

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



PAUL PITNER,

Charging Party,

v.

CONTRA COSTA COMMUNITY COLLEGE
DISTRICT,

Respondent.

Case No. SF-CE-2292-E

PERB Decision No. 1852

August 21, 2006

Appearances: Weinberg, Roger & Rosenfield by Stewart Weinberg, Attorney, for Paul Pitner; Atkinson, Andelson, Loya, Ruud & Romo by Suzanne V. Uzelac, Attorney, for Contra Costa Community College District.

Before Duncan, Chairman; Shek and Neuwald, Members.

DECISION

SHEK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Paul Pitner (Pitner) to the proposed decision (attached) of an administrative law judge (ALJ). The underlying unfair practice charge alleged that the Contra Costa Community College District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)¹ by denying Pitner a full-time faculty position because he engaged in conduct protected by the EERA. In the proposed decision, the ALJ dismissed the allegation that the District retaliated against Pitner by denying him the position. However, the ALJ also held that the District interfered with Pitner's EERA-protected rights by unlawfully interrogating him.

The Board has reviewed the entire record in this matter, including the unfair practice charge, the complaint, the ALJ's proposed decision, Pitner's exceptions, the District's cross-

¹EERA is codified at Government Code section 3540, et seq.

exceptions, and the District's response to the exceptions. The Board finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

Based on the findings of fact, conclusions of law and the entire record in this case, the Public Employment Relations Board (PERB) concludes that the Contra Costa Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), by interfering with Paul Pitner's (Pitner) EERA-protected rights.

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

A. CEASE AND DESIST FROM:

Engaging in unlawful interrogation and thereby interfering with employees' right to participate in activities protected by EERA.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the District where notices to employees customarily are 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 that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Within thirty (30) workdays of service of a final decision in this matter, notify the PERB San Francisco Regional Director, in writing, of the steps the District has taken to comply with the terms of this Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Pitner.

Member Neuwald joined in this Decision.

Chairman Duncan's dissent begins on page 4.

DUNCAN, Chairman, dissenting: I respectfully dissent. The complaint should have been dismissed based on the following reasons:

While the administrative law judge (ALJ) utilized the "objective reasonable person test," I do not believe that "a reasonable person would have understood the set of questions to be probing allegiance to faculty or management." Paul Pitner (Pitner) was never asked whether he was sympathetic to other employees exercising their rights under the Educational Employment Relations Act (EERA).¹ Rather, Pitner was asked "what kind of person are you, what kind of colleague are you?" and to comment on the campus "climate." It is my belief that these questions were no more than the Contra Costa Community College District (District) concerning itself with how Pitner saw himself fitting into the overall campus culture. The testimony of Pitner himself indicates that not only was he never asked about the union directly, the no confidence vote was not even brought by the union and the union had apparently made a determination to stay out of it. Thus, Pitner failed to establish a case of retaliation or discrimination and the complaint should have been dismissed.

Additionally, I do not believe that the ALJ should have expanded the complaint to include an Unalleged violation of unlawful interrogation. I find no compelling reason to entertain Unalleged violations in this case. Should it become necessary to entertain Unalleged violations, the rationale must be clearly articulated in the decision. In this case, the ALJ simply states:

Although not specifically alleged as a theory in the PERB complaint, the matter was part of the same course of conduct and the matter was fully litigated by the parties. [Citation omitted.] I hereby amend the complaint to conform to the proof adduced at the hearing, and find that the District violated section 3543.5(a) of the EERA by asking Pitner questions about protected activity.

¹EERA is codified at Government Code section 3540, et seq.

I find this to be woefully insufficient. Each one of the requirements must be fully discussed to provide a clear rationale for discussing issues not found in the complaint. If Pitner found the complaint to be insufficient, he should have moved to amend it prior to hearing. Unless the Unalleged violations requirements are met, the parties are bound by the language of the complaint.

Furthermore, the questions of Pitner did not rise to the level of unlawful interrogation. In Clovis Unified School District (1984) PERB Decision No. 389 (Clovis), the Board found that "the totality of circumstances, although questionable, [did] not in this instance rise to a level of coercion which could cause even slight harm to employees' rights."² The Board stated:

As the ALJ notes, the interviews were conducted in a friendly manner by a well-liked administrator in a low-key style and involved only a small percentage of the entire electorate. While Uldall's assurance of a right to remain silent does not amount to an assurance against reprisal, since silence could be construed as support for the union [Citation omitted], here, the facts indicate that Uldall was effective in quelling any teacher anxieties or fears. In sum, we find these conversations no hint of hostility or implied retaliation against teachers for their views, and, therefore, no evidence that the conversations reasonably tended to coerce or intimidate the employees.

