

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



SANTA CLARA FEDERATION OF TEACHERS, )  
LOCAL 2393, AFT, AFL-CIO, )  
Charging Party, )  
v. )  
SANTA CLARA UNIFIED SCHOOL DISTRICT )  
Respondent, )  
and )  
UNITED TEACHERS OF SANTA CLARA, )  
CTA/NEA )  
Intervenor. )

CASE NO. SF-CE-13

PERB Decision No. 104

September 26, 1979

Appearances: Robert J. Bezemek, Attorney (Van Bourg, Allen, Weinberg & Roger) for Santa Clara Federation of Teachers, Local 2393, AFT, AFL-CIO; J. Michael Taggart, Attorney (Paterson & Taggart) for Santa Clara Unified School District; Joseph G. Schumb, Jr., Attorney (La Croix & Schumb) for United Teachers of Santa Clara, CTA/NEA.

Before Gluck, Chairperson; Gonzales and Moore, Members.

PROCEDURAL HISTORY

On May 31, 1977, after conducting an evidentiary hearing in this matter, a PERB hearing officer issued a proposed decision in which he dismissed all unfair practice allegations. The Santa Clara Federation of Teachers, Local 2393, AFT, AFL-CIO (hereafter Federation) filed timely exceptions to this decision. Thereafter, in PERB Decision No. 60 (8/3/78), the Board ordered that the case be remanded to the hearing officer for certain credibility determinations which, in the Board's opinion, were necessary for review. A supplemental proposed

decision was issued by the hearing officer on December 12, 1978, to which the Federation submitted exceptions.

The Board itself, having reached no decision on the merits in its earlier review, issues its decision and order, based on the entire record, as follows.

#### FACTUAL SUMMARY

The Santa Clara Unified School District (hereafter the District or respondent) maintains a staff of approximately 904 certificated employees, of whom approximately 860 are non-managerial employees. In May 1977, when the instant unfair practice charge was filed, no employee organization was certified or recognized as the exclusive representative of these employees although a representation election between the Federation and the United Teachers of Santa Clara, CTA/NEA (hereafter CTA or intervenor) was scheduled.<sup>1</sup>

The Federation charges that the District unlawfully refused to hire Laura Garton. This assertion is based on the following

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<sup>1</sup>The representation election between the Federation and CTA was conducted on October 4, 1977, subsequent to the initial hearing in this case. As a result, CTA was certified as the exclusive representative on October 12, 1977.

The Federation initially alleged that the District unlawfully encouraged support for CTA in anticipation of the election. CTA intervened in the original case. The Federation's exceptions do not address matters pertaining to CTA activity. Therefore, having waived any exceptions to the hearing officer's dismissal of that unfair practice allegation, the issue of CTA preference is not addressed herein.

facts. Garton was first employed by the District as a long-term substitute at Cabrillo Junior High School from September 1974 through the first semester of the 1974-75 school year. She was next employed as a long-term substitute at Wilson Junior High School from December 1975 through the end of the 1976 school year. She was also employed as a summer school teacher at Washington Elementary School during the summer of 1976.

At the end of June 1976, Garton first learned of a possible vacancy in the English Department at Wilson from Washington summer school principal Barbara Jeffers. About two days later, Garton contacted Wilson principal John Cowden and inquired about the possibility of a regular teaching position at Wilson. Cowden told Garton that she would have to have an English minor to qualify for the position but that if she did, there was a good possibility of her getting the job. That same week, Garton enrolled in a three-unit English class at San Jose State University. Upon completion of the course on August 13, 1976, she took her grades to the District office and received an affidavit indicating that she had attained a sufficient number of credits to have an English minor recorded on her teaching credential. This affidavit was registered with the District office.

On August 27, 1976, the Friday before the school session began, Cowden and Garton discussed the vacancy in the English

Department at Wilson and agreed that initially Garton would begin teaching five English classes and one art class at Wilson as a long-term substitute. Cowden indicated that if Garton's performance were satisfactory and if enrollment warranted the continuation of these classes, Garton would have an "inside track" on a permanent position.

After teaching these classes at Wilson for several weeks, Cowden informed Garton that because of student enrollment, the permanent position would involve teaching three English classes and would be a part-time position at about 57 percent of full salary. Cowden advised Garton to consider his offer. In doing so, she made inquiries with the District office concerning the relative insurance benefits of part-time and substitute teachers. Garton also contacted Federation President James Hamm to get his opinion about Cowden's 57 percent salary offer. Hamm told Garton he would look into the matter and on the following day he spoke to Assistant Superintendent Nick Gervase and inquired about the method used by Cowden in computing the 57 percent salary figure that was proposed. Gervase did not understand how the percentage had been determined and agreed to check into the matter.

Garton was contacted by Hamm on Friday afternoon and was advised that it would be more beneficial for her to take the part-time position than to continue working on a substitute basis. Garton testified that on the following Monday morning,

September 27, 1976, she went to see Cowden to discuss the part-time position. Cowden agreed with Garton that the 57 percent figure was incorrect and agreed that 66 percent was accurate.<sup>2</sup> Garton testified that she told Cowden that she had come to the conclusion, based on the advice she had received, that it would be to her benefit to accept the part-time position rather than remain in the substitute position.

Later that same day, Garton went to Cowden's office. On cross examination, Garton testified as follows:

Q. Okay. And what was the first thing you remember that was said?

A. The first thing I remember being said is, asking me, you know, what -- what I was doing going to Jim Hamm, and the next thing I remember is asking or telling me that he'd received a phone call from Mr. Gervase

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<sup>2</sup>Garton testified that she was concerned about the method by which Cowden had computed the salary percentage. She experimented with four different methods of computation. When she spoke to Cowden on Monday morning, she asked him why he had selected one method, which resulted in the 57 percent rate, over other methods, one of which resulted in a 66 percent rate. After showing Cowden her calculations, he agreed that the position warranted the 66 percentage rather than the 57 percentage rate. As noted infra, the facts reveal that the position was advertised at 64 percent of full-time salary rate, but do not indicate why it was 64 rather than 66 percent. After the position was filled, it became a full-time position.

stating that Mr. Hamm had been in the office, and it sounded like there was -- that I wanted to grieve the whole thing.<sup>3</sup>

Her testimony was that Cowden said that he felt he had been stabbed in the back, that she should watch who her friends were as they might not really be her friends at all, that heads were going to roll and his was not going to be one of them, and that if she had any problems she should come and talk to him about them first. At the end of that meeting, Cowden announced that the part-time position would be advertised and filled by competitive procedures. This was the first time that any mention was made of such procedures.<sup>4</sup>

Cowden's testimony comports with Garton's in that after he received the telephone call from Gervase during which Gervase mentioned that Garton had spoken to Hamm about the position, he called Garton to his office and told her of the decision to

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<sup>3</sup>See footnote 8, infra, for a discussion as to the admissibility of Garton's testimony that Cowden told her that Gervase told Cowden that Garton was ready to "grieve the whole thing."

<sup>4</sup>District administrators testified that they did not generally utilize competitive procedures, except that when an involuntary transfer pool existed, vacant positions were announced and open for competition. In this case, however, the record establishes that no such pool existed during September 1976. Therefore, under normal District procedures, this position would not have been advertised.

advertise. Testimony of both administrators reveals that while the decision to advertise the position was announced by Cowden, this decision was generated by Gervase's recommendation. Gervase's testimony, however, was that he decided to utilize competitive procedures in order to secure a more highly qualified person.

A job advertisement for a 64-percent part-time position was subsequently posted in the faculty room at Wilson. Five candidates were considered for the position, including Garton. A screening committee composed of Cowden and two teachers interviewed all applicants. Prior to the interview with the screening panel, Garton met with Gervase. Gervase told Garton that she should bring any problems to him first. He also told her that Cowden would select the candidate to fill the position and that he hoped she would not be discouraged if not selected.

