

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



OPAL L. HERRIN,

Charging Party,

v.

LEMOORE UNION HIGH SCHOOL DISTRICT,

Respondent.

Case No. S-CE-390

PERB Decision No. 271

December 28, 1982

AVENAL-LEMOORE FEDERATION OF TEACHERS,
LOCAL 3219,

Charging Party,

v.

LEMOORE UNION HIGH SCHOOL DISTRICT,

Respondent.

Case No. S-CE-391

Appearances; Janet K. King, Attorney for Opal L. Herrin and Avenal-Lemoore Federation of Teachers, Local 3219; Robert A. Galgani, Attorney (Breon, Galgani, Godino & O'Donnell) for the Lemoore Union High School District.

Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

GLUCK, Chairperson: Opal L. Herrin and the Avenal-Lemoore Federation of Teachers, Local 3219 (Association) except to a hearing officer's proposed remedy in a decision which found that the Lemoore Union High School District (District) violated

subsection 3543.5(a) of the Educational Employment Relations Act (EERA).¹

The charging parties had each filed charges alleging that Herrin had been denied numerous promotions over the past several years because she had been a union activist. The charges were consolidated, and the hearing officer found that the District violated the Act by not giving her proper consideration for the appointment to vice-principal. He declined to find that she would have received the position but for her union activity. He dismissed all other allegations.

The hearing officer ordered that the District reopen the selection process for vice-principal and give full and fair consideration to Herrin and all other candidates for the position, without regard to their organizational activities.

Herrin and the Association claim that this remedy is not adequate because it will not restore the status quo or

1The EERA is codified at Government Code section 3540 et seq. All references will be to the Government Code unless otherwise indicated.

Subsection 3543.5(a) provides:

It shall be unlawful for a public school employee 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.

effectuate the purposes of EERA. They argue that Herrin will not be protected against continued discrimination since the District is not precluded from using the same selection panel which rejected her nor from giving the incumbent credit for the experience he gained as vice-principal.

The District filed no exceptions.

The Board finds the attached hearing officer's findings of fact free from prejudicial error and adopts them as its own.

DISCUSSION

In providing an effective remedy, two uncontested findings are germane: 1) the District did not unlawfully deny Herrin an appointment; and 2) the District did unlawfully deny her the opportunity to compete for such appointment on a fair and equal basis. Because there has been no finding of an unlawful deprivation of the job itself, as opposed to the loss of the opportunity to seek it, a remedy of back pay and placement in a comparable job is inappropriate. There is no evidence that had she been given a fair opportunity, she would have been appointed.

On the other hand, the unlawful denial of the opportunity to compete for the job demands that a nondiscriminatory opportunity now be made available. The hearing officer's remedy seeks to recognize these distinctions, but fails to accommodate specific areas of legitimate concern. We therefore modify the remedy to require: first, any new competition must,

to the extent possible, reconstruct the conditions that were present when the interviews for the position of vice-principal were originally held. This includes the requirement that the new interviews must be structured in form and content to eliminate any advantage to the incumbent by virtue of his period of incumbency. Second, the interviewing panel must not be tainted by the unlawful animus which the hearing officer found to permeate the original selection process. Third, the selection of a vice-principal for the Lemoore High School should be scheduled to permit appointment effective at the beginning of the next school year.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is hereby ORDERED that the Lemoore Union High School District and its representatives shall:

A. CEASE AND DESIST FROM:

Discriminating against Opal L. Herrin when considering her for promotion or other appointments because of the exercise of her rights guaranteed by the Educational Employment Relations Act.

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

1. Reopen the selection process for the vice-principal position at Lemoore High School and give

Opal L. Herrin and other candidates a full and fair opportunity to be appointed prior to the start of the next school year by not considering protected organizational activities; structuring interviews to eliminate any advantage to the incumbent by virtue of his period of incumbency; and assuring that interview panels are not tainted by the unlawful animus that was found to exist in the original selection process.

2. Within seven (7) workdays following the date of service of this Decision, post at all work locations where notices to employees customarily are placed, copies of the Notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that such notices are not reduced in size, defaced, altered or covered by any other material.

3. Within forty-five (45) workdays following service of this Decision, notify the regional director of the Public Employment Relations Board in writing of what steps the employer has taken to comply with the terms of this Decision. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on charging parties herein.

The Board further ORDERS that all other allegations in the charges are hereby DISMISSED.

Members Jaeger and Morgenstern joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case Nos. S-CE-390 and S-CE-391, Opal L. Herrin v. Lemoore Union High School District and the Avenal-Lemoore Federation of Teachers, Local 3219 v. Lemoore Union High School District, in which all parties had the right to participate, it has been found that the Lemoore Union High School District violated the Educational Employment Relations Act, Government Code subsection 3543.5(a) by discriminating against Opal L. Herrin because of her participation in union activities by not properly considering her for appointment to vice-principal.

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

We will:

A. CEASE AND DESIST FROM:

Discriminating against Opal L. Herrin when considering her for promotion or other appointments because of the exercise of rights guaranteed by the Educational Employment Relations Act .

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

Reopen the selection process for the vice-principal position at Lemoore High School and give Opal L. Herrin and other candidates a full and fair opportunity to be appointed prior to the start of the next school year by not considering the protected organizational activities; by structuring interviews to eliminate any advantage of the incumbent by virtue of his period of incumbency; and using interview panels not tainted by the unlawful animus that was found to exist in the original selection process.

LEMOORE UNION HIGH SCHOOL DISTRICT

Dated: _____ By: _____
Authorized Representative

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



OPAL L. HERRIN,)	
Charging Party,)	Case No. S-CE-390
v.)	
LEMOORE UNION HIGH SCHOOL DISTRICT,)	
Respondent.)	
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AVENAL-LEMOORE FEDERATION OF TEACHERS,)	
LOCAL 3219,)	
Charging Party,)	Case No. S-CE-391
v.)	PROPOSED DECISION
LEMOORE UNION HIGH SCHOOL DISTRICT,)	(10/26/81)
Respondent.)	
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Appearances: Janet King, Attorney for Opal L. Herrin and Avenal-Lemoore Federation of Teachers, Local 3219; Robert A. Galgani, Attorney, Breon, Galgani & Godino, for the Lemoore Union High School District.

Before Gary M. Gallery, Hearing Officer.

PROCEDURAL HISTORY

In this case, a high school teacher contends she was denied promotional opportunities because of her union activities.

On December 31, 1980, Opal L. Herrin (hereafter Herrin) and the Avenal-Lemoore Federation of Teachers, Local 3219, (hereafter Federation) each filed an unfair practice charge

against the Lemoore Union High School District. Both charges alleged violations of Government Code sections 3543, 3543.5(a) and 3543.6 (b) by denying Herrin job promotions because she is a member of the union executive board and had assisted in negotiations with the District. On January 21, 1981, a "correction" was filed on both charges deleting reference to Section 3543.6 (b). Timely answers and motions to dismiss were filed by the District and the two unfair practice charges were consolidated. An informal conference was held, without success, and the formal hearing was held on April 6, 7, 8 and 9, 1981 at Lemoore, California. Submission of brief was completed and the matter submitted on July 14, 1981.