Similarly here, the questions asked of Pitner did not rise to a level of coercion. As noted above, President Mark Edelstein's (Edelstein) and Francisco Arce's (Arce) questions were intended to determine how Pitner saw himself fitting into the overall campus climate or campus culture. In addition, when the decision was made to hire Mary Beth Hartshorn, Greg Marvel was unaware of the "alleged" controversial portion of Pitner's interview. Pitner

²In Clovis, the Board took guidance from Blue Flash Express, Inc. (1954) 109 NLRB 591 [34 LRRM 1384] where the ALJ examined the circumstances surrounding the conversations and determined that the questioning was neither so threatening nor coercive as to constitute an interference with employee rights.

also testified that neither Edelstein or Arce ever said anything to make him think they were displeased with his answers. When Pitner filed a grievance related to not being selected for the full-time position, he did not include any allegations related to the questions he was asked in the interview with Edelstein and Arce. In light of the totality of the circumstances, I do not find that Pitner proves a case of unlawful interrogation and it also should have been dismissed.

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



After a hearing in Unfair Practice Case No. SF-CE-2292-E, Paul Pitner v. Contra Costa Community College District, in which all parties had the right to participate, it has been found that the Contra Costa Community College District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a), when they interfered with Paul Pitner's EERA-protected rights by unlawfully interrogating him.

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

A. CEASE AND DESIST FROM:

Engaging in unlawful interrogation and thereby interfering with employees' right to participate in activities protected by EERA.

Dated: _____ Contra Costa Community College 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



PAUL PITNER,

Charging Party,

v.

CONTRA COSTA COMMUNITY COLLEGE
DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-2292-E

PROPOSED DECISION
(4/16/04)

Appearances: Weinberg, Roger & Rosenfeld, by Stewart Weinberg, Attorney, for Paul Pitner; Atkinson, Andelson, Loya, Ruud & Romo by Mark S. Williams and Suzanne V. Uzelac, Attorneys, for Contra Costa Community College District.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Paul Pitner initiated this action by filing an unfair practice charge against the Contra Costa Community College District (District) on September 11, 2002. Following its investigation, the general counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on June 18, 2003. The complaint alleges that the District denied Pitner a full-time faculty position because he refused to take the side of management in a dispute that resulted in a no-confidence vote by the faculty against one of the District's college presidents. This conduct is alleged to violate Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA).¹

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

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

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or

The District answered the complaint on July 9, 2003, denying the material allegations of the complaint and asserting a number of affirmative defenses.

The parties participated in a settlement conference on July 24, 2003, but the matter was not resolved.

On October 22, 2003, the undersigned conducted a formal hearing at the District's administrative offices in Martinez. The matter was submitted for decision on December 11, 2003, following receipt of the parties' post-hearing briefs.

FINDINGS OF FACT

Paul Pitner is an employee within the meaning of section 3540.1(j) of the EERA. The District is a public school employer within the meaning of section 3540.1(k).

Pitner has been a part-time instructor of psychology at the Diablo Valley College, one of three campuses in the District, for the past 12 to 13 years. He received a bachelors degree in psychology at the University of California, Berkeley, and a masters degree in community college teaching from San Francisco State University. Prior to teaching, he acquired clinical experience as a therapist working with children and adolescents.

In the spring of 2002, the Diablo Valley campus was embroiled in a controversy over the implementation of a district-wide reorganization plan. While some elements of the reorganization were accepted, the faculty at the Diablo Valley campus opposed the one transferring authority from division chairs, who were 50-percent-time faculty, to a division dean structure, where the chairs were 100-percent-time administrators. Meetings were held on the issue. It was publicized in the faculty newsletter and covered in the campus newspaper.

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

The faculty senate also discussed the matter.² Posters appeared on campus. The faculty informed Diablo Valley College President Mark Edelstein that if he persisted with the reorganization plan, they would institute a vote of no-confidence. When he refused to relent, the faculty voted overwhelmingly "no confidence" in Edelstein. Edelstein testified that the atmosphere on the campus at that time was "difficult," and he admitted that the no-confidence vote clearly concerned him.

During this time an opening for a full-time faculty position in the psychology department occurred. Pitner applied. Mary Beth Hartshorn, also a part-time, Diablo Valley instructor, applied as well. She eventually received the position. Hartshorn began as a part-time instructor in November 1999, and was teaching for approximately two years, when the examination process began in February 2002. The selection procedure is outlined in the negotiated agreement covering the bargaining unit. It prescribes an initial paper-screening step conducted by faculty members. The faculty screening committee identifies candidates for the interview pool. An interviewing team, also constituted according to the contractual procedure, is expected to recommend "at least two," and "preferably three-five" of the best qualified candidates, without a ranking, to the college president. The president then interviews the recommended candidates. Management and the faculty team are then to meet to discuss their choices, after which, the president forwards a recommendation to the chancellor. An amendment to the collective bargaining agreement, at Article 6, "Division/Departments," section 6.4.3.3.2 provides in relevant part:

Management shall make the final selection based upon the recommendations of the interviewing team, and its own evaluation. If the college president and the interview team do not

² The exclusive representative for the faculty, the United Faculty of Contra Costa Community College District, who later assisted Pitner in prosecuting a grievance over his non-selection, took a neutral position throughout this conflict.

reach agreement regarding the candidate interviewed under this procedure, both recommendations shall be forwarded to the Chancellor for a final recommendation to the Governing Board.