On approximately November 1 or 2, 1976, Garton was informed by Cowden that another person had been selected for the job. Cowden's explanation for recommending Lillian Jurika for the position was that he wanted someone with a stronger academic background and an English major in order to build up the department. The department was at that time composed only of persons not having English majors.

Shortly thereafter, Garton left the substitute position she had occupied prior to the competitive process. The position, filled by Jurika, subsequently became a full-time permanent

position. Garton has continued to substitute throughout the District and, as of the date of the hearing, had substituted at Wilson 10-12 times. Short-term substitute assignments are made through the "substitute desk" at the district offices and are generally made without the school principal's knowledge or involvement.

The following factual circumstances are the basis of the charging party's allegations that the District unilaterally changed the Wilson teaching schedule and unlawfully harrassed William Chapman because of his opposition to the policy on behalf of the Federation. Beginning in the summer of 1974, the school board decided that more emphasis should be placed on basic skills and that elective subjects should be de-emphasized. It also decided that school schedules should be more uniform throughout the District. In the fall of the 1975-76 school year, school principals were directed, consistent with their designated responsibilities, to prepare school schedules for the upcoming school year. Discussions concerning various schedules were initiated at the November 26, 1975, meeting of the Wilson faculty council. At the faculty council meetings in December, January, and February, the schedule was also discussed. Schedule alternatives were eventually narrowed to two: Plan 1, which contemplated a constant outside preparation period during the first period of the day; and Plan 2, which allowed for teachers' preparation

periods to rotate throughout the school day. Cowden indicated in November 1975 that he favored Plan 1 while William Chapman, faculty council president and Federation representative at Wilson school, favored Plan 2. In addition to teacher flexibility in preparation schedules, individual faculty preference for one of the two plans was also influenced by the plans' impact on class size, reduced under Plan 1.

At the March 3, 1976, faculty meeting, after months of discussion about the plans, a faculty vote on the schedule plans was conducted. The vote by secret ballot was 21 to 17 in favor of Plan 2. While the faculty vote was characterized in faculty council meeting minutes as a "vote preference," several faculty members, including Chapman, believed that the vote would be decisive because it came as the culmination of the prolonged period of faculty debate and discussion. After the vote, however, Cowden characterized the election results as the faculty's "recommendation" and indicated that he would announce his decision shortly. Thereafter at the March 10, 1976 faculty meeting, Cowden announced that he had selected the Plan 1 schedule.

The Federation considered filing a grievance under the District's grievance policy. Gervase and another district administrator advised the Federation that the teaching schedule did not violate any grievable District policy. The Federation did not pursue the matter further under the grievance

machinery, nor did it request to negotiate or consult as to the schedule change.

The Plan 1 teaching schedule was eventually implemented at Wilson school at the beginning of the 1976-77 school year. On August 30, 1976, when reporting to Wilson after summer vacation, Chapman testified that he told Cowden that he objected to the requirement that he report to school at 8:10 a.m. for the preparation period and that he could not honor the new teaching schedule. Chapman also testified that Cowden's response to this statement was that Chapman's failure to report on time would result in docking of pay and that he would consider such disregard for the teaching schedule as insubordination. Cowden testified that this conversation with Chapman occurred, but that he had no recollection of having said that he would dock Chapman if he did not show up or that he would have him punch a time clock. Although Chapman had served as Federation representative at Wilson for the past four years and had represented teachers in grievances against the District, the record reveals that Chapman's comment to Cowden on or about August 30, 1976, suggested personal dissatisfaction with the plan adopted and, in this instance, does not support a finding that he was acting in the capacity of Federation spokesperson.

In the three or four weeks after August 30, 1976, Cowden conducted 11 informal observations of Chapman's classes, each

observation lasting a few minutes. Cowden also conducted a formal "sit-down" observation of Chapman for approximately 15-20 minutes during Wilson's "Spirit Week" in late November 1976 during which the students were dressed in costumes and their behavior was "fired up." While the record indicates that formal observations were not normally conducted during that week, Cowden testified that he had informally observed other teachers during Spirit Week. He did not indicate dissatisfaction with Chapman's performance or the atmosphere of his class during Spirit Week.

Chapman, a mathematics teacher at Wilson and a district employee for six years, testified that during prior years he had been observed approximately four or five times per year. The only testimony concerning the number of observations conducted by Cowden of other teachers in the math department was introduced by Federation witness Edward Whitehead and was based on his conversations with these teachers. While admitting to observing Chapman on about 10 or 11 occasions, Cowden testified that, in general, Chapman was not evaluated in a manner different from other teachers.

#### DISCUSSION

In its decision to remand this case to the hearing officer,<sup>5</sup> the Board indicated that, based on the Supreme

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<sup>5</sup>PERB Decision No. 60.

Court decision in Universal Camera Corp. v. NLRB (1951) 340 U.S. 474 [27 LRRM 2373], determinations rendered by the agency's hearing officers based on the observation of witnesses would be upheld and affirmed by this Board unless such findings were "clearly erroneous." In Universal Camera, however, the Supreme Court rejected the "clearly erroneous" standard as it related to the National Labor Relations Board's (hereafter NLRB) review of its administrative law judges' findings. Subsequent decisions of the courts have clearly established that it is within the power of the Board to overrule administrative law judges where their findings conflict with strong inferences raised by the evidence. (NLRB v. Fitzgerald Mills Corp. (2d Cir. 1963) 313 F.2d 260 [52 LRRM 2174] cert. denied, (1963) 313 F.2d 834 [54 LRRM 2312]).

This Board, appropriately taking cognizance of case precedent arising under the National Labor Relations Act (hereafter NLRA) (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]), likewise rejects the "clearly erroneous" standard of review of its hearing officers' findings and thus rectifies its prior misapplication of the rule of law as set forth in Universal Camera, supra. Therefore, while the Board will afford deference to the hearing officer's findings of fact which incorporate credibility determinations, the Board is required to consider the entire record, including the totality of testimony offered, and is free to draw its own and perhaps contrary inferences from the evidence presented.

(NLRB v. Pacific Grinding Wheel Co., Inc. (9th Cir. 1978) 572 F.2d 1343 [98 LRRM 2246]; Penasquitos Village, Inc. v. NLRB (9th Cir. 1977) 565 F.2d 1074 [97 LRRM 2244]; NLRB v. Jackson Maintenance Corp. (2nd Cir. 1960) 283 F.2d 569 [47 LRRM 2054]; Standard Dry Wall Products, Inc. (3rd Cir. 1951) 188 F.2d 362 [27 LRRM 2631]). California administrative caselaw parallels this standard. (Garza v. Workmen's Compensation Appeals Board (1970) 3 C.3d 312 [90 Cal. Rptr. 355, 475 P.2d 451]; Repko v. Carleson (1975) 48 C.A.3d [122 Cal. Rptr. 29]; Rushing v. Workmen's Compensation Appeals Board (1971) 15 C.A.3d 517 [96 Cal. Rptr. 756].)

#### The District's Refusal to Hire Garton

The Federation has alleged<sup>6</sup> that the District's refusal to hire Garton as a regular part-time teacher violated

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<sup>6</sup>The Board takes notice of the fact that the Federation and not Garton is the charging party alleging impropriety of the District's refusal to hire. In so noting, the Board does not find that the Federation's nonexclusive status or Garton's nonmembership in the Federation prevents the Federation from asserting an allegation that the District engaged in conduct deemed to be an unfair practice under the Act since it is not contested that Garton's decision to seek Federation assistance is a protected activity. Moreover, since no party to this action has taken issue with the Federation's standing to pursue this matter before this agency, and because the addition of Garton as a second charging party could easily have cured any such defect, the Board holds that under the particular circumstances of this case, the Federation's status as charging party is appropriate.

section 3543.5(a) of the Educational Employment Relations Act.<sup>7</sup> In dismissing this allegation, the hearing officer distinguished and separately considered the actions and conduct of the District's agents Cowden and Gervase, finding that Cowden acted in order to avoid the further wrath of his superior and that Gervase's conduct was motivated by legitimate educational concerns to select more highly qualified staff.