FINDINGS OF FACT

The Lemoore Union High School District (hereafter District) is an employer, and the Federation an exclusive representative within the meaning of the Educational Employment Relations Act (hereafter EERA).¹

The Federation became the exclusive representative as a result of an election held in November of 1976. Initial negotiations in early 1977 were protracted and without success. The Federation requested, on June 3, 1977, that PERB establish that impasse exist. Thereafter, on August 18, 1977,

¹Government Code section 3540 et. seq. All references are to the Government Code, unless otherwise stated.

following extensive mediation, PERB determined that factfinding was appropriate.² Around this time some teachers engaged in picketing at a board of trustees meeting. Herrin participated in that activity.

In late August, 1977, the teachers had a special meeting to discuss, with invited members of the public, the status of their negotiating efforts with the District. Herrin spoke to the group. Among her comments, she made the statement "that we were working with five nice individuals as board members but collectively they were not hearing us." She went on to say that she "made one statement that was never quite finished and came out a little bit differently than I had planned for it to, but as it stated it's true that I would leave tomorrow if I could, and did not finish explaining the 'if I could'."

On August 25, 1977, an article in the Lemoore Advance, a local newspaper quoted extensively from Herrins' remarks at the special meeting.

A paid advertisement in the Hanford Sentinel, a local newspaper, dated September 6, 1977, by the "We for Education

²These facts do not appear in the record. However, an administrative agency may take official notice of its records. Anderson v. Board of Dental Examiners (1915) 27 Cal.App.336, 338 [149 P. 1006, 1007] California Administrative Agency Practice (Cont. Ed Bar 1970) Hearing Procedures, section 3.34, page 167. These facts appear in the Sacramento Regional Office file.

Through Board Action Committee," took exception to the teachers position in the negotiations. Included with the ad was the following:

In the August 25th "Lemoore Advance" one very vocal teacher made it quite clear she was being mistreated and would quit tomorrow "if I could." Let's explore this teacher. First of all what does "if I could" mean? It would seem obvious that she cannot find a job better than the one she now has! This same person only a few years ago asked the Board for leave of absence to run for political office. This was granted and her aspirations rejected by the public vote. She then went back to the now "unfair" Board and retained her employment. Teardrop, teardrop.

Herrin testified, without refutation, that Gary and Bill Miguel, sons of Board member Ed Miguel, were members of the committee and had signed one of the ads.

A public meeting of the Board, on September 8, 1977, was held, ostensibly, to give the public an opportunity to ask questions of the Board on bargaining positions. Stan Hawk, then Board president, announced at the beginning of the meeting that certain ground rules would govern the meeting. The Board president and the president of the Federation were each given 15 minutes to present their views on the controversy. Thereafter, speakers were allowed three minutes. No teachers or their spouses would be allowed to speak to the Board. Persons desiring to speak would give their names to Neil Nordstrom, then District superintendent, who would draw names

from a box. Hawk also announced that the Board would not answer any questions that evening but would put out an information sheet later in response to questions that were asked. The meeting became chaotic. Speakers would speak without obtaining recognition from the chairman. Others, given recognition, would be shouted down by members of the crowd. The names of two of his sons were drawn and Miguel testified of the great hurt he felt when one was booed down and could not finish his speech.³ Hawk then declared the public meeting terminated and the Board went into executive session for further business that evening.

Miguel testified that as he entered the meeting room before starting time, as was his usual practice, he saw several teachers, including Herrin, in a group just outside the meeting room. He further testified that while he did not see her shouting during the meeting, he knew she was part of the group that was doing it.

In addition to the description of chaos by the various witnesses, newspaper articles termed the meeting "tragic" and "ending in shambles." Later, the Hanford Sentinel carried an editorial criticizing the Board for the conduct of the hearing.

³He went home, Miguel said, and with his wife, cried over the event.

At an election of trustees held in November of 1979, Gene Martin and Donald Delaney, were elected as new members. The resignation of a third incumbent member led to the board appointment of Vincent Pittarelli. The two elected trustees assumed their office on December 13, 1979. Pittarelli began one week earlier. All three testified that they ran for the school board because of need for new blood or because they believed there was a lack of communication between the administration and staff.

The Board, during December, decided by a 3 to 2 vote with all the new members in the majority, not to renew Nordstroms' contract as superintendent. He resigned on December 13, 1979. For the next few meetings of the Board, Allen Gilkey, then assistant superintendent, became acting superintendent until July 1, 1980, when he was appointed permanent superintendent.

Gilkey served as assistant superintendent from 1970 until he was appointed acting superintendent.

Against this background, Opal Herrin sought appointment to various administrative positions.

Herrins Qualifications

Herrin has been a business education teacher in the District for over 27 years. She holds a lifetime General Secondary Credential, a General Elementary Credential, and an

Administrative Credential.⁴ she taught for eight years in Oklahoma prior to her employment at the Lemoore Union High School District.

Herrin has held almost every office in the CTA, including the presidency and has served as special services chairman for both CTA and AFT and has taken care of the teacher insurance program.

Herrin testified that as special services officer, she was in charge of all the insurance programs. She made recommendations to teachers about their health insurance, dental programs, income protection programs, or whatever programs were in force. She sells tax-sheltered annuities, and other insurance programs to both the certificated and classified employees. She holds a real estate license and sells real estate.

With regard to curriculum development, Herrin testified that she had spent 27 years with the business education curriculum within the department, and at times had been on the overall curriculum committee, including departmental development of responses to changes in the vocational educational program. Herrin testified that she had been asked

⁴Herrin's other qualifications are set forth in her letter to the District, dated August 12, 1980 set forth in footnote 11, infra.

to chair the business department "at least ten times" but had declined.

Herrin's administrative experience is limited to work she did in the school where she was employed in Oklahoma prior to coming to Lemoore. For a year and a half, she worked half a day in the superintendent's office. She took care of transportation, insofar as arranging the monthly servicing of school buses. She did the entire payroll. She worked together with the principals of the two schools and they would select books and set curriculum for the first six grades. She ordered supplies for the concession stands for athletic events and supervised personnel for the gates. The school had around 350 students. It was, she said, about the same size as Lemoore High School when she first came to the District.

Selection of Director of Guidance and Counseling - 1979

A memo to the employees of the Lemoore High School District was issued by Nordstrom on May 25, 1979 relating to vacancies within the District. Among others, the position "Director of Guidance" at the Lemoore High School was listed, followed by the designation "Certificated Management Position."

Herrin applied for the position and was interviewed by Nordstrom, Gilkey and Ralph Peterson.⁵ she was questioned,

⁵Peterson has been principal at Lemoore High School since 1962.

she said, about her union activities.⁶ Nordstrom asked her, she said, "Opal, do you think after belonging to the union, do you think you could come to our side in strict confidence, and that we could confide in you?"

She said she "told him that I was very trustworthy and that it was - negotiations should never be anything that you take personally, that you are negotiating for your organization or your side of the team, and I laughed and said I could even negotiate for the District if they wanted me to."

She said the salary offered was \$19,500, and that they told her she would have to take a cut from her then salary of around \$20,080.

Herrin alleged that David Tonini, who was appointed director of guidance, earned \$20,865 in the year 1979-80 as director of guidance.

Gilkey testified and was corroborated with documentary evidence, that Tonini was hired in June of 1979 at a salary of \$19,500. Later, as Gilkey testified, when salary agreements had been reached with all other employees, administrators salaries were increased accordingly. Tonini was then given a salary increase on October 11, 1979/ to \$20,865, retroactive to the first of the school year.

