written around that same time from GCEP board members to Superintendent Deasy, which included King's name, that acknowledged that GCEP believed other governance models for Crenshaw High School should be examined. According to the District, the decision not to renew the GCEP MOU and for the District to take over full control of Crenshaw High School's affairs was a mutual decision between GCEP and the District.

B. Meeting in District Board Member Marguerite LaMotte's Office

On or around October 22, 2012, Caputo-Pearl and fellow teacher Mr. Brown were summoned to a meeting at District board member Marguerite LaMotte's office with Superintendent Deasy, Corley, and Bartleson, from the ISI division. Superintendent Deasy explained that the District had determined to convert Crenshaw High School to three Magnet schools and, in the course of that process, all staff would have to apply to work in the new Magnet programs. Superintendent Deasy also stated that teachers who were a good fit with the new programs would be selected and discussed possible themes for the new Magnet schools. Caputo-Pearl inquired whether existing programs would be discontinued and Superintendent Deasy responded, "Let's not have a war at this school." According to Caputo-Pearl, Superintendent Deasy "reacted negatively" when Caputo-Pearl characterized the action as a reconstitution. Caputo-Pearl questioned the fairness of forcing teachers who had devoted many years to the success of the school to reapply for their jobs. Caputo-Pearl also questioned why the decision had been made at that time, when a few months earlier Superintendent Deasy had said Crenshaw High School would be reassessed at the end of the 2012-2013 school year to determine whether existing programs had yielded success. Superintendent Deasy responded that the school was failing and that the Magnet conversion would go forward.

C. First Meeting With the Faculty to Announce the Conversion

Approximately the day following the meeting in LaMotte's office described above, on October 23, 2012, the District publicly announced the plan for Magnet conversion in an all-faculty meeting on the Crenshaw campus. Tommy Chang, the superintendent of the District's Intensive Support and Innovation Center (ISIC),[12] and Donna Muncey, the chief of the ISI division (and Bartleson's supervisor), made the announcement.[13] Before this meeting, Chang and Muncey asked Corley to record the meeting so that the District could prepare written responses to any questions that were asked. Corley testified without contradiction that a written response was so prepared. Chang and Muncey also had a private "pre-meeting" with Caputo-Pearl and teacher/UTLA Chapter Chair Garcia where they explained that they would announce the planned conversion and tell the staff that they would have to apply to work in the new Magnet schools. Caputo-Pearl stated to Chang and Muncey that the process was a reconstitution. He said Chang and Muncey denied that the conversion was a reconstitution and they "reacted negatively" to that word.

The primary focus of the District's presentation to teachers in the general faculty meeting was that the GCEP partnership was coming to an end and that the school's academic progress was consistently low. The teachers were informed of the Magnet conversion plan and told that they would have to apply if they wanted to work in the Magnet schools. Corley used his cell phone to record the question and answer period of the faculty meeting. Several teachers asked questions during this meeting. One of them, Regional Occupational Program (ROP) teacher Sandra Luna, testified that she felt uncomfortable because the meeting was

[12] The ISIC division of the District works with schools that have consistently low student performance levels.

[13] Neither Chang nor Muncey testified.

being recorded and because teachers were also asked to state their names when they spoke. Luna raised a concern during the meeting about Special Education students being affected by the Magnet conversion. Caputo-Pearl expressed concerns about teachers' voices being heard in the conversion process. Garcia criticized the conversion plan for lacking detail about curriculum, class assignments, and access to instructional materials. Special Education teacher Chandra Roberts asked whether there would be changes made to that department.

D. December 2012 Faculty Meeting With Superintendent Deasy

Superintendent Deasy and District board member LaMotte attended a Crenshaw High School faculty meeting in December 2012 to further discuss the Magnet conversion plan. Corley and Bartleson were also in attendance at the meeting. Teachers handed out a UTLA fact sheet before the meeting that questioned the efficacy of reconstitution in urban schools as related to improved student performance. Superintendent Deasy's presentation focused on the school's declining enrollment with the loss of students to nearby charter schools and other Magnet programs, and also students' persistently low academic performance as reasons for the District's decision.[14] He described it as a "moral imperative" to convert the school to Magnet programs. Special Education teacher Christina Lewis asked Superintendent Deasy what teachers were to do when students were coming to them with second and third grade reading and math proficiency levels, to which LaMotte interjected, "I'm tired of you teachers thinking these babies can't learn."[15] Caputo-Pearl criticized Superintendent Deasy's expression of there being a "moral imperative," by stating to Superintendent Deasy during the meeting:

[14] Crenshaw High School had the capacity to accommodate 2,500 students, but its enrollment during this timeframe was down to 1,300 students.

[15] LaMotte did not testify.

> [W]hy it had taken so long to get around to that moral imperative when the School District had placed so many administrators at the school, when some of John Deasy's allies in the charter school community had been allowed to pop up charter schools around the school and drain out the higher performing students, like where was the moral imperative before. Why now and why does the moral imperative involve blaming teachers and reconstituting the school?

Caputo-Pearl and Superintendent Deasy had another exchange during this meeting over which multiple witnesses from both sides testified. Caputo-Pearl said that he was concerned that Union leaders and/or advocates would be targeted for exclusion in the Magnet selection process since Superintendent Deasy had stated at the July 2012 GCEP board meeting that teachers at Crenshaw High School were "too political," and he had heard from another reliable source that Superintendent Deasy had said disparaging things about UTLA activists at the school. According to Caputo-Pearl, Superintendent Deasy got flustered and angry and denied making such statements. Teacher Meredith Smith testified regarding this exchange that Superintendent Deasy accused Caputo-Pearl of "being inappropriate, that he was just trying to rile people up and get them upset about this whole process." Teacher Creasia described Superintendent Deasy as being "spit-hissing mad" in response to Caputo-Pearl's comments. Teachers Luna, Roberts, and Lewis all described Superintendent Deasy as being red in the face and/or loud and angry as a result of the exchange. Corley testified that Superintendent Deasy reacted by saying to Caputo-Pearl, "you weren't present at this meeting, and why are you putting out things that you don't know if those are true or not." Corley described the demeanor of the two men as "just sharing their standpoints," but not being "mad" at each other. Bartleson denied that Superintendent Deasy raised his voice during the conversation. Adaina Brown (Ms. Brown), who held the title of "Instructional Specialist" at Crenshaw High School, a position that was described as being similar to an assistant principal and as being a part of

Corley's administrative team, testified as follows regarding Caputo-Pearl's and Superintendent Deasy's discussion during the meeting:

> That exchange was, I would say very tense. Dr. Deasy talked about the data. He talked about his decision to transform the school because of the data. He said something had to happen. Alex Caputo-Pearl kind of bantered with him back and forth. And at one point, Dr. Deasy just said -- No, Alex Caputo-Pearl said that, why weren't we asked about it before you made this decision. And he said, well, Mr. Caputo-Pearl, he said, do you inform your parents before you make a decision about what's going to happen in your classroom, and Caputo-Pearl didn't answer. And Dr. Deasy said, and I don't have to inform you of what I'm going to do when it comes to the best interest of my students, and the room fell silent. And I think probably at that point, everybody could cut the tension with a knife.