Both administrators are agents of the District, and therefore their conduct necessarily inheres to the District. Contrary to the hearing officer's analysis, the Board does not view Cowden's and Gervase's refusal to hire Garton as severable actions when considered for purposes of determining the unlawful nature of the District's activity. Rather, the Board will consider facts and incidents compositely and draw inferences

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<sup>7</sup>The Educational Employment Relations Act (hereafter EERA or the Act) is codified at Government Code section 3540, et seq.

Government Code section 3543.5(a) provides:

It shall be unlawful for the public school employer to:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

All section references are to the Government Code unless otherwise noted.

reasonably justified therefrom. (Shattuck Denn Mining Corp. v. NLRB (9th Cir. 1966) 362 F.2d 466 [62 LRRM 2401].)

Therefore, after review of the totality of evidence presented, the Board finds that the District's conduct, subsequent to the Federation involvement on Garton's behalf, compels the conclusion that the District's consideration of such protected activity improperly infected its decision concerning the filling of the vacancy. In so finding, the Board credits the testimony of Garton which establishes that she was told by Cowden that she had an inside track on the position, that on her behalf Hamm contacted Gervase, and that she in fact accepted Cowden's offer at the 66 percent rate. Her testimony further establishes that Gervase informed Cowden of his displeasure with the Federation's inquiries and that Cowden asked Garton to verify Gervase's report that she had gone to see Hamm and told her to seek his assistance first. Then, for the first time, Cowden announced that, contrary to the District's usual practice, competitive procedures would be used to fill the vacancy. The Board is persuaded that the inferences which emerge from this chain of events compels the conclusion that the District acted because of Garton's contact with the Federation.<sup>8</sup> The Board therefore necessarily

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<sup>8</sup>When assessing the Federation's charge that the District's refusal to hire Garton was improperly motivated, the hearing officer failed to properly consider Garton's testimony

rejects the explanations proffered by Cowden and Gervase. To view Cowden's action as a desire to avoid the commotion which resulted from the Federation's involvement, as the hearing officer does, ignores the fact that the EERA serves to make such reliance on an employee organization's support and advice protected activity, resultant commotion notwithstanding. Gervase's otherwise legitimate desire to utilize competitive procedures in order to select a more qualified candidate for the regular position, when viewed in light of the time sequence demonstrated by the facts, is discredited and viewed as pretextual.

#### Separate Violation of Statements

In remanding this case to the hearing officer, the Board noted that, independent of the District's refusal to hire Garton, statements made in connection with that decision had

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that Cowden told her that he had been told by Gervase that she was ready to "grieve the whole thing". Since the truth of Gervase's comment (i.e. that Garton was in fact ready to grieve the matter) was not at issue, it was not offered to prove that fact and is therefore not hearsay. (Cal. Evid. Code, sec. 1200) Garton's testimony that Cowden told her that Gervase had so advised him was offered for the truth of the matter stated; however, pursuant to the California Evidence Code, section 1220, this statement is admissible as an admission of a party to the action. (See Jefferson, California Evidence Benchbook, (1972), section 3.3, p. 59.) Thus, this statement should have been fully considered by the hearing officer because PERB's rule 32176(a) specifically provides that hearsay evidence may be sufficient in itself to support a finding if "it would be admissible over objection in civil actions". (Cal. Admin. Code, tit. 8, sec. 32176(a).)

not been considered as a possible separate violation of section 3543.5(a) of the Act. In this regard, in his Proposed Supplemental Decision, the hearing officer considered Cowden's conversation with Garton on September 27, and Garton's conversation with Gervase prior to her appearance before the screening committee. In both conversations, Garton was instructed to come to these administrators with her problems before seeking Federation assistance. The hearing officer concluded that neither administrator was improperly motivated by a desire to frustrate involvement of the employee organization but was offering advice based on accepted personnel practice.

An otherwise accepted personnel practice cannot be used to obfuscate the means by which District administrators force employees to forego rights guaranteed by the EERA. Having found that the District's refusal to hire Garton was inextricably bound to her decision to seek assistance from the Federation, the substance of the cited conversations which urged that Garton forego such contact prior to seeking solutions to her problems from the District's agents must also be viewed as a violation of the Act. While actual harm is not a prerequisite to finding a violation,<sup>9</sup> in light of the fact that Garton was forced to suffer the adverse consequences of

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<sup>9</sup>See Oceanside-Carlsbad (1/30/79) PERB Decision No. 89.

disobeying the District's directive, the conversations themselves can clearly be viewed as attempts to interfere with Garton's protected right to seek Federation assistance prior to or in lieu of seeking assistance from the District's agents.

The hearing officer further determined that the finding of a separate violation was precluded by the charging party's failure to specifically allege that the conversations constituted an independent violation of section 3543.5(a) of the Act. The hearing officer properly cited two factors, the adequacy of notice and the opportunity to defend, which are appropriate to consider when an unfair practice is not specifically alleged. His conclusion, however, is erroneous on two counts. First, the cases he cites which refer to notice requirements and the opportunity to defend concern factual circumstances where the unalleged violation was distinctly separate from the charged unfair practice.

Second, other factors have been considered by the NLRB when examining unspecified violations. Where, as here, the unalleged violation is intimately related to the subject matter of the complaint, where the communicative acts are a part of the same course of conduct, where the unalleged violation is fully litigated, and where the parties have had the opportunity to examine and be cross-examined on the issue, the NLRB has entertained unalleged violations. (Southwestern Bell Telephone Co. (1978) 237 NLRB No. 19 [99 LRRM 1012]; Holly Manor Nursing

Home (1978) 235 NLRB No. 56 [98 LRRM 1291]; Murcel Mfg. Corp. (1977) 231 NLRB No. 80 [97 LRRM 1537]; Vegas Village Shopping Corp. (1977) 229 NLRB No. 40 [96 LRRM 1551]; Alexander's Restaurant & Lounge (1977) 228 NLRB No. 24 [95 LRRM 1365]; Crown Zellerbach Corp. (1976) 225 NLRB No. 130 [93 LRRM 1030]; Lorenz & Sons, Inc. (1975) 217 NLRB No. 79 [89 LRRM 1457]; Rochester Cadet Cleaners, Inc. (1973) 205 NLRB 773 [84 LRRM 1177]; Monroe Feed Store (1955) 112 NLRB 1336 [36 LRRM 1188].)

The Board finds a separate, though unalleged, violation of section 3543.5(a) based on the facts that the cited conversations with Garton intimately relate to the refusal to hire charge, that these communications were a part of the same course of conduct as the refusal since they were the means used to inform her of Cowden's and Gervase's displeasure with her seeking Federation advice, that the parties examined and cross-examined all witnesses concerning these conversations, and that no factual dispute persists as to the utterance of these statements by Cowden and Gervase.

#### The District's Conduct Toward Chapman

The Board affirms both determinations of the hearing officer dismissing the allegations that Chapman was threatened or harrassed in violation of section 3543.5(a) of the EERA. The Board concludes that Cowden's response to Chapman's refusal to accede to the new preparation schedule, (i.e. that Chapman would be required to punch a time clock or have his pay

docked), was a legitimate response to threatened insubordination. In agreement with the hearing officer, the Board finds that it is unnecessary to reach the issue of whether Chapman's statement was made as a Federation representative because insubordinate conduct of an employee which threatens the employer's ability to maintain order and enforce legitimate rules and policies loses any protected status which may otherwise have attached. (American Tel. & Tel. Co. v. NLRB (2nd Cir. 1975) 521 F.2d 1159 [89 LRRM 3140].)

The Board also affirms the hearing officer's determination that Cowden's observations of Chapman's teaching techniques did not constitute unlawful harrassment. While the record indicates that the number of observations of Chapman may have been unusual, Cowden's assertion that he followed normal procedures in evaluating Chapman was not refuted by persuasive evidence to the contrary. Moreover, the record as a whole is barren of any evidence which links Cowden's evaluation activities to Chapman's role as an outspoken Federation opponent of the preparation schedule adopted by the District. To the contrary, Chapman's threatened insubordination could reasonably have caused Cowden to temporarily adopt a somewhat more frequent observation schedule than used in the past. Therefore, unlike the Board's determination with regard to the pretextual nature of the explanation of Cowden and Gervase offered as a basis for their refusal to hire Garton, no

compelling inference of unlawful conduct arises from the facts admitted into evidence.

