STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CUPERTINO EDUCATION ASSOCIATION CTA/NEA,	)	
Charging Party,	)	Case No. SF-CE-1190
v.	)	PERB Decision No. 764
CUPERTINO UNION SCHOOL DISTRICT,	)	September 14, 1989
Respondent.	)	

Appearances: Ramon E. Romero, Attorney, for Cupertino Education Association CTA/NEA; Breon, O'Donnell & Miller by Nancy B. Bourne, Attorney, for Cupertino Union School District.

Before Craib, Shank, and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by both parties to the proposed decision of the administrative law judge (ALJ). The case arose out of an unfair practice charge filed by the Cupertino Education Association CTA/NEA (Association) against the Cupertino Union School District (District) alleging violations of section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act).[1]

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5(a) and (b) states in pertinent part:

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise

The Association alleges that the District violated the Act when it failed to reelect three teachers at the conclusion of their probationary period. After a hearing on the matter, the ALJ found that the Association had failed to establish a prima facie showing that the exercise of protected rights was a motivating factor in the District's action, and granted the District's Motion to Dismiss with regard to Patricia Johnstone and Barbara Korn. The ALJ found that the District denied Susannah Eades-Boutry reemployment because of her protected activity in violation of EERA section 3543.5(a) and denied the Association the right to represent its members in violation of section 3543.5(b).

The Board, after review of the entire record, affirms in part and reverses in part the ALJ's attached proposed decision, in accordance with the discussion below.

SUMMARY OF THE FACTS

In June 1984, the District issued approximately 100 layoff notices to teachers based on declining enrollment and budgetary problems. Faced with a layoff, many teachers took leaves of absence or a reduced teaching load, and others retired. This left the District with several vacancies to fill for the upcoming school year.

> to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

The District hired temporary teachers because the collective bargaining agreement provided for return rights for those teachers on leave or reduced workload status. The agreement also provided for a priority transfer procedure for remaining teachers. Eades-Boutry was one of the temporary teachers hired in 1984.

In June 1985, the District was again uncertain of its staffing needs for the upcoming year as individuals on leave, layoff, or reduced status had not committed to return. The parties agreed to extend the date teachers had to request a priority transfer. Judith Fritz, Director of Human Resources and Community Development for the District, held a meeting with the temporary teachers in late May or early June to explain the District's staffing plan and indicated that the District was not sure when it could finalize temporary staffing for the next year. Fritz also explained that unemployment benefits would be retroactive to July 1, 1985, so temporary teachers would not lose benefits if they waited to file until the District made its staffing decision. Teachers who filed immediately and accepted reemployment would have to repay unemployment benefits received during the summer. In the meeting, Eades-Boutry spoke out in a manner critical of the District's employment procedures. She also applied for unemployment benefits at the end of the school year.

Eades-Boutry was reemployed as a temporary teacher at the beginning of the 1985-86 school year. Korn and Johnstone were

hired for long-term substitute positions. Both had held other substitute positions during previous years. In April or May 1986, Johnstone sought to have her status changed to temporary teacher since it appeared that she would be teaching in the same position for the entire school year. Johnstone contacted Dorothy Brough, Cupertino Education Association (CEA) President, who arranged a meeting between Johnstone, Fritz and herself to discuss the matter. Fritz indicated she would recommend to the school board that Johnstone receive a retroactive temporary contract. Johnstone testified that Fritz seemed pleased to recommend her for the contract.

Korn was in a position identical to Johnstone and heard of her reclassification. After meeting Fritz by chance in the District office's hallway, Korn indicated that she would like to be compensated as a temporary teacher. A few days later, Pat DeMarlo, of the Human Resource and Community Development office, contacted Johnstone and Korn and informed them that their retroactive temporary contracts had been approved.

On April 17, 1986, Fritz and DeMarlo held another meeting with temporary teachers and explained that while the District was optimistic, it would be unable to guarantee employment for the following year. The unemployment insurance process was explained again. Eades-Boutry spoke with Fritz after the meeting and requested employment verification in order to secure a home loan. Fritz provided the verification, but required Eades-Boutry to sign a disclaimer.

Eades-Boutry filed for unemployment benefits at the end of the school year. After approximately four weeks, Eades-Boutry was notified that the District had contested the payments because it was going to rehire her for the upcoming school year. Eades-Boutry later received notice that the four weeks of benefits payments already received were an overpayment and she would have to repay those benefits as well as the benefits received during the last two weeks in August, 1985. She was also assessed with a penalty for both years for wilfully making false statements to obtain benefits.

Eades-Boutry contacted Bill McMurray, CEA Executive Director, who agreed to represent her at the unemployment hearing. The Administrative Law Judge for the Unemployment Insurance Appeals Board found that: (1) Eades-Boutry was eligible for benefits in 1985 and did not make any false statements; and (2) an overpayment had been made in 1986 and that Eades-Boutry had made false statements which justified the penalty. Eades-Boutry appealed the decision. The Unemployment Insurance Appeals Board itself reversed the Administrative Law Judge's finding that she had made false statements and canceled the penalty.