E. Superintendent Deasy's Meeting With GCEP Board Members in February 2013

King and Grimsby both testified about attending a meeting at the District's offices in or around February 2013 to discuss GCEP's role in the school given the Magnet conversion. Neither King nor Grimsby indicated that Corley attended this meeting and there is no other information in the record to place him there. Donna Muncey was present but it appears that Bartleson was not. Grimsby was asked directly whether Superintendent Deasy made any statements about UTLA, and she responded "No." Grimsby said that Superintendent Deasy specifically called Caputo-Pearl a "trouble-maker" at the school. She took this to mean that Superintendent Deasy disapproved of the Social Justice Academy as being "more of a political thing" that the Superintendent "just didn't like." Grimsby also testified that Superintendent Deasy connected Caputo-Pearl to telephone calls made to Sacramento to complain about the Magnet conversion plan or Superintendent Deasy in particular.[16] Grimsby was upset by

[16] Bartleson testified that he was informed of complaints made to the State Department of Education (DOE), but that the DOE did not identify the complainant. Caputo-Pearl

Superintendent Deasy's comments about Caputo-Pearl. She had known Caputo-Pearl for several years through her roles in GCEP and the Crenshaw Cougar Coalition, and as a parent of students in his classes. When she left the meeting, Grimsby felt it important to warn Caputo-Pearl that Superintendent Deasy was out to get him. Grimsby and Caputo-Pearl had a telephone conversation later that same day about the Superintendent's comments during the meeting. King testified that during the meeting Superintendent Deasy specifically said Caputo-Pearl and unidentified "others" in the Union were impediments to moving forward or a roadblock to progress at Crenshaw High School.

F. Faculty Meeting in Spring 2013

At a faculty meeting held during the spring semester in 2013, Caputo-Pearl raised several issues with Corley regarding teachers' concerns over access to instructional materials and poor communication from administration over scheduling matters, as well as issues related to teachers' concerns over the Magnet conversion process. Caputo-Pearl said that Corley got upset, became defensive and said to him, "You're trying to set me up." Several other teachers who were present at this meeting testified about it. According to Special Education teacher Tracy McKinney, Corley raised his voice in response to Caputo-Pearl, walked toward him and avoided answering his question by saying, "We're not going to talk about this." Teachers Tiff and Lewis also testified that Corley seemed upset and "cut off" Caputo-Pearl from talking. Ms. Brown testified that she had never observed any "exchanges" between Caputo-Pearl and Corley, and that it was "not [Corley's] personality" to raise his voice, but she was not questioned about whether she was actually present at the faculty meeting at issue. Corley generally denied ever raising his voice to Caputo-Pearl during meetings and said they had a

admitted to calling the DOE because he was concerned that Magnet conversion could jeopardize the school's SIG funding.

very cordial relationship. He was not questioned regarding their interactions at any particular meeting.

UTLA-Sponsored Activities in Response to the District's Magnet Conversion Plan

Teachers were understandably concerned about having to apply to continue working at the Crenshaw High School site after the Magnet conversion. They were worried about losing jobs that many of them had held for years, building strong community ties. Several teachers, including Garcia and Caputo-Pearl, had moved near Crenshaw High School specifically to become more involved in the local area. As described below, UTLA sponsored a number of events to publicize awareness of the District's plan within the community and to spur parent action in response.

A. Leafleting

Teachers periodically gathered in front of Crenshaw High School before school started during the spring of 2013 to hand out leaflets regarding the Magnet conversion process to parents as they were dropping off students at school. Sometimes the leaflets described meetings that were scheduled to discuss teachers' concerns over the process. Teacher McKinney described the teachers' purpose in doing so as "to bring community awareness to the magnetization process." Teachers testified to regularly seeing administrators outside, including Corley, while they were leafleting in front of the school.

B. Press Conferences

Caputo-Pearl helped organize two press conferences to discuss concerns about the Magnet conversion. Several teachers attended the press conferences and, as discussed further below, some of them spoke during the event or were interviewed by the press afterward. Both conferences were held in front of the Crenshaw High School in late December 2012 or early

January 2013 and were attended by print and television media outlets. Corley and other administrators, including Bartleson, were present and took notes during the press conferences.

C. Attendance at District Board Meetings

Teachers attended District Board of Education (BOE) meetings during November 2012 and January 2013 as a group, many wearing blue t-shirts that signified opposition to what the teachers believed to be reconstitution of the school. The BOE took action at the January 2013 meeting to formally approve the Magnet conversion plan for Crenshaw High School and two other schools submitted for conversion that year. A few Crenshaw High School teachers, as will be discussed below, publicly addressed the BOE. Corley attended these BOE meetings.

D. Attendance at Meetings of the Crenshaw Cougar Coalition

As previously noted, the Crenshaw Cougar Coalition was meeting regularly on the Crenshaw High School campus during the 2012-2013 school year and several teachers participated in the meetings on a consistent basis. According to Caputo-Pearl, the group met in what was called the Parent Center. In previous years they had met in the library. Caputo-Pearl believed that the District allowed the group to meet on campus. Corley, however, testified about seeing teachers and community members meeting on campus several times in the relevant time period but he had not authorized them to do so.[17] Ordinarily, he would need to approve a request for any meeting held on school property, but he had not received any such requests in these instances. Corley observed the following teachers as being at these meetings: Caputo-Pearl, Mr. Brown, James Altuner, Creasia, Roberts, Tiff, and Courtney Stanton-Gomez. Corley said that he made no attempt to disband these meetings because he "wanted to respect the teachers' right to assemble." Corley described going into one of these meetings for

[17] Corley did not identify that these were meetings of the Crenshaw Cougar Coalition, but it is clear from the testimony of other witnesses that they were.

a few moments because he noticed people entering a campus building after school and he wanted to see what was going on. He said that it appeared the purpose of the meeting was to encourage community members to be against the Magnet conversion. He reported staying for five or ten minutes and then leaving. Caputo-Pearl similarly testified that Corley entered a meeting of the Crenshaw Cougar Coalition, took notes, and stayed for only around five minutes. Self-described "parent activist" Kahllid Al-Alim also testified that Corley entered a meeting that he attended in the Parent Center, took a few notes, and then left after a few minutes.

Al-Alim described being granted a meeting in Superintendent Deasy's office with some other community leaders at some point during the conversion process to discuss his worries that teachers might lose their jobs at Crenshaw High School in the conversion and requested a method for parents to petition for teachers to keep teaching there. Al-Alim expressed to Superintendent Deasy that the Parent Center at Crenshaw High School was under-developed and needed full-time staff. The Superintendent responded, "well yeah, that's because it's being used for a political purpose." Al-Alim responded to Superintendent Deasy that while parents and students often held meetings there, it was not true that these meetings were somehow political. Al-Alim testified that Superintendent Deasy expressed that the parents and teachers utilizing the center were plotting to get rid of Corley and to disrupt the Magnet conversion. Superintendent Deasy did not name any particular teachers that he thought were plotting in this manner during the meeting with Al-Alim.

The Selection of Magnet Themes

Bartleson was the District administrator tasked with primarily overseeing the conversion process. He had a team of about 30 people assisting him in various ways. The year before, he had done the same thing at another District site, Westchester High School. Bartleson explained that his experiences in that process informed his approach at Crenshaw High School. The existing staff at Westchester High School had to apply and be selected to work in that school after the Magnet conversion.

The District wanted input from parents and students regarding the academic focus of the new Magnet schools at Crenshaw. Students were surveyed twice during the school year regarding their academic interests to start to focus in on potential Magnet themes. In order to solicit input from parents and interested community members, Corley held twice-monthly meetings beginning in January 2013 and continuing through the spring called "Coffee With the Principal." Bartleson also attended these meetings. Parents were also surveyed over what kinds of academic themes they would like to see in the new Magnet schools. As a result of the feedback received from students and parents, a comprehensive "Crenshaw High School Plan" document was created and three Magnet themes were finally selected: Visual and Performing Arts (VAPA), Science, Technology Engineering, Math and Medicine (STEMM), and Business Entrepreneurship and Technology (BET). Bartleson testified that while there was some support for Social Justice and Law, it was not among the most three popular choices and therefore was not selected as a Magnet theme. UTLA supporters and officials, including then-President Warren Fletcher, and members of the Crenshaw Cougar Coalition attended some of these meetings and expressed opposition to what they termed the reconstitution of the school.