#### Adoption of the Teaching Schedule

The Federation alleges that the District's teaching and preparation schedule change was improperly motivated by a desire to discriminate against the Federation, to harrass its membership, to adversely influence district employees in the upcoming representation election, and to discourage Federation membership. In support of this contention, the Federation urges that since Federation membership was highest at Wilson school, it was viewed as the Federation "stronghold." Therefore, the charging party asserts, since the Federation opposed the scheduling change, the District's adoption of the policy change caused members of the bargaining unit to view the Federation as ineffective. Evidence does not support the Federation's allegations that these factors caused or resulted from the District's schedule change. The record fails to refute the District's assertion that the schedule change was made in response to academic concerns of the school board. Thus, other than the fact that Chapman was a Federation representative and a critic of the adopted plan, there is no evidence that the Federation, as a contender in the upcoming election, took a position in opposition to the teaching schedule change or that Federation members at Wilson School as a group opposed the plan. Since the Federation did not act as

an opponent of the plan, it is untenable to conclude that the District's adoption of the plan was improperly motivated or that the District's proffered explanation was pretextual. Thus, the record fails to demonstrate that the teaching schedule as adopted resulted in or tended to result in any harm to employee rights granted by the EERA. (Oceanside-Carlsbad, supra.) The Board therefore affirms the hearing officer's conclusion that subsections (a) and (b) of section 3543.5<sup>10</sup> were not violated by the District's adoption of the teaching schedule plan.

The Federation also charges that the District violated subsections (b) and (c) of section 3543.5<sup>11</sup> of the Act by failing to meet and negotiate with the Federation prior to adoption of the changed teaching schedule. The Federation charges that the District violated section 3543.5(b) by failing to meet and consult with the charging party prior to adoption

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<sup>10</sup>Section 3543.5(b) of the Act states:

It shall be unlawful for a public school employer to:

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

<sup>11</sup>Section 3543.5(c) of the Act states:

It shall be unlawful for a public school employer to:

• • •  
(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

of the schedule. Assuming for the sake of discussion, as did the hearing officer, that the teaching schedule is within the scope of representation as set forth in section 3543.2 of the Act,<sup>12</sup> the District's obligation to meet and negotiate clearly does not inhere to the Federation. As was stipulated by the parties, the Federation was not the exclusive representative of the District's certificated bargaining unit employees

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<sup>12</sup>Section 3543.2 of the Act provides:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by section 53200, leave and transfer policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to section 3546, and procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

and, therefore, section 3543.3 of the Act<sup>13</sup> imposed no obligation on the District to engage in negotiations over the scheduling policy.

By oral amendment, the Federation charged that based on section 3543.1(a) of the Act,<sup>14</sup> a nonexclusive employee organization has, in connection with its right to represent its

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<sup>13</sup>The employer's obligation to meet and negotiate with the exclusive representative is set forth in section 3548.3 of the Act as follows:

A public school employer or such representatives as it may designate who may, but need not be, subject to either certification requirements or requirements for classified employees set forth in the Education Code, shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives of appropriate units upon request with regard to matters within the scope of representation.

<sup>14</sup>Section 3543.1(a) states:

Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

members, the right to meet and consult with the District on subjects which are within the scope of representation. We are in agreement with the hearing officer's conclusion that it is unnecessary to determine whether section 3543.1(a) of the Act includes this right to meet and consult. The record reveals no evidence that the Federation ever requested to meet and consult on the teaching schedule. This is true even though the Federation had ample notice of the change<sup>15</sup> and had ample opportunity to submit such a request.<sup>16</sup> The failure of the Federation to provide evidence that it ever requested to meet and consult obviates our consideration of the question whether or not section 3543.1(a) confers on nonexclusive representatives the right to meet and consult, the Federation's oral amendment notwithstanding. Therefore, without deciding this issue, the Board credits the hearing officer's decision that the Federation, by failing to make a request to meet and consult, waived any such right that a nonexclusive employee organization might derive from section 3543.1(a) of the EERA.

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<sup>15</sup>The faculty council was advised by the District as early as November 1975.

<sup>16</sup>The Board has considered Chapman's testimony that he made inquiries concerning the possibility of filing a grievance over the scheduling change under the District's grievance procedure, but that, based on the District's assertion that the matter was not grievable, this possibility was not pursued. Assuming the Federation so relied, the Board will not construe a request to grieve or even a grievance as a request to meet and consult with the District.

## REMEDY

Section 3541.5(c) of the EERA sets forth the Board's remedial authority in unfair practice cases. It provides:

(c) 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 the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

This section is similar to section 10(c) of the NLRA and, therefore, in fashioning the appropriate relief, the Board takes cognizance of applicable NLRB precedent. (Fire Fighters Union, supra.)

In the instant case, the Board finds that the District violated section 3543.5(a) by refusing to hire Laura Garton because of the exercise of her rights guaranteed by the EERA. The remedy set forth is "designed to restore, so far as possible, the status quo which would have obtained but for the wrongful act." (NLRB v. Rutter-Rex Mfg. Co., Inc. (1969) 396 U.S. 258 [24 L.Ed.2d 405, 72 LRRM 2881] reh. den. 397 U.S. 929 [25 L.Ed.2d 109].) Therefore, to fully compensate Garton and to place her in the position she would have had but for the District's actions, it is appropriate to order that she be offered the teaching position she was denied at the Wilson school or the next available position which is equivalent thereto. This relief is consistent with remedial orders of other state public employment relations boards and commissions

involving reinstatement of wrongfully discharged or transferred public employees. (City of Boston (MA 1978) 5 MLC 1558; City of Elizabeth (NJ 1979) 5 NJPER 10048; Freeport Union Free School District (NY 1979) 12 PERB 3038; City of Green Bay Board of Education v. Wisconsin Employment Relations Commission (1976) 92 LRRM 3170.) Garton is entitled to employment as a full-time rather than part-time teacher, because the position she was wrongfully denied became a full-time position by virtue of increased District enrollment, and the Board's authority to fully compensate Garton must reflect all benefits she would have accrued but for the violation. (Condenser Corp. of America (1940) 22 NLRB 347 [6 LRRM 203], modified on another point and enforced (3rd Cir. 1942) 128 F.2d 67 [10 LRRM 483]; Underwood Machinery Co. (1951) 95 NLRB 1386 [28 LRRM 1447], injunction denied on another point (1st Cir. 1952) 198 F.2d 93 [30 LRRM 2398]; City of Elizabeth, supra.)

Garton is also entitled to a back pay award which shall compensate her for that amount she would have earned had she been employed by the District in the permanent position, including the period during which the position was full-time. (Reeths Puffer School District (MI 1979) MERC LO-1979, Vol. XIV, p. 37; City of Elizabeth, supra.) Consistent with NLRB precedent, this amount shall include interest on the award (Isis Plumbing & Heating Co. (1962) 138 NLRB 716 [51 LRRM 1122]; Reserve Supply Corp. v. NLRB (2d Cir. 1963) 317 F.2d 785

[53 LRRM 2374]) in the amount of 7 percent per annum.<sup>17</sup> This amount will be offset by any earnings received by Garton during the period beginning on or about November 1, 1976, the date Garton relinquished the substitute position to Jurika, until such time that the District offers Garton the position so ordered herein. Deduction of Garton's interim earnings is in accordance with NLRB practice. (Big Three Industries, Inc. (1975) 219 NLRB No. 159 [90 LRRM 1147].)

Having found that the District separately violated section 3543.5(a) by virtue of Cowden's and Gervase's conversations with Garton, the District is ordered to cease and desist from such conduct.

