

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



EMPIRE TEACHERS ASSOCIATION,

Charging Party,

v.

EMPIRE UNION SCHOOL DISTRICT,

Respondent.

Case No. SA-CE-2023-E

PERB Decision No. 1650

June 29, 2004

Appearances: California Teachers Association, CTA/NEA, by Priscilla Winslow, Attorney, for the Empire Teachers Association; Littler Mendelson by Matthew J. Ruggles, Attorney, for Empire Union School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Empire Union School District (District) to a proposed decision (attached) of the administrative law judge (ALJ). The ALJ's proposed decision found that the District violated the Educational Employment Relations Act (EERA)¹ by retaliating against three teachers for their protected activities, and by this conduct, also violated the rights of the Empire Teachers Association (Association).

The Board has reviewed the entire record in this matter, including the proposed decision, the District's exceptions and the Association's response. The Board finds the ALJ's proposed decision to be free of prejudicial error and adopts it as the decision of the Board itself, subject to the discussion below.

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

DISCUSSION

Did the District, when it issued a negative evaluation to JoAnne DeMattos (DeMattos), discriminate against her because of her protected activities, thereby violating EERA section 3543.5(a)?

It is undisputed that DeMattos signed her evaluation on May 9, 2000. Thus, DeMattos knew as of that date that she had received a low mark in the category of professional relations. Despite this knowledge, this unfair practice charge was not filed until February 27, 2001, more than eight (8) months later.

The statute of limitations under EERA is six (6) months. (EERA sec. 3541.5(a)(1).) It is well-settled that the limitations period begins to run once a charging party knows or should have known of the conduct underlying the charge. (Fairfield-Suisun Unified School District (1985) PERB Decision No. 547.) In the proposed decision, the ALJ found the allegation involving DeMattos' evaluation to be timely because it was not until November 2000, that DeMattos discovered facts leading her to believe that her low mark was due to unlawful retaliation for her protected activities. In reaching his holding, the ALJ acknowledged the long line of cases which have held that a charging party's belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing. (See UCLA Labor Relations Division (1989) PERB Decision No. 735-H (UCLA); California State Employees' Association (Darzins) (1985) PERB Decision No. 546-S (Darzins).) However, the ALJ believed that in Peralta Community College District (1998) PERB Decision No. 1281 (Peralta), the Board had reversed UCLA and Darzins, and their progeny.

The Board has reviewed the decision in Peralta and agrees that it can be read to conflict with the rule set forth in UCLA and Darzins. Specifically, that Peralta can be read to hold that it is the discovery of the conduct, not its legal significance, that triggers the limitations period. The Board does not believe, however, that the Board in Peralta intended such an interpretation. Notably, there is no mention in the Peralta decision about UCLA or Darzins. Had the previous Board intended to overrule those cases, it surely would have noted the significant departure from precedent. Further, neither the Peralta Board or any Board thereafter has ever interpreted that case to have overruled UCLA and Darzins. To the contrary, even after Peralta, the Board has repeatedly cited to UCLA and Darzins with approval. (See, e.g., Oakland Unified Education Association, CTA (Rossmann, et al.) (1999) PERB Decision No. 1307; Teachers Association of Long Beach (Filinuk, et al.) (1999) PERB Decision No. 1312; State of California (Department of Corrections) (1999) PERB Decision No. 1366-S; Trustees of the California State University (1999) PERB Decision No. 1367-H; United Teachers of Los Angeles (Hopper) (2001) PERB Decision No. 1441; State of California (2001) PERB Decision No. 1459-S.) Accordingly, the Board finds that Peralta did not reverse the rule set forth in UCLA and Darzins regarding the triggering of the limitations period. To the extent that Peralta can be read to conflict with UCLA and Darzins, and their progeny, it is overruled.

With respect to the present case, it is clear that DeMattos knew of the conduct, the low mark on her evaluation, giving rise to the unfair practice more than six months before the charge was filed. What DeMattos discovered in November 2000 was evidence that her low mark may have been motivated by her protected activities. Under UCLA and Darzins, such a discovery does not re-start the limitations period. Accordingly, the allegation of discrimination arising from DeMattos' May 2000, evaluation must be dismissed as untimely.

Did the District, by its November 17, 2001, memorandum to DeMattos, interfere with employee rights guaranteed by EERA in violation of Section 3543.5(a)?

EERA section 3543.5(a) prohibits both discrimination and interference with protected activities. With respect to DeMattos, the complaint charged the District with violating EERA section 3543.5(a) under both a theory of discrimination and interference. Because the proposed decision found that the District had discriminated against DeMattos, the ALJ did not address the alternative theory of interference. As the Board has overturned the ALJ's finding of discrimination, the Board must now address whether the District interfered with DeMattos' protected rights.

Here, DeMattos inquired of Melva Rush (Rush), the principal of Teel Middle School, as to how she could improve her rating in the area of professional relations on her upcoming annual evaluation. On November 17, 2001, Rush responded as follows:

By not following established procedures, problems are difficult to address in a timely and efficient manner. Issues that you carry to Price Club and to ETA meetings, for example, before they have gone through channels at the site, waste the time of people involved, and can result in misunderstandings, and frustration.
(Emphasis added.)

By this letter and her other actions², Rush made it clear to DeMattos that DeMattos' performance ratings would be contingent of her not bringing issues directly to the Association. Such a policy interfered with DeMattos' protected right to bring her workplace grievances to the Association. As a result, the Board finds that the District violated EERA section 3543.5(a) by its actions discussed above.

²Rush's other actions demonstrating her anti-union animus are thoroughly set forth in the proposed decision.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Empire Union School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b), by discriminating for and/or interfering with the exercise of protected activities by JoAnne DeMattos, Kim Davis and Marj Whinery and by denying the Empire Teachers Association (Association) the right to properly represent its members in their labor relations with the District.

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

A. CEASE AND DESIST FROM:

1. Discriminating against employees for the exercise of their protected rights and/or interfering with those protected rights.
2. Denying to the Association rights guaranteed to it by EERA.

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

1. Assign Kim Davis, at her request, to a sixth-grade honors class as soon as practicable, but no later than the start of the 2004-2005 school year.
2. Discard the letter of reprimand issued to Marj Whinery on November 22, 2000, and delete all references to it in all District records.
3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, 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 ensure the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the Sacramento Regional Director of the Public Employment Relations Board in accordance with the director's instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Association.

Chairman Duncan and Member Whitehead 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. SA-CE-2023-E, Empire Teachers Association v. Empire Union School District, in which all parties had the right to participate, it has been found that the Empire Union School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b).

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

A. CEASE AND DESIST FROM:

1. Discriminating against employees for the exercise of their protected rights and/or interfering with those protected rights.
2. Denying to the Empire Teachers Association rights guaranteed to it by EERA.

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

1. Assign Kim Davis, at her request, to a sixth-grade honors class as soon as practicable, but no later than the start of the 2004-2005 school year.
2. Discard the letter of reprimand issued to Marj Whinery on November 22, 2000, and delete all references to it in all District records.

Dated: _____

EMPIRE UNION SCHOOL DISTRICT

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



EMPIRE TEACHERS ASSOCIATION,

Charging Party,

v.

EMPIRE UNION SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. SA-CE-2023-E

PROPOSED DECISION
(2/13/03)

Appearances: California Teachers Association, CTA/NEA, by Priscilla Winslow, Attorney, for the Empire Teachers Association; Littler Mendelson, by Matthew J. Ruggles, Attorney, for Empire Union School District.

Before Allen R. Link, Administrative Law Judge.

PROCEDURAL HISTORY

On February 27, 2001, the Empire Teachers Association (ETA) filed an unfair practice charge with the Public Employment Relations Board (PERB) against the Empire Union School District (District). The charge alleged violations of the Educational Employment Relations Act (EERA or Act).¹ On October 30, 2001, the General Counsel of PERB, after an investigation of the charge, issued a complaint alleging violations of subdivisions (a) and (b) of section 3543.5.²

¹ All section references, unless otherwise noted, are to the Government Code. The EERA is codified at section 3540 et seq.

² Subdivisions (a) and (b) of section 3543.5, in pertinent part, state:

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. . . .

On November 19, 2001, the District filed its answer to the complaint. The answer denied all material allegations and propounded various affirmative defenses. On November 28, 2001, an informal conference was held in an unsuccessful attempt to arrive at a mutually agreeable solution. On May 20, 21, 22, 23, 24, and July 8, 2002, a formal hearing was held before the undersigned. With the filing of the briefs by each side, the matter was submitted for a decision on November 26, 2002.

INTRODUCTION

Three ETA activists, after exercising protected activities, were given negative personnel documentation by Teel Middle School (Teel) Principal Melva Rush (Rush). Charging party alleges such documentation was a direct result of their protected activities. The respondent insists that, in each case, there were legitimate non-union related reasons for Rush's acts, and that the employees' protected activities had nothing to do with the documentation they received.

FINDINGS OF FACT

Jurisdiction

The parties stipulated, and it is therefore found, that the charging party is an employee organization and an exclusive representative and the respondent is a public school employer, within the meaning of the Act.

Background

The District encompasses K-8 students and has six sites in and around the city of Empire, just south of Modesto. Teel is the only middle school. It has a population of 1,200 to 1,300 students and employs approximately 56 teachers.

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

The ETA represents all District certificated employees, and during the subject time period, the parties were operating under the auspices of a collective bargaining agreement (CBA) that expired on June 30, 2001.

Rush's First Three Years

Rush became the principal of Teel at the start of the 1994-95 school year, after having previously worked with Superintendent Robert W. Price, Ed.D. (Price),³ in another school district. Almost immediately she irritated the teaching staff with, what they believed, was an autocratic, uncommunicative, management style. Various employees, according to Dave Loucks (Loucks), ETA's co-president, referred to her style as "panic management," and a pattern of "trying to get things done as things were due or just shortly thereafter." The teachers turned to ETA for assistance in acquiring some input into decisions that were affecting them on a daily basis. After a number of failed attempts at improving communications, they asked the ETA leadership to permit them to take a vote of no confidence during her first year.

Loucks, who taught for twenty-years at Teel before transferring to another District school during the 1999-2000 school year, discouraged the no-confidence vote. He urged the teachers to give Rush "time to get organized, get her feet wet and learn the ropes in our district." He did tell Rush that, in the teachers' opinion, she communicated poorly and seemed disorganized. Louck's comments did not seem to have any effect on Rush's management style.

Sometime during her second year, ETA asked Price to conduct a survey of teachers about Rush's capabilities as a principal. After the District rejected this request, ETA conducted its own survey. Loucks reported that the survey showed that there was a widespread

³ Price, in addition to his duties as the District's superintendent, teaches various courses to prospective educational administrators at California State University, Stanislaus.

concern over Rush's management style and communication. The results were shared with both Price and Rush.

Price contends that the District itself conducts a bi-annual "effective schools profile" survey for each of its schools. There are individual surveys for certificated employees, classified employees, students, and parents. Teel's population was surveyed during the 1995-96, 1997-98, and 1999-2000 school years. Teel's positive scores increased between 1995-96 and 1997-98. However, they fell dramatically in 1999-2000, in six of eight categories, to levels that were appreciably lower than those in 1995-96.

During Rush's third year, 1997-98, complaints continued about her poor communications skills, lack of collaboration with teachers, and her unilateral changes in academic programs. These changes directly affected the teachers' abilities to teach and they were upset over having no input into them.