District witnesses testified to their belief that UTLA and its supporters were generally opposed to the Magnet conversion.

"Coffee With the Principal" meetings also yielded criteria that the community was looking for in teaching staff for the Magnet schools. According to Bartleson:

> They wanted those teachers to teach culturally relevant materials, they wanted the teachers to submit weekly lesson plans, they wanted teachers to follow the curriculum that was established that the principal and the administrators had established, participate in professional development, do extra[-]curricular activities. Those are the things that come to mind.

The Application, Interview, and Selection Process for Employees Seeking a Position in the Magnet Schools

A. Administrators

Despite having been recently hired as the Crenshaw High School principal, Corley had to apply to be the principal of the new Magnet schools, like all other staff desiring a position within them. There were 10 other applicants for that job. In February 2013, Corley was interviewed by a large panel of stakeholders that included teachers, parents, community members, and alumni, as well as Bartleson, who served as the Superintendent's designee. The same panel interviewed all 10 applicants. Corley was the panel's choice and Superintendent Deasy then approved his selection. The Superintendent always has the final say over the selection of principals.

After the selection of principal was made, applicants for assistant principal were interviewed by a panel having similar composition in terms of the representation of stakeholder groups that were involved in the interviews for principal.[18] Corley made the final hiring

[18] It is not clear whether Bartleson participated in the interviews of assistant principal candidates.

decisions for assistant principals. Only one of the assistant principals who was employed at Crenshaw High School applied for a position in the Magnet schools. That person was selected.

B. Teachers and Classified Staff

a. Teacher Applications

It was announced in February 2013 that the interview process for teachers desiring a position in one of the Magnet schools would occur in April 2013. Bartleson asked the District's Human Resources staff to provide instruction to teachers explaining the application process. Teachers were told that if they applied for but were not selected for a position in the Magnet schools they would become "displaced" from Crenshaw High School, but would remain employed by the District and retain their base salary, benefits, and seniority levels. Human Resources staff also held workshops for teachers on résumé writing and interviewing techniques, including holding mock interviews. Teachers were told that if they were interested in submitting an application, to prepare a résumé and cover letter indicating their interest in the specific Magnet programs offered and to which Magnet school they were applying, and to submit those to Corley and/or Bartleson.

b. Teacher Interviews

Bartleson arranged and coordinated all of the interviews for existing Crenshaw High School staff that were applying for positions in the Magnet schools.[19] Interviews were conducted by a panel. Neither Bartleson nor Corley participated in the interviews as panelists. Human Resources staff conducted training sessions for the community members, parents,

[19] Bartleson's involvement with the interview process itself only extended to Crenshaw High School employees who were applying to work in the Magnet schools. As further discussed below, after the internal staff selections were made by Corley, external candidates were permitted to apply for positions in the schools. Bartleson and his team had no involvement with external candidates.

students, alumni, UTLA representatives, and administrators who did serve as panel interviewers. Panelists were informed that interviews should last approximately 30 minutes. The questions to be asked during the interviews were shared with the panelists during their interviewer training and had been derived from the criteria developed during the "Coffee With the Principal" meetings. Bartleson was present at Crenshaw High School on all of the days that interviews were held to manage the process and escort candidates to their interview rooms. Interviews took place after school during the first three weeks of April 2013. Bartleson testified that a community group within Crenshaw, the Black Education Coalition, approached him and Chang during the conversion process to suggest that after the interviewers marked their rating sheets, they should place them in a sealed envelope that would then be given to the principal. Bartleson explained that this suggestion stemmed from that group's desire to "avoid politics in the decisions." Bartleson agreed with the suggestion and presented it during "Coffee With the Principal" meetings without opposition. That method was adopted. Thus, panelists did not discuss their impressions of candidates with each other during the interview process.[20]

c. Teacher Selection

Corley had the final say over the selection of all staff, including teachers, who were chosen to work in the Magnet schools. Bartleson testified that he provided no input regarding staff selection. Human Resources Interim Deputy Chief Ignagni testified that principals are vested with the authority to make staffing selections for their schools. Corley testified that he did not have any input from or conversations with Superintendent Deasy over whom should be

[20] The parties stipulated during hearing that they would not seek to introduce testimonial or documentary evidence about the scores or ratings of candidates that were generated by the interview panels.

selected to work in the Magnet schools. No contrary evidence was presented, despite the testimony of several teachers who said they did not know who made the final decision or simply did not believe that it was Corley's ultimate responsibility. UTLA witness Al-Alim, who served as a panel interviewer, confirmed that Bartleson told panelists during their training that Corley would have the final say over staff selections. Final staff selection decisions were made for internal candidates before external candidates were considered.

Corley testified that in addition to his own observations of and interactions with Crenshaw High School teachers who were applying for positions in the Magnet schools, he also considered feedback he received from his administrative team (assistant principals and instructional specialists) regarding their own experiences with the internal applicants during the 2012-2013 school year. Corley testified in general that he personally observed teachers during the 2012-2013 school year around four times. He said that he visited everyone around the beginning of the year in September and again in or around November. As a part of the Magnet conversion process, all teachers were observed by a group of District administrators, including Corley, in February or March. Bartleson was also present for those observations. Finally, Corley testified to visiting all classrooms again in April or May. Corley's testimony in this regard is disputed by all of the teachers who testified. At most, the teachers recall his visiting them twice during the year and some could not remember him observing them at all.

Corley and the other Crenshaw High School administrators met weekly during this time period. He testified as follows about the criteria he considered during the teacher selection process:

> We looked at the quality of teacher, the instructional practice. We were -- We were moving towards a more rigorous program and so we wanted them to be willing to participate in additional professional development so that they would be prepared to

> provide rigorous instruction. We looked at their willingness to follow Crenshaw High School and District policies. And then finally, I reviewed specifically the Stakeholder feedback that was given during the interview panels.

Other than that final statement above, the District did not introduce any evidence showing that the feedback given from interview panels played any particular role in Corley's decision not to select the teachers that are at issue in this case.

Regarding the degree to which a teacher's overall employment record was taken into account during his decision-making process, Corley testified that it only played "some" role and clarified:

> A. . . . But I made my evaluations strictly off of my experience with individuals. If they had some egregious things in there from the past that were -- they weighed more heavily, but my final decision was based on my experience. I think that's the fairest way to evaluate someone.
>
> Q Okay. And when you say, my experience, do you mean from your personal observations?
>
> A No, I mean from the time that I have worked with them and observed them, not just personal, but also feedback that I received from other administrators, any comments or issues that arise with parents. My whole experience with them at the school site.