In this case, the faculty interviewing team consisted of Steve Johnson, a division chair, Pamela McNeilly, the psychology department chair, Manuel Gonzales, and Greg Tilles. The interviewing team used rating sheets. The faculty team chose seven candidates to interview. Thereafter, they agreed to forward the names of three candidates to the president: Pitner, Hartshorn, and Dean Yoshizume, an outside candidate. The committee believed all three to be "well qualified."

Edelstein and Vice President of Academic Affairs Francisco Arce interviewed Pitner on or about April 17, 2002. They conducted the interview with a set of scripted questions. The same questions were used for each of the three candidates. However, both Edelstein and Arce took the opportunity to interject follow-up questions based on particular responses from the candidates. Edelstein and Arce both took notes during the interviews.

Edelstein testified and took the opportunity to describe his general philosophy of the management interview. He accepts the recommended candidates as having met the faculty's test of being academically qualified and capable in the classroom. Lacking the same subject matter expertise, Edelstein concerns himself more with "what kind of person and colleague" the candidate will make, what kind of "member of the [Diablo Valley College] community" he or she is going to be, and how the candidate will "grow and develop." Edelstein is interested in how much "self-knowledge" the candidate possesses, and what he or she will bring to the "classroom and to the community."

Pitner was somewhat apprehensive heading into the interview because of the controversy surrounding the no-confidence vote. He confided in his sister, a lawyer, about this

concern. She advised him not to worry because the matter was irrelevant to his qualifications for the position and therefore was not likely to surface.

Both Arce and Edelstein believed that Pitner did not interview particularly well because he was nervous. Edelstein and Arce appeared somewhat inconsistent on this point however. Edelstein testified that Pitner was "voluble," a sign he interpreted as nervousness, and that Pitner's answers as a result lacked depth and insight. Arce agreed Pitner was nervous, but claimed that Pitner's speech was "halting" and not "free flowing." Edelstein added that Pitner appeared somewhat meek in his presentation, which surprised him, given Pitner's length of time at the college.

The critical point in the interview, from Pitner's standpoint, came when he was asked about the "climate" on the campus. It began with the scripted question: "What kind of person are you, what kind of colleague are you?" Edelstein testified that the question - which appears at the end of the list - was a more personal question than the others. It was intended to surprise the candidates a bit, though solely for the purpose of ascertaining their "self-knowledge" and how they envisioned themselves fitting into the academic community. After Pitner stated that he enjoyed the interaction with faculty colleagues over his lengthy service at Diablo Valley, Edelstein added a follow-up question. He asked Pitner to comment on the campus "climate." This was not a scripted question. Edelstein's notes confirm that the question was asked of Pitner, under the heading of the person/colleague question. No similar question appears on the Hartshorn or Yoshizume rating sheets. Pitner read this as a question about the circumstances surrounding the no-confidence vote.

According to Pitner, he responded simply that it was "contentious." Then he smiled. Arce smiled in response. Then Pitner offered the comment that there was "a lot of vilification going on." Edelstein asked if Pitner thought that this climate was "affecting the teachers'

functioning." Pitner denied that it was, but admitted there was "certainly a lot of discussion going on." Arce then posed the following question: "How do we know you will not be like the teachers who are currently teaching here now in five years?" I read Pitner's testimony as indicating that this question was the most troubling for him since he saw himself as identified with the current faculty due to his having been at the college for 12 years. He did not want to distance himself from the faculty because they were his colleagues and were supporting him.³ Pitner tried to avoid further controversy by saying he would emphasize his interest in technology,⁴ the outside experience in business management he acquired as a consultant, and his ability to employ different "modalities" in classroom management.

Edelstein's interview notes indicate that Pitner's response was something to the effect that instructors "seemed happy to go about their business" and were not getting "involved in political matters." Arce made a note on his sheet: "polarization is not conducive to anything." Arce could not recall any relationship between the note and anything that was discussed.

Edelstein testified that he was somewhat taken aback by Pitner's response because the intent of the questions here was only to elicit the "self-knowledge" information. Political matters were irrelevant. Edelstein stated, "[W]e were asking about the overall campus climate or campus culture and how the individual saw it and saw himself fitting into it." Edelstein testified that at some point Pitner did express his view that the department was resistant to change and that he would try to bring innovation. But Edelstein was not particularly impressed with the quality of Pitner's answer. Edelstein was looking for, among other things, the ability to implement different pedagogies. He also had hoped to see more innovation to have been demonstrated by Pitner during his time as a part-time faculty member. Pitner testified that

³ As it turned out, the faculty rated him their first choice.

⁴ Pitner developed a website related to psychology while on campus.

Edelstein asked him why he thought the faculty was resistant to change. Pitner answered that he thought the faculty were comfortable with their situation. At another point in the interview, Pitner asked Edelstein a question concerning the state of the college, and Edelstein responded about his belief in the need to provide diverse curriculum offerings to the students.

For the same person/colleague question, Edelstein's notes for Hartshorn were: "Enthusiastic, fiercely loyal, can't do something she doesn't believe in, integrity, core values." His notes for Yoshizume were: "Curious - likes to find answers - esp[ecially] about people and himself- life long learner - self motivated, determined, disciplined" Edelstein also made a note of Yoshizume's specialty in brain research.

