents had seen Mrs. Smith hand over the calculator to her on October 10, 1997. She must have known that those same parents would know that Paul had taken the calculator. Her newsletter article thanking the parent for having courage to

return the calculator would have confirmed to those parents that Paul had taken the calculator.

Further, Leonard's testimony on the destroyed Father's Day project appears to be an attempt to justify a senseless act. She said the project had no name on it. Yet she knew it was Paul's project. She said Mrs. Smith had previously objected to the use of cigar boxes, yet Leonard allowed Paul to start the Father's Day project using a cigar box, and was prepared to let him take it home. Furthermore, Leonard testified that Mrs. Smith saw the project and did not say anything. That Mrs. Smith saw the project was confirmed by her written request specifically asking for the Father's Day project.

Leonard destroyed the project because, she said, it was the last week of class. Yet she destroyed it on June 2, and school was not out until June 9.

It is fair to conclude that Leonard destroyed the Father's Day project without justification. To the Smiths, this action certainly could appear to be vindictive.

Accordingly, the District would have been justified in counseling Leonard for the newsletter comment and destruction of the art project.

The fact that Leonard may have breached her promise to Mrs. Smith regarding the calculator, or that she deliberately destroyed Paul's art project to get back at Mrs. Smith does not end the inquiry, however. The question is, did the District issue the letter in retaliation for Leonard's protected

activities? Several of the Novato factors are present here to justify an inference of unlawful motivation.

The March 16, 1999, letter followed an intense history of combat between Leonard and the District. Mayfield was involved in most of the PERB-related litigation that the Association and Leonard had pursued. Twice, within two years before issuing the letter of reprimand, the District, had been found to have violated Leonard's EERA rights.²² While timing alone is not a basis for inferring a motive, Leonard's long history of conflict with the District, coupled with other factors, justifies an inference of unlawful motivation in the imposition of the March 16, 1999, letter. The record contains evidence that the District departed from its own policies and procedures in imposing sanctions against Leonard. Unexplained, these departures from established policies strongly suggest retaliatory intent.

The District's complaint procedure, permits complainants, employees, or the superintendent to request permission to address the board of trustees regarding a complaint. Here, the District canceled the hearing at which Leonard would have had an opportunity to respond to the charges. Moreover, the District issued the March 16, 1999, letter before this procedure was

²²Leonard's participation in the Anderson matter was not connected to this case. Her appearance at a grievance meeting followed the January 15, 1999, draft letter of reprimand. Likewise, the Association's argument that an unfair practice charge filed on Anderson's behalf just before the March 15, 1999, letter is rejected as there is no demonstrated connection between Leonard and the unfair practice charge.

complete. Taken alone, this factor does not furnish an inference of retaliatory motive, but viewed in the overall context, cancellation of the hearing is not consistent with the goal of "fair and constructive communication" espoused by the District in its complaint resolution procedure.

The District failed to follow its own progressive discipline policy. Leonard had been publishing the newsletter for five years and had never had complaints regarding its contents. Under its progressive discipline policy, the District should have given her a verbal warning. Likewise, Leonard had been cleaning her classroom in the same manner for as long as she had been with the District, and without complaint about the practice. However, destroying a child's Father's Day project, under the prevailing circumstances in this case, merited some form of sanction against Leonard. Again, however, the District's discipline policy required a verbal warning prior to a written warning. In both instances, the District failed to conform to its own discipline policy.

The District further required Leonard to develop a policy on destruction of classroom possessions. It required Leonard to submit that policy to Mayfield for approval. It further required Leonard to share that policy with the parents of her students. Leonard was singled out to have a policy, have it approved, and to share it with parents. No other teacher was required to do so. Viewed in the overall context, this is evidence of disparate treatment and is discriminatory towards Leonard.

In addition, Mayfield had no idea what policies were used by other teachers. Neither he, nor Cornett investigated the practice with other teachers. The District had no policy, nor did it have a policy that teachers have a written policy, or that such policy be approved by the District, or that the policy be shared with parents.²³

Moreover, the investigation with respect to the report card comments was incomplete. Cornett stated that the January 1998 report card "reaches conclusions which may or may not be based on facts." She then recommends that "If the [report card is] included in [Paul's] permanent cumulative record, Mrs. [Smith] should be allowed to remove those sections which are not based on fact."

Mayfield changed the comments on the report card even though Cornett's report did not make a definitive judgment on which statements were, or were not, based on fact. He did no investigation of his own, and there is no evidence that he spoke with Mrs. Smith to ascertain what objections she had to the comments.²⁴ In conclusion, we find that the District's investigation was cursory and incomplete.

As noted by the Association, Mrs. Smith's complaint about comments on Paul's report card consisted of two sentences out of

²³We do not infer unlawful motivation from the absence of a district policy on student project disposal. Rather, it is the imposition of the requirement only upon Leonard.

²⁴Mayfield's testimony also reflects an admission that he was not sure which statements were factual and which were not.

a nine page single-spaced letter. Yet, it became a major part of the sanctioning letter of March 16, 1999, and it prompted the District to take the affirmative action of altering the comments on the report card.