Finally, in order to effectuate the purposes of the EERA, the District is instructed to post a copy of this order thereby informing employees of the disposition of the charges and announcing its readiness to comply with the ordered remedy. (Pennsylvania Greyhound Lines, Inc. (1935) 1 NLRB 1 [1 LRRM 303] enfd. (1938) 303 U.S. 261 [2 LRRM 599]; NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].)

#### ORDER

Upon the foregoing decision, conclusions of law and the entire record in this case, the Public Employment Relations

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<sup>17</sup>The California Constitution, article XV, section 1, prescribes a rate of interest at 7 percent per annum. Also see Florida Steel Corp. (1977) 231 NLRB No. 117 [96 LRRM 1070].

Board hereby ORDERS that the Santa Clara Unified School District and its representatives shall:

1. Cease and desist from in any manner restraining, discriminating against, or otherwise interfering with the rights of employees because of the exercise of their right to seek advice and assistance from an employee organization.

2. Take the following affirmative action which is necessary to effectuate the policies of the Educational Employment Relations Act:

- a) Offer Laura Garton immediate employment in the position unlawfully denied her or the next available equivalent position at the Wilson Elementary School or another school within the District;
- b) Tender to Laura Garton a back payment award which reflects an amount equal to that which she would have been paid absent the District's refusal to hire beginning on or about November 1, 1976 until the present, this total amount to be offset by Garton's earning as a result of other employment during this period, and with payment of interest at 7 percent per annum of the net amount due;
- c) Post at all school sites, and all other work locations where notices to employees customarily are placed, immediately upon receipt thereof, copies of the notice attached as an appendix hereto. Such posting shall be maintained for a period of 30 consecutive workdays from receipt thereof. Reasonable steps should be taken to insure that said notices are not altered, defaced or covered by any other material; and
- d) Notify the San Francisco Regional Director of the Public Employment Relations Board, in writing, within 20 workdays from the date of

this Decision, of the action taken by the District to comply herewith.

3. It is further ORDERED that the alleged violations of section 3543.5(a), (b) and (c) which refer to the teaching schedule policy and the rights of William Chapman are hereby DISMISSED.

This ORDER shall become effective immediately upon service of a true copy thereof on the Santa Clara Unified School District.

By: Barbara D. Moore, Member

Harry Gluck, Chairperson

Dr. Raymond J. Gonzales' dissent and concurrence begins on page 33.

APPENDIX: Notice

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

After a hearing in which all parties had the right to participate, it has been determined that the Santa Clara Unified School District violated the Educational Employment Relations Act by refusing to hire an employee in a part-time regular teaching position because of the exercise of rights guaranteed by the EERA. As a result of this conduct, we have been ordered by the Public Employment Relations Board to post this notice. We will abide by the following:

- (a) Cease and desist from imposing or threatening to impose reprisals on employees, discriminating or threatening to discriminate against employees, or otherwise interfering with, restraining or coercing employees because of their exercise of rights guaranteed by the Educational Employment Relations Act.
- (b) Offer Laura Garton the position or a position equivalent to the one for which the District wrongfully refused to hire Garton.
- (c) Grant full relief to Garton by issuing a back pay award, with appropriate amounts offset, for the employment compensation she would have received but was denied her because of the District's unlawful practice.

APPENDIX: Notice

SANTA CLARA UNIFIED SCHOOL DISTRICT

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By: Superintendent

Dated: \_\_\_\_\_

This is an official notice. It must remain posted for 30 consecutive workdays from the date of posting and must not be de- faced, altered or covered by any material.

Raymond J. Gonzales, dissenting in part and concurring in part:

My colleagues find the Santa Clara Unified School District (hereafter District) to have violated section 3543.5(a) of the Educational Employment Relations Act (hereafter EERA) in that it discriminated against and interfered with the exercise of rights by Laura Garton regarding her efforts to acquire a teaching position with the District. Upon review of the entire record, I am essentially persuaded by the hearing officer's analysis of the facts and law pertaining to the charge of discrimination leveled at the District by the Santa Clara Federation of Teachers, Local 2393, AFT, AFL-CIO (hereafter Federation). Similarly, I could not find the District to have committed an independent violation of section 3543.5(a) on the grounds of interference. I discuss my views on these issues below; regarding other determinations appealed by the Federation to the Board, I concur with my colleagues that neither the District's conduct toward William Chapman nor the adoption of a new teaching schedule constituted violations of the law.

#### Discrimination

The discrimination issue is principally factual: Did the District intend to discriminate against Garton for purposes of hiring because she sought advice and assistance from James Hamm, the Federation president, regarding a part-time position she had been offered by a District principal? An

important policy consideration in resolving this issue regards the weight the Board will accord a hearing officer's credibility findings.

In this regard I note that the procedural history of this case demonstrates that the Board itself acknowledged the wisdom of the hearing officer. Over a year ago, we remanded the case to the hearing officer for credibility findings to resolve the conflicting testimony about the District's intent. Ten months ago, the hearing officer responded with findings favorable to the District. The majority now proceeds to resolve the case contrary to the findings of the hearing officer. If the credibility findings were necessary to resolve the case, we must be compelled to find in favor of the District. On the other hand, if the Federation's case is so strong that it can prevail even in the face of adverse credibility findings, what excuse do we have for imposing upon the parties a wholly superfluous year's delay in resolving this case. The Board's prior handling of this case impeaches its decision today. In a case such as this, where some of the critical facts are susceptible of varying interpretation and where the evidence is directly conflicting, it seems to me that the hearing officer's role as a first-hand observer is most crucial. The hearing officer has provided the Board with the benefit of his observations of the witnesses with the result that his findings have been rejected.

In so rejecting his findings, the majority describes and relies principally upon a "chain of events" in concluding that the District acted unlawfully:

1. Garton was told by John Cowden, the principal of Wilson Intermediate School, that she would have "an inside track" on a permanent teaching position there by assuming a temporary substitute position at his school upon commencement of the school year.
2. Hamm contacted Nick Gervase, the District's Assistant Superintendent, Personnel Services, on Garton's behalf, questioning the reasoning behind her being offered a 57% part-time position.
3. After Hamm's meeting with Gervase, the latter called Cowden informing him "of his displeasure with the Federation's inquiries," additionally indicating that it sounded like Garton "wanted to grieve the whole thing."
4. Cowden asked Garton to "verify" Gervase's report that she had gone to see Hamm.
5. Cowden told Garton to seek his assistance first.
6. Finally, Cowden informed Garton that competitive procedures would be used in filling the vacancy at his school, a procedure which the record reveals is not typical district practice.

Painted so broadly it is understandable how the majority can find its way to a conclusion of unlawful motivation by the District. But, in my view, the recitation of events relied on by my colleagues is misleading. First, although, they claim to have reviewed the total evidence, close scrutiny of the record suggests that they have chosen their facts most selectively. Second, I believe the majority has mischaracterized certain portions of the record which I will elaborate upon below. Finally, because certain significant aspects of the evidence are susceptible of differing interpretations, I believe the hearing officer's first-hand observation of the witnesses in this case is more reliable than the Board's gloss of the sterile record.

Unlike my colleagues, I would focus upon evidence relevant to Gervase's actions to determine the element of unlawful intent on the District's part notwithstanding certain evidence introduced regarding Cowden's conduct; it was Gervase's, not Cowden's, decision to institute a competitive process to fill the vacancy at Wilson Intermediate School, thus overruling Cowden's initial offer to Garton of a part-time position. Further, while the record indicates that Gervase left it up to Cowden to make a final decision on filling the vacancy subsequent to the screening panel interviews, it also clearly indicates that Gervase would be overseeing the process and ready to intervene if necessary. Gervase's ultimate approval

of Cowden's choice is clearly suggested by the fact that the committee's recommendation to hire Lillian Jurika was made to Gervase. If Cowden possessed complete autonomy in this area, a recommendation to Gervase would have been a meaningless act. Finally, the fact that the ultimately selected candidate, Lillian Jurika, was a unanimous choice of the screening panel (which included a Federation member) and that her credentials were plainly superior to Garton's<sup>1</sup> in my view, left Cowden with little choice as to whom to pick for the position.