⁶In negotiations for the first contract between the Federation and the District, Herrin was a member of the negotiating team. Although, she said, she "mostly sat at the back and took shorthand," she did handle the cost negotiations on that contract.

Herrin testified that at the time of the application, she held, while Tonini did not, a valid administrative credential. However, Tonini possessed an Administrative Service Credential which was valid for preschool, grades 1-12 and adult classes for the period 10-31-76 through 11-1-81.

Tonini had a degree in psychology, and held counseling and administrative credentials. He had also served as summer school vice-principal. Opal's background is discussed elsewhere, but she testified that she had had about ten psychology related courses in college, although she admitted that they were the type required for teaching credentials generally and, but for one, all were taken in Oklahoma. She also admitted that she had never held a certificated counseling position.

Teaching and testing abilities were important for the position. In addition to supervising counselors, the position also involved placement of incoming students from the feeder schools.⁷ During the interview for the director of guidance position, Herrin was presented with a form used by the District in each students' file indicating the results of sundry tests. Some degree of predictability for placement purposes is discernible from the scoring on the tests. At the hearing, Herrin was vague on her recall of the answers she gave to

⁷The feeder schools were those schools in the area from which Lemoore drew its freshman students.

questions by the interview panel about the form. She did not, at the hearing, initially recognize the form, and could not tell which grade level the sample student represented. Gilkey testified credibly that, at the interview, Herrin had difficulty understanding the form and she said, "Well, she could pick this up in a matter of time." The decision of the panel was unanimous in favor of recommending Tonini for appointment by the Board of Trustees.

Avenal Acting Principal, Lemoore Vice-Principal

Until July 1, 1980, the District consisted of two high schools, one in Lemoore, and the second in Avenal, California. As a result of recommendations of the county committee on school district organization in 1977, a unification election on March 6, 1979 resulted in the approval of a new proposed unified district consisting of the then existing Reef-Sunset Union School District and the Avenal High School, effective for all purposes, July 1, 1980.

Some months prior to the effective date, but after the election for unification, the then principal at Avenal resigned. Because of the pending transfer of Avenal High School to the newly formed district, it was determined to have the Lemoore Board of Trustees assign, on a temporary basis, an employee to serve as acting principal at Avenal until a permanent principal, selected by the Avenal Board of Trustees, could be employed.

The Lemoore board approved Bill Cottini, recommended by Nordstrom, as interim principal at Avenal. Cottini was, at the time, vice-principal at Lemoore High School. At the same time that Cottini was appointed to the Avenal position, Don Warkentin was appointed as acting vice-principal to take Cottini's place at Lemoore High School. Cottini served approximately 8 weeks as principal of Avenal. Cottini returned to Lemoore High as vice principal to replace Black who, as is later discussed, was appointed to the interim Director of Federal Projects position.

Gilkey testified that Nordstrom had made the appointments and that the board had approved them. To his knowledge, neither had been posted by the District. Herrin and one Jim Bennett complained to then superintendent Nordstrom about the absence of posting.

Warkentin had been a Science teacher and coach prior to his appointment as acting vice-principal at Lemoore. Gilkey could not explain how it was that Warkentin was appointed to the position from his teaching position.

Director of Projects and Special Education

Upon learning of Gilkey's appointment as acting superintendent, Herrin informed him of her interest in his old job.

The District posted the position on February 7, 1980.⁸ Applicants included Herrin, Dave Tonini, Bill Cottini, Don Warkentin, Robby Bryan and Bill Black. Gilkey testified that he used a series of about 20 questions relating to the responsibilities of the director of federal projects and special education.

Gilkey testified that the District participated in and received funds for under the Elementary, Secondary Education Act, (Title 1) Section 4(b) of the Act for Library Resources, the Vocation Education Act, Indian Education Act, Migrant Education, Bilingual Education all of which require yearly updates and maintaining the budget within federal guidelines.

Because of recent legislation, substantial change and development had occurred in the area of providing special services for handicapped students. A master plan is required as well as plans for individual students. Special education, said Gilkey, would take up most of the employees' time.

During her interview for the job with Gilkey, there was a discussion of her qualifications. They discussed her understanding of budgets and budgetary controls, and vocational

⁸The position was styled as "Interim" and called the "Director of Projects and Special Education." Qualifications were: Administrative Credential, 5-year teaching experience, Administrative experience. The primary function was described as ". . . responsibility for submitting and coordinating all programs funded from special sources, federal and state, and perform other duties assigned by the superintendent."

education programs. She had no recall of discussion of ESEA Title 1 or EIA. She has, she said, never worked with those programs or in special education. There was not, she said, an "in depth" discussion of those subjects.

While she professed to have attended IEP conferences, she did not know what it stood for. She has not ever developed an individual education plan required for students in special education. She has never developed an application for a federal grant, nor has she ever done any work in administering a federal grant. Finally, she has had no experience in budgetary control of federal grants.

She was not aware that Warkentin and Tonini had also applied for the position.

Herrin testified that Black was interviewed on Wednesday before a Thursday Board meeting.⁹ She was interviewed the following Friday or Monday. The next Friday (of the week the board would not have met) she learned that Black had been appointed to the interim Director of Federal Projects. She did not know, however, when Black was appointed by the Board.

Black was appointed, said Gilkey, because of his administrative experience and because he, Gilkey, had worked with him on a criminal justice grant application. The Board

⁹The Board meets on the first and third Thursday of each month.

members variously testified that they selected Black because they relied upon Gilkey, who had done the job before, and would therefore, know who would best fill the position. Too, they were giving Gilkey some latitude at the time because of their review of the organizational structure of the District.

Vice-Principal - Lemoore High School

Herrin had a meeting with Peterson sometime prior to May 1, 1980. She said the meeting was during her evaluation and Peterson said, "Opal, we're going to have - it looks like we're going to have a vice-principal vacancy next year, and I'm going to recommend you for that position." She said he further stated, "you are tough, you are a good disciplinarian, and I think you would be good in that position."

Peterson, on the other hand, testified that he could not recall the setting of the conversation, but he did recall that she told him that she didn't think she was going to apply for the job. He said he told her "I think you ought to give it a shot, Opal." He denies having said that he would recommend her, but did say that he felt she was a strong candidate from inside the district. He said he wouldn't have told her that he would "recommend" her prior to having seen other candidates.

May 1, 1980 Board Meeting

Underlying Herrin's contention that she was not promoted because of her union activity are statements made on

May 1, 1980 by Ed Miguel, then president of the Board at a Board of Trustees meeting.

Herrin had conferred with Jim Ingliss, Federation president, and suspected that the District might have denied her promotion because she was a woman. She had filed a charge with the Department of Fair Employment and the Equal Employment Occupational Commission and had obtained extensions of time to formally commence the charge.

She requested to meet with the Board in executive session. The Board met with her, during a regular meeting on May 1. In attendance at the executive session were the five Board members, Gilkey and Peterson. Ingliss attended with Herrin. All nine testified as to what occurred at the meeting as well as what Miguel stated. There is considerable variation in the testimony of the witnesses as to what transpired and what was said by Miguel.

After introducing Ingliss and expressing thanks for the Board's time, Herrin addressed several questions to the Board about the appointment of the projects director and the director of counseling and guidance. Her tone and approach was negative. She did express satisfaction in Gilkey's appointment as superintendent. She made reference to the fact that she had a document in her purse that had to be filed and that she wanted to talk to the Board first before filing it. At a point in her presentation, about when there was considerable

differences of testimony, Miguel interrupted and said that he had something to get off of his chest.