Notably, all of the teachers at issue here had a consistent history of receiving a rating of "Meets Standards" on their performance evaluations, which is considered a positive assessment of performance. Approximately 51 percent of Crenshaw High School teachers who applied to work in the Magnet schools were selected for positions therein.

d. <u>Information Provided to Teachers That Were Not Selected for Positions in the Magnet Schools</u>

Teachers who were not selected for a position in the Magnet schools were informed of such by letter in mid-April from Corley. The letter did not provide any specific reasons that

the teacher was not selected. Many teachers testified to sending e-mails to Corley and/or Bartleson asking for specific reasons that they were not selected and never receiving a response to their inquiries. GCEP board member Grimsby testified that she asked Corley during a community meeting held after the selections had been made for the reasons or criteria that some teachers had not been given positions in the new schools. Corley responded that the reasons were private and could not be disclosed. Only one teacher, McKinney, testified that Corley said in a faculty meeting in April 2013 that teachers wanting individual results of the selection process could receive them by e-mail. Then, she testified that a week later he changed his mind and said no reasons could be provided. No other teacher was questioned regarding this particular faculty meeting and no others testified about Corley making such statements. As McKinney's account on this point is different than all of the other witnesses who testified, I do not credit her statements on this issue.[21]

The District's Human Resources staff held informational meetings for teachers who did not receive positions in the Magnet schools. It was explained that if teachers did not apply for and receive positions in other District schools that had openings, they would be considered displaced and assigned to the District's contract pool without the loss of their base salary, benefits, or seniority. The contract pool is not viewed by teachers as an advantageous assignment. Teachers in the contract pool receive teaching assignments early in the morning through an automated telephone system, in a way that is similar, if not identical, to the manner in which substitute teachers receive their daily assignments. Thus, there is a daily level of unpredictability regarding where a contract pool teacher may have to report to work and what kind of teaching assignment may be required. Teachers in the contract pool are regularly

[21] I do not find that McKinney was testifying untruthfully. Rather, it seems most likely that she misunderstood the communication she testified about.

forced to teach outside of their areas of expertise and grade level. If a teacher in the contract pool does not receive a teaching assignment through the automated system, they report to a base school where they could be assigned any number of tasks. One teacher described working as a hall monitor. Several teachers testified to feeling a level of disrespect by school staff when they were assigned to the contract pool, as if they had done something wrong or were no longer considered to be good teachers.

e. Classified Staff Selections

Classified employees working at Crenshaw High School had to apply and be interviewed for a position in the Magnet schools, similar to the above-discussed process for teachers. Human Resources staff did not provide the same workshops for classified employees as they did for certificated employees. Corley made the final classified staff selection decisions. Approximately 50-55 percent of former Crenshaw High School classified staff were selected for positions in the Magnet schools.

Employees at Issue in the Charge

1. Cathy Garcia

Garcia was a Math teacher at Crenshaw High School from 2003-2013. As discussed previously, she served as the UTLA chapter chair during the 2012-2013 school year and, for this reason, weekly UTLA lunch meetings were sometimes held in Garcia's classroom. Before that, she had served as a UTLA chapter co-chair since 2008. Garcia voiced her criticism of the Magnet conversion plan during public and private meetings with District officials stating, for instance, that the timeline for the conversion was unrealistic, questioning whether the District was violating a recent side-letter agreement with UTLA promising no new reconstitutions, and other critical comments previously discussed. Garcia also attended one of the two UTLA press

conferences regarding the Magnet conversion. She did not speak during the press conference itself, but afterward was interviewed by a Spanish language television station, where she translated in Spanish some of the remarks made by Caputo-Pearl in English during the conference. Garcia regularly wore red to support UTLA and posted materials on the UTLA bulletin board that was located adjacent to Corley's office. Garcia also made announcements regarding UTLA matters over the public address system until Corley halted that practice in the fall of 2012.[22] Corley was present for much of these activities, including the press conference and meetings with faculty and GCEP.[23]

Garcia was absent for a significant portion of the 2012-2013 school year for medical reasons. Her absences began sporadically in the fall of 2012. Sometimes she took off a few consecutive days during that period, another time a consecutive week. By January 2013, Garcia requested and was approved for an extended medical leave that lasted until around April 7, 2013.

Garcia applied for a position in the Magnet schools by submitting a résumé and letter of intent to Corley. Garcia then participated in an interview, but ultimately was not selected as a teacher for the Magnet schools. As noted previously, teachers that were not selected for a position were informed of such by a letter from Corley that did not provide any rationale for the decision. Garcia received this letter.[24]

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[22] The issue of the public address system will be discussed in more detail in a later section of the proposed decision.

[23] Because there is no dispute that Corley was present during the UTLA press conferences, it is presumed that he was aware when a teacher discussed herein attended them.

[24] Unless otherwise noted, all of the teachers at issue received the same generic rejection letter.

Cao had a brief assignment in the contract pool until she accepted a contract position at the District's Carson High School in September 2013. She voluntarily resigned from that position a few weeks later for personal reasons. Around a month later, Cao took a teaching position outside of the District.

4. Kenneth Maxey

Maxey was a Physical Education (PE) teacher at Crenshaw High School from 1984-2013. He also taught Health. From 2006-2008, Maxey held the administrative position of Dean of Students, which has oversight over student disciplinary matters. Maxey holds an administrative credential in addition to his teaching credential. In approximately 2010, Maxey served as an assistant principal for three months. In every year that Maxey worked at Crenshaw High School, he held some sort of coaching position. Coaching positions are not permanent assignments, but are assigned on a year-to-year basis. An additional stipend is paid. The principal of the school has the final approval over coaching positions. In the 2012-2013 school year, Maxey was the assistant varsity football coach.

Maxey leafleted before school during the spring of 2013.[28] He said that he wore red every Tuesday during that time period and regularly attended UTLA lunch meetings. Maxey attended, but did not speak during, one of the UTLA press conferences at Crenshaw High School in January 2013.

Before Maxey applied for a PE teaching position in the Magnet schools, Corley approached Maxey and discussed with him his desire to create a position in the new Magnet schools that would oversee "in-house" student suspensions. Corley also told Maxey that the

[28] Maxey himself was a little unsure of exact dates at times, but other witnesses placed him at commonly attended events and there is no dispute of his participation in various protected activities.

a prima facie allegation of discrimination against an applicant for employment under the NLRA have been the subject of inconsistent decisions over the years. In *FES, A Division of Thermo Power* (2000) 331 NLRB 9 (*FES*), the NLRB clarified the allocation of burdens for both the charging party and the respondent to an allegation that the respondent refused to hire an applicant for employment:

> To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. In sum, the issue of whether the alleged discriminatees would have been hired but for the discrimination against them must be litigated at the hearing on the merits.

(*FES*, *supra*, 331 NLRB at p. 12; footnotes omitted.)

The above standard is consistent with PERB's own treatment of retaliatory failure to hire cases and will provide an appropriate framework for addressing the claims in this case. Accordingly, this test shall be applied to the facts of this case to determine whether the District

discriminatorily refused to hire any of the 12 teachers at issue who applied for a position in the Magnet schools.

1. The District Was Hiring

There is no dispute as to this element of the above test. It is clear that the District was seeking to fill all certificated and classified positions within the new Magnet schools at the time of the alleged unfair practice.

2. The Applicants Had Requisite Experience or Training

With the exception of Luna, as further discussed below, there is no dispute that all of the other teachers at issue here were fully qualified to fill available teaching positions within the new Magnet schools. Therefore, this element of the above test is met for 11 of the 12 discriminatees at issue.

Regarding Luna, it is clear from her testimony and the documentary evidence that she sought to continue teaching Landscaping in the new Magnet schools. Luna's letter of intent submitted with her application only discussed the Landscaping course and its suitability for inclusion in any of the three Magnet schools. The letter of intent did not state that she was applying for any other teaching position, ROP or otherwise. The letter of intent did not discuss Luna's qualifications to teach other ROP courses that may have been planned or offered. It is undisputed that Landscaping was discontinued as a course offering in the new Magnet schools. It is undisputed that ROP course offerings are left entirely to the discretion of the school's management. Thus, it does not appear that the District was hiring for the position Luna sought. It is further not clear from the evidence presented that Luna's CTE credentials would have allowed her to teach any of the ROP courses that were to be offered in the Magnet schools. Even if they did, under the circumstances, since Luna only indicated her interest in continuing

to teach Landscaping, and had only ever taught Landscaping at Crenshaw High School, it is not clear how Corley would have been expected to know that. Under these facts, this element of the test for discriminatory refusal to hire is not met for Luna and the Union therefore has not made a prima facie showing. Accordingly, allegations in the complaint regarding Luna are hereby dismissed.