Focusing then upon Gervase's activities, the strongest key evidence that might impute to the District ill-motive is (1) Garton's testimony to the effect that Gervase told Cowden that Hamm had met with him, Gervase, regarding Garton's 57% part-time position, (2) Garton's testimony to the effect that Gervase told Cowden that it appeared as if Garton were ready to file a grievance, and (3) Gervase's decision to advertise the vacancy at Wilson Intermediate School.

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<sup>1</sup>Juricka's qualifications for the position in the English Department included a master's degree in English, seven years of English instruction, and authorship of remedial reading programs. In contrast, Garton, a 1974 graduate, was a fine arts major with a newly-acquired minor in English. Her teaching experience prior to assuming a temporary substitute position during the 1976 fall semester consisted of occasional instruction in general music, beginning typing, art, sports recreation, and drama.

Garton's testimony that Gervase informed Cowden of Hamm's having met with him on the topic of Garton's part-time position is well-corroborated. It is a most essential fact for the Federation's case. The majority, however, mischaracterizes this aspect of the case. Its opinion describes Garton's testimony as being that "Gervase . . . informed Cowden of his displeasure with the Federation's inquiries."<sup>2</sup> Rather, the substance of Gervase's conversation with Cowden as testified to by Garton is as follows:

Q. Okay. And what was the first thing you remember that was said?

A. The first thing I remember being said is, asking me, you know, what -- what I was doing going to Jim Hamm, and the next thing I remember is asking or telling me that he'd received a phone call from Mr. Gervase stating that Mr. Hamm had been in the office, and it sounded like there was -- that I wanted to grieve the whole thing.

There is absolutely nothing in Garton's testimony that Gervase ever expressed his displeasure with Hamm's inquiries much less the "Federation's" inquiries. In fact, other testimony in the record would seem to suggest, at most, that Gervase's concern was with the awkwardness of the schedule that had been arranged for Garton's part-time position.

Cowden testified:

Q. (By Mr. Taggart) The meeting that you had around the 1st of October with Linda Garton, what was the purpose of the meeting?

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<sup>2</sup>Maj. Opn. at 15.

He was explaining what the purpose of the meeting was.

MR. BEZEMEK: I'm sorry.

THE WITNESS: Laura Garton. The purpose -- I received a call from Nick Gervase, and he expressed the fact that Laura had been to see him, contacted him in some way, and that she was concerned about the schedule that was proposed for the job opening, and it was a very awkward schedule, there's no question about it, but it was a job.

.....

Hamm testified:

Q. Did you investigate the situation in any way?

A. Yes, I did.

Q. Could you tell us, please what you did?

A. I went to the personnel man, Mr. Gervase, and asked him about --

.....

THE WITNESS: -- and asked him how you could come up with a 57 percent position without leaving your class in the middle of a period, and he didn't understand that either. He said that he would look into it, and that 57 didn't appear right to him, and that -- we talked a little bit longer on various other things, and at that point I left, and I assume that he called the principal of Wilson School, Mr. Cowden, after that.

In view of the above, together with (1) the absence of any evidence that Gervase viewed Hamm's meeting with him as a Federation activity, (2) Cowden's testimony indicating that he did not perceive Garton's activities as AFT-related, and (3) the entirely cordial nature of Hamm's visit with Gervase as

described above by Hamm himself, I find the majority's conclusion that Gervase expressed displeasure with the Federation's inquiries as a faulty effort to intuit a scenario consistent with their conclusion but unsupported by the facts.

I agree with my colleagues that Garton's testimony regarding the filing of a grievance is admissible hearsay evidence consistent with Evidence Code sections 1220<sup>3</sup> and 1222(a)<sup>4</sup> as an admission of a party. Its significance, however, is arguable. It may be that Gervase's statement was made as a purely factual matter. My colleagues, however, prefer to view such statement as intimation of reprisal by way of discrimination on Gervase's part. Yet, there is nothing in the record to indicate his temperament at the time he made this

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<sup>3</sup>Evidence Code section 1220 provides:

Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

<sup>4</sup>Evidence Code section 1221 provides:

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:

- (a) The statement was made by a person authorized by the party to make a statement or statements for him concerning the subject matter of the statement; . . . .

ambiguous statement to Cowden.<sup>5</sup> Further, nothing in the hearing officer's supplemental proposed decision in which he was asked by the Board to make credibility findings based partially on his observation of the demeanor of the witnesses, suggests that Gervase would have made such a statement with an inference of reprisal attached. Without more, I cannot ascribe to Garton's testimony on this point any great probative value. I view the evidence as relevant but inconclusive.

Regarding Gervase's decision to advertise in the absence of an involuntary transfer pool, admittedly an unusual District practice, such evidence would appear to impute to the District highly questionable motives. But in view of the fact that prior to Jurika's hiring, all members of the English department possessed only English minors (some only declared minors), that the testimony of some English department staff indicated little interest on their part in being in the English department, and that Garton lacked any substantial background in the area of English, I think Gervase's explanation of a desire to upgrade

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<sup>5</sup>In his supplemental proposed decision, the hearing officer refers to "Mr. Cowden's alleged statement tht Mr. Gervase sounded angry." The hearing officer errs in reading the testimony of Garton as to what Cowden relayed to Garton concerning his telephone conversation with Gervase of September 27, 1976. The record does not reflect any statement to the effect that Gervase was angry when he spoke with Cowden.

the staff, therefore necessitating a competitive selection process, is entirely credible.

In sum, then, I am satisfied that the District did not intend to discriminate against Garton in violation of section 3543.5(a). The sole piece of evidence that remained unrefuted by the District and that lends itself to an inference of wrongdoing on the District's part is Garton's testimony relating Gervase's telephone conversation with Cowden to the effect that she was ready to grieve the entire matter. And while as matter of evidentiary law it is unnecessary to supplement or explain Garton's hearsay testimony by direct evidence for reasons noted above, I would be hardpressed to find that this shred of evidence which results in mere inference satisfies the Federation's burden of proving by a preponderance of the evidence that the District did intend to discriminate against Garton because of her seeking Hamm's assistance.

If tested on appeal, where the court is required to apply the substantial evidence rule,<sup>6</sup> it appears to me that the majority's resolution of the issue would be viewed as an application of the isolation theory, contrary to most recent

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<sup>6</sup>Government Code section 3542(b) provides in pertinent part that the "findings of the board on questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive."

case law. Garza v. Workmen's Comp.App.Bd. (1970) 3 Cal.3d 312, 317; Le Vesque v. Workmen's Comp. (1970) 1 Cal.3d 627, 638-39, fn.22. Under earlier application of the substantial evidence rule, an administrative agency decision would be sustained on judicial review if supported by any evidence. Today, the test of substantiality is measured on the basis of the entire record rather than upon isolated evidence which supports an agency finding. Thus, one cannot ignore those facts which rebut or explain evidence which would otherwise support the agency finding.<sup>7</sup>

In the final analysis, the majority was well-advised to gloss over Jurika's qualifications because addition of those facts would demonstrate the fictional nature of the majority's resolution of conflicting evidence. Wilson Intermediate School had a serious deficiency in its English department in that it lacked teachers especially trained in English. Garton possessed none of the qualities necessary to fill this void. What the District did was to conform to appropriate procedures in filling the vacancy by a competitive process. The wisdom of this procedure is demonstrated by the fact that the successful

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<sup>7</sup>See Netterville, the Substantial Evidence Rule in California Administrative Law (1956) 8 Stan. L. Rev. 563. for a discussion on pre-Levesque application of the substantial evidence rule.

candidate had precisely the background needed to strengthen the department.