Eades-Boutry, Johnstone, and Korn received temporary contracts for the 1986-87 school year. In the Fall of 1986, Fritz discussed with CEA the probability of hiring teachers into probationary positions for the first time in several years. In

November 1986, the District gave probationary status to 19 teachers, including Korn, Johnstone, and Eades-Boutry.

Since all the new probationary teachers had taught more than 70 percent of the previous school year, they were legally considered to be in their second year of probation. Based on the applicable Education Code section,[2] the governing board had approximately 60 days to decide whether to grant permanent status to each teacher. The District superintendent's cabinet developed a method of review wherein the employment record of each probationary teacher was reviewed along with recommendations from current and previous supervisors. If a teacher had only one evaluator during their employment period, a second administrator would be assigned to help determine tenure qualifications. The superintendent's recommendation to the school board would then be based upon a management team recommendation.

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[2]Education Code section 44882(b) the governing statue during the relevant period, provides in pertinent part:

> The Governing Board shall notify the employee, on or before March 15, of the employees second complete consecutive school year of employment by the District . . ., of the decision to re-elect the employee for the next succeeding school year to such a position. In the event that the Governing Board does not give notice pursuant to this section on or before March 15, the employee shall be deemed re-elected for the next succeeding school year.

This has since been repealed and the governing statute for the non-reelection of probationary certificated employees is Education Code section 44929.21.

During the closed session of the March 10, 1987 school board meeting, Yvonne del Prado, superintendent, recommended that four temporary teachers be given notice of non-reelection. The school board adopted the recommendation.

On March 12, Fritz met with Johnstone and her principal, Frank Clark. There is conflicting testimony with regard to what took place at this meeting. Johnstone testified that Fritz handed her the notice of non-reelection,[3] allowed her to read it, and said that it was just a legality in case the District decided not to reemploy her, and that she had a 99% chance of reemployment. According to Johnstone, Fritz stated that her non-reelection was not a question of competency, but that the District needed to do more evaluations. The parties agreed on an individual to evaluate Johnstone. Fritz and Clark testified that Johnstone was told that she would not be employed the following year, but that the District would provide her with help or support until the end of the school year. Fritz testified that she informed Johnstone that she was free to contact CEA or legal counsel.

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[3]The notice was a letter to each of the four teachers, signed by del Prado, stating:

> [w]e have appreciated your time and efforts in performing your duties as a teacher in the Cupertino Union School District, but regret to inform you that the <u>Board of Education has decided not to re-elect you as an employee for the 1987-1988 school year</u>. We wish you success in your future endeavors.

(Emphasis added.)

Fritz then went to another school and met with Eades-Boutry and her principal, Jerd Ferraiuolo. According to Eades-Boutry, Fritz advised her that the notice was not a final decision. Both Fritz and Ferraiuolo testified that Eades-Boutry was advised that she was being dismissed and that nothing was said in the meeting to indicate that the decision was not final. There was discussion of Eades-Boutry's right to contact CEA: however, nothing was said regarding additional assistance.

Fritz contacted Brough that afternoon to inform her that the District had taken action regarding the non-reelection of four teachers and agreed to meet with Brough on March 16.

Fritz instructed DeMarlo to meet with Korn and her principal, Dennis Nakafuji, on March 13. Korn testified that she was advised that the notice was only a technicality because Korn had not had enough formal evaluations during the school year. DeMarlo testified that she explained that Korn's contract would not be renewed and that the non-reelection decision was separate from the evaluation process, which would be carried out pursuant to the collective bargaining agreement. Korn and DeMarlo both testified that Korn would receive her final evaluation. Nakafuji did not testify.

Korn, Johnstone and Eades-Boutry contacted CEA for assistance. Fritz and DeMarlo met with McMurray, Korn, and Korn's husband. Fritz reviewed the same non-reelection information and maintained that the District was not legally obligated to give reasons for its decision. According to Korn

and McMurray, Fritz indicated that the notice was not based on Korn's teaching performance and that additional evaluations were needed.

CEA began a campaign to publicize the non-reelection issue after a meeting with Fritz and DeMarlo failed to rescind the action. McMurray made a presentation to the school board. The board president made no responding statement.

On March 25, Fritz advised Korn that a certain individual would be her co-evaluator. Korn testified that Fritz told her that there was a lot of hope that she could keep her job and that she should not bring her husband to the meetings. Fritz testified that in response to Korn's repeated requests for assistance, she advised her that she would be better off with a CEA representative familiar with the process as opposed to her husband.

On March 27, Fritz met with Johnstone to inform her of the individual who would be her co-evaluator. Johnstone testified that Fritz told her that the District had not appreciated it when another teacher brought her husband to a meeting, and that it was important to be cooperative. Fritz testified that she advised Johnstone that she could not give advice but that she should contact CEA or legal counsel.

Eades-Boutry met with Fritz to propose that she be hired for one additional year and offered to sign a notarized statement limiting her employment. Fritz testified that she agreed to

relay the proposal to the cabinet, but told Eades-Boutry that she would recommend against it.

Prior to or during the April vacation, all three teachers were contacted and advised that the decision would not be rescinded.

