STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ALFRED GUTIERREZ, Charging Party, v. STATE OF CALIFORNIA (BOARD OF EQUALIZATION), Respondent.	Case No. SA-CE-1849-S PERB Decision No. 2237-S February 7, 2012

Appearances: Law Firm of Joanne DeLong by Joanne DeLong, Attorney, for Alfred Gutierrez; State of California (Department of Personnel Administration) by Casey C. Tichy, Labor Relations Counsel, for State of California (Board of Equalization).

Before Martinez, Chair; McKeag and Dowdin Calvillo, Members.

DECISION

MARTINEZ, Chair: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by Alfred Gutierrez (Gutierrez) to a PERB administrative law judge's (ALJ) proposed decision (attached) arising out of Gutierrez's unfair practice charge against the State of California (Board of Equalization) (BOE). PERB's Office of the General Counsel issued an unfair practice complaint alleging that the BOE violated the Ralph C. Dills Act (Dills Act or Act)[1] by denying Gutierrez the right to be represented by his employee organization at an investigatory interview, and by taking adverse action against Gutierrez because he sought to prepare a grievance. The complaint alleged that this conduct constituted violations of the Dills Act section 3519(a).

[1] The Dills Act is codified at Government Code section 3512 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

On May 9, 2011, the case was submitted for decision following a formal hearing on January 26, 2011, and the filing of post-hearing briefs. On June 21, 2011, the ALJ issued a proposed decision finding in favor of the BOE. The ALJ concluded that Gutierrez did not establish by a preponderance of the evidence violations of the Dills Act as alleged. Accordingly, the ALJ proposed that the unfair practice complaint and underlying charge be ordered dismissed.

The Board has reviewed the entire record in this matter. Based on this review, the Board finds the proposed decision to be well-reasoned, adequately supported by the evidentiary record and in accordance with the applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself, as supplemented by a discussion of Gutierrez's exceptions.

DISCUSSION

Credibility Determinations

Gutierrez excepts to the ALJ's determination that Gutierrez's supervisor, Steven Hall (Hall), did not threaten a write-up as Gutierrez was preparing a grievance on December 23, 2009. Gutierrez testified that Hall made the threat. Hall testified that he did not. This exception turns on the credibility of the two main witnesses, Gutierrez and Hall. Citing the standards set forth in Evidence Code section 780 for evaluating witness credibility, the ALJ gave specific examples of why Hall's testimony should be credited over the conflicting testimony of Gutierrez.

When the Board considers the record, it is free to draw its own and perhaps contrary inferences from the evidence. It is a well-established principle, however, that the Board will defer to credibility determinations of the administrative law judge absent evidence to support

overturning such conclusions. (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2093-H.)

Gutierrez argues that he was a credible witness for three reasons. Gutierrez argues that he must have been a credible witness given that the ALJ incorporated some of his testimony into the Findings of Fact, such as Gutierrez's classification. Facts like Gutierrez's classification were not, however, in dispute. The ALJ had to decide whom to believe where the testimony of Hall and Gutierrez conflicted, and for the reasons stated above we defer to the judgment of the ALJ. As the trier of fact, the ALJ was present during the questioning and had the opportunity to observe the demeanor and attitude of the witnesses, and the character of their testimony. Gutierrez also argues that his testimony about the alleged threat is corroborated by his rebuttal memorandum of January 19, 2010. Consistency in Gutierrez's account of events does not undermine the ALJ's determination that Hall's account should be credited over Gutierrez's.[2] Gutierrez's final argument on this point is that a supervisor in a different unit never knew Gutierrez to lie to him. That supervisor's testimony in response to the question whether Gutierrez ever lied to him was, "[n]ot that I know of." We do not find this statement to be an adequate basis upon which to overturn the ALJ's credibility determination.

In addition to arguing that Gutierrez was a credible witness, Gutierrez also argues that Hall was not a credible witness, citing what he believes are seven instances in which Hall's testimony was inconsistent or incredulous. Gutierrez made a shorter version of the same

[2] It is also noted that Gutierrez's testimony about the threat does not support his claim. According to Gutierrez, he was not threatened for preparing a grievance, but for being disrespectful and not following instructions when he insisted that he should not be required to leave the work area. Gutierrez admitted that Hall never denied his requests for union time off from work to write a grievance. Hall testified credibly that he had no problem with Gutierrez working on grievances during work hours.

argument to the ALJ in his post-hearing brief. After reviewing the transcript, exhibits and the entire record, we believe the ALJ's credibility determinations are well-reasoned and adequately supported by the record, and find no basis to overturn them.

Respondent's Exhibit No. 2

Respondent's Exhibit No. 2 is a prior notice of adverse action. Gutierrez argues that it is inadmissible hearsay and not properly authenticated. PERB Regulation 32176[3] provides:

> Compliance with the technical rules of evidence applied in the courts shall not be required. . . . Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

Under this regulation, the ALJ was not precluded from admitting into evidence Respondent's Exhibit No. 2. As this exhibit was not in itself the basis for a finding, it is unnecessary to determine whether it would be admissible over objection in civil actions.