Perhaps most troublesome is the implication of the majority's opinion that mere participation in organizational activities or invocation of organizational grievance mechanism can put a person in a better position than he or she is entitled to. It may well be that had Garton herself gone to Gervase rather than Hamm going, Gervase would have still ordered a competitive process to ensue, the mere significance of either's visit putting Gervase on notice of the need to upgrade the English Department at Wilson Intermediate School. In a nutshell, however, the majority opinion appears to be saying that if there are two applicants for a position, one having minimal qualifications but a history of organizational activities and the other with superior qualifications but no history of organizational activities, the person with a history of organizational activities is entitled to a preference if for no other reason than to avoid a potential unfair practice charge based on the slightest pretense. That is precisely the result wrought by the majority in this case. It cannot fail to be noticed by those whom we regulate, who can be expected to behave accordingly. This Board has not been ordained to inflict such mischief on the public school systems of this state.

## Interference

The majority has gratuitously found the District to have committed a separate violation of section 3543.5(a).<sup>8</sup> They refer to conversations of a similar nature that both Cowden and Gervase had with Garton to the effect that in the event of any problems, she should approach them first before seeking Federation assistance. The majority states:

Having found that the District's refusal to hire Garton was inextricably bound to her decision to seek assistance from the Federation, the substance of the cited conversations which urged that Garton forego some contact prior to seeking solutions to her problems from the District's agents must also be viewed as a violation of the Act.<sup>9</sup>

I must disagree with my colleagues.

First, the argument relied on by the Board was not initiated by the Federation, and the evidence arguably supporting such a finding is most sparing. Under the circumstances, I believe it only proper and fair that the Board should afford the parties an opportunity for new briefing.

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<sup>8</sup>The only issue raised by the Federation as a separate violation of section 3543.5(a) concerned alleged statements by Cowden which the Federation claims constituted unlawful threats. The Federation curiously raised this issue on appeal, never having filed it in its initial charge. The statements specifically referred to by the Federation in its accompanying brief on appeal were Cowden's caution to Garton "that she should 'watch out who her friends were' and that 'heads would roll.'"

<sup>9</sup>Maj. Opn. at 8.

Second, the facts, leastwise with respect to Cowden, are at total variance with such a finding. Garton's testimony refutes the claim that Cowden "instructed" her that she should come to him first. On cross-examination, she testified:

Q. Okay. Did he ever make a statement to you not to talk to Jim Hamm at that -- at the meeting that we're talking about right now?

A. Okay, I can't say that he said that name specifically either.

Q. All right. Didn't Mr. Cowden say to you that the reason that he was upset was that you went to Jim Hamm or the organizations, that he wanted you to come to him first if you had any problems?

A. I'm sorry, I don't remember him saying that. I remember Mr. Gervase saying that.

Similarly, Cowden's testimony would suggest his concern purely from a supervisorial standpoint that she approach him regarding any problems, not that he intended to interfere with her right to seek organizational assistance. Quoting from the transcript, I note Cowden's testimony:

Q. Did you state to her that you didn't want her going and talking with Jim Hamm?

A. No, I told her that I would appreciate it if she talked to me first.

Q. Why did you state that to her?

A. Because I like to know of any problems with my staff first. If my staff has any kind of a problem at all, I'd like to know about it before they take it anyplace else.

Q. The fact that she did -- well, strike that. Did you have any concern that she went and talked to Nick Gervase first?

- A. Yes.
- Q. Do you feel that she should have come and talked to you before she talked to Nick Gervase?
- A. Absolutely.
- Q. Do you know if she talked to anybody else other than Mr. Gervase and Mr. Hamm?
- A. I don't know. I think she mentioned she talked to several people. I think she talked to somebody in the District Office here on insurance or something of this nature. She mentioned several people that she talked to.
- Q. Did it upset you that she talked to some other people in the District Office concerning this problem?
- A. I don't think I was upset. I was concerned about it.
- Q. Concerned?
- A. Yes.
- Q. What was your concern?
- A. My concern was that she should have come to me first.
- Q. Did it have anything to do with her activities, if any, with the AFT?
- A. I wasn't aware she had any activities with AFT. (Emphasis added).

Gervase's statement to Garton that she should see him before going elsewhere is verified by the record, although its import is relatively undeveloped by any testimony. While I am puzzled by the fact that Garton sought to talk to Gervase prior to her testifying in this case as a result of Gervase's statement, I cannot, on this evidence alone, view Gervase'e

statement as a District directive nor am I willing to impute to the District ill-motive because of its utterance.

Finally, I believe the Board's holding to be ill-advised in terms of appropriately constituted personnel practices. It discourages the resolution of issues on an informal basis, making it seemingly necessary for employee organizational involvement prior to discussion between the actually affected parties.

~~Raymond J. Gonzales~~ member



discriminatorily denied permanent employment by the Santa Clara Unified School District (hereafter District) in violation of Government Code section 3543.5(a) and (b).<sup>1</sup> The following additional proposed findings supplement the original decision and should be read in conjunction therewith.

#### SUPPLEMENTAL FINDINGS OF FACT

##### A. Credibility Determinations.

In late August 1976, when Laura Garton began teaching as a long-term substitute at Wilson School, Mr. Cowden, the principal, testified that he told Ms. Garton that she would have an "inside track" on the job if it became permanent. Ms. Garton testified that Mr. Cowden indicated that "if things worked out" after teaching English for a couple of weeks (she had not taught English before), he didn't see anything which would "hinder" her from getting the permanent position.

In the hearing officer's opinion, the two versions of this conversation are essentially consistent and discrepancies result solely from the passage of six months' time between the events in question and the hearing.

After about two to three weeks of teaching, Ms. Garton met Mr. Cowden in the hallway between classes and he asked if she was ready to have Assistant Superintendent Gervase evaluate her. This indicates that from the beginning, Mr. Gervase intended to participate in the hiring for the permanent position.

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<sup>1</sup>All statutory references are to the Government Code.

On Tuesday of the next week, September 21, 1976, Mr. Cowden told Ms. Garton that the permanent position would be a 57 percent part-time position. Although this occurred about three weeks after classes began, Mr. Cowden testified that he made this decision about six weeks after the beginning of classes. The hearsay statement made shortly thereafter to Ms. Garton by Mary Mabrey, Mr. Gervase's secretary, to the effect that Ms. Garton "was the one that was going to be over at Wilson" lends some support to Ms. Garton's recollection of the date of the decision concerning the part-time position (Cal. Admin. Code, tit. 8, sec. 32176(a)).

In general, Ms. Garton's testimony as to the dates that pertinent events occurred was more accurate and specific than was Mr. Cowden's. This was due to the fact that she kept a diary calendar at home containing this information and had notes of the pertinent dates with her while testifying. Mr. Cowden had no such aid and his recollection of dates was more hazy. In the hearing officer's opinion, this was due to the passage of time between the events in question and the time of the hearing and, by itself, does not indicate that Mr. Cowden's testimony is otherwise inaccurate or fabricated. Further, the discrepancies in dates do not appear to be relevant to resolution of the discrimination charge.

Turning next to the afternoon meeting on September 27, 1978, between Mr. Cowden and Ms. Garton (Mr. Cowden placed this meeting as around October 1, again an insignificant

discrepancy), Ms. Garton testified that Mr. Cowden was angry, while Mr. Cowden denied raising his voice or being angry. The hearing officer credits Ms. Garton in this respect because from his testimony and demeanor at the hearing, Mr. Cowden impressed the hearing officer as a person who might lose his temper when he felt that his authority was being undermined. Further, William Chapman similarly testified that when he told Mr. Cowden he would not observe the 8:10 a.m. school starting time, Mr. Cowden also became angry. In this latter instance, while not directly admitting to anger, Mr. Cowden impliedly admitted it by his answer that "I guess I made my point."

Similarly, the remainder of Ms. Garton's version of the September 27 afternoon meeting also is credited, although in general substance, Ms. Garton's and Mr. Cowden's versions agree.