Herrin testified that Miguel said that as long as he was on the Board, she would never be an administrator, and that it was because of the part she played in negotiations. Miguel denied making such a statement, but admitted telling her that "he didn't appreciate her activities," that she'd been "anti-administration" in many cases he felt "were embarrassing to the administration and to the school itself." He was thinking, he said, of a picketing incident, and public meetings where teachers would "interfere and interrupt." Herrin, he said, was one of the leaders of the group of people and she didn't do anything about it so he attributed it to her. He said he thought he might have said to her that "it would be real difficult for him to work with her after some of the activities that she had been involved in in the past against our administration."

Board member Pittarelli testified that Miguel stated in effect, "if it were up to me you'll never hold an administrative position in this school." Peterson said that Miguel said he didn't trust her. Hawk said that Miguel stated that "he felt that she had done everything she could or made great effort to discredit the board and the administration of the district over a period of years and that he didn't think he could work with her in an administrative job."

Herrin further testified that Miguel related the hurt her conduct had caused him and that he commented that they had been friends and how could she have done this to him. She had no recall that he might have said that it wasn't because of her union activities, but because of the way she conducted herself.

Herrin testified she pointedly asked Miguel "then you're saying that I'll never be an administrator in this position because of the role I played in negotiations?" And that he replied, "that's right." Miguel said she asked "well, do you mean you wouldn't vote for me because of my activities?" He said, "no, I'm referring to you as an individual in past activities." He said that's the way he judges all people, and that he has "a lot of good friends who belong to the union."

Ingliss also testified that Miguel did make the statement, "no, I don't have anything against you as a negotiator, I don't have - negotiations isn't a concern here." Miguel further stated, said Ingliss, "I'm concerned about what you said, to me it was disloyal," or words to that effect and how hurtful the things she had said had been to him.

After further words, Herrin and Ingliss left the meeting. The board continued in executive session and discussed the presentation, with Gilkey and Peterson present. While there is a difference in the testimony of the board members about what was said, Hawk credibly testified "well, it was-well, I think all the members expressed shock and surprise at the-and

the--what we considered an attack on what we'd done in the past few months, and I think on the basis of that, why, it was generally understood among the Board members that the attitude displayed there, why, there was no way we could work with her in an administrative job." He thought the feeling was unanimous among the members of the Board.

Hawk further testified that Gilkey and Peterson would have been aware, since they were there, of the Board's attitude that they didn't feel the Board could work with Mrs. Herrin in an administrative capacity. Miguel testified that Peterson and Gilkey participated in the conversation.

Delaney said he felt intimidated by her comments, and that he wondered about her functioning as a professional because "in the 45 minutes that she spent before the Board, she failed to get across the point that she was trying to make, whatever that point was." It didn't appear to be too well organized and "didn't seem to have a point, a direct point" and was "vague."

Pittarelli said he was not intimidated but felt she had not made a point in her presentation. Hawk perceived a "threat." Miguel felt she was intimidating the Board and he became increasingly upset and disappointed. Miguel was, said Pittarelli, still angry after her presentation.

Peterson said that after the meeting the Board members asked what it was she wanted. He thought "they all felt intimidated, and they had a definite feeling that she was

really coming on strong and threatening them that if they didn't give the next job, well, she was going to mail these letters, or what ever it was those letters were meant to be.

Peterson said that as a result of her presentation, his view of Herrin as a candidate for a job was changed from the "standpoint of her diplomacy in dealing with the people in this thing. This was not an example of getting along well with people to go in and--and confront a group of men who are your employers in this fashion."

Gilkey's reaction is related in his testimony as follows:

Q. (By Mr. Galgani) Did you at the time of the presentation by Mrs. Herrin reflect to yourself on how that -- the quality of that presentation by her, did that have any impact on your thinking of her as a potential administrator--

A. No.

Q. -- in the sense that -- let me finish my question if I may -- in the sense that there were any personal qualities manifested that you might consider to be relevant to being an administrator.

A. The one that comes to my mind would probably maybe be classified under human relations or diplomacy in talking to your employers in that negative tone.

Director of Athletics

Bob Fraley, who had served some four years as athletic director resigned, for health reasons, in mid-May 1980. The District posted a vacancy on the position on May 30, 1980. The only person to apply was Warkentin, then serving as acting

vice-principal at Lemoore. In mid-June, Warkentin was appointed to the position. Later that month the position title was changed to reflect added duties relating to student activities, brought about by the ongoing study of reorganization as a result of the loss of Avenal High School. Herrin acknowledged that Warkentin was better qualified for the athletics aspects of the job, but felt they were equally qualified regarding student activities.

Federal Projects Director-Special Education,-Curriculum

In June, 1980, the District posted a position opening for the Director of Federal Projects, Special Education and Curriculum.¹⁰ Herrin applied for the job and appeared before the screening committee, which consisted of Gilkey, Peterson and Simone Ostrander, a high school teacher with the District for six years.

Herrin started the meeting with the comment, "I don't know why I'm here, because I know and you know I'm not going to get this job." She also testified that Black's service as interim director was another reason she knew she wouldn't get the job.

Peterson was upset by her remarks because he had come in from his vacation for the interviews and told her so.

¹⁰This was the same position for which Black had been appointed on an interim basis. However, the posted job description expanded the position somewhat.

Ostrander testified that the panel had been given a description of the job duties, a series of questions set forth on a form.

Ostrander rated Herrin first and Black second. Herrin, she said, was interviewed first, and Ostrander changed her rating from the initial points she had given Herrin. She said that she felt Herrin's approach was the best and that Black seemed too "impersonal."

The Board accepted the recommendation of Peterson and Gilkey to appoint Black to the permanent position. Hawk admitted that he "imagined" he felt relieved that Herrin did not get the recommendation. Miguel said he relied exclusively upon Gilkey's recommendation.

There is no direct evidence of when the Board took action to appoint Black to the permanent position of Director of Federal Projects, Special Education and Curriculum. However, Black's application therefor was dated July 7, 1981, and Herrin's was dated July 8, 1981. It is concluded therefrom, that the appointment by the Board took place after July 8, 1981.

Herrin was unaware that other applicants for the job were Warkentin, Bryon and Tonini. She said her interview with Gilkey went well and that she had every opportunity to present whatever she felt appropriate.

Gilkey considered experience as the most important factor. He and Black worked together on applying for a grant from the

Criminal Justice committee that was successful. He considered it a training session for Black.

In addition to the duties listed on the position vacancy announcement, the director also was on the list of duty rosters with other administrators who would rotate assignment to cover extracurricular activities. Too, the director would coordinate and supervise testing done by the county psychologist for special education.

During his service as interim director, Black appeared before the Board several times.

Vice Principal-Lemoore

Sometime in July of 1980, Herrin learned of the vice-principal vacancy. She had made arrangement to vacation in Oklahoma and Gilkey accorded her additional time to apply for the position.¹¹ The announcement included as qualifications, "Appropriate Administrative Credential, five (5) years successful teaching experience, and a starting date of August 22, 1980."