3. Union Animus Contributed to the Decision Not to Hire the Applicants

a. Legal Standards

The determination of this element of the discriminatory refusal to hire test requires evidence showing that the respondent was unlawfully motivated in its hiring decision. Because direct evidence of unlawful motivation is rare, PERB typically looks for circumstantial evidence to reveal a respondent's true motivation. In order to assist in this assessment, PERB has developed a set of nexus "factors." In addition to close timing between protected conduct and adverse action, one or more other factors demonstrating unlawful motivation must be present to adequately show a connection between them: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 6); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara USD, supra*, PERB Decision No. 104, p. 20); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S, p. 15); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 19; (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529, p. 10) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland*

Unified School District (1990) PERB Decision No. 786, pp. 13-14); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, pp. 15-16;); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District* (1982) PERB Decision No. 264, p. 22).

b. Analysis

As a threshold matter, the District does not dispute and I find that the numerous concerted activities described herein that were undertaken by employees in response to the District's Magnet conversion plan, such as: leafleting, wearing symbolic colors or clothing to show union solidarity, participating in press conferences and meetings with parents to discuss working conditions, attending, en masse, meetings of the BOE to protest the Magnet conversion's effect on working conditions, etc. were classic expressions of protected union activities under EERA. The record is clear that Corley and other District officials were aware of these activities by the employees at issue and believed generally that UTLA was officially opposed to the Magnet conversion. All of the employees' activities were close in time to the non-selections.

UTLA's chief arguments regarding evidence of the District's unlawful motivation in this case is that since the District never stated its reasons for not selecting the employees at issue at the time of the decision, and for the first time at hearing provided numerous, mostly performance-based reasons, over which none of the subject employees had received formal discipline or negative performance assessments, that shows a discriminatory motive.[41] Next,

[41] UTLA makes a related argument that since the District made no effort to reveal information from the employee interviews, that the selection process itself was a sham. I disagree. Corley testified that he took the raters' information into account when making his selections, but also provided detailed testimony about his own experiences with the internal applicants having the most bearing on his decision-making process. That is a reasonable

UTLA argues that Superintendent Deasy's statements showing his union animus must be imputed to the putative decision-maker, Corley, and further argues that it is illogical that Superintendent Deasy would not have been involved in the staffing decisions for the Magnet schools since Superintendent Deasy made the decision to convert Crenshaw High School to a full Magnet program. These arguments are addressed in turn below.

i. Lack of Reasons Given for the Non-Selections

As noted above, PERB often finds a respondent's lack of justification to an employee for its action indicative of an unlawful motive. However, that is not always the case. In *City of Alhambra* (2011) PERB Decision No. 2161-M, the Board found that an employer's refusal to inform a probationary employee of the reasons he was being let go did not support an inference of unlawful motivation under the circumstances. Citing to NLRB case law finding that a vague statement such as employees did not "fit into the scheme of things,"[42] did not necessarily show discriminatory intent, the Board held, "we find an employer's failure to offer justification at the time it took action is not a reliable indicator of discriminatory intent unless the employer was required by law, policy, or past practice to give a reason." (*Id.* at p. 17.)

In this case, the District refused to explain its selection rationale to employees, even if they asked. It never deviated from that practice, simply ignoring the sometimes repeated requests for an explanation. The consistency of the action in this regard implies a conscious decision to keep the deliberative process confidential. There was no evidence presented that

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position and does not imply that the selection process was pretense. For the employees at issue, Corley testified that he had reasons for his decisions distinct from anything that came out of the interviews. That does not also imply that for every other internal applicant, the interview performance may have had more or less influence over Corley's decision.

[42] *BLT Enterprises of Sacramento, Inc., d/b/a Sacramento Recycling & Transfer Station & Chauffeurs, Teamsters & Helpers Local Union No. 150, Int'l Bhd. of Teamsters, AFL-CIO* (2005) 345 NLRB 564, at pp. 570, 575.

the District has a policy or practice to inform applicants for employment with the reasons that they were not successful, which would have required disclosure of the reasons under *City of Alhambra*. Under the circumstances, especially given that the District acted at all times consistently, I do not find the lack of justification to employees for their non-selection to be a reliable indicator of unlawful motivation.

ii. Union Animus

As an initial matter, UTLA's argument that Superintendent Deasy "must" have had input over staff selections in the Magnet schools is based entirely on conjecture. UTLA presented no evidence that a Superintendent is routinely involved in site staffing decisions in the District, or that Superintendent Deasy was involved in the decisions in this case. Bartleson's and Corley's testimony over who made the final hiring decisions was credible. Ignangi testified that principals are always vested with the authority to make staff selections at their schools. There is no compelling reason to find that anyone other than Corley was responsible for the selection of employees in the Magnet schools.

As to the issue of animus toward UTLA, the evidence presented by UTLA showing that Superintendent Deasy harbored ill will toward UTLA activists at Crenshaw, albeit primarily if not exclusively directed toward Caputo-Pearl, was persuasive. Grimsby and King were witnesses with no particular interest in the outcome of the case and therefore no obvious motivation to exaggerate. Their testimony regarding Superintendent Deasy's statements regarding the Union and Caputo-Pearl was compelling and believable. Ms. Brown's testimony over Superintendent Deasy's acrimonious exchange with Caputo-Pearl during a faculty meeting was also telling. PERB has recognized that not every expression of frustration or anger by a manager who is the object of employees' criticism is evidence of an unfair practice.

(See *City of Oakland, supra*, PERB Decision No. 2387-M, pp. 24-25, and the cases cited therein.) However, Ms. Brown's account of Superintendent Deasy's reaction to Caputo-Pearl's accusations over his anti-union motivations went beyond just an expression of anger at a personal attack. Superintendent Deasy essentially communicated to Caputo-Pearl and the rest of the teachers present at the faculty meeting that he, as Superintendent, could not be called to task by a teacher or the Union. When the whole record is considered, it is apparent that Superintendent Deasy had animus toward Caputo-Pearl's advocacy on behalf of UTLA and Crenshaw High School employees. The question is whether Superintendent Deasy's union animus can be imputed to Corley as the decision-maker in this matter.

As discussed previously, the Board in *Santa Clara USD* found that administrators' separate reasons for taking action could not be parsed out and since both were agents of the employer and therefore their conduct necessarily inhered to the employer. (*Santa Clara USD, supra*, PERB Decision No. 104 at p. 14.) More recently, the Board set forth a rule for determining when it is appropriate to impute animus from an official of the employer to the decision-maker. In *Regents of the University of California (Los Angeles)* (2008) PERB Decision No. 1995-H (*Regents*), the Board rejected a union's argument, citing NLRB authority, that a supervisor's unlawful motivation is imputable to the employer even if the official who takes the adverse action is unaware of the supervisor's animus. In rejecting the NLRB's approach, the Board stated:

> In *San Bernardino City Unified School District* (2004) PERB Decision No. 1602 (*San Bernardino*), a director of classified personnel removed a substitute teacher from a phone calling system's bank of substitute teachers based on the recommendation of an assistant affirmative action officer, whose investigation revealed that the teacher used physical force on a student. The ALJ's proposed decision in *San Bernardino* would have imputed the director's knowledge of the substitute teacher's union activities

> to the affirmative action officer in the absence of any evidence that the officer was aware of the teacher's protected activity. The Board did not affirm that portion of the proposed decision and specifically found that the imputation of knowledge under those circumstances was not warranted. (*San Bernardino*, at p. 25, fn. 22.) Therefore, under PERB precedent, one individual's experience will not be imputed to another unless it is warranted under the circumstances.