For example, Mr. Cowden confirmed that in his telephone conversation with Mr. Gervase, the latter mentioned that Ms. Garton had seen James Hamm (the Federation president) and others concerning the part-time job. This is generally consistent with Ms. Garton's testimony. Although she could not remember the first thing Mr. Cowden said at the meeting, the first thing she did recall was his asking her why she had been to see Mr. Hamm about the part-time position. However, Mr. Cowden left out or denied details related to his anger, such as whether he made the comment that "heads were going to roll." In the hearing officer's opinion, on the stand Mr. Cowden tried to hide his loss of temper only, and was not untruthful in the remainder of his testimony.

It is found that Mr. Cowden was angry because Ms. Garton created a commotion over the part-time position, resulting in what Mr. Cowden described as an angry phone call from Mr. Gervase, his superior, and which Mr. Cowden apparently viewed as threatening to his position in the District. He must have been somewhat anxious since as Ms. Garton testified, he told her that "four or five heads. . .were going to roll this year, and his wasn't going to be one of them." (Emphasis added.)

In the hearing officer's opinion, Mr. Cowden's above-described apprehension was the reason why he became angry that Ms. Garton had seen Mr. Hamm and others, and not because Mr. Hamm was the Federation president. This also explains why he was concerned that Ms. Garton had not tried to work out her problems with him rather than complain to others. Mr. Cowden's other remarks during this meeting, such as his comment that Mr. Gervase said that it looked like Ms. Garton wanted to "grieve the whole thing," are similarly explained.

At this September 27 meeting, Ms. Garton was informed by Mr. Cowden that the part-time position would be advertised and she would have to compete for it. Both Mr. Gervase and Mr. Cowden testified that Mr. Gervase made the decision to advertise the position. It is true that the actual written job request form, requesting that the position be advertised, originated with Mr. Cowden. Mr. Gervase gave final approval. In view of Mr. Cowden's and Mr. Gervase's uncontradicted testimony it is found that although Mr. Cowden originated the written request for advertising the job, he did so upon Mr. Gervase's orders. This may further explain why Mr. Cowden was upset that Ms. Garton had involved Mr. Hamm and others--the

net result was that Mr. Gervase became more involved and removed much of Mr. Cowden's autonomy in filling the position. Also, Mr. Gervase's desire to see applicants better qualified in English than Ms. Garton raises the implication that he was dissatisfied with the quality of Mr. Cowden's previous English department selections, a further possible reason for Mr. Cowden's discomfort.

Based on the fact that Mr. Gervase decided to advertise the position, in the original proposed decision it was determined to focus on Mr. Gervase's motivation and actions.

As found in the original proposed decision, Mr. Gervase decided to advertise the part-time position for legitimate reasons unrelated to Ms. Garton's organizational activities. Furthermore, the only evidence concerning Mr. Gervase's alleged statement to Mr. Cowden in their September 27 telephone conversation, to the effect that it looked like Ms. Garton was ready "to grieve the whole thing," came from Ms. Garton's account of what Mr. Cowden said Mr. Gervase said. Neither Mr. Gervase nor Mr. Cowden were asked about this statement. The same is true with respect to Mr. Cowden's alleged statement that Mr. Gervase sounded angry. Only Ms. Garton testified to this. Thus, Ms. Garton's testimony on these two points is hearsay and no finding of discrimination based on this evidence alone can be made.<sup>2</sup> ( Cal. Admin. Code, tit. 8, sec. 32176(a)).

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<sup>2</sup>If Mr. Cowden had testified as to the first statement in issue, there would be no hearsay problem since the fact that Mr. Gervase said it, and not whether or not it was true, is the important consideration bearing on the question of discriminatory motivation on Mr. Gervase's part. See, Jefferson, California Evidence Benchbook (1972) sec. 1.6, pp. 24-7, sec. 14.1, pp. 165-71.

Thus, the only direct evidence of possible discriminatory motivation on the part of Mr. Gervase was that before he communicated the decision to Mr. Cowden that he wanted the position to be advertised, he mentioned that Mr. Hamm, the Federation president, had been to see him on behalf of Ms. Garton. The hearsay evidence may be used only to "supplement or explain" this direct evidence. (Cal. Admin. Code, tit. 8, sec. 32176(a)).

Considered as a whole, the hearing officer declines to draw an inference that Mr. Gervase acted with discriminatory motivation. He mentioned not only Mr. Hamm, but also that Ms. Garton had seen others as well. Rather than discrimination, these facts, standing alone, equally would support a finding that Mr. Gervase's anger, if any, was directed at Mr. Cowden for having allowed the matter to mushroom into such a big issue instead of Mr. Cowden quietly handling it himself. This also would explain Mr. Cowden's concern that Ms. Garton should have tried to work it out with him first.

When coupled with the evidence tending to show legitimate justification for Mr. Gervase's actions, as well as the fact that Ms. Garton apparently experienced no discrimination with respect to her subsequent substitute teaching at Wilson and other schools in the District, it is found that the Federation has failed to sustain its burden of proving that Ms. Garton was not hired for the part-time position in violation of section 3543.5(a) or (b).

B. The conversations between Garton and Cowden and Garton and Gervase as independent violations of Government Code section 3543.5(a).

If in their respective meetings with Ms. Garton, either Mr. Cowden or Mr. Gervase attempted to intimidate or coerce Ms. Garton respecting her contact with the Federation, there might be independent violations of section 3543.5(a).

Taking first the September 27 meeting with Mr. Cowden in which Ms. Garton was told that the part-time position would be advertised, it is noted that Ms. Garton testified that Mr. Cowden did not mention the Federation nor did he tell her not to talk to Mr. Hamm in the future.

Turning next to Ms. Garton's meeting with Mr. Gervase prior to her appearance before the screening committee for the part-time position, Ms. Garton testified that Mr. Gervase told her that it was Mr. Cowden's decision as to who would be hired, not to be disappointed if not selected, and that she should come to see him first if she had any problems. There is no evidence that Mr. Hamm or the Federation was mentioned.

Ms. Garton did not testify that she was intimidated in either of these two meetings, or that they inhibited her in any way in her future contacts with the Federation. The only fact that could possibly be construed as evidence of intimidation is that before testifying at this unfair practice hearing concerning the alleged discrimination against her, Ms. Garton requested to see Mr. Gervase and asked him if there would be any "black marks" against her if she testified. She said that

one of the reasons she talked to Mr. Gervase was because he previously told her to come to him first if she had any problems. This might be construed as indicating that she was afraid to talk to Mr. Hamm or other Federation officers because Mr. Gervase had told her to talk to him first. Mr. Cowden also told her to come to him with her problems.

In the hearing officer's opinion, there is insufficient evidence to suggest that Mr. Gervase's and Mr. Cowden's requests to Ms. Garton that she come to them first were motivated by discrimination rather than accepted personnel practice. Therefore, no independent violations of section 3543.5(a) are found.

Furthermore, neither the unfair practice charge nor the "particularized statement of charge" includes allegations that these two meetings constituted independent violations of section 3543.5(a). This theory is not argued in the charging party's post-hearing briefs nor is any remedy requested with respect to these meetings. Charging party's case with respect to Ms. Garton was confined to arguing that she was discriminatorily denied the permanent, part-time position at Wilson School. Under the circumstances, it is found that the District did not have adequate notice or opportunity to defend on this theory. See American Motors Corp. (1974) 214 NLRB 455, n.2 [87 LRRM 1399]; Hadbar, Division of Pur O Sil, Inc. (1974) 211 NLRB 333 [86 LRRM 1437]; Kingwood Mining Co. (1974) 210 NLRB 844 [86 LRRM 1203].

Pursuant to PERB Decision No. 60 (8/3/78), a party may file

a statement of exceptions and supporting brief within twenty (20) calendar days following the date of service of this Supplemental Proposed Decision. See Calif. Admin. Code, tit. 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Executive Assistant to the Board at the Headquarters Office in Sacramento before the close of business (5:00 p.m.) on January 2, 1979, in order to be timely filed. See Cal. Admin. Code, tit. 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, sections 32300 and 32305 (as amended).

Dated: December 12, 1978

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Gerald A. Becker  
Hearing Officer