Edelstein believed he saw something special in Hartshorn: a certain ability to connect with students in the classroom. He was impressed with the fact that she had started a career in the private sector and then decided that teaching was her true calling.

Edelstein and Arce rated the three candidates at the conclusion of the interviews.⁵ They then met three times with the faculty committee. No consensus could be reached. Edelstein had rated Yoshizume first, Hartshorn second, and Pitner third. The faculty committee had rated Pitner first, and the other two candidates behind Pitner.

Notes of these meetings were made by Edelstein and reflect discussions of the strengths and weaknesses of each candidate. These notes provide some important insight, though without in-depth testimony regarding them, it is difficult to be certain to whom to attribute the various comments. According to these notes, the faculty was not particularly high on

⁵ Edelstein gave a letter grade to each question for each of the candidates. Hartshorn and Yoshizume received mostly A-s and B+s. Both received an overall A-/B+ rating. Edelstein's overall impressions of Hartshorn included such phrases as "articulate, personable, positive," "natural teacher," and "seems authentic." Yoshizume was noted to be "well spoken, very sincere, straightforward, poised," "has great potential," and "working on being more dynamic." Yoshizume garnered an A for the person/colleague question, and Hartshorn an A-. Pitner received Bs and several B-s for an overall B rating. Edelstein's overall impressions of Pitner included phrases such as "very attached to DVC," "careful," and "likeable."

Yoshizume because, while he was advancing toward a doctoral degree, he lacked teaching experience, having only been a teaching assistant. His expertise, in cognitive matters, was "deep but narrow." Hartshorn impressed with her teaching ability, rapport with students, energy and enthusiasm.⁶ Her academic preparation was viewed as somewhat narrow, though she had taken on outside projects while at Diablo Valley. Pitner was praised for his surprisingly broad and deep academic preparation, his outside work, and the fact that he had been a Diablo Valley student himself. Tilles is quoted at the second meeting as being concerned that Yoshizume's teaching experience was weak and that he could only propose forwarding his name for reasons of "internal politics" (i.e., avoiding a choice between two internal candidates). A statement is attributed to McNeilly that the faculty would prefer Hartshorn to Yoshizume and that Yoshizume's classroom presentation did not impress the faculty.

Ultimately, Edelstein reported to the chancellor that the parties had agreed to disagree on candidates. Pursuant to the amended MOU language regarding the selection process, the parties agreed to submit separate recommendations, rather than pursue other alternative scenarios. Edelstein prepared a memorandum to the chancellor that ranked the three candidates from first to last. He included his reasoning as to each candidate's relative merits. Edelstein recommended Yoshizume based on his doctoral degree, strong final interview, experience as a community college student, and his "great potential for growth and development." Edelstein chose Hartshorn second, noting her to be a "dynamic, student centered instructor" who had been active in three extra-curricular projects on campus. Edelstein commented that Pitner was rated last because, although he had developed a fine

⁶ This point is corroborated in the faculty letters of recommendation in Hartshorn's file.

reputation as a teacher, his final interview was not "particularly effective" and Edelstein did not believe he would bring additional strength to the department.

Edelstein testified that he was disappointed in the meet-and-confer process with the faculty hiring committee because he requested that the committee not come to the table with a pre-conceived ranking and he felt the committee had already decided upon Pitner. He mentioned that in his memorandum as well, stating:

In general, each side respects the perspective and expertise of the other, and the meetings occur in an atmosphere of collegiality and candor. The administration sometimes convinces and sometimes is convinced by the committee members in the effort to reach consensus. However, in this case we feel that the committee has effectively presented only one choice to the administration, and when that occurs, the process does not work.

The amended collective bargaining agreement states that where there is no consensus regarding the "candidate interviewed," "both recommendations" are to be forwarded to the chancellor.

According to Hartshorn, Arce telephoned her in the middle of May to inform her that she was "out of the running." Arce denied he had this conversation. I credit Hartshorn. She had no self-serving motive to offer this testimony. Moreover, according to McNeilly, Hartshorn repeated the statement to her shortly after receiving the call.

Sometime in early June, Yoshizume withdrew his name. Around this time, Greg Marvel, the District's vice-chancellor and designee for purposes of the selection process, conducted a review and made the decision on which candidate to recommend to the governing board. Marvel chose to accept Edelstein's second choice, Hartshorn, after Yoshizume withdrew. Marvel reviewed the rating sheets of both committees and the files of all three candidates. In his memorandum back to the principals, he noted that a number of faculty members had not returned their rating sheets, and that of those that had, one rated Hartshorn higher than Pitner, and another rated her equal to him. On the basis of his review, Marvel

stated that he found "no compelling reason to disagree" with Edelstein's recommendation. Marvel credibly asserted he had no knowledge of any questions that could be construed as testing Pitner's faculty allegiances during his interview. The position was offered to Hartshorn. She accepted and assumed her new position in August 2002.

ISSUE

Did the District retaliate against Pitner for protected activity when it refused to offer him the full-time teaching position in the psychology department at Diablo Valley College, or otherwise interfere with his rights to engage in protected activity?