In support of his argument that Respondent's Exhibit No. 2 was not properly authenticated, Gutierrez refers to the testimony of Brian Branine (Branine). Branine, however, was called upon to authenticate Respondent's Exhibit No. 3, the decision of the State Personnel Board (SPB), not Respondent's Exhibit No. 2. In the course of making this argument, Gutierrez claims that the ALJ was subject to Branine's improper attempt to bond with her when he referred to the format of the SPB's decision as being the same as it was when the ALJ worked at the SPB. The Board has held that "unless the judge makes statements indicating a clear predisposition against a party, no bias or prejudice is established." (*Gonzales Union High School District* (1985) PERB Decision No. 480.) Not one scintilla of evidence exists showing that the ALJ formed any opinions or conclusions in this matter that were not strictly based on the evidence before her.

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

The Discrimination/Retaliation Claim

Gutierrez excepts to the ALJ's conclusion regarding the nexus element of the prima facie case and the BOE's burden of proof under *Novato Unified School District* (1982) PERB Decision No. 210. Regarding the nexus argument, Gutierrez argues that the proposed decision makes "two concessions," one that timing is a factor and the other that direct evidence of improper motive is not required. These are not concessions, but standards of law. Gutierrez goes on to argue that direct evidence of improper motive exists in Joint Exhibit No. 1, Hall's memorandum to Gutierrez entitled "Disrespectful Behavior." We do not agree that Hall's reference to inappropriate actions taken by Gutierrez "regarding the grievance issue" is direct evidence of any improper motive on Hall's part. As mentioned above, Gutierrez admitted that Hall never denied his requests for union time off from work to prepare grievances. By extracting a short phrase from a single-spaced document, Gutierrez has robbed himself of context and perspective. The memorandum was not prepared in an act of retaliation for writing a grievance but to express management's view that grievances are to be prepared outside the work area.

Regarding the BOE burden issue, Gutierrez excepts to the ALJ's statement that the BOE would have taken the same action even in the absence of protected activity. Gutierrez argues that this statement is pure speculation given the absence of any legitimate basis for the action. The ALJ's analysis of this issue will not be repeated here, but suffice it to say that Gutierrez's insistence on being able to prepare grievances in an open print shop rather than in a quiet and private area arranged for by management, as management had done in the past, provides an adequate basis for the ALJ's conclusion. What precipitated the memorandum was Gutierrez's insistence on doing things his way, and not his action of writing a grievance. Moreover, PERB Regulation 32178 provides that the "charging party shall prove the complaint

by a preponderance of the evidence in order to prevail." We agree with the ALJ that Gutierrez failed to prove the elements of the prima facie case by a preponderance of the evidence. Therefore, notwithstanding the burden shifting analysis performed by the ALJ for the sake of completeness, the burden of proof never shifted to the BOE.

Weingarten[4] Right to Union Representation

Gutierrez excepts to the ALJ's determination that the January 14, 2010, meeting was not a disciplinary interview. As the ALJ explained, PERB adopted the *Weingarten* rule in *Rio Hondo Community College District* (1982) PERB Decision No. 260. In order to establish a violation of this right, the charging party must demonstrate: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (See *Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617; *Fremont Union High School District* (1983) PERB Decision No. 301; see also *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382.)

The issue presented by Gutierrez's exception is whether Gutierrez has proven by a preponderance of the evidence the existence of element (b) above, i.e., an investigatory meeting. The ALJ found that the meeting was short, 10 to 15 minutes in length, that the purpose of the meeting was informative and instructional, and that Gutierrez was not questioned during the meeting. Based upon these factual findings, the ALJ concluded that the meeting was not an investigatory interview. We agree that Gutierrez failed to establish that the meeting was investigatory in purpose, a failure fatal to Gutierrez's case.

[4] In *National Labor Relations Board v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court granted employees the right to representation during disciplinary interviews.

In coming to this conclusion, we are persuaded by the weight of precedent decisions holding that in order to establish a *Weingarten* violation, the nature of the meeting must be investigatory, i.e., a questioning session, interrogation or interview. The United States Supreme Court in *Weingarten* describes the right as the right to have a union representative present at an "investigatory interview." As the Court stated:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors.

(*Weingarten, supra,* 420 U.S. at pp. 262-264.)

Because a meeting with management whose essential purpose is to elicit damaging facts from the employee has the potential to impact the employment relationship, denial of the assistance of the employee organization frustrates the statutory purposes of representation. (*Placer Hills Union School District* (1984) PERB Decision No. 377.) If the meeting's purpose is otherwise, however, such as when the employer simply intends to deliver notice of a disciplinary decision already made, the right does not attach. (*Trustees of the California State University* (2006) PERB Decision No. 1853-H.) But if the employer persists in seeking information to support its potential case for discipline, a violation occurs. (*California State University, Long Beach* (1991) PERB Decision No. 893-H; see also *Baton Rouge Water Works Co.* (1979) 246 NLRB 995 [the full panoply of *Weingarten* protections can become applicable even at a disciplinary interview, however, if the employer engages in investigatory conduct "beyond merely informing the employee of a previously made disciplinary decision"].)