California School Leadership Academy

Price, Rush, Loucks, and four ETA Teel teacher representatives met with Price during the 1996-97 school year. ETA described the reasons it believed Rush was a poor communicator. Both ETA and Price agreed that a third party could be helpful in addressing the problems at Teel. The parties jointly chose the California School Leadership Academy (CSLA)⁴ to facilitate progress in two areas, i.e., staff communications and student academic progress. This CSLA system consisted of creating a team made up of Rush, a number of Teel department chairs, Loucks, Monica Corriea (Corriea), and some classified employee representatives. According to Price, the initial goal at Teel, as set by the CSLA team, was to provide a coach to help Rush strategize new methods of communication, and provide input and

⁴ According to Price, CSLA's mission, in general, is to provide professional development in the area of leadership at school sites and districts.

feedback on how to make the teacher meetings more effective. However, Price stated in an April 1, 1999, letter to the Teel CSLA team that neither he, nor the CSLA facilitator, recall any agreement that improving the administrative leadership was an initial CSLA objective. In his testimony he listed CSLA's objectives as (1) organizational management issues and (2) student educational performance. He also stated that the project eventually emphasized instructional objectives.

The team was originally scheduled to operate for a two-year period. However, nine of the twelve teacher participants resigned their CSLA membership after a year-and-a-half when they realized that Rush's communication style had not changed and that the CSLA facilitator was not even trying to bring about this result.

Rush complained that one of the original purposes was to enhance Teel's communications, not just hers. She believed that the teacher team members refused to change their own communication style; they just wanted to change hers.

During the governing board's (board) "Hear the Public" session on May 4, 2000, Ed Bearden (Bearden), the District's board chair at the time, stated that it was "pretty obvious that it (CSLA) didn't help a bit. As a matter of fact, it may even [have] made things a little bit worse."

Department Chair/Liaison Realignment

Near the end of the 1998-99 school year, Rush had a full-day meeting with the department heads to set the calendar for the next year. The very next week, when the eighth grade teachers were attending a Great America trip with their students, Rush told the remaining

teachers that there would no longer be any department chairs. They were to be replaced with liaisons, who would represent teaching teams.⁵

She populated the new system with liaisons of her own choosing. Most of the department chairs had been ETA members selected by their peers. Accordingly, these chairs were viewed by the teachers as spokespersons to the administration on issues such as curriculum, school policies, student discipline, and budget. Most of the liaisons were not ETA members and were not representatives of their peers. Rush made this major change in the school's communication structure with no input from either the teachers or the CSLA team. In response, the teachers placed a large poster at the school site to solicit signatures protesting this change. Shortly thereafter the poster was presented to the board. There was no evidence submitted regarding a board response to this presentation.

One of the requirements of becoming a liaison was to agree to continue the CSLA process. None of the former department chairs or other resigned members of the CSLA team wanted to continue that process, so they did not apply for a liaison position. At this time, the District committed Teel to CSLA for a second two-year term, with the liaisons as the CSLA team members.

Louck's Address to the Board

In July 1999, Loucks addressed the board about Teel's morale problems, as well as ETA's disillusionment with the CSLA process. He complained of (1) Rush's inability to adequately communicate with her staff, (2) CSLA's refusal to attempt to get her to change,

⁵ The team teaching system refers to teams that consist of five teachers from four disciplines, two in English, one each in science, math and social studies. This team is responsible for the entire academic curriculum for a finite group of students.

(3) academic programs unilaterally being changed with neither input from the teachers, nor adherence to the communication principals espoused by CSLA, (4) the unilateral change in Teel's bell schedule,⁶ and (5) the "infamous vocabulary list" issue.

SAT -9 Vocabulary List

The first three issues had been the subject of grievances and conflict throughout most of Rush's tenure at Teel. The fourth issue was the subject of a grievance. The last issue concerned a relatively new teacher passing out a vocabulary list to her colleagues with the statement that they could use this list to prepare their students for an upcoming standardized SAT-9 test. When the teacher was asked where she obtained the list, she rather quietly said that she looked over her students' shoulders when they were taking the test the year before.

Carol Eneboe (Eneboe), a retired twenty-eight year District teacher, remembers being at the Teel faculty meeting in 1998-99 when she heard the teacher make these statements. Both Rush and Price were present when this teacher passed out her list of vocabulary words. Eneboe knew that Rush heard the teacher make this statement, because she (Rush) said, "we'll just pretend we didn't hear that and go on with what we're doing and go ahead and use them," or words to that effect. Eneboe stated that she was five feet away, and that Rush was ten feet away, from the teacher at the time the words were said. Rush strenuously denied either hearing such a statement from the teacher or making such a statement to the group.

Once the test was given, the teachers realized that the listed vocabulary words were actually on the test. When they became aware of this, the teachers became concerned about tainted test results and their part in them. Eneboe states that she knows of two unnamed

⁶ The bell schedule matter concerned a Rush unilateral decision that required teachers to be in their classrooms when the first "passing" bell sounded. This was an issue that primarily concerned the first period of the day and the first period after lunch. Prior to Rush's change, teachers were only required to be in their classrooms when the final or "tardy" bell sounded. There is a four to five minute period between the two bells.

teachers who called the District about the matter. In addition, Loucks called the state Department of Education. Rush contended that she brought the matter to the administration's attention. However, Eneboe stated that Rush did so only after another teacher came to her and complained the words she received were listed in exactly the same order as those in the test.

These calls triggered a state-directed investigation, conducted by the District itself. The results were confidential, as they potentially involved personnel actions. In a July 8, 1999, address to the board, Loucks referenced this incident when he said "[i]nstead of the superintendent being pleased with our honesty he stated we overreacted to the situation."

Price's Response to Louck's Presentation

Price responded to Louck's board presentation with a July 19, 1999, letter to him explaining that it "has long been the policy of the Board to hear only those complaints regarding employees that are processed in accordance with established district policy." He referenced Item #4 of the board's agenda under the "Hear the Public" section of the meeting.

. . . No oral presentation shall include charges or complaints against any employee . . . regardless of whether or not the employee is identified in the presentation by name or by another reference which tends to identify. All charges or complaints against employees shall be submitted to the governing board under provisions of governing board policy.

Price said that Loucks' complaints to the board had identified employees

by name or position and contained issues that have not been processed through appropriate administrative channels. . . . I can only assume you knowingly and deliberately decided to violate Board Policy. This shows disrespect for the Board and its policies. It is also generally injurious to the welfare of all employees of the District, including the teachers you represent as a leader of the Empire Teachers Association.

Other avenues of protest and complaint are clearly open to you. . . .

.....

. . . Both employees mentioned by name or position in your letter have been sent copies of your letters for their attorneys to review. I understand that whether or not your comments are actionable under civil statutes is still under review. . . .

.....

If you believe that your concerns are valid and would like to have the issues you raised investigated, you need to pursue a remedy through appropriate channels. I remind you again of the Board's established process for resolving complaints regarding district employees. [Emphasis added.]

Louck believed that “appropriate administrative channels” required him to bring all issues to the principal first, then to Price and then, and only then, were they to go to the board. Loucks insists that he had done exactly that with almost all of the issues he touched upon in his July 1999 address to the board.

Louck’s Honors Class Assignment

While attending the above-mentioned Great America trip, Louck learned that his literature honors class would be taken away from him at the end of the 1998-99 school year. He had been teaching this class for seven years. Concurrent with his reassignment, the course content was changed from literature to language arts, with an emphasis on writing. He insisted that his reassignment from the honors course caused him to spend 50 percent of his teaching time outside of his credentialed area.

The District claims that Loucks was taken out of the program because he admitted that he was not comfortable teaching writing, and it was necessary to enhance the writing program for honor students. However, Rush admitted, on cross-examination, that she does not know when Loucks told her that he was uncomfortable teaching writing, whether it was before or after she removed him from the honors class.

District's Complaint/Communication Policies

Many of the core issues in this case concern employees being accused of not following the proper District complaint policies. In order to properly understand the actions of the parties, it is necessary to describe and examine the subject policies. There are four avenues available for District employees if they are dissatisfied with work site circumstances. They are (1) the grievance procedure, (2) discussion(s) with his/her immediate supervisor(s), either individually or through ETA, (3) the Price Club, and (4) the District's complaint procedure.

Grievance Procedure

The parties' grievance procedure consists of filing a grievance alleging a violation of the CBA and submitting it up the chain of command until it receives a final decision from the governing board.

Price Club

CBA Article X in its entirety states:

Confer Meetings

The Superintendent and his/her representatives shall meet monthly at a mutually convenient time after the instructional day with the Association President(s) and one representative from each school to confer on matters of mutual concern.

These meetings are called the "Price Club." The purpose of this "club" is to permit Price to learn of employee concerns and to informally resolve as many of them as possible. Both sides seem comfortable with the manner in which this system worked. The meetings are informal, but Price insists that any matter brought to this meeting must be previously discussed with the site principal. The subject is then discussed only if the principal was unable to previously resolve the matter. Any matter not resolved by the Price Club can be appealed to the board. Price believes that failure to notify the site principal of the matter before it is

brought to the Price Club is a breach of a teacher's professional responsibility, that may appropriately be reflected with a lowered rating in an evaluation.

In addition, Price believes quite strongly that personnel issues, including complaints about administrator(s), should be kept confidential. He also believed that a general complaint about a principal would constitute a personnel issue, because it is specifically against an employee. Consistent with this belief, such matters would not be an appropriate topic for the Price Club. However, Price said that if the teachers came to him with a complaint against a principal, and they had previously discussed it with her, he would either discuss it at the Price Club, or depending "on the sensitivity of the issue or we might set up another time to discuss it more privately."

The dividing line between whether or not an employee concern is a personnel issue, in Price's view, seems to be based on a determination of whether the complaint is primarily aimed at procedures and policies or the individual.

District Complaint Procedure

On March 11, 1999, a veteran Teel teacher, JoAnne DeMattos (DeMattos), addressed the board with a series of complaints regarding her sense of distrust and dissatisfaction with Rush. This letter will be discussed in detail infra. Shortly thereafter, Price wrote to the Teel CSLA team to instruct them to use the Parent/Community Complaint procedure, as set forth in District Administrative Regulation (AR) section 1312.1(a), if they had a complaint against another District employee. This is the first time there is any record of Price directing employees to use this procedure for a complaint against another employee.

On January 24, 2000, ten months later, Price wrote a board memo to remind all certificated staff of various problem resolution processes available to them, i.e., grievances, Price Club, Interest Based Bargaining and "complaint procedures." The memo said that the

board would ultimately hear any formal complaints that were unresolved at the lower levels. It went on to state:

We believe that such complaints must be reviewed and investigated, but because they involve confidential matters surrounding employee performance, we strongly believe that such matters are best resolved through the established confidential complaint procedures.

. . . Therefore, we are referring the issues raised at the Board meeting in open session [complaints about Ms. Rush raised by Teel staff at a November 4, 1999, board meeting] back to our established complaint resolution process. Any staff members who are inclined to use the “Hear The Public,” section of a regular Board Meeting to bypass other problem solving processes and bring a personnel matter directly to the Board are not adhering to personnel practices established in Board policy. . . . [P]ersonnel issues are not appropriately discussed in a public forum. [Emphasis added.]

The public complaint procedure, located in District AR section 1312.1(a), references only parent/community member complaints against an employee and not staff complaints against an administrator. Accordingly, ETA asked Price for a clarification of his directive. On March 1, 2000, Price once again referred the teachers to AR section 1312.1(a), stating this was the process to be utilized by members of the staff with a complaint against another staff member(s).

AR Section 1312.1(a) states, in pertinent part:

Community Relations

Parent/Community Complaints Concerning School Personnel

Whenever appropriate, complaints by parents, guardians and/or other members of the community should be made directly by the complainant to the person against whom the complaint is lodged. If the complaint is not or cannot be resolved at this level, the complainant should direct the complaint to the employee’s administrative supervisor, or principal. If the complaint, after review by the supervisor, remains unresolved, the complainant is requested to put the complaint into writing and the supervisor shall refer the written complaint, together with the supervisor’s

report and analysis of the situation, to the superintendent or his/her designee. [Emphasis added.]