(*Regents*, *supra*, PERB Decision No. 1995-H, p. 13.) The Board concluded in the *Regents* case that since the decision-maker was not aware of the other officials' unlawful motivation and had not consulted with them over the layoff decision at issue, animus could not be imputed to the decision-maker under those circumstances. (*Id*. at pp. 13-14.)

Under the rationale in *Regents*, *supra*, PERB Decision No. 1995-H, Superintendent Deasy's union animus can only be imputed to Corley over Superintendent Deasy's statements of which Corley was aware. There is no evidence that Corley was present for the GCEP meeting where Superintendent Deasy made disparaging statements about Caputo-Pearl being a trouble-maker and the Union being an impediment to progress at Crenshaw High School. Likewise, there is no evidence that Corley was aware of the telephone call between Superintendent Deasy and King where the Superintendent blamed UTLA and its activists for his need to end the GCEP MOU. However, Corley was present during faculty meetings where Caputo-Pearl and Superintendent Deasy exchanged heated words over the Magnet conversion process and the Superintendent's strong reaction to Caputo-Pearl's advocacy in that setting can be reasonably imputed to Corley.

Additionally, some of Corley's own actions may also show union animus. The fact that Corley abruptly ended, without explanation, his practice of regularly meeting with Caputo-Pearl over teachers' employment concerns at Crenshaw High School followed closely by his elimination of the Union's access to the school's public address system shows that he may have

harbored some ill will toward the Union and its representatives. His explanation over why he cut off access to the public address system at the time he did was not particularly plausible. Corley testified to allowing unauthorized after school meetings to take place on campus even though he asserted that was in violation of District policies. It is not clear why the public address policy would require adherence where the other did not. Corley also had a somewhat heated exchange over the Magnet conversion and employment concerns with Caputo-Pearl in a faculty meeting according to the testimony of several Union witnesses. Their specific testimony over that incident is credited over Corley's general assertion that he enjoyed a good relationship with Caputo-Pearl and Ms. Brown's assessment of Corley's generally polite nature.

UTLA also notes that Corley was prone to surveillance of Union activities by video recording employees asking questions during the faculty meeting, and taking notes at press conferences and at a meeting of the Crenshaw Cougar Coalition. In *Lake Tahoe Unified School District* (1999) PERB Decision No. 1361, warning letter, p. 2, the Board cited to the NLRB's stance on unlawful surveillance:

> The National Labor Relations Board (NLRB) has generally found that an employer has engaged in unlawful surveillance when the employer photographs or videotapes employees or openly engages in recordkeeping of employees participating in union activities. (*F.W. Woolworth Co.* (1993) 310 NLRB 1197.) The mere observation of open, public union activity on or near the employer's property, however, does not constitute unlawful surveillance. (*National Steel & Shipbuilding Co.* (1997) 324 NLRB 499.)

Under the above standards, the note-taking at the press conference, being an observation of open, public union activity on the District's property, would not constitute unlawful surveillance. Likewise, the video recording was done in a faculty meeting called by the employer, not in a UTLA meeting. The reasons for the recording were undisputed and

believable. The fact that some employees may have felt uncomfortable asking questions while being recorded at a meeting of the employer does not transform Corley's actions into unlawful surveillance. However, Corley's popping in and taking notes for a few minutes at a meeting of the Crenshaw Cougar Coalition, where employees were speaking out against the Magnet conversion, is questionable. That action would reasonably tend to chill employees' speech and Corley's reasons for doing so were not explained. The fact that he felt the need to record something about that meeting may indicate animus toward union activities.

On whole, there is a sufficient inference of union animus by the District to suggest that it may have been discriminatorily motivated in its selection of staff for the Magnet schools. Even though the evidence suggests the strongest prima facie case as to Caputo-Pearl, since the other 10 employees were also engaged in concerted activities against the Magnet conversion plan and there is a specter of animus against such activities by Corley, I find the Union has met its prima facie burden for all employees still at issue. Thus, under the standard set forth in *FES*, *supra*, 331 NLRB 9, the burden shifts to the District to show that it would not have hired the remaining applicants even in the absence of their union activity or affiliation.

4. Burden Shift

Since the *FES* discriminatory refusal to hire standard employs the *Wright Line* burden shifting analysis that PERB adopted in *Novato*, it is appropriate to analyze the District's burden under the same framework used in the *Novato* retaliation test. (*Novato*, *supra*, PERB Decision No. 210.) Where there is evidence that the respondent's action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal.3d 721, 729-730 (*Martori Bros*.).) The "but for" test is "an

affirmative defense which the respondent must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) As discussed above, in *Palo Verde*, the Board clarified that in order for a respondent to meet its burden, it must show both that it had and acted because of an alternative, non-discriminatory reason. (*Palo Verde*, *supra*, PERB Decision No. 2337, p. 31.)

In assessing the evidence, PERB's task is to determine whether the respondent's "true motivation for taking the adverse action was the employee's protected activity." (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3, citations omitted; see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 23.) Further, PERB "weighs the respondent's justifications for the adverse action against the evidence of the respondent's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 14 (*Baker Valley*).) If PERB determines that a respondent's action was not taken for an unlawful reason, it has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 17.)

a. <u>The District's Defense as to: Cathy Garcia, Meredith Smith, Linh Cao, Kenneth, Maxey, Margot Tiff, Cathy Creasia, Tracy McKinney, Christina Lewis, Chandra Roberts, and Lynn Turner</u>

UTLA urges PERB to find that the District's performance-based reasons for not selecting the above-named employees at issue were pretextual and illegitimate because these teachers had never received formal discipline or negative performance evaluations for the reasons highlighted by Corley during the hearing and he did not formally document his concerns by either note-taking during his observations and/or sharing those concerns with the employees. UTLA also points out a factual dispute between the subject teachers and Corley

regarding the number of times Corley allegedly observed their classes and argues that Corley's testimony was not credible.

As to the latter assertion, in evaluating the credibility of the testimony of witnesses, the ALJ may rely on observational factors, such as, demeanor, manner, and attitude, and non-observational factors, including those specified in Evidence Code section 780. (*Palo Verde*, *supra*, PERB Decision No. 2337, p. 28.) Non-observational credibility factors in Evidence Code section 780 include: the extent of the witness's capacity to perceive, to recollect, or to communicate any matter about which he or she testifies; the existence or non-existence of any fact testified to by the witness; the existence or nonexistence of the witness's bias, interest, or other motive; and a statement made by the witness that is inconsistent with any part of the witness's testimony at the hearing. Based on the above standards, I find no reason to conclude that Corley's testimony was not generally truthful and credible, even though I have made and will make below some adverse rulings against the District. I also find no reason to doubt the veracity of the Union's witnesses on the issue of the frequency of Corley's observations. The factual dispute regarding the number of observations could be explained a number of ways. For example, there is no information in the record showing that any of the subject teachers were in a formal evaluation cycle during the 2012-2013 school year. Accordingly, all of Corley's classroom observations appear to have been informal. It is conceivable that a quick, pop-in visit by Corley may not have made a lasting impression on the teacher under the circumstances. In any event, I do not find that the factual dispute in this regard casts doubt over the truthfulness of Corley's testimony.