Here, the purpose of the meeting was to review interactions between Hall and Gutierrez that occurred in December 2009, and to provide information and instruction to Gutierrez regarding those interactions. Hall was a participant in those interactions, and there was nothing for him to investigate. Hall did not seek to obtain damaging facts from Gutierrez nor

did he seek an admission of wrongdoing. Hall had already determined what needed to be done and was not seeking to support a case for discipline.

Although the meeting was memorialized in a memorandum given to Gutierrez on January 19, 2010, the memorandum was not placed in Gutierrez's official personnel file and the events memorialized in the memorandum were not being investigated for possible discipline. Regardless of how the memorandum is characterized, no discipline was imposed *as a result of* the meeting of January 14, 2010. Facts used by Hall to support the memorandum were those gathered and observed by Hall during his interactions with Gutierrez in December 2009. This case is best analogized to cases where the meeting between management and the employee is simply to deliver notice of a disciplinary decision already made, although in this case no formal discipline was imposed. (See also *Amoco Chemicals Corp.* (1978) 237 NLRB 394 [counseling sessions for absenteeism conducted with management's assurance that the sessions were not disciplinary meetings and would not be recorded in the employees' personnel files were deemed unprotected by the *Weingarten* rule].) In sum, *Weingarten* seeks to protect against compelled participation in an investigatory interview, not an informational or instructional meeting. As the meeting on January 14, 2010, did not have an investigatory purpose, no *Weingarten* violation occurred.

ORDER

The unfair practice complaint and underlying unfair practice charge in Case No. SA-CE-1849-S is hereby DISMISSED.

Members McKeag and Dowdin Calvillo joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ALFRED GUTIERREZ, Charging Party, v. STATE OF CALIFORNIA (BOARD OF EQUALIZATION), Respondent.	UNFAIR PRACTICE CASE NO. SA-CE-1849-S PROPOSED DECISION (6/21/2011)

Appearances: Joanne DeLong, Attorney, for Alfred Gutierrez; State of California (Department of Personnel Administration) by Casey C. Tichy, Labor Relations Counsel, for State of California (Board of Equalization).

Before Christine A. Bologna, Acting Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges denial of the right to representation during an investigatory interview, and discrimination/retaliation against the employee for preparing a grievance. The employer denies committing any unfair practices.

On January 29, 2010, Alfred Gutierrez (Gutierrez) filed an unfair practice charge (charge) against the State of California (Board of Equalization) (BOE); on May 10, Gutierrez filed an amended charge. On May 26, the Public Employment Relations Board (PERB or Board) Office of the General Counsel issued an unfair practice complaint (complaint) alleging that a bargaining unit employee requested union representation during an investigatory interview over his grievance but representation was denied, and retaliation against the employee when he received a disciplinary memorandum (memo) after seeking to write the

grievance, in violation of Government Code section 3519(a) of the Ralph C. Dills Act (Dills Act).[1]

On June 14, 2010, Respondent BOE answered the complaint, denying all substantive allegations and asserting affirmative defenses. On June 17, 2010, an informal settlement conference was conducted but the dispute was not resolved.

On January 26, 2011, formal hearing was held in Sacramento. On May 9, the case was submitted for decision following receipt of the parties' post-hearing briefs.

FINDINGS OF FACT

Jurisdiction

Respondent BOE admitted that the Department of Personnel Administration is the State employer and the Governor's designated representative under sections 3513(j) and 19815.4(g). It is found that Gutierrez is an employee under section 3513(c). It is also found that BOE is an appointing authority of employees in various bargaining units.

Background

Gutierrez is a Sheetfed Offset Press Operator II in the BOE Printing and Publishing Services Unit and Copy Center (Print Shop),[2] and has worked for BOE since June 1996. He is a union member, and was a shop steward for several years[3] until the end of 2010 or early 2011, the only steward in the BOE Print Shop. Gutierrez also served on the bargaining unit negotiating team five years ago.

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[1] Unless otherwise indicated, all statutory references are to the Government Code. The Dills Act is codified at section 3512 et seq. PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[2] Gutierrez works Monday through Friday from 7:45 a.m. to 4:45 p.m.

[3] Gutierrez testified that he served as a steward for eight to nine years. Steven Hall (Hall), his supervisor, testified that Gutierrez was a steward for five to six years.

Service Employees International Union Local 1000 (SEIU or union) is the exclusive representative for State Bargaining Unit 14 (Printing Trades).[4]

Printing Trades Supervisor II Hall has supervised Gutierrez for 11 years. Hall is a member of the Association of California State Supervisors. When Hall was a unit 14 printer, he was a member of the California State Employees Association (CSEA), before CSEA affiliated with SEIU.