The regulation goes on to explain what information should be in the written complaint and briefly describes the process by which a complainant could appeal a preliminary decision to the board itself.

Price stated that everyone, teacher, parent, or member of the community, who wanted to pursue a complaint against an employee past the principal level, would have to use the parent/community complaint process and submit their complaint in writing. However, John D. Berry Ph.D., deputy superintendent, admitted that parents who had complaints about Rush in 1998 or 1999 were not told that they must put their complaints in writing in order to have them considered. On the other hand, employees were always required to put their complaints in writing in order for the board to consider them.

In an August 22, 2000, seventeen-page memo to “All Teel Staff,” Price responded to an ETA allegation that the District had directed the teachers to a complaint form that did not exist. Price’s response, in pertinent part, is

A review of all written documents regarding complaints indicate that no employee has ever been referred by administration to a complaint form. We have consistently referred employees to a complaint resolution process that is clearly defined in policy. Each Teel employee has received a copy of this policy. In order to facilitate the perceived need for a form, the district has developed a form for employees to use in seeking resolution of complaints. [Emphasis in original.]

The new form omitted the parent/community references and set forth a process for the complainant to move through the same three step process as set forth in the grievance procedure, i.e., complain directly to the involved employee, appeal to supervisor(s), and, eventually, to the board. There was no form for either parents or staff prior to this time. At a

negotiations session on November 13, 2000, ETA, referencing the proposed complaint form, said “as far as we are concerned, this looks good.”

In his August 30, 2000, “welcome back” message to Teel employees, Price referenced the turmoil at the school at the end of the previous school year, and set forth a program to resolve it. His message, in pertinent part, is as follows:

The 1999-2000 school year ended on a less than positive note with the submission to the Board of a list of complaints from several Teel teachers. Under separate cover I have sent the Board’s response to the issues brought forward by ETA Those teachers who sent individual letters or e-mail messages . . . have also been sent an individual response. These responses represent the Board’s final decision and the district considers these issues resolved/ closed. . . .

The vast majority of concerns reviewed by the Board at their June 22nd meeting dealt with issues that had remained unresolved over long periods of time. We have reviewed complaint resolution procedures and developed a form to be used by any employees who wish to file a complaint against other employees. The Board believes that using the established complaint resolution procedures allows employee complaints to be resolved in a manner that respects the rights of all those involved. I strongly encourage the use of this process to promote the resolution of conflicts at the site. Guidelines for lodging complaints include:

- Informal discussion of issues with those involved. Most issues can be resolved at this level. If a conflict persists after discussion with those involved, the complaint procedures should be initiated at the next level.
- Individuals involved need to initiate the complaint procedure. It is not appropriate or efficient for staff to take on the issues of others.^[7]
- The Board is very interested in resolving complaints that follow established procedures. They [sic]do not believe it is ever appropriate to bring complaints forward in public.

⁷ Price testified that he did not intend that these two sentences would preclude ETA from filing a complaint against an employee/administrator.

In order to proceed with the orderly operation of Teel Middle School, we need to leave past actions in the past and move forward together. I encourage the use of the new complaint form to resolve complaints at the earliest possible time and as close to the source of the problem as possible. Likewise, I encourage the use of the grievance procedure whenever a disagreement over contract language occurs. The use of these procedures will ensure a structured review of all disagreements and encourage the resolution of grievances and complaints in a timely manner, respecting confidentiality and due process. [Emphasis added.]

Summation

Prior to August 2000, the District's policies concerning employee complaints about administrators were vague and internally inconsistent. Any attempt by a teacher to speak to the board during its "Hear the Public" session was met with negativity and a referral to "established procedures." However, the "established procedures," on their face did not apply to staff members. The teachers were encouraged to use the Price Club, but not for complaints about their principal. They could file grievances, but not lobby the board about the merits of those grievances. The net effect of this system was to deny the teachers any viable means to complain about any of their supervisor's actions.

The creation of the new form would seem to add some certainty to this process, but there was no evidence proffered regarding whether it provided any effective alternatives to the above-described circumstances.

Vote of No Confidence – May 2000

In May 2000 the ETA asked all Teel teachers, ETA members and non-members alike, to vote as to whether they had any confidence in their principal. ETA reported that eighty-nine percent of fifty teachers⁸ voted for a declaration of no confidence in Rush. A few days later,

⁸ Although the evidence repeatedly references fifty-four teachers voting, the voting roster (Respondent Exhibit DD) shows that only fifty voted.

on May 3, ETA sponsored a leafleting at Teel's annual Open House night to inform the parents of their vote. ETA presented the no confidence resolution to the board at its May 4 meeting.

In a May 10, 2000, memo to the ETA executive board, Price complained of ETA's no confidence vote, decrying its

. . . attempt to make the evaluation of a site principal a public process. . . . Neither I nor the Board will be intimidated into abandoning established district evaluation and/or complaint procedures by the presence of the media or the use of concerted activities regarding Ms. Rush. . . . I do believe that such a campaign is unprofessional and unethical and may also be illegal.

.....

. . . repeated attempts to discuss these personnel issues in the public arena have been made by some staff. Such disruptive, disrespectful, and illegal actions cannot and will not be tolerated. [Emphasis added.]

May 4 Board Meeting

At the May 4, 2000, board meeting there was an extended "Hear the Public" session. The single-spaced verbatim partial transcript of the parent/teacher comments covered twenty-four pages. The entire dialogue concerned circumstances at Teel. Many of the participants asked the board to sit down with the teachers and parents and work out a solution to Teel's problems. Most of the participants were complaining about various aspects of Rush's tenure as principal, although there were several comments in support of her.

Shortly thereafter, in a May 16, 2000, memo, California Teachers Association Executive Director John Uelmen, asked Price for an open forum to "look for solutions to the problem." In response, Price offered to forward any and all Teel teacher complaints to the board. On June 5, ETA sent Price an extensive list of complaints with accompanying documentation. On August 22, Price, on behalf of the board, responded to, and basically rejected, each of the complaints. As a part this response the board voted 5-0 to express their confidence in Rush.

Permissible Statements at Board Meetings

On a number of occasions Price told employees who had addressed the board at its "Hear the Public" session, to use the complaint process instead of speaking directly to the board. When asked if it was inappropriate for employees to ever bring their complaints directly to the board, Price testified as follow:

Q [by ALJ] . . . Are you telling them they can't bring up their complaints with the principal in front of the board of . . . directors?

A I'm not telling them they can't, I'm telling them the board's preferred method of resolving complaints is through their established procedure. They certainly have a free speech right to . . . say what they want during "Hear the Public", but the board does not want to respond to complaints that are delivered in that way. They want them in writing so they can respond to the written complaint.

Price acknowledged the employees' free speech rights to bring up whatever issue they wish before the board. However, he also stated that if the issue involves a personnel matter the board will not enter into a discussion with the speaker.

Price also stated:

Q . . . if teachers came to the board and complained about the communications problems at Teel Middle School and alleged that those communications problems were due to the managerial style of the principal, would you consider that a personnel complaint?

.....

A . . . Not necessarily, no.

Price also stated that if ETA wants a resolution of its complaints against Rush, it should not bring it up at board meetings. On the other hand, if all they want to do is air complaints, it is not proper or professional, but not illegal due to their free speech rights, to do so.

With regard to whether a teacher's address to the board, without going through the complaint process, merited a lowered "Professional Relations" rating in an evaluation, Price first testified that he did not believe that such ratings should be lowered.

Later he said that it would be proper to have those ratings lowered on their evaluations. The next day he said the lowered ratings would not be appropriate.

Student Failure Rates

In 1995-96 Rush's emphasis was on teachers whose student failure rates were too high. She called a number of teachers into her office and asked them why their percentage of Ds and Fs was higher than what she felt was proper. Because "too high" was never defined, Loucks asked Rush to issue a memo explaining her grading standards. ETA believed that this would enable the teachers to better understand what was expected of them. Rush refused to issue such a memo, stating that teachers could individually come and talk to her if they had questions or concerns. She was willing to discuss her standards one-on-one, but not in a memo.

ETA raised the grading issue at both Teel department meetings and at the Price Club. Eventually Price came to Teel to discuss the matter. One teacher, Kate Archangel (Archangel), an eighth grade English teacher and ETA activist, seemed to be the focus of Rush's concerns, ostensibly because of a high failure rate in her general population classes, but not in her honors class. Rush did not explain to Archangel what was an acceptable level of failing grades; she just wanted her level to drop appreciably.

Archangel discussed her grading policies with Rush and, although she disagreed with some of the principal's approaches to solving the problem, she modified her policies as best she could. Throughout this entire time Archangel was in compliance with the District's written grading policies. Archangel talked to and solicited advice from her fellow teachers about the

issue, consulted with ETA, and eventually brought the matter to the Price Club. Rush accused her of causing trouble by discussing this subject with other teachers and by taking the matter to the Price Club. She also threatened to remove Archangel from her honors class assignment if she did not bring down the number of her failures. Although the number of her failing grades diminished, Rush eliminated her honors class assignment at the end of the 1995-96 school year.

When asked if she had had any earlier conflicts with Rush, Archangel responded:

A Yes, my first interaction with Ms. Rush was over misrepresentation of moving a student from my class to a team member's class without talking to me about it. I went in to speak to her about that and she said that yeah, that she had moved the student and that she hadn't really talked to anybody about it except the parent. I asked her if she talked to the other team member, whose class she move[d] the student into, she said no. However, I found out a day or so later that she had indeed spoken to this other teacher about it before she had moved the student. And when I went back to ask her about that, I don't recall exactly what she said about why she misinformed me but, the next day after that the other teacher told me that she had been chastised for speaking, for telling me the truth about the matter and that what is said in the office from now on is supposed to stay in the office.

Rush Hour

Early in the 1998-99 school year, ETA approached Rush about the possibility of setting up monthly meetings with Teel's ETA representatives. This monthly meeting would enable the parties to discuss employee concerns at the local level. It was conceived, in part, because many ETA members were afraid to speak to Rush individually, and because the Price Club seemed to work well at resolving disputes quickly and informally at the District level.

They suggested the meetings be called the Rush Hour, paralleling the Price Club pun. Rush felt the term "Rush Hour" was sarcastic and meant to poke fun at her, but she could not explain why the term "Price Club" was not similarly derisive.

Rush declined to set up such meetings. In her view, meeting with ETA representatives should only be on an as-needed basis, and there were already procedures in place for the ETA to voice its concerns, i.e., the Price Club and the CBA grievance procedure. She told ETA that she did not want it speaking for the teachers at Teel, because she did not think it represented the interests of all teachers.

Rush's further justification for declining to establish a Rush Hour was that there were already individual procedures in place at Teel, e.g. individuals could e-mail her, call her, or come in and speak with her.

In asking her to reconsider her position, the Teel ETA representatives wrote Rush, pointing out that

. . . It is possible that sometimes issues might cross over between your teaching staff and union members' interests, but not always. Therefore, it is not always possible or appropriate to bring these issues through the channels suggested by you.

Other site administrators meet with union representatives in a cooperative and casual manner. It appears to be successful and eliminates issues being forwarded to the Price Club.