CONCLUSIONS OF LAW

The complaint alleges that the District retaliated against Pitner by refusing to offer him the full-time faculty position "because of his exercise of activities that were protected under the EERA."⁷ Section 3543.5(a) makes such conduct unlawful. To prove this violation, the charging party bears the initial burden of showing evidence that he engaged in protected activity, that the employer knew of the activity, and that the protected activity was a "motivating factor" in the employer's decision to take adverse action against him. (California State University, Hayward (1991) PERB Decision No. 869-H; Novato Unified School District (1982) PERB Decision No. 210.) Motivation may be proven by either direct or circumstantial evidence, or a combination of both. (Carlsbad Unified School District (1979) PERB Decision No. 89.)

⁷ Section 3543(a) provides that:

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

Once protected activity is established to be a motivating factor, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. (Novato Unified School District, supra, PERB Decision No. 210; McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 304 [234 Cal.Rptr. 428]; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 730 [175 Cal.Rptr. 626].)

Pitner contends that there is substantial contextual evidence that he became a victim in the all-pervasive, faculty-administration conflict at the Diablo Valley campus. Because he was vigorously supported by the psychology department's faculty, and because he personally failed to come across in his interview with the president as willing to demonstrate loyalty to the administration, he was passed over in favor of Hartshorn, the candidate who was willing to do so. The questions posed to him during his interview amounted to unlawful interrogation, which offers strong evidence of a decision tainted by unlawful animus. Edelstein is not to be believed in setting forth his rationale for choosing Hartshorn over Pitner.

The District's central line of defense is that the decision to hire was ultimately made at the chancellor's level, by Vice Chancellor Marvel, based "primarily upon the candidates' background and skills which best met the needs of the District." Since most of the alleged evidence of animus toward protected activity from Pitner rested on the questions asked of him in the interview by Edelstein and Arces at the campus level, and there was little if any to demonstrate that Marvel was aware of Pitner's protected activity or the inappropriate questions, the District claims the nexus required in a discrimination case is lacking. The District also contends that no questions were asked of Pitner that could be construed as ones implicating protected activity or Pitner's views thereof, nor were any answers elicited suggesting Pitner's allegiance to the no-confidence voters.

This case came to hearing after the general counsel had originally dismissed the charge for failing to state a prima facie case. The Board reversed the general counsel and ordered that a complaint issue, finding that Pitner had alleged sufficient facts to demonstrate that he engaged in protected activity by displaying sympathy for the no-confidence voters and that there existed a nexus between his protected activity and the adverse employment decision. Since PERB has already considered the central issues in the case, its guidance must be considered. (Contra Costa Community College District (2003) PERB Decision No. 1520.)

In addressing protected activity the Board concluded that a question seeking to determine whether or not Pitner supported the no-confidence vote would constitute protected activity, regardless of whether Pitner himself were active in the no-confidence vote campaign. (Contra Costa Community College District, supra, PERB Decision No. 1520.)⁸ While the District does not take issue with this point of law in its post-hearing brief, it does argue that Pitner mistakenly believed the questions asked were intended to elicit information about his position regarding the faculty-management dispute. The District argues that no reasonable person would have construed the questions as being inappropriate, noting several of Edelstein's explanations of the purpose of the questions, and that it was a nervous Pitner who stepped into the quagmire by incorrectly interpreting the aim of those questions.

It is true, as the District argues, that Pitner was never asked about the "no-confidence vote" in those precise terms. Nor did the question about the "climate" on campus directly implicate political activity. This does not end the inquiry however. I agree with the District's position, which is, in essence, that the issue is whether a reasonable person would have

⁸ "Activities of an employee organization" have been construed to include activities broader than activities directly sponsored by an employee organization. (See, e.g., Oakland Unified School District (2003) PERB Decision No. 1529 [complaints to administrators about working conditions].)

understood the set of questions to be probing allegiance to faculty or management. (Clovis Unified School District (1984) PERB Decision No. 389.)

Pitner began with his answer to the person/colleague question by emphasizing that he had a good relationship with the existing faculty by virtue of his more than 12 years of experience. This appeared to identify himself with the current permanent faculty. Edelstein then asked the "climate" question. When Pitner responded that he saw the climate as "contentious," he stopped before elaborating. He smiled. It was undoubtedly a nervous and awkward smile. But Arce smiled back. I conclude it was the type of knowing smile reflecting agreement with what was obviously the most prominent issue of the day. Given that Arce had appeared to make an attempt to put Pitner at ease, Pitner followed up with an explanation. It was one that attempted to steer the course of neutrality. Pitner stated, "There was a lot of vilification going on." Edelstein's note to the effect that Pitner thought most faculty were attempting not to get involved in political matters confirms the gist of Pitner's answer.