Business Services Officer II Julio DeAnda (DeAnda) manages the BOE Print Shop and Supply Unit. DeAnda supervises Hall, and supervised Warehouse Manager I Richard "Hank" Renner (Renner) until Renner retired at the end of 2010. In DeAnda's absence, Renner supervised Hall.

The BOE Print Shop is a large open production area without partitions or dividers. It contains seven printing presses, bindery equipment, and other machines; when machines are operating, the environment is loud and noisy. There are two desks in cubicles assigned to Hall and the Attendance Coordinator. Printing trades employees obtain work from carts and counters. Any writing is done while employees are standing at the countertops or carts.

On September 22, 2007, Gutierrez and Hall signed a BOE Print Shop Work Expectations memo setting forth general office policy and guidelines. "Office Etiquette and Common Courtesy" of the memo calls for courtesy in all interpersonal contacts, and directs that complaints be made to the immediate supervisor in a constructive manner.

[4] Gutierrez worked with at least seven SEIU representatives during his five to six years as a steward.

Prior Discipline

On May 1, 2009, Gutierrez received a notice of adverse action of 20 working days suspension, effective May 8 through June 8, for insubordination; discourteous treatment toward Hall and another supervisor, manager DeAnda, and two coworkers; willful disobedience; and other on duty failure of good behavior, based on nine incidents from March 2007 to February 2009. He appealed the discipline to the State Personnel Board (SPB). A hearing was held on June 7 and 9, 2010.

On August 26, 2010, the SPB Administrative Law Judge (ALJ) issued a proposed decision that Respondent BOE proved the factual charges by a preponderance of the evidence; the facts established the four legal causes for discipline; and the penalty was appropriate, despite Gutierrez' prior discipline-free work history.[5] On September 8, SPB adopted the proposed decision.

Mediation

In early 2010, SEIU contacted BOE to arrange for mediation between supervisor Hall and Gutierrez to resolve their issues. The mediation was scheduled for March 4 at University of California, Davis. Hall went to the mediation, but neither Gutierrez nor a SEIU representative appeared. Hall met with the mediator for one hour.

Gutierrez testified that he and SEIU initiated the mediation. When the mediator called to schedule it, Gutierrez asked to postpone the mediation until after the SPB hearing. He received no further communications about the mediation. Gutierrez did not seek to reschedule the mediation after the SPB decision.

[5] The SPB ALJ made credibility determinations between the conflicting testimony of Gutierrez and supervisor Hall, finding that the coworkers, the other supervisor, and manager DeAnda corroborated Hall's version. The ALJ also rejected Gutierrez' affirmative defenses of working out-of-class and retaliation for protected union activity.

December 2009 Events

On December 16, 2009, Gutierrez questioned Hall about why a female employee was being trained in another work area. Hall responded that it was the last day of training.

On December 21 or 22, 2009, Gutierrez inquired about the female employee's training on that day, complaining to Hall that it was unfair to the others. Hall responded that the situation was temporary, and it was a management decision. According to Gutierrez, Hall threatened him with a write-up; Hall denied this. Later that day, Gutierrez told Hall that he would file a grievance over the issue, and asked for union time off work to prepare the grievance. Hall granted his request to work on the grievance the next morning.[6]

December 23, 2009 Grievance Preparation

On December 23, 2009, neither Hall nor DeAnda were at work when Gutierrez reported. Gutierrez informed Renner that he would take union time to file a grievance, and asked to use DeAnda's cubicle. Renner offered another vacant cubicle, and also suggested the mailroom or cafeteria. Gutierrez responded that he was kidding about DeAnda's cubicle, and he would prepare the grievance in his own work area. Renner replied that was okay, but he should talk to Hall when his supervisor arrived.

Hall reported at 8:25 a.m. He observed Gutierrez in the work unit, not performing any work. Hall asked Gutierrez what he was doing. Gutierrez responded that he was filing the grievance. Hall replied that Gutierrez could not write the grievance in the unit, and Hall would provide him with a quiet private room to do so. Gutierrez responded that he would not be

[6] Gutierrez' January 19, 2010 rebuttal memo states that the second discussion with Hall about the female employee's training occurred on December 21, 2009, and he requested union time to file the grievance that day. Hall responded that he would get back to him. Gutierrez reminded Hall on December 22 that he had asked for union time to file the grievance, and Hall agreed that he could do so the next morning, December 23. Hall's January 19, 2010 memo asserts that the second discussion and Gutierrez's request for union time to prepare the grievance both occurred on December 22, 2009.

comfortable elsewhere, and should be allowed to prepare the grievance in his work area.[7] According to Gutierrez, Hall threatened him with a letter; Hall denied this. Hall told Gutierrez that he would look into the matter and get back to him, and to resume working until then. That afternoon, Hall told Gutierrez that he could not prepare the grievance in the work area, and had to go to a quiet room to do so.[8] Gutierrez declined the offer, and continued working.