The ETA representatives prepared a list of issues of concern to be used in a hoped-for meeting with Rush in November of 1998. This list, in abbreviated fashion, is as follows:

- (1) Ventilation systems need regular service to promote clean air environment,
- (2) Rain gutters need to be cleaned out to avoid mold, mildew and potentially ruinous effect on floors and carpeting,
- (3) Request for NCR copies of monthly attendance sheets,
- (4) Serious concerns about Deputy Mason's unprofessional behavior toward teachers and students,
- (5) Request for clarification of requirements for SIP days, SST and staff meetings, etc.,
- (6) Request for clarification of independent study procedures,
- (7) Request for EUSD Policies and Procedures and State Education Code documents to be kept current and available to teachers, and
- (8) Confirm or dispel rumor that teachers must have student corroboration of their version of events in an incident/disciplinary report.

In her response Rush described what she believed to be the proper method of resolving employees' concerns, as follows:

If a staff member(s) has a question/concern, he/she should first discuss the issue with the person/persons directly involved. If the matter is not resolved at that level, the next step is to meet with site administration. If the matter is still not resolved, the next step is to meet with district level administration. If someone is uncomfortable meeting with administration, he/she may bring a colleague.

The Rush Hour was never implemented at Teel. Price states that he does not know of any other District school that has a monthly meeting that is equivalent to the Price Club.

Academic Senate

In June 1999, in another attempt to create an avenue of communication between the Teel teachers and the administration, ETA created a new body, the Academic Senate. ETA believed that under the liaison system there was no communication between the various academic disciplines and Rush. Therefore, it created this new body which was aligned along academic discipline lines. Various teachers, representing academic departments, were elected to the Senate in late October 1999. In November, the Senate held numerous meetings and tried to meet with Rush. She gave them a single audience, at which time she told them that the issues they were raising should go through the liaisons.

DeMattos

Background

DeMattos has been teaching reading and language arts at Teel since 1984. She was described by Price as not just a good teacher, but an "excellent teacher." She is currently teaching an honors class at Teel. She serves as Teel's ETA site representative, which requires her to represent the teachers to Rush. In addition, she served as a Teel representative to the Price Club for three years from 1997-98 through 2000-01.

Allegations of Failure to Previously Discuss Matters with Rush

The District cited four instances in which it contends that DeMattos failed to discuss matters with Rush prior to bringing them to the Price Club. In an abbreviated fashion, these matters are: (1) the report card revision committee, (2) Carol Braden's (Braden) overcrowded classroom, (3) annual goals, and (4) an allegation that the liaisons failed to communicate properly. Each of these issues will be discussed below.

Report Card Revision Committee

On February 22, 2000, DeMattos brought to the Price Club the fact that several Teel teachers who had volunteered to serve on a District report card revision committee had been told that their assistance was not needed. DeMattos later learned that sometime between the request for volunteers and the February Price Club meeting Rush decided that the school's report card would not be revised.

Overcrowded Classroom

In October 2000 DeMattos brought up the issue of Braden's overcrowded classroom. DeMattos contended that Braden very clearly said that she had spoken to Rush. In addition, Braden discussed the subject at a sixth grade meeting and the minutes of those meetings always go to Rush. Price said Rush did not know anything about the issue. The District contends that once Price contacted Rush on the matter, it was resolved quickly and amicably.

The CBA states that the overloaded teacher is entitled to specified additional amounts of either (1) classroom clerical aide time, or (2) budgetary funds for instructional materials or equipment.

Rush insisted that she was monitoring the overload situation, but that Braden had not yet sent anything to her in writing about her preference of aide time or budgetary funds.

Shortly after this October 2000 Price Club meeting, Braden told DeMattos that Rush admitted that she (Rush) forgot that Braden had talked to her about the matter. And yet, in her testimony, Rush replied in the affirmative when the District's attorney's asked her if this was an example of DeMattos failing to follow proper procedures.

Annual Goals

In September 2000, DeMattos, at a Price Club meeting, raised the issue of whether a principal can include annual goals in a site plan over the objections of a department. DeMattos had been told by Corriea that she (Corriea) had discussed the issue with Rush. Later DeMattos learned that Corriea was in error, and that the first time the issue was discussed with Rush was a month after the September Price Club meeting.

DeMattos admitted that sometimes, due to time restraints, she takes things to the Price Club based on assertions by her fellow teachers that they have discussed the issue(s) with Rush, rather than personally checking with Rush to determine if she has been previously notified of the issue.

Vickery Liaison Issue

Jessica Vickery (Vickery), a probationary Teel teacher had a complaint about the liaisons not properly communicating with her. The District pointed out that ETA brought up Vickery's issue, even though Vickery never requested it do so. However, Corriea believed Vickery brought it to ETA, because it was discussed at a Teel ETA meeting. The District contended that this incident supports its contention that DeMattos and ETA bring up issues that are not really valid employment issues and are designed to do no more than "stir up trouble."

Address to Board

On March 11, 1999, DeMattos addressed the board at its meeting. She read a letter that she addressed to Price and Rush. Her letter, in pertinent part, is as follows:

In all the years I have taught for this school district, I have never felt so compelled to describe my perception of the atmosphere and climate of this school. And I do so now – not out of any desire to make a personal attack, because I appreciate the support this principal has given to activities in my classroom, but because, in talking to many of my colleagues, I am getting a sense of distrust and dissatisfaction with the leadership of this school. And, although, many fear to say it aloud, the existence of CSLA during the past two years has made absolutely no change in this leadership style, nor has it created any different communication venue at this site.

. . . [M]any feel our professional judgement has come to mean and stand for very little in the decision making process. Increasingly, we are being “told” what to do and how to do it. . . .

. . . I understand the frustration that has occurred over the controversy concerning the passing bell. The handling of this situation is seen as one more attempt by the administration to control and direct teachers instead of discuss, compromise, or achieve consensus, and this has everything to do with leadership style. . . .

The District, in its brief, stated that the primary purpose of the letter was to “express Ms. DeMattos’ personal opinion of the issue of the passing bell.” It rejected her characterization of her remarks as being on behalf of either ETA or the other Teel teachers.

Shortly after DeMattos delivered her remarks, a statement in support of her comments was sent to Price, Rush, and the board. The statement, in pertinent part, states:

Teel staff members would like to express their great respect and admiration for JoAnne DeMattos. She had the courage and tenacity to write a letter to both Ms. Rush and Bob Price expressing her dismay over the state of affairs, the leadership, and the morale at Teel Middle School.

We would like to thank JoAnne for publicly expressing what most of us are afraid to stand alone and say. Her concerns certainly reflect the feelings of many of the staff, who, for reasons of their own, will not, or can not, voice them publicly. Instead, they are looking for new jobs. Currently, at least 26% of the teachers are actively looking for other jobs. Others are considering leaving; several more would leave if their circumstances permitted.

The statement was signed by thirty-three Teel staff members.

Price's Response

Price responded to DeMattos' address in a memo dated March 17, 1999. He first chastised her for not giving him a chance to respond before reading her comments publicly. He then stated, in direct contradiction to the view expressed in the District's brief, that it appeared to him that her memo was "primarily in regard to issues of others, rather than your personal concerns." Price admonished DeMattos "not to own the expressed pain of others."

With regard to her complaints about poor communication at Teel, Price stated

. . . In terms of improving communication, there was an agreement by the CSLA team and Teel staff to follow established procedures addressing issues through normal supervisory channels. Not one of these unhappy colleagues you refer to has given me the professional courtesy of appealing any decisions made by site administration during the past school year, despite repeated offers from me to hear any appeals. Do you believe that this is professional conduct?

In his closing paragraph he again states that he

would encourage you not to own the expressed pain of others.

In response to DeMattos' complaints about Rush's unilateral bell schedule change, he wrote that any discussion before the board of a matter in a pending grievance is inappropriate.

However, in his testimony, there were a series of questions, answers, objections and rulings about whether he still believed it was inappropriate to discuss a grievance in the board's "Hear the Public" portion of its meetings. Eventually Price testified that despite the fact that he would like it to happen another way, "I pretty much have a neutral view."

DeMattos testified, without rebuttal, that all of the matters she referenced in her March 11 address to the board had previously been discussed at the Price Club, so she was at a loss to know what he meant when he said he had not been given the courtesy of prior knowledge of her complaints.

Rush's Response

Rush also complained, in a March 19, 1999, letter to DeMattos, of not having been given a prior copy of her remarks to the governing board. Once again DeMattos said that all of the issues in her March 11 letter had been previously discussed with Rush.

Near the end of her response Rush included the following statement:

I must admit that I was extremely surprised that you would read your letter in the open session at the Board of Trustees meeting on March 11, 1999, without first affording me the professional courtesy of an opportunity to respond. Further, if you were dissatisfied with my response then your next step should have been to meet with or correspond with Dr. Price. The processes are in place to help resolve employee issues in this district in a professional manner. I encourage you to use them appropriately in the future.

Evaluation - 2000

Two months later, in her May 9, 2000 evaluation of DeMattos, Rush gave her a “does not meet” rating in the area of professional relations, with the following comment attached:

This is an area that needs improvement. You need to learn to utilize the communication processes in place in the district in order to work on resolution of problems and concerns.

Rush testified that there were two major reasons for DeMattos’ lowered rating: (1) her March 11, 1999, letter to the governing board, and (2) her failure to follow the “prior notification” Price Club rule.

DeMattos, on May 11, 2000, submitted her evaluatee’s comments in rebuttal to Rush's evaluation. The first substantive paragraph states:

In response to Item D [Professional Relations], I would like to state that I have tried many avenues of communication in order to solve problems and discuss concerns. I have talked to the administrator one on one, and with other teachers. I have raised issues at language arts department meetings. I have taken issues to Price Club. Finally, I have written letters and spoken at board meetings, not out of a desire to create or promote a negative atmosphere at our school, but to bring attention to issues that

have been raised. I have always thought and I still believe that if this administration would listen, discuss, and actually consider teacher input that many problems could be resolved and many of the processes we have to work through would be more positive and effective. If I haven't used the correct communication processes, then I regret to say, I don't know what they are.

DeMattos expanded on her evaluation rebuttal comments in her testimony when she stated she spoke to Rush (1) personally, in her role as DeMattos, the teacher, (2) personally, as DeMattos, the ETA representative, (3) personally, as a part of a group of teachers, and (4) in a group format at (a) language arts meetings, (b) literacy meetings, and (c) grade level meetings. Rush was not responsive to any of these approaches. DeMattos did not know what else she could do to try to work with Rush to solve the teachers' problems.

DeMattos was asked if she believed that she was given a low rating in professional relations because of "these communication issues on campus." She replied

A The only reason I could possibly think of had to do with my job as an ETA rep, that was the only thing I could think of that that had to do with.

Q So, when you got the evaluation, you understood that to be a criticism of you in your role as an ETA rep, is that right?

A Yes, well, that I spoke and represented teachers. --

[ALJ] The answer is yes or no.

THE WITNESS: Yes.

In October 2000, DeMattos was informed that due to her "does not meet" professional responsibility rating the previous year, she would be evaluated in all areas the next year, rather than bi-annually as is usually the case for California tenured teachers. This additional evaluation caused DeMattos to revisit the reasons she had been marked down when she believed she had followed all of the appropriate communications procedures.

She decided to ask Rush to explain why she received her “does not meet” rating, to better enable her to avoid being “marked down again.” She wrote to Rush as follows:

. . . Please let me know (in writing) specifically what I failed to do and what I should attempt to do differently this year so that I will be able to meet your expectations.

Rush responded on November 17, 2000 as follows:

. . . By not following established procedures, problems are difficult to address in a timely and efficient manner. Issues that you carry to Price Club and to ETA meetings, for example, before they have gone through channels at the site, waste the time of people involved, and can result in misunderstandings, and frustration. (Emphasis added.)

Shortly thereafter DeMattos received a very positive 2000-2001 evaluation from Assistant Principal Michael Hermosillo (Hermosillo), with no negative ratings or comments of any kind.