As to the argument that Corley's stated reasons for not selecting the above-named teachers were pretextual, I am not persuaded. Corley's explanation for the reason that he was

unable to document every performance concern that was raised in his mind during his busy first year at Crenshaw High School, especially given the massive restructuring that the Magnet conversion planning entailed, was reasonable under the circumstances.[43] Even if Corley's failure to document his stated concerns before he relied on those concerns during his selection process was a poor personnel practice, PERB has found that "numerous instances of poor personnel relations and personnel practices" to be "insufficient evidence to discredit [an] employer's stated motive for the actions[,]" where there was no evidence of the employer's treatment of an employee inconsistent with past practice or of disparate treatment. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H, proposed dec., pp. 48-49.) There was no evidence of disparate treatment or that Corley deviated from past practice regarding the above-named employees, and there is nothing in the record that causes me to believe that Corley did not think the performance concerns that he testified about regarding them were genuine.

In several instances, such as Corley's stated concerns over Garcia (absences), Cao (classroom management), Tiff (stern demeanor toward students and excessive failure rate), Creasia (late/incomplete IEPs, missed IEP meetings, not accompanying Special Education students to General Education classes, and doing personal work during instructional time), McKinney (leaving students unattended and inappropriate grade-level curriculum) Lewis (lack of instructional rigor), and Roberts (tardiness and doing personal work during instructional time), they were corroborated by either Ms. Brown or Frierson, and in some cases by both

[43] In cases like *Baker Valley*, *supra*, PERB Decision No. 1993, the Board has found an employer's failure to document performance concerns that were later relied upon to support the non-reelection of probationary employees to be persuasive evidence that the employer acted for an unlawful reason. I do not find that rationale persuasive under this circumstance, where all positions in the school were being eliminated.

Ms. Brown and Frierson. There is no basis to doubt the testimony of either Ms. Brown or Frierson. To the extent that there were factual disputes between the accounts of the teachers and Ms. Brown and/or Frierson, Ms. Brown's and Frierson's more believable and detailed testimony is credited in each instance over the more general denials by the teachers. Likewise, Corley's testimony over times when he had discussed a particular issue with one of the employees in question was generally more detailed and believable than the employees' general denials that no one had ever addressed the issue with them.

UTLA also presented evidence attempting to show that Corley's performance concerns were baseless and therefore cannot be legitimate business reasons. For example, Garcia explained, very rationally, why she used the book, "Flatlands," in her geometry class. Garcia also explained that all of her absences were ultimately approved by the District. Creasia explained why IEPs can be late for reasons other than teacher error. Tiff explained why she felt justified in conducting tardy sweeps. But PERB's function is not to determine whether the employer's stated reasons for its actions are correct or justified.

In *California State University, Long Beach* (1987) PERB Decision No. 641-H (*CSULB*), the Board noted that there was some evidence of animus toward the union by the supervisor of an employee who had suffered adverse action. However, the record also showed that the supervisor believed, rightly or wrongly, that the employee was a poor worker, would not improve with time, and required more supervision than was necessary. (*Id.* at proposed dec., p. 49.) PERB said its role was not to decide whether the supervisor was justified in his belief that the employee was in fact a "problem employee," but instead to determine the likely basis for the employer's conduct. The Board concluded that the supervisor's beliefs about the employee's work habits, rather than union animosity, was the primary motivator. (*Id.* at

proposed dec., pp. 53-54.) In another case with similar facts to those here, where employees in an entire division of an employer, including many union activists, were forced to apply to continue working for their employer due to a reorganization, the ALJ noted that "[s]ome reasons for the hiring decisions may seem petty or unfair, and some may not have been well communicated to the employees, but they do not appear pretextual." (*Regents of the University of California* (1999) PERB Decision No. 1354-H, proposed dec., p. 59.)

Similarly, in this case, the above-named employees may dispute that Corley was correct in his assessments of their performance, but whether he was correct or not is not the point of PERB's inquiry. As stated above, PERB's role is to suss out the true motivation for the conduct. An employer may take action for a number of incorrect reasons that are not necessarily unlawful. PERB has also recognized that a desire to staff a school with superior employees is within the right of a school district employer. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561, p. 4 (*Bellevue*).) In that case, two probationary employees who had overall satisfactory performance ratings were non-reelected. The two employees at issue had, with all other teachers at their site, participated in a concerted work-to-contract action. The union argued that since their performance was satisfactory, the teachers' non-reelection must have been because of their participation in union activities. Despite prima facie evidence of retaliation, the Board agreed with the ALJ that the employer had met its defense by showing that even though satisfactory, the teachers' performance had not met the employer's standards of superiority. (*Ibid.*) The Board further found that because there was no showing that the two employees were leaders of the teachers' protest or were especially active in the campaign, the union's theory that the employees were targeted as being part of a union stronghold was speculative and unsupported. (*Id.* at pp. 2-3; proposed dec.,

p. 41 ["no evidence of protected conduct that [was] unique to [the discriminates]".)

By all measures, Corley's concerns about the above-named employees appeared to be genuinely held. As discussed above, many of those concerns were corroborated by members of his administrative staff. In other instances, Corley had previously shared some concerns with the employee, as was the case with Smith (student supervision issues when she was Athletic Director), Turner (absences from required school functions, lack of rigor in instruction, and student relationships), Roberts (use of videos and early release of students), and Maxey (unstructured PE program).[44] Thus, rightly or wrongly, Corley had and acted upon non-discriminatory reasons for not selecting the above-named employees. I draw no conclusions on whether he was correct or incorrect in his individual assessments of these teachers. His desire to staff the school with what he viewed to be the best fitting employees for the programs in the new Magnet schools is also in accord with the rationale in *Bellevue, supra*, PERB Decision No. 1561.[45] Also as in *Bellevue*, the above-named employees here

[44] Corley's testimony regarding Turner was unrefuted since she did not testify. As to Maxey, Corley's explanation over why he was not selected to teach PE was really less over any performance concern than it was due to fewer positions being available. Furthermore, the fact that Corley intended to offer Maxey a newly created position and actually allowed him to serve as a football coach in the new Magnets undercuts the theory that Corley harbored animus toward Maxey's UTLA activities.

[45] Likewise, regarding the statements made by Creasia, Lewis, and Roberts that the full inclusion model of Special Education would never work and/or that Special Day students would not be able to perform in that model having influenced Corley's decision not to hire them, PERB has found that the desire to conduct an educational program according to the employer's own judgment, where an employee was opposed to those objectives, provides a non-discriminatory reason for adverse action. (*CSULB, supra*, PERB Decision No. 641-H, proposed dec., pp. 54-55.) Although under EERA an employee has a protected right to voice complaints on educational policy (see *Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 19), the comments here that influenced Corley's decision were teachers' questioning students' ability to perform. Under *Bellevue*, *supra*, PERB Decision No. 1561 and *CSU*, *supra*, PERB Decision No. 1970-H, Corley's desire to staff the school with employees who supported the program in the new Magnets was justified.

participated in roughly the same amount and kind of protected activities that employees who were ultimately selected for Magnet positions—for example, Altuner and Mr. Brown—also participated in. While a discriminatory motive is not disproved by an employer failing to weed out every union adherent in the workplace (see *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 7), in this instance none of the above-named employees played any unique role in UTLA's campaign as compared to employees who were selected for Magnet positions. This provides further evidence that it was likely Corley's stated concerns which motivated his decision not to select the above-named employees for Magnet positions rather than their involvement in Union activities.