Edelstein then asked if Pitner thought this was "affecting the teachers' functioning." This was not a question directed at Pitner's personal qualifications for the position. If Edelstein is to be believed on his claim that he was taken aback by Pitner's response to the initial question because political matters were irrelevant, why did he not steer Pitner away from that area entirely? Could a question about how faculty were functioning in the confidence crisis really be intended to move the conversation back toward Pitner's ability to express self-knowledge, or determine how Pitner saw himself fitting into the campus culture irrespective of politics? Nevertheless, had Edelstein and Arce been content at this juncture to move on to another area and spare Pitner further difficulty, I would likely find their conduct innocent.

However, after Pitner made another attempt at being non-committal, with the vague answer that there was "certainly a lot of discussion going on," Arce asked, "How do we know

you will not be like the teachers who are currently teaching here now in five years." Read in context, this was not a question about how Pitner saw himself personally and professionally growing within the college culture or the psychology department. Coming as it did on the heels of Pitner's acknowledgement of ties to current faculty and the ambiguous comment about most faculty members trying to avoid the conflict, it seems apparent it was intended to draw a more clear-cut position from Pitner on the matter. Of the three candidates, the evidence suggests that only Pitner was asked the "climate" question as a follow-up to the scripted person/colleague question.

Arce's desire to find someone who could distinguish themselves from the existing faculty becomes more telling in this light; there is a pejorative connotation given to the current faculty that is not readily explained by something other than the no-confidence vote.⁹ This point is corroborated by the "coincidence" that the highest ranked candidate, Yoshizume, was an outside candidate, with no existing relationship with the college. Hartshorn had much less experience than did Pitner, but was rated ahead of him. To the extent the question of a test of Pitner's allegiance to elements of the faculty viewed as "entrenched" from a political standpoint, I find that Pitner's answers, read in context, suggested that he did not provide the type of answer sought by Edelstein and Arce.

This brings me to the second point addressed by PERB in the decision ordering the issuance of a complaint, the evidence as to nexus. PERB wrote:

It is axiomatic that the purpose of an employment interview is to elicit information from a candidate in order to make a hiring

⁹ I found Arce to be a witness lacking credibility on several key issues. Arce appeared to testify falsely that he never told Hartshorn she was out of the race. Arce recorded the note of Pitner saying "polarization was not conducive to anything," but had no recollection of Pitner's comments that engendered it. Arce contradicted Edelstein when he described Pitner's answers during the interview to be "halting" rather than "voluble." Arce's recollection was in general weak, and at times I detected a lack of earnestness with respect to the matter at hand.

decision. Here, the charge alleges that Pitner was queried about his position on the upcoming "no confidence" vote. Pitner was asked how he could assure the president that Pitner would be "different from the faculty members who were contentious." The Board finds that asking such questions during an employment interview creates a strong inference of discrimination, and in some situations, constitutes direct evidence of discrimination. Such questions are akin to asking an interviewee whether he or she will join the union if hired, or asking a female interviewee whether she intends to have children in the near future. These questions serve little or no legitimate purpose other than to allow the employer to make an employment decision based upon an improper basis. Accordingly, the Board holds that when an employer asks an interviewee whether he or she is sympathetic to other employees exercising their rights under EERA, the third prong of Novato is satisfied of the purposes of establishing a prima facie case. [Contra Costa Community College District, supra, PERB Decision No. 1520, pp. 7-8.]

At the time PERB issued the decision, no evidence had been received. Only allegations had been lodged. Thus, for the reasoning of PERB's decision to have force the evidence at the hearing must be consistent with the facts assumed by PERB to exist. To repeat, though Pitner was not asked explicitly about the "no confidence" vote, by implication he was asked to state his position on the matter. He was asked - again impliedly - to distinguish himself from faculty "who were contentious." In short, he was asked for a loyalty oath to management as opposed to the faculty bloc which had voted, or was about to vote, overwhelmingly against the administration. The Board found the mere asking of the question to satisfy the prima facie requirement for a complaint and added, somewhat equivocally, that such evidence could constitute direct evidence of discrimination.

Upon further consideration of the matter I find that there is indeed direct evidence of unlawful animus in the form of the questions asked.¹⁰ In addition to the direct evidence, there

¹⁰ The process of logical deduction by way of legal inferences - typically referred to as circumstantial proof- is necessary here, but only to conclude that the questions asked were ones seeking to elicit Pitner's position on the employee/management conflict. Once the conclusion is reached that they were, the fact of the questions' impropriety has been proven.

is circumstantial evidence of unlawful animus. Edelstein's ranking was by "coincidence" one where the highest ranked candidate, Yoshizume, was an outside contact with no existing relationship with the college. Hartshorn, the second ranked candidate, had much less experience in the District than did Pitner, 12 years to two years. As Pitner emphasizes in terms of disparate treatment, Hartshorn described herself as "fiercely loyal" in her response to the person/colleague question. Hartshorn's answer, assuming she was suggesting loyalty to management rather than her faculty colleagues, would have to be interpreted satisfying that requirement.¹¹ There is also the contemporaneous nature of the no-confidence vote with the interview ratings. Lastly there is what is, if not a clear departure from normal procedures, the suspicious nature of Edelstein's ranking of the candidates, rather than the submission of a single candidate in his "recommendation of a candidate" to the chancellor's office.¹² Thus, prima facie evidence of causation has been demonstrated. (Noyato Unified School District, supra, PERB Decision No. 210.)