Meeting of Rush and Teel ETA

Rush’s attitude toward ETA activities was made apparent in an October 31, 2000, meeting she had with DeMattos, Corriea, who is another Teel ETA teacher representative, Jan Hastings (Hastings), a California Teachers Association staff director, and Teel Vice-Principal Lisa Gonzalez. ETA requested the meeting to discuss various issues that the teachers raised at an earlier ETA meeting.

DeMattos remembers that Rush was visibly upset at the beginning of the meeting. It is her belief that Rush was upset because ETA had typed up various issues in an agenda format and was speaking on behalf of all of the teachers. Corriea remembers Rush stating it was not necessary to put these things in writing. She also remembers that Rush directed some comments directly at her (DeMattos), insisting that those particular issues were DeMattos’ personal gripes. Rush commented that “this is an example of why you were marked down.” DeMattos believes that this comment refers to her evaluation rating on professional relations.

Contemporaneous ETA notes describe the beginning of the meeting as follows:

The principal's immediate response was her disappointment/dissatisfaction that staff issues of concern were being presented in writing by the ETA organization. She indicated these issues would be better addressed by having any/each individual with a concern speak directly to her (in her office) in the presence of an ETA rep if desired. While this may be successful for some, many teachers feel more comfortable having ETA represent their various concerns, including those involving miscommunication at the site, and in fact it is ETA's responsibility to do so. This was supported by CTA's director. [Emphasis added.]

During this meeting, Rush accused Corriea and DeMattos of "stirring up conflict," and insisted that teachers should come to her individually rather than having their concerns presented by their union. Hastings' contemporaneous notes, and a subsequent "follow-up" letter written by the ETA Executive Board to Rush, confirm these remarks. Rush denied making these statements, but admits saying that for timeliness reasons ETA should just refer employees with problems to her.

In addition, DeMattos, at the same general time, attended a teachers' meeting in which she was accused, by Rush, of creating problems and not trying to solve problems when all she did was ask questions. In one such instance she merely asked for any available research on a program she was being asked to integrate into her curriculum. She wanted to know how the program had worked in the past. Rush accused her of being negative and not attempting to solve problems.

Davis

Background

Kim Davis (Davis) was a Teel English teacher for eleven years, from 1990 to 2001, an ETA representative from 1993-94, and its treasurer from 1994 to the present time. ETA executive board meetings were held in her classroom for many years, and Rush would occasionally ask her about union matters. Shortly before March 29, 2000, she formally

requested a transfer to any of the District schools other than Teel. She has since left Teel and now works at Capistrano Elementary School, another school in the District.

No-Tell Day

CBA Article VI.5 is entitled “Personal Leave – Partial Payment.” Section A grants employees the right to request the District to grant them a maximum of three partially paid personal work days of leave for “pressing personal reasons that do not qualify” for specified necessity leaves. Section B, in its entirety, is as follows:

Two (2) days of the above three (3) may be taken by the employee without having to specify the reason. However, the employee may not use these two (2) days for purposes of entertainment, vacation or concerted activities. Prior to taking these two (2) days, notice to the District shall be provided in the same manner as in the case of an employee taking sick leave. (Emphasis added.)

On March 15, 2000, Davis accompanied her students when they attended a week-long session at the Foothills Horizon Outdoor Education Camp (camp) in the Sonora area. This is an educational site in the mountains about an hour-and-a-half from the District. Davis had no educational duties, as these were assumed by the camp’s staff, which is employed by the County Office of Education. Her role, along with the other attending Teel teachers, was to supervise the students. While at camp, Davis took a CBA-sanctioned “no-tell” day off for the purpose of attending a job interview in a neighboring district. She was absent from the camp from 9 a.m. to 2 p.m. She arranged for a colleague, Sandra Burdick (Burdick), who is also a District credentialed teacher, to replace her for the few hours she (Davis) spent at the job interview. Burdick herself was on a “no-tell” day when she substituted for Davis.

Deputy Superintendent Berry said that while a teacher ordinarily may use a “no tell” day to cover an absence from school, the usual substitute service notification procedure does not lend itself to supplying substitutes for the camp, due to its distance from the District.

There are no written rules, CBA language or District policy, with regard to the proper manner to take a “no-tell” day off when assigned to the camp. Davis said that although she did not tell Rush of her plans, she “mentioned” them to the school secretary. However, the secretary testified that she told Davis that she should let Rush know she was leaving.

Burdick also used a “no tell” day when she covered for Davis. The District contends that Burdick was attending the camp as a “volunteer,” not as the result of a District assignment. When pressed on the issue, Davis testified that “. . . in retrospect I probably did not think it through as well as I should have.”

For her actions in this matter, Davis was given a letter of reprimand by Berry. She filed a grievance over the letter. On appeal, Price slightly modified the letter’s wording, and re-issued it to her on June 2, 2000.

Davis’ letter of reprimand is not one of the allegations set forth in this case’s complaint, as it was issued on June 2, 2000, more than six months prior to the date the charge was filed, February 27, 2001, with PERB. However, evidence regarding this matter was accepted into evidence as it impacts the question of whether or not there was a pattern or practice of union animus at Teel during the subject period of time.

Another teacher, Steven Cleek (Cleek), also took a no-tell day while at the camp. There was no evidence proffered regarding the details of his absence. He also received a letter of reprimand. In an October 18, 2000, Price Club report, Price, in response to an inquiry, confirmed that Cleek was “replaced by a full time intern teacher.”

Comments to Press at Open House

On May 3, 2000, at Teel’s open house, ETA leafleted the attending parents, informing them of its no confidence vote on Rush. When a Modesto Bee reporter came to the school, she was referred to Pam Wright (Wright) and Davis. Davis was quoted in the local paper the

following day as saying that Rush does not listen to her staff's comments and "she micromanages and when somebody questions her decision she publicly ridicules you and dresses you down."

Evaluation-2000

On May 10, 2000, Davis received her bi-annual evaluation. The category of "Professional Relations" was marked as "does not meet" with the following explanation:

In the past I have felt that you have been open with me regarding concerns and issues. In the past few months I have observed a lack of communication and candor between us.

If you have an issue or problem, we need to work together in a professional manner towards resolution.

When Davis met with Rush just before the end of the 1999-00 school year to learn why she had been marked down in the area of professional relations, Rush told her that she did not appreciate her staff talking to the newspaper. In her testimony, Rush did not deny making this statement – she simply could not recall whether she made it or not.

Rush stated that the camp incident was her reason for giving Davis a low evaluation mark in professional relations. She further stated that she did not reference this incident in the evaluation because a grievance was pending and she did not want to impact that process.

Davis' evaluation is not one of the allegations set forth in this case's complaint, as it was issued on May 10, 2000, more than six months prior to the date the charge was filed, February 27, 2001. However, evidence regarding this matter was accepted into evidence as it impacts the question of whether or not there was a pattern or practice of union animus at Teel at the subject period of time.

Removal From Honors Class

A second allegedly retaliatory act occurred at the end of the 1999-00 school year when Davis was informed that she would not be teaching the sixth grade honors reading class she

had taught for the previous three years, and would be given a class of low achieving readers. She had not taught this student level prior to this time. The District explained that there were not enough incoming sixth graders to make up two honors classes.

Historically, there had always been two sixth grade honors classes at Teel. One was exclusively populated by honors students, the other included mixed honors and high achieving students. The latter class usually had two-thirds honors students.

Rush had to determine which of the two 1999-00 honors class teachers, Davis or Marilyn Rice (Rice), would teach the honors reading class in 2000-01. Rush said that Rice, the school's Student Activities Director, also teaches a leadership class and has an extra preparation period during which her students go to another sixth grade teacher. Because Davis did not have this daily interruption in her schedule, Rush made the decision that it would be better to assign the Corrective Reading Program Comprehension class to Davis so the below-grade level students would not be required to "float" between two different instructors. In other words, the advance honors students were better suited for Rice's schedule, because they had a greater ability to adapt to her shifting schedule.

ETA believes this explanation is pretextual because Teel had, historically, its largest sixth grade class ever. In the 2001-02 seventh grade, populated by 2000-01's sixth graders, there are two honors classes, with both classes having honors and high achieving students. Teel School Psychologist Tracy Manzoni (Manzoni) said that for the past five years Teel has had two honors classes in both sixth and seventh grade, with the only exception being the 2000-01 school year.

Davis stated that she had several students in her 2000-01 class that had been recommended for honors, but, for some unknown reason, were not assigned to the honors class. In the past, she had a "mixed" class, which included honors students and others whose

parents specifically requested Davis as a teacher, often because she had previously taught the student's older sibling(s).

On May 5, 2000, Rice wrote a letter to Price. In it she included the following two sentences:

I, personally, am appalled at the unprofessional behavior of some of our teachers

and

In closing, I just want you to know I am a Ms. Rush supporter and I am embarrassed by the behavior of some of my colleagues.

This letter was written shortly after Rush chose Rice, rather than Davis, to teach the honors class in 2000-01. This letter of support of Rush is in contrast with a petition Rice signed in March 1999.

Shortly after DeMattos wrote her March 11, 1999, letter to the board about Rush decrying "one more attempt by the administration to control and direct teachers instead of discuss, compromise, or achieve consensus," Rice signed a petition thanking DeMattos for her expression of dismay over "the state of affairs, the leadership, and the morale at Teel."

Clearly the various Teel teachers were being pressured to either support ETA or Rush. Rice solved the problem by publicly expressing support for both sides.

Manzoni also wrote Price expressing confidence in Rush and stating that she was "ashamed and embarrassed by recent action taken by ETA members."

Partner-Teacher Non-Selection

A third allegedly retaliatory act occurred when Davis' two requests to be a partner-teacher in the fall of 2000 were ignored by Rush. The District's partner-teacher program pairs a veteran teacher with a new one in the same discipline to help the latter "learn the ropes," such as dealing with report cards, parent conferences, and general familiarization with the site. The

extra duties earn the teacher a \$175 annual stipend, and Davis had performed these tasks for the three previous years.

Rush failed to give Davis an explanation for her failure to be re-appointed, but she testified that she made this decision for two reasons: (1) the June 2000 letter of reprimand, and (2) Davis' request, in March 2000, to transfer to another District school. Rush concluded that Davis did not make a good candidate for a partner-teacher because she was not a proper role model, and it was not clear that Davis would stay at the school for the entire year.

Although Rush never told Davis why she did not select her for the partner-teacher program, she did tell her that new sixth grade teachers were not going to be assigned to the classroom area near her because Rush believed she was a negative influence.

Whinery

Background

Marj Whinery (Whinery) has been a Teel physical education (P.E.) teacher for twenty-six years. She was an ETA co-president with Loucks in the early 1980's, and has periodically been an ETA site representative, most recently for the 1999-00 school year. She had been a department chair prior to that system's demise, and had also had been a member of the Academic Senate in 1999-2000. On May 4, 2000, Whinery, along with other ETA members, addressed the governing board concerning the negative personnel atmosphere at Teel.

Evaluation-2000

In May 23, 2000, Whinery received an evaluation that contained negative comments. Although she was not marked down in the area of professional relations, in fact she was given no rating at all in this category, the evaluation contained the following narrative:

I am very concerned that in a few cases you have chosen not to follow established procedures for dealing with issues or concerns regarding administration. For example, issues should not be

brought forward during staff meetings that have not been addressed at the individual level. [Emphasis added.]

Whinery believes that the reference to staff meetings concerns an attempt on her part, along with several other teachers, to ask questions at a staff meeting about student discipline. She felt comfortable raising the issue because “student discipline” was an item on Rush’s meeting agenda. Rush sent each of the inquiring teachers a memo informing them that they could not “bring up” an item at a staff meeting unless they discussed it with her beforehand.