Gutierrez testified that he did not complete or file the grievance because he was intimidated and discouraged by the discussion with Hall, and the prospect of receiving another disciplinary write-up.[9]

Gutierrez admitted that Hall never denied any of his requests for union time to work on grievances.

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[7] Gutierrez testified that he had written one prior grievance, but always prepared draft grievances in his work area. He then met with a SEIU representative outside the work unit to finalize the grievance(s). Gutierrez did not know of any written BOE or other policy that prevented writing a grievance in the work unit, and Hall did not limit where he could write the grievance when he gave permission to prepare it the day before. Hall testified that this was the first time Gutierrez sought to write a grievance in the work area. On three or four prior occasions, he asked for union time to prepare grievances, and Hall found locations outside the work unit: quiet rooms in the lobby, the break room in the mail unit across the hall, and the cafeteria. Gutierrez testified that the noise in the Print Shop did not bother him because his work area was in the farthest corner of the unit; he was not comfortable in the cafeteria because he had gone there before; he did not want to go to the mailroom break room because those employees would question what he was doing there; and the presses and other machines shut down at 4:00 p.m. Hall testified that Gutierrez' work station was three feet from the next work area; he was seated, facing employees who were working, close enough to talk to them. Gutierrez and the employees were not conversing, however.

[8] Hall explained the reasons for not allowing grievances to be prepared in the Print Shop. It was noisy, and lacked privacy and confidentiality. Moving equipment was distracting. Employees could be intimidated if they thought they were being written up. Renner and DeAnda agreed that the Print Shop was not conducive to preparing grievances because of the noise, lack of privacy, disruptions, and interruptions.

[9] Gutierrez filed grievances over the counseling and corrective memos that were the basis for the 20 work days suspension.

January 14, 2010 Request for Representation

At 4:00 p.m. on January 14, 2010, Hall asked Gutierrez to meet with him and DeAnda. Gutierrez brought out his "Dills card," read his rights, and requested union representation. Hall responded that the meeting had nothing to do with adverse action, and they wanted to discuss some information. Gutierrez again asked for union representation. Hall replied that the meeting had nothing to do with discipline.[10]

Hall, DeAnda, and Gutierrez then met in the mail unit break room. Gutierrez testified that the grievance was discussed at the meeting, including what it was about, how long he would take to write it, and where he could write it. Hall testified that the meeting took ten to 15 minutes. Hall informed Gutierrez that he could prepare the grievance on union time, but not in the work area, and asked him to schedule meetings in the future to discuss workplace concerns. Hall did not question Gutierrez during the meeting.

DeAnda testified that the purpose of the meeting was to provide information on where to prepare or write up grievances. DeAnda did not recall what, if anything, he said at the meeting. DeAnda did not recall if Hall asked any questions, or if Gutierrez said anything at the meeting. Gutierrez did not request union representation during the meeting, and DeAnda was not aware that he ever requested union representation.

January 19, 2010 Memos

On January 19, 2010, Hall gave Gutierrez a memo entitled "Disrespectful Behavior" at the end of the workday. The memo documented the January 14, 2010 meeting and discussions, and the incidents of December 22 and 23, 2009. That evening, Gutierrez prepared a rebuttal memo at home. At 9:23 p.m., Gutierrez sent the rebuttal memo to Hall, DeAnda, Renner, a

[10] Hall testified that Gutierrez requested union representation once, and he responded once.

SEIU representative, and the BOE Personnel Management Section as an electronic mail message (e-mail) attachment.

Hall was unable to open the e-mail attachment; he spoke with others copied and they could not open it. Hall testified that he asked Gutierrez two or three times for a hard copy of the rebuttal memo, but one was not provided. Gutierrez testified that Hall did not ask him for a copy of the rebuttal memo or to resend it. He did not try to resend the rebuttal memo to Hall or the others.

Hall's January 19, 2010 memo was not placed in Gutierrez' official BOE personnel file. It is located in Hall's informal supervisory "drop" file.

Credibility Determination

The standards for evaluating witness credibility in Evidence Code section 780 are: demeanor; character of testimony; capacity to perceive, recollect, or communicate; bias, interest, or motive; prior consistent or inconsistent statements; attitude; admissions of untruthfulness; and existence or nonexistence of facts testified to.

This case turns on the conflicting testimony of Gutierrez and his supervisor, Hall. Hall's testimony is credited over the contrary testimony of Gutierrez for the following reasons. First, Gutierrez' testimony is internally inconsistent. His testimony changed about how many years he served as a steward. He prepared one written grievance, but always prepared drafts in his work area. He met with union representatives outside the work unit previously, but now was uncomfortable doing so. Second, Hall's testimony about the reasons for not preparing grievances in the Print Shop was corroborated by DeAnda and Renner. Finally, Gutierrez' testimony that the January 14, 2010 meeting focused on the details of the grievance is not believable, given that he decided not to file the grievance on December 23, 2009, 22 calendar days and 14 work days before the meeting.