Gilkey testified that the qualifications for a vice-principal would be someone with administrative experience, self-discipline, knowledge of the state laws, had

¹¹Her application for the vice-principal is dated July 18_f 1980. She used the same application as she had for the position of permanent Director of Federal Programs, Special Services, Curriculum.

good rapport with the students and the staff, and would work well with parents. In some instances, he said, being familiar with the school and the community would help. Teaching experience is also an important ingredient.

Gilkey testified that generally a department chairperson is not an administrative position. In some districts it is. He could not recall what the situation was where Rowe had been chairman.

Herrin was given an appointment for an interview for the vice-principal position, but because she was suffering from the flu, she was unable to attend the scheduled meeting. She had her husband hand deliver a letter to Gilkey the morning of the scheduled meeting.¹²

¹²The letter is set forth in part.

August 12, 1980

TO: Mr. Allen Gilkey, Interview Screening
Committee, and Board of Education

FROM: Opal Herrin

Thank you for the opportunity of applying for the current vice principal vacancy at Lemoore High School.

Mr. Gilkey and the rest of the Screening Committee, I sincerely apologize to you for not being able to keep my interview appointment. I have the stomach flu, and even though I think I'm recuperating, I don't

On the morning of the scheduled interview with Herrin, at the time she was to come in, Gilkey's secretary, presented the panel with her letter. Gilkey spoke with Herrin on the phone, and then put Geneva Bengston, school nurse and a panel member, on the phone. Bengston encouraged Herrin to come in for the interview and assured Herrin that the panel would not catch the flu. Bengston said that they reached an understanding that

feel that I should take the chance of contaminating you.

I doubt that you need a resume, for I feel that my abilities, inabilities, assets, or liabilities are an "open book," for if you don't know my virtues or my faults after 26 years, than you will probably never know me or them.

.....

I recently appeared before the Board to try to find out why I have been discriminated against in filling administrative positions at Lemoore High School or within the District during the past year, and indeed, I found out. I thought we could "talk out" a problem that I felt existed. I tried to tell you without actually saying it that I did not want to file an "unfair" against the District. I am sorry that I misjudged the animosity (sic) that at least some of you hold for those of us who were appointed by our peers to do a job in negotiations. And regardless of how you feel, I was not unprofessional. I do apologize for my speech delivery that apparently set up an aura of defense from you, and that certainly was not my intent.

.....

should Herrin feel better by 4:00 that afternoon, she would call and the panel would meet with her at 8:00 the next morning. It is concluded that the parties did reach this understanding.

Herrin did not call back.

Bengston said that because Herrin did not show up for the interview the panel did not give her a rating as they did for all other candidates. They did not, she said, discuss Herrin's qualifications for the position. Peterson thought her absence was a big factor in the recommendation for the vice-principal. Another candidate showed up 20 minutes late and Peterson thought that was noteworthy.

Larry Rowe, not previously employed by the District, also applied for the position. He had, according to Gilkey, 13 to 15 years teaching experience and had been a summer school principal for two summers, one of which was an intern position. The Board selected Rowe upon the unanimous recommendation of the interview panel.

Members of the Board were aware that Herrin had applied, and that she did not show for the interview. Hawk admitted that he might have been relieved that the administration was not recommending Herrin for the position. Delaney testified that he was unsure of her qualifications because of the poor representation she made before the Board at the May 1 meeting.

Miquel said he relied exclusively on the recommendation of Gilkey in making the choice.

Delaney testified that Rowe appeared at the meeting and was questioned in the presence of the Board at which he was selected. Pittarelli said Rowe was at the meeting where the Board appointed him as vice-principal. The testimony of the other Board members is vague on this point.

Herrin learned of Rowe's appointment from Rowe himself, when he visited her real estate office to obtain assistance for housing. Without knowing that she had applied for the job, he told her that Gilkey had told him of the appointment but that the Board had yet to approve it.

Peterson testified about a skin problem that Herrin had that reacted to sunlight. On occasion in the past, she had worn scarfs and large hats while out in the sun. He thought this might be a problem with respect to the vice-principal assignment because of the extensive amount of movement around the campus required of the job.

Peterson also testified that they couldn't put off the selection of the vice-principal any longer. School was to start on September 3 or 4 and ordinarily, Peterson said, the vice-principal works all summer long getting ready for the fall term. The teachers returned to school one week before the beginning of school for meetings and the vice-principal was expected to attend those meetings.

Posting of Positions

Herrin complained that some position vacancies were filled without posting, and that this violated the provisions of the contract.

The fact is the District did include management positions in its posting. The May 25, 1979, notice from Nordstrom included the Director of Guidance; with the prefatory statement, "In accordance with District Policy and Employee Agreements, the following vacancies are being posted." The October 10, 1979 District announcement included the vice principal - Athletic Director - Avenal vacancy; with the prefatory statement, "In accordance with the District A.L.F.T. Agreement the following positions are being announced as vacant."

The evidence, however, reveals that only the interim principal position at Avenal and the vice-principal at Lemoore in the fall of 1979, and the position of superintendent in December of 1979 were not posted. As to the latter, Herrin felt that Gilkey should have gotten the appointment and as to the former, there is insufficient evidence that the District did not post the positions for any reason of Herrin's possible candidacy.

ISSUES

The issues in this case are:

1. Is the unfair practice charge barred by the EERA statute of limitations?

2. Did the District discriminate against Opal Herrin in the selection of the Director of Federal Projects, special education and curriculum, or the position of vice-principal at Lemoore High School because of organizational activities in violation of Government Code section 3543.5 (a)?

CONCLUSIONS OF LAW

The District filed, with their answer to the charge, a Motion to Dismiss on the ground that the charge is barred by the statute of limitations. Since, argues the District, the charge was filed on December 31, 1980, and the operative date of the charge is May 1, 1980 (referring to the meeting Herrin had with the Board of Trustees), the events given rise to the charge occurred more than six months preceding the filing date (June 31, 1980) and pursuant to section 3541.5 the charge must be dismissed.

Under section 3541.5, the Public Employment Relations Board (hereafter PERB) is precluded from issuing a complaint in respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. Thus, the defense of the statute of limitations, timely raised, compels dismissal of any alleged violations occurring before June 31, 1980.

Here, Charging Parties contend unlawful or discriminatory refusal to promote because of anti-union animus. Of the promotional opportunities charging party complains were denied her because of her union activities, two; the permanent Director of Federal Projects, Special Projects and Curriculum and the vice-principal at Lemoore High School were positions for which the selection of persons took place after June 31, 1981, and are, thus, within the six month period of limitation.

Even if one were to accept the District's argument that the May 1 event was the decision to deny Herrin promotional opportunities, because of her union activities, the effect of that decision did not occur until July and August with respect to the two noted positions. The effect of the decision, within the limitation period, is reviewable as a potential violation of the EERA. This conclusion is analogous to the holding of the PERB in Carlsbad Unified School District (1/30/79) PERB Decision No. 89, 3 PERC 10031, where the Board held that while the decision to make a transfer may have generated a right to file a charge, still, separately, a charge could be filed on the transfer itself, i.e., the effect of the decision. So here, if the May 1 event was a pronouncement of refusal to promote Herrin because of her union activities, the effect of that pronouncement was not carried out until July and August, within the six month period.

The District's Motion to Dismiss on the statute of limitations is, for the foregoing reasons, denied.

Charging Parties contend that Herrin was denied promotion to the various administrative positions because of her organizational activities.

Under section 3543.5(a), it is unlawful for the District to

. . . 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.