Although the evaluation was prepared by Assistant Principal Kirkland-Jones (Kirkland-Jones), Whinery was told by her that Rush directed her to insert the cited language. The reason the “does not meet” box was not checked was because Kirkland-Jones did not personally observe the allegedly “unprofessional” behavior.

Whinery’s evaluation is not one of the allegations set forth in this case’s complaint, as it was issued on May 23, 2000, more than six months prior to the date the charge was filed, February 27, 2001. However, evidence regarding this matter was accepted into evidence as it impacts the question of whether or not there was a pattern or practice of union animus at Teel during the subject period of time.

The next year Whinery was told she was going to be evaluated again. She went to Rush to inquire as to the reason for this additional evaluation. Rush told her it was because she had received a “does not meet” rating in her previous evaluation. She disagreed and asked Rush to check her records. Rush never re-contacted Whinery, and shortly thereafter she (Whinery) was contacted by Assistant Principal Hermosillo with regard to her new evaluation.

Whinery asked Rush for a list of the things she could do to improve. She stated that if she did not know what she did wrong, she could not keep from doing it again. She never received any sort of a response from Rush. Eventually, her 2001-02 evaluation missed several statutory and CBA deadlines and was never completed.

Letter to the Board

On May 31, 2000, Whinery sent a letter to Ed Steele, the governing board's president. In it she expanded and personalized many of the complaints ETA had expressed at the May 4 governing board meeting. These complaints included her belief that (1) Rush retaliates against teachers who criticize her, (2) Teel discipline is dispensed on a disparate basis, (3) the CSLA process had broken down, and (4) there was a general decline of teacher morale at Teel. When asked why she wrote this letter, Whinery said:

Because we were very frustrated at Teel with the lack of communication and how to do things to get things accomplished. We were going around in a circle, things would be brought to Ms. Rush, we would take it to Dr. Price at the Price Club and then it would come back to us. And it was our understanding that the next level would be to go to the school board with our concerns.

On August 22, 2000, Price responded to Whinery's letter, with a copy to Rush. His response paralleled his above described August 22 letter to "All Teel Staff." (See pp. 13 and 16.)

Rainy Day Multipurpose Room Conflict

Teel's multipurpose room is used as both a cafeteria and a gymnasium. Ordinarily P.E. classes are held outside, but on rainy or very cold days they use this room. Historically, there have been conflicts between cafeteria and custodial staff on one side and the P.E. teachers on the other, with regard to the use of the room immediately before and after the lunch period.

On October 26, 2000, it rained at Teel, which caused the P.E. department to use the multipurpose room for its activities. Immediately prior to lunch, the P.E. teacher in charge, not Whinery, was having difficulty controlling the students, and they did not leave the room until eight minutes before the period was over. Later that day, each of Teel's P.E. teachers received an e-mail from Hermosillo, one of Teel's assistant principals, who had joined the staff eight weeks previously. The e-mail read, as follows:

Starting tomorrow, 10/27 the only periods that the gym will be available for P.E. on rainy or real cold days will be periods 1, 2, & 8. Please make the necessary adjustments to your schedules. Thank you! Michael H.

This directive represented a major change in the policy set forth the previous year by Rush when she sent, on January 24, 2000, the following memo to all Teel P.E. teachers:

Just a reminder that the custodial staff need [sic] a minimum of 20 minutes⁹ to set up for lunch inside the multipurpose room. This means that on a regular day schedule, they will need to start set-up at 11:30 a.m. On minimum days, they will need the same 20 minutes. You and your students may stay in the cafeteria as long as there is space for activity to proceed safely. However, there may be noise and distractions due to the need for set up for lunch [Emphasis added.¹⁰]

Whinery spoke to the other P.E. teachers and they decided that she should reply to Hermosillo on behalf of the department. They then entered into a series of reciprocal e-mail messages, with Whinery's first message stating:

Since no complaints were directed to us and we have ALWAYS used the gym the period before lunch and the period after lunch we will continue with this practice. The decision to ban us from the gym directly affects approximately 350 students and their education. I know the members of the school board are student advocates and would probably be upset if they knew that these students are not allowed to use our facilities. We have it on good authority that Steve can set up in 9 min. and that sometimes the students wait outside for 5 to 10 min. before being served and no

⁹ Even this twenty-minute period was earlier than the historic time period . Whinery contends that prior to Rush's arrival it was accepted that a few (three or four) minutes before the "dressing" bell was adequate. The dressing bell rings at eight minutes before the end of the period. Therefore, the historic time for the P.E. students to leave the multipurpose room was eleven to twelve minutes before the end of the period, instead of Rush's twenty minutes.

¹⁰ On February 17, 2000, three and one-half weeks after Rush wrote her note setting down the "twenty minute - but stay as long as there is space to proceed safely" rule, the cafeteria staff and Whinery had a dispute. The dispute concerned whether her class left in sufficient time for the room to be set up for lunch. A memo was sent to Rush describing the incident and quoting Whinery as saying "we have a problem that needs to be addressed." This incident occurred eight months before the Hermosillo-Whinery correspondence and does little more than confirm that there was an ongoing conflict between the cafeteria and the P.E. teachers.

one has been in the gym to hinder the set up. Marj
(Capitalization in original.)

Hermosillo responded twenty-four minutes later, stating:

The decision was brought to me from Melva and I executed it. If you want to disregard this order that's [sic] your decision, but I would not advise it. All it would do is make things worse. I would hope that we can work together and find a compromise, and hopefully a solution that we can all live with and one that would be in the best interest of all involved. As of this writing I'm meeting with Melva to discuss this and other issues, such as the bell schedule. I will need the P.E. department's input since it seems that this program is impacted the most. I'm asking you and your colleagues in the P.E. department to please be patient and work with me on this, and hopefully when the smoke clears we'll have a solution that we can all feel comfortable with. Thank you. [Emphasis added.]

Whinery responded a little over an hour later, as follows:

"Work together and find a compromise". How can that happen when we do not even know why we were banished in the first place?? We have no Dept. Chair to be our advocate and we never have a Dept. Mtg. to come to a compromise. This needs to be cleared up NOW since this is the time of year when it is cold and wet. Marj [Capitalization in original.]

Three and one-half hours Hermosillo responded, as follows:

The P.E. Dept will have an answer tomorrow afternoon concerning this issue. In the meantime I'm working on permanent solution to this problem, please bare [sic] with me. Thank you. [Emphasis added.]

Whinery and the P.E. department agreed to Hermosillo's request and did not use the multi-purpose room the next time it rained.

A compromise was eventually worked out on November 1, 2000. With regard to the period before lunch, the P.E. staff agreed to help the custodians set up the tables as soon as the dressing bell rang. With regard to the period after lunch, the P.E. teachers agreed to wait until the room has been cleaned up before letting their classes into the room.

Whinery met with Rush on November 6, before the reprimand was issued and assured her that she would never be insubordinate. She also told Rush that she had been speaking for the entire P.E. department in her communications with Hermosillo. Rush acknowledged Whinery's November 6th statement about the nature of her communication with Hermosillo, but said that she had only Whinery's word that this was true.

Letter of Reprimand

Rush, on November 22, 2000, after learning of the above-described e-mail exchange, issued Whinery a letter of reprimand. This letter inaccurately, or at least partially inaccurately, references the previous year's solution of "P.E. classes leaving twenty minutes before the end of the period before first lunch," ignoring the additional stipulation that students could stay as long as there was space for activity to proceed safely. Rush's letter goes on to state that on Wednesday, October 25

. . . after several reminders from administration for the need to vacate the gym in a timely fashion before first lunch this [previous year's] approach did not work because P.E. staff refused to cooperate and students were not cleared from the gym until eight minutes before lunch began. Unfortunately, this uncooperative response has occurred frequently enough with P.E. staff that the Teel administration issued a directive to the Physical Education Staff on October 26, 2000 stating that the gym could not be used during periods 3, 4, 5, 6 and 7 on rainy or extremely cold days. . . . This directive was a necessary and reasonable step, in view of the need of the school to adequately and safely serve its student population, and the recalcitrance of the physical education teachers in working with other team members to implement an effective solution. [Emphasis added.]

Whinery's written rebuttal, attached to the letter of reprimand, in pertinent part, states:

This letter confuses me. In the letter there are many complaints concerning the p.e. dept. I am not the p.e. dept. I feel I am being harassed because I was the dept. chair at one time and I still speak for the p.e. dept. from time to time when issues arise. I ask questions, I try to find the logic in some decisions being made that hurt the educational process. I am then targeted and sent "see me" notes and given a letter for my file.

Whinery claims that the subject e-mail was sent on behalf of all of the members of the P.E. department. The District points out that the other members of the department were not copied on any of Whinery's e-mails. When questioned on this subject, Whinery responded as follows:

Q Why didn't you have other members of the PE department chime in with their support, if they in fact supported this decision?

A Well, if I knew I was getting a letter of reprimand, I would have had them do that.

Q Why didn't you do it afterwards in your response?

A There's no reason to drag other people into my business.

The District's attorney questioned Whinery regarding her initial response to Hermosillo, as follows:

Q If he [Hermosillo] was raising the issue of insubordination, why didn't you affirm that that was not the case in your response you sent about 18 minutes later?

A I don't know.

Q Did you talk to the whole PE department about your 10:15 a.m. response, before you sent it?

A Yes, I consulted the PE department prior to every response.

Q Okay. So, in that 18 minutes you got a hold of everyone to ask them, and you guys formulated a response and you made it?

A They're only a phone call away.

Between the fifth and sixth days of the formal hearing, all of Teel's P.E. teachers prepared a document that retroactively confirmed that Whinery spoke on their behalf in her

e-mails with Hermosillo. As the objective of the formal hearing is to evaluate and analyze actions and attitudes at the time they occurred, this letter was of insufficient probative value and was not admitted into evidence.

No other members of the P.E. department were given reprimands.

ISSUE

1. Did the District, when it issued a negative evaluation to DeMattos, discriminate against her because of her protected activities, thereby violating subdivision (a) of section 3543.5?

2. Did the District, when it reassigned Davis from an honors- to a below- grade class, discriminate against her because of her protected activities, thereby violating subdivision (a) of section 3543.5?

3. Did the District, when it denied Davis a position as a partner-teacher, discriminate against her because of her protected activities, thereby violating subdivision (a) of section 3543.5?

4. Did the District, when it issued a letter of reprimand for insubordination to Whinery, discriminate against her because of her protected activities, thereby violating subdivision (a) of section 3543.5?

5. Did the District, when it issued any of the above alleged negative personnel actions, deny to ETA any rights guaranteed to it by the EERA, thereby violating subdivision (b) of section 3543.5?

CONCLUSIONS OF LAW

In Novato Unified School District (1982) PERB Decision No. 210 (Novato), the Board set forth the test for retaliation or discrimination in light of the National Labor Relations Board (NLRB) decision in Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] enforced in

part (1st Cir. 1981) 662 F. 2d 899 [108 LRRM 2513]. Under Novato, unlawful motivation must be proven in order to find a violation.

In order to establish a prima facie case, the charging party must first prove that the subject employees engaged in protected activity.¹¹ Next, it must prove that the person(s) who made the decision(s) that resulted in the harm were aware of such protected activity. Lastly, a nexus or connection must be demonstrated between the employer's conduct and the exercise of a protected right, resulting in harm or potential harm to that right.

Proving the existence of unlawful motivation can be difficult. PERB acknowledged that when it stated the following in Carlsbad Unified School District (1979) PERB Decision No. 89, at page 11:

Unlawful motivation, purpose or intent is essentially a state of mind, a subjective condition generally known only to the charged party. Direct and affirmative proof is not always available or possible. However, following generally accepted legal principles the presence of such unlawful motivation, purpose or intent may be established by inference from the entire record. [Fn. omitted.]