Therefore, Hall's denials of threatening to write-up Gutierrez are credited, and it is found that he did not make those threats. Hall's testimony that Gutierrez first sought to prepare a grievance in the Print Shop on December 23, 2009, and that he provided alternative locations on three to four prior occasions, is not controverted. Finally, the reasons for not preparing grievances in the Print Shop are rational, and are credited over Gutierrez' arguments that the alternatives were unsatisfactory.

ISSUES

1. Did BOE deny Gutierrez the right to representation during an investigatory interview on January 14, 2010?

2. Did BOE discriminate or retaliate against Gutierrez by issuing the January 19, 2010 memo after he sought to write a grievance?

CONCLUSIONS OF LAW

Right to Union Representation

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. PERB adopted the *Weingarten*[11] rule in *Rio Hondo Community College District* (1982) PERB Decision No. 260 (*Rio Hondo CCD*). In order to establish a violation of this right, a charging party must demonstrate: (1) the employee requested representation, (2) for an investigatory meeting, (3) which the employee reasonably believed might result in disciplinary action, and (d) the employer denied the request. (*Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617 (*Redwoods CCD*); *San Bernardino County Public Defender* (2009) PERB Decision

[11] In *National Labor Relations Board (NLRB) v. Weingarten* (1975) 420 U.S. 251 (*Weingarten*), the Court granted employees the right to representation during disciplinary interviews.

No. 2058-M; *State of California (Department of Parks and Recreation)* (1990) PERB Decision No. 810-S and 810a-S; *State of California (Department of Forestry)* (1988) PERB Decision No. 690-S; *Fremont Union High School District* (1983) PERB Decision No. 301.)

In *Rio Hondo CCD, supra,* PERB Decision No. 260, the Board cited *Baton Rouge Water Works Company* (1979) 246 NLRB 995, 997, which held that the right to representation applies to a disciplinary interview, whether labeled as investigatory or not, so long as the interview in question is not merely for the purpose of informing the employee that he or she is being disciplined.[12]

> . . . were the employer to inform the employee of a disciplinary action and then seek facts or evidence in support of that action, or to attempt to have the employee admit his alleged wrongdoing or to sign a statement to that effect, or to sign statements relating to such matters as workmen's compensation, . . . the employee's right to union representation would attach. . . .

(See also Morris, *The Developing Labor Law*, 2d ed., pp. 152-153.)

In approving the *Weingarten* rule, the U.S. Supreme Court noted that the NLRB would not apply it to "such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques." (*Weingarten*, quoting *Quality Manufacturing Co.* (1972) 195 NLRB 197, 199; see also *Regents of the University of California* (1983) PERB Decision No. 310-H.)

A meeting with management in which the essential purpose is to elicit incriminating evidence has the potential to impact the employment relationship. In those settings, denial of the assistance of the employee organization frustrates the statutory purposes of representation. (*Placer Hills Union School District* (1984) PERB Decision No. 377 (*Placer Hills*).) If the meeting has another purpose, i.e., when the employer simply intends to deliver notice of a

[12] *University of California (Lawrence Berkeley Laboratory)* (1993) PERB Decision No. 998-H.

disciplinary decision already made, the right to representation does not attach. (*Trustees of the California State University* (2006) PERB Decision No. 1853-H; *State of California (Department of California Highway Patrol)* (1997) PERB Decision No. 1210-S; *State of California (Department of Transportation)* (1994) PERB Decision No. 1049-S.)

A right to union representation may be held to exist, in the absence of an objectively reasonable fear of discipline, only under "highly unusual circumstances." (*Redwoods CCD, supra,* 159 Cal.App.3d 617.) The finding of "highly unusual circumstances" in the *Redwoods CCD* case was based on the requirement that the employee attend a meeting which she no longer sought over her appeal of a negative performance rating; the interview was investigatory and formal; the interview was held by a high-ranking official of the employer; and the hostile attitude of the official toward the employee.

In *Roadway Express, Inc.* (1979) 246 NLRB 1127, the NLRB observed that once an employee makes a valid request for union representation, the employer has a choice of one of three options: (1) grant the request; (2) dispense with or discontinue the interview;[13] or (3) offer the employee the choice of continuing the interview unaccompanied by a union representative or of having no interview at all, and thereby dispensing with any benefits which the interview might have conferred on the employee. The employer, however, may not continue the interview without granting the requested union representation unless the employee "voluntarily agrees to remain unrepresented after having been presented by the employer with the choices" described above, or "is otherwise made aware of these choices." (*U. S. Postal*

[13] The *Weingarten* rule requiring representation is inapplicable if no meeting or interview takes place. (*Los Angeles County Office of Education* (1999) PERB Decision No. 1360; *San Bernardino City Unified School District* (1998) PERB Decision No. 1270; *Placer Hills, supra,* PERB Decision No. 377.)