I turn then to the District's defenses centered around claims that Edelstein would not have found Pitner the most qualified candidate, regardless of his answers to the climate questions, and that, even if his choice were unlawfully motivated, it was rendered moot by

For purposes of analyzing the facts of this case, it can be assumed that Pitner was asked the equivalent of the explicit question, "Are you for or against management in the current dispute?" This is direct evidence of discriminatory intent.

¹¹ Edelstein denied Hartshorn's answer made any impact because he did not interpret the loyalty as applying to himself, since she had never had a relationship with him previously. I was neither impressed nor disturbed by that response. I treated it as a general denial. Hartshorn's answer was not in response to any questions about the campus climate.

I reject the District's argument that its rejection of Pitner's grievance alleging a violation of the contract based on the submission of the candidates ranked in order must be given collateral estoppel effect. (See State of California (Department of Developmental Services) (1987) PERB Decision No. 619-S, following People v. Sims (1982) 32 Cal.3d 468, 477 [186 Cal.Rptr. 77].)

Marvel's independent decision. In every discrimination case where a prima facie case has been demonstrated, the employer must rebut the showing by establishing that it would have made the same decision regardless of the charging party's protected conduct. (McPherson v. Public Employment Relations Bd., supra, 189 Cal.App.3d 293, 304.)

PERB has held that a decision by a person or entity higher in the employer's management hierarchy as to whom evidence of unlawful animus is weak or non-existent does not necessarily provide a defense to claim of discrimination. This is the case where the higher entity simply ratifies an already tainted decision or fails to make a decision based on an independent and impartial investigation of its own. (Konocti Unified School District (1982) PERB Decision No. 217.) I will analyze this issue after first considering the bona fides of Edelstein's recommendation.

The District contends that Edelstein exercised his discretion to identify the candidate who "best met the needs of the District." To the extent that Edelstein attempted to define how he sought to distinguish candidates in his interview, he emphasized "what kind of a person and colleague" the candidate would make, what kind of "member of the [Diablo Valley College] community" he or she is going to be, and how the candidate will "grow and develop."

The three candidates submitted by the faculty committee were all judged to be well qualified for the position. Edelstein was already limited to choosing one of the faculty's three recommendations. While he would have access to their files including letters of recommendation, the interview would likely be the single most important tool for distinguishing the three. This factor could cut both ways: Edelstein could use the interview to weed out anyone whom he perceived as not loyal, or earnestly attempt to distinguish between a group of potential equals. I must keep all matters in context.

Judging strictly from their demeanor, I can understand why he might praise Hartshorn for her enthusiasm and spirit, while finding Pitner "meek" and possibly less engaging. These are personal characteristics that could legitimately be perceived as translating into teaching ability. While I find Edelstein's claim that he saw in Hartshorn a certain quality that indicated a rare gift for teaching somewhat exaggerated given the short time he spent with her in the interview, I do not reject it as pretextual. There is corroboration for Hartshorn's energy in the faculty recommendations she presented. She is described as having very strong rapport with students. A separate consideration, noted in Edelstein's memorandum to the chancellor's office, is the fact that on a purely competitive basis Hartshorn interviewed better than Pitner. Edelstein stated that Pitner's answers in general lacked depth. Edelstein's contemporaneous interview sheets indicate that Hartshorn and Yoshizume did garner higher overall grades than Pitner. I believe Pitner did come across as nervous; he admitted that the campus conflict caused him some anxiety entering the interview. At the hearing, I found him to be thoughtful but restrained.

Also, while Pitner would appear to be the one most aligned with the current faculty because of his length of teaching at the college, I believe there was a basis for Edelstein to conclude that Hartshorn had demonstrated more initiative in a short period of time. According to her letters of recommendations, she had demonstrated a positive can-do attitude and was involved several campus projects. Pitner's academic preparation, according to the faculty committee was deeper and broader than Hartshorn's. However, if all were deemed well qualified for the position, and Edelstein were indeed searching for the candidate with the greatest potential, I believe he had a basis to select Hartshorn over Pitner.

Next, I find that the context of the questioning suggests that, while revealing the president's concerns with the faculty uprising at the time, it was not necessarily an overriding

concern. The evidence demonstrates that Edelstein and Arce for the most part followed the scripted questions as to all candidates. To some degree I believe Edelstein was attempting to identify a candidate capable of being a catalyst for innovation in the department, not simply one who would refrain from negative politics. Despite some concerns about Edelstein's credibility noted above, I found his demeanor professional. It was Arce who actually asked the question as to how Pitner could ensure he would be different from the current faculty. I find it quite likely that Arce saw himself as the "good soldier" who interjected the loyalty question in a moment of self-interest. Pitner never claimed Edelstein smiled during the interview, when the on-campus conflict was raised.