Analysis

There is little doubt that DeMattos, Davis and Whinery engaged in protected activities. They all participated in various ETA activities, including serving as officers, representatives to the Price Club, Academic Senators, spokespersons at an ETA leafleting, representatives at meetings with Rush, speaking to the board on behalf of ETA issues and grievances, and/or hosting ETA board of directors meetings in their classrooms. Nor is there any doubt that both

¹¹ In relevant part, section 3543 grants public school employees:

- (a) . . . the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. . . .
- (b) Any employee may at any time present grievances to his . . . employer, and have such grievances adjusted, . . .

Rush and Price, the primary decision-makers in this case, were aware of such protected activities. Therefore, the first two elements of the Novato test are satisfied.

The remaining element is whether a nexus exists between the administrators' knowledge of these activities and the negative personnel action(s) taken.

Price

Although the evidence sets forth many incidents of animus towards ETA on the part of the administrators in this case, the most obvious concerns the Price Club. This meeting is a creation of the CBA, a bilaterally created contract. It obligates the District superintendent to meet each month with ETA's president(s) and specified teacher representatives.

First, the Price Club is not a meeting of teachers with their second level supervisor; it is in many ways an informal negotiating session to discuss "matters of mutual concern." These matters concern various aspects of the employees' terms and conditions of employment. If the ETA representatives that attend these meetings do not bring items to Price in the manner that he feels is appropriate, he has every right to tell ETA that it is not following the rules and to take whatever action the process permits. It must also be remembered that the Price Club "rules," like the ground rules for negotiations, are to be determined bilaterally, not handed down from management by fiat.

Even though Price can negotiate certain ground rules for Price Club meetings and subsequently complain about any ETA failure to follow these rules, he can not negatively impact the individual representatives' employment records for violating these rules. This is true whether the impact takes the form of lowered ratings on evaluations or negative letters from the board to such representatives. To put it another way, the evidence clearly shows no instances of any employee being guilty of a "failure to communicate properly" at the Price Club because there were no employees at the Price Club, only ETA representatives. Their

employment status cannot be impacted by actions taken while they are in a purely ETA representative status.

Secondly, the governing board has a "Hear the Public" session during each of its meetings. Members of the public can stand up and address the board on whatever subject they feel is appropriate. Price explained that he understands that freedom of speech protects the right of everyone, employees included, to speak their mind. After an extended discussion during the formal hearing, Price finally concluded that, although he would like it to be different, he was "neutral" about whether the teachers' employment status could be negatively affected for lobbying the board on a pending grievance(s). By analogy, the employees have the same right to be free of any potential negative employment status impact for any statement made to the board with regard to any other complaint(s).

This conclusion does not require the board to enter into a discussion with, or even comment on, the employee(s)' complaints. However, it cannot impact the speaker(s)' employment record(s) due to such presentation.

Three separate Price responses to various ETA actions support an inference of unlawful motivation on his part.

1. Price's May 10, 2000, letter to the ETA executive board complained about its "no confidence" vote in Rush.

Price was upset over ETA's May 2000 vote of no confidence in Rush and the subsequent publication of such vote to both parents and the board. He wrote a letter to the ETA executive board stating that the use of concerted activities regarding Rush was "unprofessional, unethical and may be illegal."

Price was correct when he said the no confidence vote was a concerted activity. However, a concerted activity such as a no confidence vote by a union is time-honored and

perfectly legal. Publishing the results of such an action is also legal. The evidence supports a conclusion that the notification of the vote to the board was done in a restrained polite manner. There was no evidence ETA's leafleting was done in anything other than an orderly manner. There was no evidence that anything connected with either of these concerted activities was unprofessional, unethical, disruptive, disrespectful or illegal. Price's attempt to label ETA's activities with negative adjectives, suggests an improper attempt at intimidation for its protected activities, and supports an inference of unlawful motivation on Price's part.

2. Price's March 17, 1999, letter to DeMattos admonishes her for (1) not giving him an opportunity to respond before reading her comments to the board , and (2) owning the "expressed pain of others."

In the first place, DeMattos and numerous Teel teachers have been telling him, for eight years, that Rush's autocratic, uncommunicative, method of managing is intolerable: she rewards her favorites and punishes anyone that does not adopt an obsequious manner. Price may not agree with these teachers; he can call them malcontents and troublemakers, but he certainly cannot, with any credibility, insist that they have not brought these issues to him time and time again.

Secondly, DeMattos has every legal right, as an ETA representative, to own the "expressed pain of others." That is what unions do. Employees band together to speak with a collective voice in an attempt to improve their terms and conditions of employment.

3. Price's July 19, 1999, response to Louck's board presentation chastises him for including charges against an employee and includes a veiled threat of legal action.

Price told Loucks that "[o]ther avenues of protest and complaint are clearly open to you," and yet these other avenues consist of no more than repeated references to a policy that, on its face, has never included employees as potential complainants. In addition, for six years

this policy (1994–2000) included no form that would permit a teacher to know that this was the process by which they could “protest and complain.”

Rush

The record is replete with evidence supporting Rush’s attitude towards ETA and its representatives. Some examples, and this list is not exhaustive, are set forth below.

1. Rush refused to set up a Rush Hour, because (a) she did not want ETA speaking for the teachers as she does not believe it represents all of them, and (b) employees can come to her if they have a problem.

2. Rush chastised a teacher who admitted to a colleague that Rush had told her about an impending student transfer. In expressing this attitude, Rush implied that the teacher should have lied to her colleague, under the guise of some personal standard of “what is said in the office, stays in the office.”

3. Rush made a strongly negative comment at the October 31, 2000, meeting with DeMattos, Corriea, and Hastings regarding ETA’s typed agenda. She insisted that it was not necessary to put the issues in writing, thereby suggesting that this heightened level of formality was beyond the realm of proper behavior for employees and/or ETA.

4. Rush also commented at the above-referenced meeting about specified issues being DeMattos’ personal gripes. This was a meeting with ETA, not DeMattos. The issues were ETA’s, and they should have been treated as such.

5. Rush’s November 17, 2000, letter to DeMattos told her to go through channels (meaning Price and Rush) before taking issues to ETA meetings. This is an excellent example of Rush’s attitude towards ETA and its representatives. It demonstrates a complete lack of understanding of the rights granted to employees by the EERA.

6. Rush, on several occasions, accused various ETA representatives of “stirring up trouble,” when they brought issues forward, insisting that the teacher(s) most directly involved did not authorize ETA to raise the issue.

One of ETA’s primary roles is to protect their CBA. If Rush is ignoring this employment contract on any issue, for example, not paying for, or delaying payment of, student overload monies, ETA not only has a right, but an obligation, to bring it to the District’s attention. This is true regardless of whether or not the individual teacher wants ETA to do so.

7. Rush insisted that teachers should come directly to her if they have a problem, and that, due to timeliness concerns, ETA should just refer teachers with complaints to her.

8. Rush’s attempt to evaluate Whinery for a second consecutive year based on a nonexistent “does not meet” rating the previous year and then refusing to explain the obvious discrepancy.

Based on the foregoing examples, it is quite clear that Rush has a strong animus towards ETA, in general, and to its teacher representatives, in particular. These examples also support an inference of unlawful motivation on the part of Rush towards DeMattos, Davis, and Whinery.

This same evidence dictates a finding that any credibility conflicts between her and these three teachers, and to Loucks, Archangel, and Corriea, are resolved against Rush and in favor of the six teachers.

ISSUE NO. 1

Did the District, when it issued a negative evaluation to DeMattos, discriminate against her because of her protected activities, thereby violating subdivision (a) of section 3543.5?

The District insists that this charge is barred by section 3541.5(a)(1) which prohibits PERB from issuing a complaint “in respect of any charge based on an alleged unfair practice occurring more than six months prior to the filing of the charge.” The statute of limitations begins to run on the date the charging party obtains actual or constructive knowledge of the subject conduct. (Fairfield-Suisun Unified School District (1985) PERB Decision No. 547; Regents of the University of California (1990) PERB Decision No. 826-H; Regents of the University of California (1993) PERB Decision No. 1023-H.)

Even actual knowledge must “clearly inform” the charging party of the alleged unlawful act. DeMattos signed her evaluation on May 9, 2000. The charge was filed on February 27, 2001. She testified at length on what her thoughts were when she received the document. When asked if she knew why she was given the low mark in the category of professional relations, she said, “the only reason I could possibly think of had to do with my job as an ETA rep.” Shortly thereafter she agreed with the District’s counsel that she understood this rating to be a criticism of her role as an ETA representative.

The general tenor of her testimony was that she arrived at this conclusion only because she could not think of any other reason for the low rating. In her testimony she manifested no certainty for this conclusion; it was just that she could think of no other explanation.

In California State Employees Association (Darzins) (1985) PERB Decision No. 546-S and UCLA Labor Relations Division (Regents of the University of California) (1989) PERB Decision No. 735-H, the Board, relying on specified NLRB cases, stated that the section 3541.5(a)(1) six-month period commences on the date the conduct constituting the unfair practice charge is actually discovered, rather than the date of discovery of the legal significance of that conduct. However, in Peralta Community College District (1998) PERB Decision No. 1281 (Peralta CCD), the Board reversed those decisions when it stated that the

six-month period did not begin to run until the charging parties learned of the disparate treatment that formed the basis of the charge.

With regard to the instant case, on May 9 DeMattos learned she was given a “does not meet” rating in professional relations. She had a belief that it was somehow connected to her role as a ETA representative, but she had no facts upon which to base this belief.

On November 17, in response to a request from DeMattos to explain the reasons for her low mark, Rush stated it was a direct result of not following established procedures such as taking issues to the Price Club and to ETA meetings. This memo cleared up any ambiguity about her low mark. She no longer had to speculate about the reasons for it. It was at this time that she first knew that Rush’s low mark was a result of disparate treatment and in retaliation for her protected activities. As in Peralta CCD, this disparate treatment is the basis of the instant charge. Therefore, the relevant date is the date that DeMattos learned of this treatment. Based on the foregoing, it is concluded that the six-month limitation period began to run on November 17, not May 9, 2000. These facts dictate a conclusion that the complaint in this case is not barred by section 3541.5(a)(1).

When Rush’s ETA animus is combined with her letter of November 17, 2000, in which she chastised DeMattos for carrying issues to the Price Club and to ETA meetings before they go her (Rush), there is more than adequate evidence to support a conclusion that DeMattos’ lowered rating was in retaliation for her protected activities. Therefore, it is concluded that when Rush gave DeMattos a lowered rating, the District violated subdivision (a) of section 3543.5.

ISSUE NO. 2.

Did the District, when it assigned Davis from an honors- to a below-grade class, discriminate against her because of her protected activities, thereby violating subdivision (a) of section 3543.5?

Prior to getting into the issue of the honors class assignment, the issue of Davis' evaluation must be analyzed. Granted, this occurred more than six months prior to the filing of the charge and any directive on this matter is outside of PERB's jurisdiction. However, when evaluating the actions of the parties in the issues that are properly within PERB's jurisdiction, it must be noted that Davis' evaluation was fraught with the same retaliatory motivation as set forth supra in DeMattos' evaluation. Rush stated that she lowered Davis' mark because of the camp "no-tell" leave incident; Davis stated that Rush told her that she did not appreciate her talking to the press at the open house leafleting. Neither of these reasons provide a valid justification for a lowered evaluation rating. The press contact was discussed supra, and the "no-tell" leave incident is described, in detail, infra.

With regard to the honors class assignment, Rush insisted there were two reasons that Davis was not assigned to this class. First, there were insufficient students to populate two sixth grade honors classes. Second, the various schedules of Davis and Rice supported her decision to give the one remaining honors class to Rice.