For all of the reasons stated above, the District has met its burden regarding the non-selection of Garcia, Smith, Cao, Maxey, Tiff, Creasia, McKinney, Lewis, Roberts, and Turner. The allegations in the complaint regarding those employees are therefore dismissed.

b. The District's Defense as to: Alex Caputo-Pearl

Unlike the employees previously discussed, Caputo-Pearl's role in UTLA's protests over certain aspects of the District's plan for Magnet conversion was unique because of his visible leadership in organizing the press conferences, the tenor of his public comments against the plan, and open criticisms of Superintendent Deasy's union animus. Actions by Corley found here to signal union animus were almost exclusively in reaction to speech or representational activity by Caputo-Pearl. In *Bellevue*, the ALJ distinguished a case relied on by the union, *Livingston Union School District* (1992) PERB Decision No. 965 (*Livingston*). The ALJ in *Bellevue* said about *Livingston*:

> There are some similarities between *Livingston* and this case, but there are also significant differences. The probationary teachers in *Livingston* engaged in several acts of protected conduct that put them directly at odds with the principal. Indeed, the principal

> referred to a faction of the faculty which included the probationary teachers as "bitchers" or "gripers," a district official commended the principal for the way she dealt with the "malcontents," and the principal indicated who the teachers associated with was more important than their performance. In contrast, [the *Bellevue* employees at issue] engaged in no protected conduct, which set them apart from other teachers. All teachers in this case engaged in precisely the same conduct. . . . And there is no evidence of labels attached to [the *Bellevue* employees at issue] such as "bitcher" or "griper."
>
> [¶. . .¶]
>
> Plainly, the circumstances underlying the Board's decision in *Livingston* are different from the record in this matter. While the failure to make the reelection standard absolutely clear may suggest an unlawful motive that leads to a finding that a nonreelection decision is truly pretextual, those circumstances are not present here. Thus, I find that *Livingston* does not compel a finding that the District violated EERA when it decided to nonreelect [the *Bellevue* employees at issue].

(*Bellevue*, *supra*, PERB Decision No. 1561, proposed dec., pp. 48-49.) The Board agreed with and adopted the analysis of the ALJ. (*Id.* at pp. 2-3.)

Like the employees in the *Livingston* case, Caputo-Pearl's actions put him directly at odds with Corley and Superintendent Deasy. (*Livingston*, *supra*, PERB Decision No. 965.) It is conceivable that Corley, having witnessed Superintendent Deasy's tense interactions over the Magnet conversion with Caputo-Pearl would have been influenced by Superintendent Deasy's obvious disdain over Caputo-Pearl's sharply worded advocacy on behalf of teachers. And while Corley seemed to sincerely believe some of his stated reasons for failing to consider Caputo-Pearl for a position in the Magnet schools, such as Corley's criticism of the amount of videos shown by Caputo-Pearl during instruction and the age of the posted student work in his classroom, the one factor Corley labeled as the most "significant" in his decision was highly suspect. Corley admitted that he did not know whether Caputo-Pearl had actually given credit

for students' completion of surveys. He further admitted that he took no steps to verify the truth of the student's comment in this regard and did no investigation. Ms. Brown was familiar with the rumor, but she testified to her belief that it had been resolved by Corley having spoken with Caputo-Pearl about it. Corley admitted that he never even took that basic step. Yet, Corley also gave vague testimony over his intent to initiate discipline against Caputo-Pearl, but was unable to do so because of personal hardship. I find that Corley's intention to discipline Caputo-Pearl over an alleged infraction that he had taken no steps to verify the truth of provides evidence that this reason for Caputo-Pearl's non-selection was pretextual.

Furthermore, Corley's initial testimony over his lack of familiarity with educational programs initiated by Caputo-Pearl at Crenshaw High School was at odds with Corley's later admissions that he had personal familiarity with those programs because he met with Caputo-Pearl and officials from the Ford Foundation and thoroughly discussed them. His testimony in this regard and attempt to bolster the comparative contributions of Mr. Brown with Caputo-Pearl's just did not ring true. I find this as further evidence that Corley's reasons for not selecting Caputo-Pearl were a pretext.

Based on the whole record, it appears that "but for" Caputo-Pearl's UTLA adherence and protected activities, he would have been selected for a teaching position in the Magnet schools. When weighing the evidence of the District's retaliatory motive in Caputo-Pearl's case against its stated reasons for failing to hire him, the evidence tips in favor of finding that an unlawful motivation was the true reason for the District's action. (*Baker Valley*, *supra*, PERB Decision No. 1993, p. 14.) Thus, the District has failed to meet its burden regarding Caputo-Pearl and the allegations in the complaint regarding him are sustained.

All other allegations in the complaint are hereby DISMISSED.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5(c) states:

> The board shall have 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 reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It has been found that the District violated EERA by discriminatorily refusing to hire Caputo-Pearl as a teacher in the Magnet schools. It is therefore appropriate to order the District to cease and desist from retaliating against employees for their union activities. (*Baker Valley*, *supra*, PERB Decision No. 1993, p. 16.) Since Caputo-Pearl was considered as an applicant, but was not hired in the Magnet schools for discriminatory reasons, the appropriate remedy is to order the District to offer Caputo-Pearl the position he applied for in the Magnet schools or, if that position no longer exists, then to offer a substantially similar position. (*CSU*, *supra*, PERB Decision No. 1970-H, proposed dec., p. 28; *Stamford Taxi, Inc.* (2000) 332 NLRB 1372, 1375-1376.) It is also appropriate to order the District to pay Caputo-Pearl back pay for any loss of earnings that resulted as a result of his failure to be hired at the Magnet schools, augmented with interest at a rate of 7 percent per annum. (*CSU*, *supra*, PERB Decision No. 1970-H, proposed dec., p. 28; *Journey Charter School* (2009) PERB Decision No. 1945a, p. 2.)

Finally, it is appropriate to order the District to post a notice incorporating the terms of this order at all locations where notices to unit employees are usually posted. Posting of such a notice, signed by an authorized representative of the District, provides employees with notice that the District acted in an unlawful manner, must cease and desist from its illegal action, and

will comply with the order. In addition to physical posting of paper notices, the notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with employees in the certificated bargaining unit. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 43-45.) It effectuates the purposes of PERB-enforced statutes to inform employees of the resolution of this controversy. (See *Omnitrans* (2010) PERB Decision No. 2143-M, proposed dec., p. 19.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5, subdivisions (a) and (b). The District violated EERA when it refused to hire Alex Caputo-Pearl as a teacher at Crenshaw Magnet High School for a discriminatory reason.

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

A. CEASE AND DESIST FROM:

1. Discriminating against certificated employees because of their union activities.

2. Failing to select Alex Caputo-Pearl for a teaching position at Crenshaw Magnet High School.

3. Interfering with the right of certificated employees to be represented by United Teachers Los Angeles.

4. Interfering with the right of United Teachers Los Angeles to represent its members.

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

1. Within ten (10) work days of the service of a final decision in this matter, offer Alex Caputo-Pearl the teaching position for which he applied at Crenshaw Magnet High School, or if such a position no longer exists, then a substantially similar position. If applicable and at the request of United Teachers Los Angeles, the effective start date of the position may coincide with the end of Mr. Caputo-Pearl's term as United Teachers Los Angeles president.

2. Within ten (10) workdays of a final decision in this matter, make whole Alex Caputo-Pearl for losses which he suffered as a result of the District's refusal to hire him at Crenshaw Magnet High School, including paying him back-pay augmented at an interest rate of 7 percent per annum, from the beginning of the 2013-2014 school year until the date of the offer of the new position, subject to any mitigation.

3. Within ten (10) workdays of a final decision in this matter, post at all work location where notices to certificated employees 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 that this Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its certificated employees.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or to the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on United Teachers Los Angeles.

Right to Appeal

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 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)