There was a suggestion by counsel for the District, and corroborated in Edelstein's memorandum to the chancellor's office, that the assessment of Pitner's qualifications posed no difficulty for Edelstein, but rather the fact that the faculty committee appeared to come with a closed mind.¹³ I believe this factor, too, cuts both ways. At a time when the issue of power and control was at the forefront, Edelstein could have used the selection as an opportunity to "send a message" to the faculty committee about managerial prerogative. If Edelstein entered the interview process with a view toward that end, Pitner might be entitled to relief as an innocent object lesson. (See Cupertino Union Elementary School District (1986) PERB Decision No. 572; McPherson v. Public Employment Relations Bd., *supra*, 189 Cal.App.3d 293, 310.) But I doubt this was the case. On the other hand, if Edelstein viewed the faculty committee as having an agenda, I do not believe his response, in terms of entrenching himself

¹³ At one point in the hearing, counsel for the District asserted that the faculty committee "had fixed on Mr. Pitner and had no intention of collaborating with the district in the selection of a candidate, and that this entire action is an outgrowth of that." Arce testified that Johnson, a division chair, and Tilles, a faculty member, lobbied him outside of the formal process and that he found this unprofessional.

as to his original ranking, would necessarily warrant relief because the faculty's initiative could not be construed as legitimate protected activity.¹⁴

I find that based on the record as a whole, there is insufficient evidence to conclude that Edelstein would have favored Pitner over Hartshorn in the absence of the intrusive questioning about his faculty allegiances. The record does not demonstrate that Pitner had qualifications that made him objectively superior to Hartshorn. I believe Edelstein treated Pitner's answer to the loyalty question with some degree of unlawful animus, but not with sufficient weight for him to have dropped Pitner from a place higher in the rankings than Hartshorn. The inquiry into how Pitner would distinguish himself from the existing faculty did legitimately go in part to bringing innovation to a static department.

Finally, Marvel's decision does indicate that an attempt at independent investigation was made at the chancellor's level, within the limits of the process. Marvel reviewed the files of all three candidates. As he noted in the memorandum explaining his decision, as between Hartshorn and Pitner, the faculty rating sheets available to him failed to demonstrate that Pitner was better qualified.¹⁵ There is nothing in the evidence to suggest that Marvel was aware of the loyalty questions.

Accordingly, I find that the evidence is insufficient to demonstrate that Pitner would have been awarded the position but for the questions about his faculty allegiances. I therefore dismiss the allegation in the complaint that the District retaliated against Pitner because of

¹⁴ Assuming that certain members of the faculty committee did attempt to use the process as a way to strengthen their ranks, rewarding Pitner with the position based on his attempt to steer a course of neutrality goes beyond the legitimate remedial purposes of the Act.

¹⁵ The only faculty rating sheets submitted by either party were two for Pitner, showing one with a perfect score (60 out of 60 points) and another with an average 7.5 for each 10 point question (45 out of 60 points). The perfect score was from Johnson. I note that Johnson's score does stand out and could reflect a bias or interest owing to the impact of the reorganization on him.

protected activity. I also find, however, as argued by Pitner, that the questions did amount to a form of unlawful interrogation about protected activity, particularly the question as to how he could guarantee that he would be different from other faculty who were deemed "contentious." (NLRB v. West Coast Casket Co. (9th Cir. 1953) 205 F.2d 902, 904 [32 LRRM 2353].)

Although not specifically alleged as a theory in the PERB complaint, the matter was part of the same course of conduct and the matter was fully litigated by the parties. (Modesto City Schools (1983) PERB Decision No. 291.) I hereby amend the complaint to conform to the proof adduced at the hearing, and find that the District violated section 3543.5(a) of the EERA by asking Pitner questions about protected activity.

REMEDY

Section 3541.5(c) grants PERB

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.

When Edelstein and Arce posed questions to Pitner, which in effect sought to elicit his allegiances to the faculty in the context of the no-confidence vote, they engaged in unlawful interrogation. By this conduct, the District interfered with Pitner's right to engage in activities protected by the EERA, in violation of section 3543.5(a). The appropriate remedy is to cease and desist from such unlawful conduct. (San Marcos Unified School District (2003) PERB Decision No. 1508.)

It is also appropriate that the District be required to post a notice incorporating the terms of this order. The Notice should be signed by an authorized agent of the District indicating that it will comply with the terms thereof. The Notice shall not be reduced in size. Posting of such notice will provide employees with notice that the District has acted in an

unlawful manner and is being required to cease and desist from this activity and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. (Davis Unified School District (1980) PERB Decision No. 116; see also Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to the Educational Employment Relations Act (Act), Government Code section 3541.5(b), it is hereby ordered that the Contra Costa Community College District (District) and its representatives shall:

A. CEASE AND DESIST FROM:

Engaging in unlawful interrogation and thereby interfering with employees' right to participate in activities protected by the Act.

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

1. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations in the District where notices to employees customarily are 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 that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Within thirty (30) workdays of service of a final decision in this matter, notify the San Francisco Regional Director of the Public Employment Relations Board (PERB or Board), in writing, of the steps the employer has taken to comply with the terms of this

Order. Continue to report in writing to the Regional Director periodically thereafter as directed. All reports to the Regional Director shall be served concurrently on the Charging Party.

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 PERB 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 of 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. (Cal. Code of 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 of Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code of 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 of Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Donn Ginoza
Administrative Law Judge