There are a number of evidentiary facts that support a conclusion that Rush's reasons are not credible. These facts are: (1) the eight separate examples supra establish that Rush has animus towards ETA representatives, such as Davis; (2) there had been both a sixth and seventh grade honors class for at least the past five years, 1997-98 through 2001-2002, with the exception of the 2000-2001 sixth grade; (3) the 2000-01 sixth grade class was the most populous class that had ever entered Teel; (4) Davis was aware of several 2000-01 sixth

graders who had been recommended for honors, but had never been so designated; (5) Rice's letter of support for Rush, as opposed to Davis' comments to the press, provided Rush with one more opportunity to support an ally and negatively impact an opponent, (6) the decision to take the honors class away from Davis occurred within a month of ETA's no-confidence vote, Davis' comments to the press, and various negative statements about Rush made by ETA representatives to the board.

Due to all of the above, it is concluded that Rush's reasons for failing to give Davis an honors class in 2000-01 were pretextual, and therefore, they support a conclusion that this decision was the result of unlawful motivation.

ISSUE NO. 3

Did the District, when it denied Davis a position as a partner-teacher, discriminate against her because of her protected activities, thereby violating subdivision (a) of section 3543.5?

Rush stated that Davis was not selected as a partner for two reasons, i.e., her June 2000 letter of reprimand and her March 2000 request for a transfer from Teel.

Davis was given a letter of reprimand for failing to notify Rush of her decision to take a "no-tell" day when she was at the camp.

The CBA states that an employee shall notify the District of his/her option to take a "no-tell" day "in the same manner as in the case for employees taking sick leave." It was understood that the proper procedure for an employee to notify the District when taking sick leave was to call the District's substitute service (sub service) as soon as s/he was aware that a substitute was going to be necessary. Once the employee notified the sub service, s/he was on authorized leave from work until the next morning, or twenty-four hours later.

There is nothing in the (1) CBA, (2) District policies, (3) directives from either Price or Rush, or (4) instructions to the teachers prior to their leaving for camp, modifying any of the rules concerning the usual method of taking a day of sick leave. If Davis had (1) taken ill in the middle of the night, (2) had someone come to the camp and take her to her family physician in Empire, (3) called the sub service, and (4) failed to show up the next morning for her camp duties, she would have fulfilled all written prerequisites for obtaining paid sick leave. Under these circumstances she would have been legitimately absent with leave for twenty-four hours.

Instead she (1) notified the camp director she would be gone for a few hours, (2) obtained her own substitute, a fully tenured District teacher, and (3) was absent for only five, rather than twenty-four hours. The evidence is clear that she had no academic duties throughout the day, and only student supervision duties during the evening. She missed only a part of the former and returned to full duty for the latter. Therefore, there was no substantive loss to the District as a result of her brief absence.

Granted, she initially lied when Berry asked her about her absence. However, the CBA states that such leave may be taken by the employee without having to specify the reason. She should not have been asked for the reason for her absence, other than whether or not she took the leave for any of the three prohibited reasons, which she did not.

The District has not developed and manifested a procedure for taking sick leave or a no-tell day while at camp. Therefore, the employee is entitled to use reason and act accordingly. She did just that. She violated no written procedures. She left no student unsupervised.

No employee wants to tell his current supervisor that s/he is out looking for a new job. This was especially true with Rush, given her animus towards ETA and its representatives.

The evidence strongly suggests that if any other employee had been sick and taken exactly the same steps Davis took, s/he would not have been given a letter of reprimand.¹² The evidence supports a conclusion that the letter of reprimand was the direct result of Davis' protected activities.

Due to this conclusion, Rush's first reason for failing to give Davis partner-teacher status is without credibility. The second reason is more problematical. A partner-teacher shepherds the new teacher in his/her activities throughout the school year. If the senior partner is not going to be available for any substantial part of that year, the value of the partnership is seriously diminished.

The charging party states, in its brief, that the "transfer request arose and presumably was rejected the previous spring." Therefore, it contends that Rush's reliance on this request was misplaced. However, there was no evidence proffered with regard to the time of this denial and counsel's argument is not evidence.

There is little doubt that Rush did not want Davis to partner her new hirees, but there is insufficient evidence to support a conclusion that she failed to select her for this role because of her protected activities.

ISSUE NO. 4

Did the District, when it issued a letter of reprimand for insubordination to Whinery, discriminate against her because of her protected activities, thereby violating subdivision (a) of section 3543.5?

¹² There was evidence of another employee being given a letter of reprimand for leaving camp at the same time as Davis. There were no details proffered regarding the circumstances of this other teacher's absence. There was also a brief reference, in a Price Club report, to this other employee being replaced by an intern teacher. The reference did not explain whether this employee left the District or just Teel. In any case, there is insufficient evidence in the record to draw a conclusion about any parallels between the two teachers' camp circumstances.

Conclusions set forth supra with regard to (1) Rush's animus toward ETA and its representatives, and (2) her improper use of employees' evaluations to discriminate against them for their protected activities are incorporated by reference into the analysis of this issue.

Whinery has been a District P.E. teacher for twenty-six years. During that time she, like all other P.E. teachers in schools with a single multipurpose room, has been involved in turf wars with the cafeteria and custodial personnel on rainy and cold days.

Rush issued a directive on January 2000 to all Teel P.E. teachers. It stated that the custodial staff needed twenty minutes to set up for lunch, but the teachers could stay in the room "as long as there is space for activity to proceed safely." Ten months later, the P.E. teachers received a terse memo from Hermosillo, the new assistant principal, banning them from the multipurpose room for five of the eight periods of each rainy or cold day. Whinery checked with the other P.E. teachers and they agreed that she should let this newcomer know that they have always used the gym during the periods surrounding the lunch and they will continue to do so. Hermosillo wrote back stating that he was given his orders by Rush, herself, and that they would disregard her instructions at their peril. With Hermosillo leading the way, the parties discussed the matter and eventually a reasonable mutually agreeable solution was reached. In the interim, Whinery and the rest of the P.E. teachers did not use the room during the periods and days prohibited in the Hermosillo/Rush initial memo.

Even in the short period of time I observed Whinery, it became clear that she has a strong, assertive personality, without any obvious guile. She has been the elected leader of the P.E. teachers for many years. The fact that Rush unilaterally took away her role as department chair did not diminish her position as the natural leader of her peers. She is comfortable speaking for the department. I have no doubt that her peers are comfortable with her role as their spokesperson. There is also little doubt that Rush is aware of this situation.

In addition, an examination of Whinery's correspondence with Hermosillo makes it quite clear that he was speaking to the entire departmental faculty, not just Whinery. His memos consistently reference group actions, i.e., (1) "a solution that we can all live with," (2) "one that would be in the best interest of all involved," (3) "we need the P.E. department's input," (4) "I'm asking you and your colleagues in the P.E. department," (5) "solution that we can all feel comfortable with," and (6) "the P.E. Dept. will have an answer tomorrow afternoon." These Hermosillo phrases make it quite clear the he knew he was corresponding with the entire department and not just one renegade teacher.

Seven findings of fact support an obvious conclusion: (1) Rush has a strong animus towards ETA's representatives, (2) Rush improperly attempted to negatively affect Whinery's evaluation five months earlier, (3) Whinery wrote a May 31, 2000, letter to the board president setting forth various Rush inadequacies, (4) Whinery is acknowledged as both the historic and natural leader of the P.E. teachers, (5) there was an initial outburst to a new administrator who may not have been aware of the history behind the lunch period use of the room, followed by dialogue and compliance with the directive, (6) Rush insisted that there was no reason to believe that Whinery's e-mails to Hermosillo were from all of the teachers, citing only Whinery's failure to copy the other P.E. teachers in support of this belief, despite the tenor and phraseology of Hermosillo's e-mail messages, and (7) Rush used these circumstances to give Whinery, and only Whinery, a letter of reprimand.

All of these facts lead to an irrefutable conclusion that Rush's letter of reprimand to Whinery was unlawfully motivated, as it was a direct result of her protected activities.

ISSUE NO. 5

Did the District, when it issued any of the above alleged negative personnel actions, deny to ETA any rights guaranteed to it by the EERA, thereby violating subdivision (b) of section 3543.5?

To establish a violation of subdivision (b) of section 3534.5, ETA must establish a denial of its rights separate and apart from those of the involved employees.

ETA, like all unions and associations, has a protected right to elect leaders and spokespersons and have them communicate with their fellow employees. If one of these leaders or spokespersons is subjected to discrimination, in any manner, it thwarts the union's ability to have its members voluntarily step into leadership roles and communicate with their fellow employees. Therefore, discrimination against one of its leaders is a denial of the right of that leader's employee organization to properly represent the members of its bargaining unit, a right guaranteed by the Act. Therefore, based on the foregoing, it is concluded that the District, when it discriminated against DeMattos, Davis and Whinery, it simultaneously violated subdivision (b) of section 3543.5.

SUMMARY

Based on all of the foregoing, it has been concluded that the District violated subdivisions (a) and (b) of section 3543.5 when it discriminated against DeMattos, Davis, and Whinery for their exercise of protected activities and denied ETA the right to properly represent its members in their labor relations with the District.

REMEDY

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

In order to remedy the unfair practice of the District and prevent it from benefiting from its unfair labor practices, and to effectuate the purposes of the Act, it is appropriate to order it to cease and desist from (1) discriminating against employees for the exercise of their protected rights, and (2) denying ETA rights guaranteed to it by the Act.

It is also appropriate that the District be required to post a notice incorporating the terms of this Order at all District sites where notices are customarily placed for certificated employees. This notice shall be subscribed by an authorized agent of the District, indicating that it will comply with the terms therein. The notice shall not be reduced in size, defaced, altered, or covered by any other material. Posting such a notice will provide employees with notice the District has acted in an unlawful manner and is being required to cease and desist from this activity. It effectuates the purposes of the Act that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (See Placerville Union School District (1978) PERB Decision No. 69.) In Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal. App. 3d 580, 587 [159 Cal.Rptr. 584], the California District Court of Appeals approved a similar posting requirement. (See also National Labor Relations v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

PROPOSED ORDER

Based on the foregoing findings of fact, conclusions of law and the entire record in this case, it is found that the Empire Union School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a) and (b). Therefore, it is hereby ORDERED that the District, its administrators, and representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against employees for the exercise of their protected rights.
2. Denying to the Empire Teachers Association (ETA) rights guaranteed to it by the Act.

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

1. Delete the (1) “does not meet” rating in the area of professional relations in JoAnne DeMattos’ (DeMattos) May 2000 evaluation, and (2) comment attached to such rating. In addition, delete all ancillary references to this “does not meet” rating in the District files.
2. Insert a rating of “meets” expectation level in the area of professional relations in DeMattos’ 2000 evaluation.
3. Assign Kim Davis, at her request, to a sixth-grade honors class as soon as practicable, but no later than the start of the 2003-2004 school year.
4. Discard the letter of reprimand issued to Marj Whinery on November 22, 2000, and delete all references to it in all District records.
5. Within ten (10) workdays of service of a final decision in this matter, post at all District sites where notices are customarily placed for certificated employees, copies of the notice attached hereto as an Appendix. This notice must be subscribed by an authorized agent of the District, indicating that it will comply with the terms therein. 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.

6. Upon issuance of a final decision, make written notification of the actions taken to comply with this Order to the Sacramento Regional Director of the Public Employment Relations Board (PERB or Board) in accordance with his instructions. Continue to report, in writing, to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the charging party herein.

It is further Ordered that all other aspects of the charge and complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

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. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover

Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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 Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)



Allen R. Link
Administrative Law Judge