Section 3543 gives to employees the "right to form, join, and participate in the activities of employee organizations . . . for the purpose of representation on all matters of employer-employee relations."

The PERB has established the test by which a violation of section 3543.5(a) is determined. In Carlsbad Unified School District, supra (1/30/79) PERB Decision No. 89, 3 PERC 10031, the PERB held that where the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, and the harm to the employee's rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on

proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available. Finally, irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

The District argues first that the feelings of Miguel, and possibly Hawk cannot be transmuted to the Board as a whole. Citing the reasons given by the three Board members for running for office, the dismissal of the old superintendent and the absence of any union issues appearing before the Board between the time of their election and the May 1 meeting, the District argues that the new members and thus a majority of the Board did not harbor anti-union feelings toward Herrin.

Moreover, says the District, the appointments followed recommendations of the administration and/or a selection panel, thus, there is no cause and effect between the exercise of union activity and her nonselection.

The District's arguments are rejected. The charging party has shown that in May of 1981 the then president of the Board, Miguel, was unequivocal that Herrin would not be employed as a member of the administration while he was on the Board. She would not be employed because of her conduct in organizational activities. While Miguel contended that he did not hold the fact that she was a negotiator against her, he was otherwise

clearly reacting to her participation in picketing and her remarks about the Board. He further held her responsible for the conduct of others without any proof that she promoted or condoned such conduct. There is not one bit of evidence to show that she engaged in unlawful conduct or brought dispairment to the employer. She offended Miguel because his sons were exposed to an unpleasant crowd and she happened to be in the room at the time. Stan Hawk openly admitted he feels the same way about her promotional opportunities. They have shown that following the presentation Herrin made on May 1, 1980, the Board discussed her presentation and that Gilkey and Peterson engaged in that discussion. They have shown that subsequent to these events, Herrin applied for and was denied promotion for two administrative positions. This represents a nexus sufficient to apply the balance of the Carlsbad test.

That there was a recommendation by the administration or a selection panel does not change the result. The administration and the panel were Gilkey and Peterson. While the panel did include third persons, the controlling presence of Gilkey and Peterson cannot be ignored. They were present at the May 1 meeting, and as concluded elsewhere in this proposed decision, it is inescapable that they would carry the message forward regarding Herrin's candidacy.

The District next contends that there is no nexus between the failure of Herrin to be appointed to any of the administrative positions and her exercise of union rights under EERA. Analyzing the interim and permanent selections of the Director of Federal Projects, special education, and curriculum and the vice-principal at Lemoore position selection, the District contends those selections were based upon factors unrelated to her union activities.

The interim Federal projects director was filled, says the District, because the District needed to replace Gilkey immediately, and the relative qualifications between Black and Herrin gave the former the clear edge for appointment. The permanent position was filled by the incumbent because of his track record on the job for the previous six months and the advantage Black had in previous administrative experience.

The District argues that Herrin was not serious about the vice-principal at Lemoore position as she did not appear for the interview, and the raters could not properly rank her for consideration for the position because of that absence.

Finally, the District contends that Herrin's "exaggerated assessment" of her ability and qualifications for any position is the real basis for her claim.

The District's basic contention is that Herrin would not have been hired for either position in any event. In Martori Brothers Distributors v. ALRB (1981) _____ S. Ct. _____ 81

Daily Journal D.A.R. 2400, the California Supreme Court noted the federal precedent in dual motive cases and required that the ALRB employ the "but for" test.¹³ Where, said the Court,

. . . [it] appears that an employee was dismissed because of combined valid business reasons as well as for invalid reasons, such as union or other protected activities, the question becomes whether the discharge would not have occurred 'but for' the protected activity.

The Supreme Court also noted that the adoption by the NLRB of the test of "but for" in Wright Line, a Division of Wright Line, Inc. (1980) 251 NLRB No. 1510 [105 LRRM 1169] where the NLRB held that once the employee has shown that his union activities were a motivating factor in the employer's decision to discharge him, the burden shifts to the employer to show that the discharge would have occurred in any event. If the employer fails to carry his burden in this regard, the Board is entitled to find that the discharge was improper.

The final prong of Carlsbad includes the "but for" test. A review of the positions filled by the District prior to the May 1, 1980 meeting between Herrin and the Board of Education does not show, by a preponderance of the evidence, a practice by the District of excluding consideration of Herrin for positions within the administration. In other words, it cannot

¹³Labor Code section 1148 requires the ALRB to follow applicable precedents of the National Labor Relations Act as amended.

be said, that "but for" her union activity, the District would have hired Herrin for each of those positions.

Analysis of the action of the District in appointments to fill those positions is not barred by the statute of limitations discussed in the first part of the Conclusions of Law. The limitations period does not absolutely preclude consideration of evidence of events occurring prior to the time period. The National Labor Relations Act contains an EERA-like six months statute of limitations (29 U.S.C. 160 (b)).¹⁴

In drawing upon the distinction between using pre-limitation period evidence to reflect on events inside the time period and use of such evidence as the basis of unlawful conduct in IAM Local Lodge 1424 v. NLRB, the U. S. Supreme Court¹⁵ noted:

. . . due regard for the purposes of section 10(b) requires that two different kinds of situations be distinguished. The first is one where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose,

¹⁴PERB will invoke federal precedent as guidance in interpreting analogous provisions of EERA. Sweetwater Union High School District (1976) EERB Decision No. 4. Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616.

¹⁵(1960) 362 U.S. 411 [45 LRRM 3212].

section 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There, the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a punitive current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful (362 U.S. at 416-17, 45 LRRM at 3214-15).

In determining whether Herrin was denied promotional opportunities with respect to the Director of Federal projects, special education and curriculum position or the Lemoore High School vice-principal position because of her union activities, the earlier job opportunities and the circumstances of the May 1, 1980 Board meeting may be utilized to shed light on the true character of the denial of the positions noted.

Director of Guidance and Counseling

Herrin's qualifications for the director of guidance and counseling pale by comparison to those of Tonini, who was hired by the District for the position. Tonini had a degree in Psychology and a credential in counseling. Herrin had neither. The director of guidance and counseling supervised the counselors within the District and coordinated psychological testing by the county psychologist. These responsibilities would be best met by someone trained in the field. Tonini had counseled for a year. Herrin had none.

Tonini had recent administrative experience in summer school administration. Herrin's administrative experience was 27 years ago, and in a small school.

Finally, Herrin's response to the student test form both at the hearing and, at the time of the interview, as described by Gilkey, was that she was unprepared to employ the form. It was not unreasonable for the District to prefer Tonini's expertise over her inability to read test scores. It simply cannot, from the foregoing, be concluded that the District in this instance would not have hired Tonini over Herrin.

Herrin's testimony about the reduction in salary was adequately explained by the District. Tonini was in fact hired at \$19,500, the figure Herrin was told she would have to accept. It was changed later along with all administrators' salaries, by Board action.

The Acting Principal at Avenal

Cottini had been vice-principal at Lemoore at the time he was selected by Nordstrom, and confirmed by the Board as acting principal at Avenal. The resignation of the incumbent principal was unexpected and the District had to move quickly to secure an administrative appointment to fill the vacancy. It was also at a time when the District was about to lose the Avenal High School as a result of the unification of the Reef Sunset Unified School District. There is insufficient evidence

presented by the Charging Party that this appointment was made on any basis other than that Cottini was qualified and the District had to move fast in securing a replacement.