Service (1979) 241 NLRB 141; *California State University, Long Beach* (1991) PERB Decision No. 893-H.)

Where an employee requests representation which is denied, and assurances are made that no discipline will result, the employer may not subsequently discipline the employee based on statements during the investigatory interview. (*Lake Elsinore Unified School District* (2004) PERB Decision No. 1648.)

Gutierrez' Right to Representation

It is undisputed that on January 14, 2010, Gutierrez requested union representation when he was asked to meet with his supervisor, Hall, and manager, DeAnda. It is uncontroverted that Hall, Gutierrez' supervisor and BOE's agent, denied the request, asserting the meeting had nothing to do with discipline.

The meeting was not an investigatory or disciplinary interview, however. Hall did not question Gutierrez during the brief meeting. It is unclear if Gutierrez said anything substantive in response to Hill's directive that he could prepare grievances on union work time, but not in the work unit. Thus, no inquiries were made about anything which could result in discipline or adverse action. On the basis of this record, the January 14, 2010 meeting was not an investigatory one which Gutierrez reasonably believed might result in disciplinary action.

Furthermore, DeAnda, an independent witness with no credible reason to fabricate testimony to Gutierrez' detriment, corroborated Hall's testimony that the purpose of the meeting was to provide information on where to write up a grievance. Therefore, two of the four elements of the *Weingarten* rule, investigatory meeting and reasonable belief of possible disciplinary action, are absent.

For the same reasons, there were also no "highly unusual circumstances" creating a right to union representation within the meaning of *Redwoods CCD, supra,* 159 Cal.App.3d

617. The meeting was brief and informal, and was conducted by Gutierrez' immediate supervisor.

A violation of the *Weingarten* right to union representation is not established by a preponderance of the evidence.[14]

Discrimination/Retaliation

To demonstrate a violation of Dills Act section 3519(a), a charging party must show that: (1) the employee exercised rights under the Dills Act; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained, or coerced the employees (4) because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*); *State of California (Department of Corrections)* (2006) PERB Decision No. 1826-S (*Corrections*).)

The Board has long recognized that direct proof of motivation is rarely possible, since motivation is a state of mind known only to the actor; thus unlawful motive can be established by circumstantial evidence and inferred from the record as a whole. (*Carlsbad, supra,* PERB Decision No. 89; *Novato, supra,* PERB Decision No. 210.) PERB has therefore developed the

[14] A charging party must prove the allegations of an unfair practice complaint by a preponderance of the evidence. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H; PERB Reg. 32178.) Preponderance of the evidence has been defined by the courts as "evidence that has more convincing force than that opposed to it." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314 (*Glage*).) Preponderance of the evidence is usually defined in terms of the probability of the truth, or such evidence which when weighed against opposing evidence, has the greater probability of truth. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133.) If the evidence is so evenly balanced that one is unable to say that evidence on either side of an issue preponderates, the finding on that issue must be against the party who has the burden of proving it. (*Glage, supra,* 226 Cal.App.3d 314.)

following circumstantial factors showing a "nexus" between the protected activity and the adverse action sufficient to imply unlawful motive.

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento SD*), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected activity. (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S; *Moreland Elementary School District* (1982) PERB Decision No. 227 (*Moreland*).) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S; *Santa Clara Unified School District* (1979) PERB Decision No. 104); (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); (4) the employer's cursory investigation of the employee's misconduct (*Trustees of the California State University* (1990) PERB Decision No. 805-H); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity toward union activists (*Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive (*Novato, supra*, PERB Decision No. 210; *North Sacramento SD, supra*, PERB Decision No. 264).

Evidence of adverse action is also required to support a claim of discrimination or retaliation under the *Novato* standard. (*Novato*, *supra*, PERB Decision No. 210; *Palo Verde Unified School District* (1988) PERB Decision No. 689 (*Palo Verde*).) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Ibid.*) In *Newark Unified School District* (1991) PERB Decision No. 864, the Board further explained:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(Emphasis added; fn. omitted.)

Protected activity is broadly defined. (*Novato*, *supra*, PERB Decision No. 210.) Holding union office, such as a job steward or bargaining team member, is protected activity. (*Central Union High School District* (1983) PERB Decision No. 324; *City & County of San Francisco* (2004) PERB Decision No. 1664-M; *County of Santa Cruz* (2006) PERB Decision No. 1849-M.)[15] An employee's participation in PERB processes and procedures, such as filing unfair practice charges (*Trustees of the California State University* (2008) PERB Decision No. 1970-H; *Los Angeles Community College District* (2004) PERB Decision No. 1667; *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S; *Regents of the University of California* (1999) PERB Decision No. 1314-H; *San Bernardino City Unified School District* (1998) PERB Decision No. 1270; *Healdsburg Union High School District* (1997) PERB Decision No. 1185; *California State Employees*

[15] PERB has also found that merely holding the position of steward or other union office, without evidence that the employee engaged in specific protected acts, is insufficient to constitute protected activity. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H; *Chula Vista Elementary School District* (1997) PERB Decision No. 1232.)