The District chastised Leonard for referring to Paul as "immature." Yet Cornett (and the District) accepted without question Mrs. Carroll's assessment of Paul as "immature." Moreover, in the same year it was sanctioning Leonard for observing the student's maturity, the District implemented a report card policy that required the teacher to comment on the student's social integration, a factor that required assessing maturity.

Anaya's concern regarding protecting the District from litigation was laudable. He was new to the District and without first-hand experience with Leonard's tenacious pursuit of her rights. Such concern, however, does not justify the District's issuing the letter of reprimand in violation of Leonard's rights.

We conclude the foregoing justifies an inference of unlawful motivation by the District in issuing the March 16, 1999, letter. The burden now shifts to the District to prove it would have issued the March 16, 1999, letter to Leonard, notwithstanding her protected activity.

The only evidence offered by the District is that Anaya wanted to bring closure to the complaint to avoid litigation. If this were truly the District's motive, it could have brought internal closure to the Smiths' complaint by invoking the

progressive discipline policy and counseling Leonard regarding the newsletter and the art project destruction. Whether the Smiths pursued outside litigation is beyond the District's control.

Moreover, the District's own complaint procedure was not exhausted before the District sanctioned Leonard. The District scheduled a hearing on the Smiths' complaint for March 17, 1999. Yet, on March 16, 1999, the District issued the letter to Leonard on the issues raised in the complaint that were to be heard the next day. Leonard was thus sanctioned without the opportunity to respond to the complaint before the board of trustees.

Bringing "closure" to the complaint, by issuing the letter of reprimand on March 16, 1999, before completion of the complaint review process, is inconsistent with a desire to avoid litigation. We conclude that the District did not establish that it would have issued the March 16, 1999, letter regardless of Leonard's protected activity.²⁵

REMEDY

The PERB in EERA section 3541.5 (c) is given: '

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees

²⁵The ALJ found that there was no independent evidence of the impact the District's action against Leonard had on the Association. Accordingly, he dismissed the EERA section 3543.5(b) allegations, citing State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S. We see no reason to disturb this conclusion.

with or without back pay, as will effectuate the policies of this chapter.

It has been found that the District unlawfully retaliated against Leonard by placing the March 16, 1999, letter into her personnel file. It is appropriate to order the District to cease and desist from retaliating against employees for engagement in protected activity.

It is also appropriate to order the District to return to the status quo preceding its unlawful act. Therefore, the March 16, 1999, letter shall be removed from Leonard's personnel file and destroyed. (Mt. San Antonio Community College District (1982) PERB Decision No. 224.)

The Association requested its fees and costs in bringing the action. We assume this request includes attorney's fees. PERB will deny attorney's fees, "if the issues are debatable and brought in good faith." (Modesto City and High School Districts (1986) PERB Decision No. 566.) We decline to grant the Association fees because it has been found that the District did have merit in sanctioning Leonard. She knew that parents had seen Mrs. Smith return the calculator, and yet publicly thanked the parent for having the courage to return it. Leonard further, without justification, destroyed Paul's art project. These actions merited a response by the District. The District's failure was in the use of an appropriate level of discipline.

As there was no independent evidence of the impact the District's action against Leonard had on the Association, the

EERA section 3543.5(b) allegations are dismissed. (State of California (Franchise Tax Board) (1992) PERB Decision No. 954-S.)

It is also appropriate that the District be required to post a notice incorporating the terms of this order. The Notice should be subscribed by an authorized agent of the District, indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of EERA that employees be informed of the resolution of the controversy and will announce the readiness of the District to comply with the ordered remedy. (Davis Unified School District, et al. (1980) PERB Decision No. 116; Placerville Union School District (1978) PERB Decision No. 69.)

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this matter, it is found that the Alisal Union Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5 (a) . The District violated EERA when it issued a letter of reprimand to Donna Leonard (Leonard) in retaliation for her protected activities.

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

A. CEASE AND DESIST FROM:

1. Retaliating against Leonard because of her exercise of protected activities by placing a letter of reprimand in her personnel file.

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

1. Within ten (10) workdays of service of a final decision in this matter remove the March 16, 1999, letter to Leonard from her personnel file and destroy the letter and any copies maintained by the District.

2. 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.

3. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with the director's instruction.

All other allegations in the complaint are dismissed.

Members Dyer and Amador joined in this Decision.

APPENDIX



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

After a hearing in Unfair Practice Case No. SF-CE-2052, Alisal Teachers Association, CTA/NEA v. Alisal Union Elementary School District, in which all parties had the right to participate, it has been found that the Alisal Union Elementary-School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a). The District violated EERA by issuing to and placing in Donna Leonard's (Leonard) personnel file a letter of reprimand.

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

A. CEASE AND DESIST FROM:

Retaliating against Leonard because of her exercise of protected activities by placing a letter of reprimand in her personnel file.

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

Within ten (10) workdays of service of a final decision in this matter remove the March 16, 1999, letter to Leonard from her personnel file and destroy the letter and any copies maintained by the District.

Dated: _____ ALISAL UNION ELEMENTARY SCHOOL DISTRICT

By: _____
Authorized Agent

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