The appointment of Warkentin raises the first inference of question by the District. The position was not posted, nor were interviews given for the position. Although Gilkey was the assistant superintendent at the time, he could offer no reason to explain why the position was filled without posting or upon what basis Warkentin was appointed.

Herrin also testified about vice-principal positions at Avenal. The District posted notice in the summer of 1979 for a vice-principal/director of athletics position but the Charging Party placed no evidence into the record that she applied for or attempted to apply for that position.

Herrin also spoke of a position at Avenal in 1980. As the record clearly shows, the Avenal High School became a part of the Reef-Sunset Unified School District, effective for all purposes, on July 1, 1980. The Lemoore Board had absolutely no power over the selection of persons by the other school district. Indeed, an understanding with the Reef-Sunset Board with the Lemoore Board led to the selection of the new principal at Avenal High School, by the Reef-Sunset Board in February of 1980. Because of this and the absence of further direct evidence of the particulars of either position, no findings can be made thereon.

Director of Projects and Special Education. (Interim)

The evidence established that the position requires exercise of responsibility for the operation of federal programs, vocational education and early childhood education programs. Herrin had no experience in these areas. The position required the exercise of responsibility for special education about which she had no experience except for individual students in her class. The position required assistance in the development of individual education programs for students, something she had not done before. The position required the application for and the administration of federal grants. She had experience in neither. Finally she had no experience in budgetary control of federal grants. On the other hand, Black had assisted Gilkey the previous summer in developing a successful criminal justice grant and had, according to his resume, worked in vocational education and coordinated the vocational consumer education program with the District. He had worked in the special education program within the District and had done IEP for individual students. Finally, he had experience in coordinating curriculum development.

Thus it cannot be concluded that the selection of Black over Herrin would not have occurred but for her organizational activities.

The Director of Athletics

When Fraley resigned, the District posted the position of athletic director for which Warkentin was the only applicant. Later, at the end of June in conjunction with its own ongoing reorganization, the District added duties relating to student activities. Herrin admitted that Warkentin was better qualified than she in the area of athletics, but she felt she was better with regard to the student activities. The fact that she did not apply for the position negates any contention of the District's motive in not hiring her. The reorganization was an event occasioned by the transfer of Avenal to Reef-Sunset and resulted in a number of organizational changes. The addition of the student activities responsibility to the director of athletics carries no inferrable reflection on Herrin. It is concluded that charging party has failed to show that "but for" the activities of Herrin she would have been selected over Warkentin for this position.

Permanent Director of Federal Projects, Special Education and Curriculum

The selection of Black was based upon a recommendation of Gilkey and Peterson, who had, as has been found, been exposed to the Board's determination towards Herrin's candidacy. A third member of the panel recommended Herrin for the position. Given the taint of the May 1 meeting and its effect upon Gilkey and Peterson, as well as the disposition of the Board as

evidenced by Miguel and Hawks' testimony, it maybe questioned that Herrin's application was considered, in relation to Black, free from her organizational activities.

As correctly pointed out, however, by the District in its post-hearing brief, the position in June 1980, was open to candidates, including Black who had, in the opinion of Gilkey and members of the Board, performed the job in an acceptable manner. He has gained the experience of four or five months on the job. His initial appointment to the interim position was found to be nonsuspect and the permanent appointment is not made any less so because it takes place five months later, and after the May 1 Board meeting. Black's qualifications in February, and again in June, exceed those of Herrin. It is concluded that Herrin would not have been appointed over Black under any circumstances.

Vice Principal - Lemoore High School

While it is not intended to weigh the relative qualifications of Rowe and Herrin for the position of vice-principal at Lemoore, their signal difference is that Rowe had two years of summer school principal experience, one of which was on internship, and he had been a department chairman. The notice of the position did not require administrative experience (only an administrative credential) and it was not shown that the District at which Rowe previously served department chair was of the type that could be

considered administrative in character. As opposed to his 15 years of teaching, Herrin had over 27 years of teaching experience and had served as the District special officer for purposes of insurance. She was well acquainted with the school, the community and the staff. Rowe was a newcomer to the District.

This case raises the specter of the final part of the Carlsbad test. It is undisputed that two Board members would not consider promotion of Herrin because of her exercise of organizational activities, unacceptable to them, yet not shown to be outside of the protection afforded by the EERA. At the meeting just following her presentation, with Gilkey and Peterson present, the Board discussed her appearance, her accusations against the Board, and their personnel policies. The nonspecific answers by the remaining three members to the inquiry of what was discussed fail to overcome, in the face of Miguel's continued anger, and Hawks' candid assessment of the Board's cumulative reaction to her presentation, the inference that as a result of that discussion the Board as a whole, would not consider Herrin and Gilkey and Peterson would not venture her name as a nominee for an administrative position.

Both testified that as a result of the meeting they had changed their thinking as to her qualifications. The change related to her confronting the Board with questions about their

practice of promoting employees. Peterson¹⁶ questioned her diplomacy in "confronting a group of men who are your employers in this fashion," and Gilkey testified that the quality of her presentation did not affect his thinking of her as an administrator but rather, in talking to the employer in "that negative tone." These perceptions, standing alone raise questions of a proper or lawful response to an employee seeking explanation about employment practices of the employer. Unquestionably, Herrin had a right to ask the Board about possible discrimination in their employment practices. To do so is an inherent part of the matter of employer-employee relations about which the EERA is designed to promote and as an activity it is designed to protect.

Moreover, there is a reasonable inference drawn from the post-Herrin presentation meeting of the Board, on May 1, 1980, that Gilkey and Peterson knew full well that the Board's sentiments were simply not conducive to positive consideration

¹⁶Peterson's credibility is questioned by his adamant insistence that there was no discussion during the executive session with Herrin present, about the District's consideration of salary of prospective employees. Yet other Board members acknowledged such discussion. In addition, while admitting that he told Herrin she had a good shot at the vice-principal position, and that she was a strong candidate for the position, he then opined that because of her "skin problem" she would not be suitable for the position.

of Herrin by the Board for any administrative position.¹⁷ With two Board members admittedly opposed to her candidacy, a third, Martin who professed great respect for Miguel, and the remaining two members perplexed by her presentation, it is ineluctable that Gilkey and Peterson would not recommend her to the Board.

The unexplained variance of the District practice of filling positions from within the ranks of its own employees, in hiring Rowe, an outsider for the vice-principal at Lemoore,

17And where, as here, the employer's motive is the central issue, the factfinder must often rely heavily on circumstantial evidence and inferences. Only rarely will there be probative direct evidence of the employer's motivation. (Shattuck Denn Mining Corp. v. NLRB (9th Cir. 1966) 362 F.2d 466.) It is a well-established rule that in such cases the Board is free to draw inferences from all the circumstances, and need not accept self-serving declarations of intent, even if they are uncontradicted. (NLRB v. Pacific Grinding Wheel Co. Inc. (9th Cir. 1978) 572 F.2d 1343; Shattuck Denn Mining Corp. v. NLRB, supra, 362 F.2d 466; NLRB v. Warren L. Rose Castings Inc. (9th Cir. 1978) 587 F.2d 1005, 1008; Royal Packing v. ALRB et al. (4th Cir. 2/4/80) 4 Civ. No. 18956.)