Association (Garcia) (1993) PERB Decision No. 1014-S; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Los Angeles Unified School District* (1992) PERB Decision No. 957; *California State University, Hayward* (1991) PERB Decision No. 869-H; *Riverside Unified School District* (1987) PERB Decision No. 639); testifying at a formal hearing (*Placer Hills, supra,* PERB Decision No. 377; *Regents of the University of California* (1984) PERB Decision No. 403-H; *California State University, Fresno* (1990) PERB Decision No. 845-H; *Fresno County Office of Education* (2004) PERB Decision No. 1674); and participating in an informal settlement conference (*Fullerton Elementary School District* (2004) PERB Decision No. 1671) is protected activity. Preparing, writing, and/or filing a grievance is protected conduct. (*North Sacramento SD, supra,* PERB Decision No. 264; *State of California (Department of Real Estate)* (1983) PERB Decision No. 287-S; *Ravenswood City School District* (1984) PERB Decision No. 469; *Inglewood Unified School District* (1987) PERB Decision No. 624; *Corrections, supra,* PERB Decision No. 1826-S.)

An employer's knowledge of protected activity may be proven by circumstantial evidence. Mere coincidence in time between protected activity and employer conduct does not establish employer knowledge without direct or persuasive circumstantial evidence. It is irrelevant that an employer's agent knew of an employee's protected activity if there is no evidence on which to impute the agent's knowledge to the employer. (*Los Angeles Community College District* (2004) PERB Decision No. 1668; *Moreland, supra*, PERB Decision No. 227; *Regents of the University of California* (1983) PERB Decision No. 319-H.) PERB may impute an employee's knowledge of protected activity to the employer if the employee is directly involved in the adverse action, but if the employee is not involved in issuing the adverse action, his/her knowledge of protected activity cannot be imputed to the employer. (*City of Modesto* (2008) PERB Decision No. 1994-M.)

Gutierrez' Claim

The complaint alleges one protected act by Gutierrez: seeking to write a grievance against his employer.[16] The evidence established that Gutierrez informed Hall that he would file a grievance over the female employee training issue, and asked for union time off work to prepare it. Employer knowledge of protected activity is also present. Hall knew about Gutierrez' intent to file a grievance because he granted Gutierrez union time to work on it. While the January 19, 2010 memo was not placed in Gutierrez' official personnel file, there is no dispute that it was issued and it remains in Hall's informal supervisory file. The January 19 memo constitutes adverse action. (*State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S.)

Timing is present. The January 19, 2010 memo was issued within one month of Gutierrez' stated intent to file the grievance and his request for union time off work to prepare it. The timing of an employer's adverse action cannot alone support a conclusion of unlawful motivation or nexus, however.

Gutierrez has failed to establish a concomitant nexus/improper motive between the adverse action of the January 19, 2010 memo and his single protected activity of filing a grievance.[17] No credible evidence of anti-union animus by Hall was presented. Gutierrez was given union time off work to prepare this and other grievances. The reasons for not preparing grievances in the Print Shop are rational. Credibility determinations have been made in favor of Hall. Gutierrez does not argue disparate treatment, departure from established procedures and standards, or any other factor demonstrating nexus. Thus, Gutierrez failed to establish a

[16] The complaint does not allege protected activity in Gutierrez' request for union representation.

[17] Gutierrez' post-hearing brief argued the elements of interference, but the complaint alleged discrimination/retaliation, not interference.

prima facie case of discrimination/retaliation. Accordingly, the burden of proof is not shifted to Respondent BOE to demonstrate it would have issued the January 19 memo to Gutierrez even in the absence of his protected activity.

Even assuming that Gutierrez had demonstrated a prima facie case of discrimination/retaliation, Respondent BOE established non-discriminatory, legitimate business reasons for issuing the January 19, 2010 memo to him even in the absence of his protected activity. The memo addressed two issues: Gutierrez' protest of the female employee's training and intent to file a grievance over it, and his complaint over not being allowed to write the grievance in the work unit. Gutierrez was granted union time off work to prepare the grievance in non-Print Shop locations where he had previously prepared grievances. He chose not to utilize these alternative sites, and ultimately did not file the grievance.

Respondent BOE established that it would have taken the adverse action of issuing the January 19, 2010 memo to Gutierrez notwithstanding his protected activity and/or in the absence of his protected conduct. Gutierrez' protected activity of expressing an intent to file a grievance and seeking work time to prepare it was not the reason for the adverse action. Accordingly, the unfair practice charge and unfair practice complaint are dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the unfair practice complaint and underlying unfair practice charge in Case No. SA-CE-1849-S, *Alfred Gutierrez v. State of California (Board of Equalization)*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the

Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 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 which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (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 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).)

Christine A. Bologna
Acting Chief Administrative Law Judge