In Marin Community College District (11/19/80) PERB Decision No. 145, 4 PERB 11198 the PERB stated:

While the actual motive of an employer who disciplines a union activist is seldom revealed by direct evidence, the illegal purpose harbored by the discriminating employer may be inferred from the circumstances surrounding the discipline or discharge. These may include anti-union animus exhibited by the employer or its agents; the pretextual nature of the ostensible justification; or other failure to establish a business justification (citing Shattuck Den Mining Corp. v. NLRB (1966) 362 F.2d 466 [62 LRRM 2401])

as opposed to Herrin, who had been advised by Peterson, before the May 1 meeting, that she should apply for it because she would have a good shot at it, and by Gilkey, that she should apply for the position work against the District's contention that she was not qualified for that position. Gilkey and Peterson did not recommend Herrin to the Board because they knew she would not be considered by the Board, and they knew that she would not be considered by the Board because of her organizational activities. The Board itself, and through its administrative staff in the persons of Gilkey and Peterson were withholding consideration of Herrin's application because of her exercise of activities guaranteed by the provisions of the EERA.

The failure of the committee to rate Herrin is also unexplainable. Bengston had known Herrin for 17 years. Gilkey had known her at least since 1970 and had interviewed her for no less than four other positions. Peterson, too, was well acquainted with Herrin, both professionally and socially and had participated in other interviews involving her. While her absence from an interview on the day in question may have precluded direct questions by the panel, they could have at least formulated a rating for Herrin on the basis of their personal knowledge of her. Their failure to rate her is more consistent with a determination by Gilkey and Peterson not to

recommend her to the Board than an inability to rank her among the contenders for the position.

It has been established that the Board was refusing to consider Herrin for promotion for administrative positions because of her organizational activities. Under the Carlsbad test, if the employer can show that the appointment would have gone to someone else, in any event, it will be exonerated from the charge.

The only direct evidence of the comparison of Rowe and Herrin was Peterson's observations about the former. Rowe, said Peterson,

. . . really came across strong in the interview. He came across—his papers were excellent. You wouldn't find them any better, I don't think. He's enthusiastic, he's had—it seemed like it was about 12 years experience as department head. He had served as—let's see—he'd done some work on a federal project in connection with his social studies department. The people thought he was a person that would take on any job. They thought if he had a shortcoming he might try to do too much, and if there's one thing I like it's a hard worker.

The determination of superior qualification on the part of Rowe is unaided by such testimony. There is no evidence of what papers were considered to be considered "excellent" as compared to Herrin. She did not have the benefit of an interview to compare enthusiasm. Gilkey said that Rowe had only four years of department chairman experience. Finally,

there was absolutely no suggestion the experience in federal projects was a criteria either necessary or considered by Gilkey as significant. Indeed, the panel did not rate Herrin because of her absence.

Finally, there is the matter of the Board meeting with Rowe before his selection. They had no rating of Herrin and yet they knew she had applied and they knew she had been unable to make the interview because of her illness. An interview with Rowe and not with Herrin was but another example that Herrin was not going to get an opportunity to move into an administrative position.

Rowe was present at the meeting when he was selected. Gilkey told Rowe before the Board meeting that he would be the appointed person. The Board wasn't weighing competing qualifications between Herrin and Rowe. She wasn't rated and had no standing against Rowe. She had no standing because Gilkey and Peterson were not going to submit her name to them.

The above circumstances and the absence of any evidence that Rowe would have been hired in any event, necessitates a conclusion that Herrin was not given consideration for the vice-principal because of her organizational activities. This is a violation of her rights under the EERA.

The District's argument that Herrin was not interested in the job is rejected. She was interested in advancement. In the face of the reaction of the Board at the May 1 meeting, she

applied for and interviewed for the director of federal projects. She did apply for the vice-principal at Lemoore. Her use of the same form for the vice-principal position as for the Director of federal projects does not mitigate against her interest.

There is no evidence that her illness was anything other than what she said it was. Her letter of August 12, 1980 stands unrefuted. She was ill and could not make the interview.

Finally, while Herrin may have had high regard for her qualifications for the positions she applied for, such assessment does not enure to the District's benefit in light of the circumstance for which it was denying her fair consideration for advancement to an administrative position.

Based upon the foregoing, it is concluded that the District violated section 3543.5(a) by discriminating against Opal Herrin in the selection of the Lemoore High School vice-principal position.

REMEDY

Section 3541.5(c) gives PERB

. . . the power to issue a decision or 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 backpay, as will effectuate the policies of this chapter.

Having found that the District did discriminate against Opal Herrin in the selection of the Lemoore High School

vice-principal position, the District will be ordered to cease and desist from discriminating against Herrin because of the exercise of rights protected by the EERA or otherwise discriminating in violation of section 3543.5 (a). To effectuate the purposes of the EERA it is appropriate to ensure that the District does not discriminate against Herrin or anyone for the exercise of organizational rights. Towards this end it is appropriate to give Herrin an opportunity to be considered for the Lemoore High School vice-principal without regard to such activities. Therefore, the District will be ordered to reopen the selection process for the vice-principal position at Lemoore High School and to consider all candidates for the position at the time without regard to organizational activities, with the caveat that Herrin will be given full and fair opportunity for selection without discrimination due to her organizational activities.

The Federation requests that the District be ordered to appoint Herrin to the next open administrative position comparable in job classification, duties and responsibilities and compensation to those positions previously denied her and that she be made whole by an award in the amount of back pay differential between her current salary and the salary of the first administrative position unlawfully denied her.

Neither remedy is appropriate. Herrin should be considered for job opportunities, based upon her relative qualifications

with other candidates, without regard to her organizational activities. That is addressed in this proposed order. To order a pay differential such as requested would be tantamount to finding that she was entitled to the position of vice-principal at Lemoore High School, a finding that is not a part of this proposed decision. Her application for that position will be considered without regard to her organizational activities, a remedy ordered herein and one that is appropriate to the circumstances of this case.

It is also appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to restore the status quo. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing facts, conclusions of law and the entire record in these cases, it is hereby ORDERED that the Lemoore Union High School District and its representatives shall;

A. CEASE AND DESIST FROM: Discriminating against Opal Herrin because of the exercise of rights guaranteed by the Educational Employment Relations Act or otherwise discriminating in violation of Government Code section 3543.5(a).

B. It is further ORDERED that the Lemoore Union High School District and its representatives shall take the following affirmative actions which are necessary to effectuate the policies of the Educational Employment Relations Act;

1. Reopen the selection process for the vice-principal position at Lemoore High School and to consider all candidates having applied for the position without regard to organizational activities and to give full and fair opportunity for the selection without discrimination to Opal Herrin.

2. Within five days of the date that this proposed decision becomes final, post at all school sites and all other work locations where notices to certificated employees customarily are placed, copies of the attached notice. Such posting shall be maintained for a period of 30 workdays.

Reasonable steps shall be taken to ensure that these notices are not altered, defaced or covered by any other material.

3. Within ten (10) workdays from service of the final decision herein, notify the Sacramento Regional Director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this ORDER. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the Charging Parties herein.

C. All other allegations in the charges are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 16, 1981 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on November 16, 1981 in order to be timely filed. See California Administrative Code, title 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 PERB
itself. See California Administrative Code, title 8, sections
32300 and 32305, as amended.

Dated: October 26, 1981

Gary Gallery
Hearing Officer