Korn asked del Prado to reconsider the decision in a meeting held on April 27. Korn testified that del Prado indicated she would reevaluate her case and asked her to keep their meeting a secret. Del Prado reviewed the process, found it to be fair, and reported her conclusion to the school board.

Joan Barram, School Board President, also met directly with Korn. Barram told Korn that she would insure that Korn was not blackballed based on her past parent activism at another school, and that the decision was based upon an evaluation of her work performance by more than one administrator.

CEA met twice with del Prado, Fritz, Barram, and the school board vice-president. Brough and McMurray testified that they overheard del Prado state that Eades-Boutry knew one of the reasons for her termination, and it had to do with her activities last summer. Del Prado did not testify with regard to the statement or deny making it.

THE ALJ'S PROPOSED DECISION

The ALJ found that: (1) the tenure decision was made at the March 10 school board meeting; (2) the record did not support a finding that the protected activity of Johnstone and Korn was a motivating factor in the District's tenure decision; (3) the fact

that Eades-Boutry was a member of the CEA Representative Assembly in 1985-86 was too remote and sketchy to be a motivating factor in the tenure decision; (4) Eades-Boutry engaged in protected activity when she sought CEA assistance in appealing two adverse unemployment insurance decisions and such activity was a motivating factor in the District's tenure decision; and (5) CEA had supported an inference that Eades-Boutry's protected activity was a motivating factor in the District's tenure decision.

CEA'S POSITION

CEA objects to certain findings of facts and credibility determinations and alleges misinterpretation of testimony, some of which, if true, would provide evidence that the District was predisposed to take reprisals against Korn and Johnstone. These objections do not require further consideration since they are not supported by the record and, even if true, the evidence would be negligible and would not support CEA's contention. An ALJ's credibility findings will not be disturbed on appeal absent evidence that those findings are clearly erroneous. (Santa Clara Unified School District (1979) PERB Decision No. 104.)

CEA also objects to the ALJ's conclusion regarding the timing of the actual decision of non-reelection. CEA asserts that Fritz' February 4, 1987 memo to the certificated management team unequivocally stated that a second administrator would be assigned to co-determine tenure if the teacher had only one evaluator during the temporary and or probationary period. CEA

argues that Korn and Johnstone were in unique positions since they were the only teachers having just one evaluator.

CEA asserts that the ALJ erroneously granted the District's motion to dismiss with regard to Johnstone and Korn without allowing it to present rebuttal evidence. The Board finds that the ALJ complied with PERB regulation 32170 and obtained a complete record upon which a decision could be rendered. Furthermore, immaterial, irrelevant, or unduly repetitious evidence may be excluded. Since the record is clear that the District's tenure decision was made on March 10 (see Discussion section), no rebuttal evidence was necessary.

DISTRICT'S POSITION

The District excepts to the ALJ's analysis and conclusion that Eades-Boutry engaged in protected activity when she sought CEA assistance in appealing an adverse employment insurance decision and that a nexus existed between that activity and the District's decision not to rehire her. The District asserts that the ALJ improperly concluded that it acted from unlawful motivation based solely on an adverse inference from uncontradicted hearsay testimony.

The District excepts to the ALJ's pre-hearing denial of its Motion For Bifurcation of the Hearing.[4]

The District excepts to the ALJ's denial of its Notice of Submission of Public Records for Official Notice and Request that

[4]The ALJ properly concluded that formal bifurcation of the hearing was unnecessary.

Official Notice Be Taken of all official documents related to Eades-Boutry's unemployment appeal.[5]

DISCUSSION

The Board affirms the ALJ's analysis and conclusion that the District made its tenure decision on March 10, 1987. The ALJ properly considered the plain language of the non-reelection letter, the applicable statute, and the testimony.

The record shows that, on March 10, the superintendent reviewed the process of developing recommendations with the school board and discussed each of the four teachers recommended for non-reelection. The school board adopted the superintendent's recommendation. Barram testified there was nothing to indicate that the board would reconsider its decision at a later date, or that it would extend any timelines for making the non-reelection decision. Education Code section 44882, subsection (b) provided that the District had until March 15 to notify employees of its tenure decision. The letter handed to the teachers and signed by the superintendent clearly stated that the Board of Education had decided not to reelect them for the next school year.

The testimony contained inconsistencies in that all three teachers testified that they were told that the decision was not final at the meeting where they received their notice of non-reelection. Korn and Johnstone testified that they were told

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[5]The ALJ properly denied the request because there was no showing that the request could not have been made, or the documents produced prior to the close of the hearing.

additional evaluations were necessary before a final decision could be made. Fritz, DeMarlo, Clark, and Ferraiuolo testified that nothing was said in the meeting which could have given the impression the decision was not final.

All three teachers contacted CEA for assistance almost immediately after receiving notice. A series of meetings were held in which the teachers and CEA representatives repeatedly requested the reasons for the non-reelection decision. We agree with the ALJ that the teachers must have believed that the decision was final since they initiated immediate action to encourage the District to rescind its decision.

The Board affirms the ALJ's analysis and conclusion that certain conduct of Eades-Boutry was not protected and that certain conduct while protected was too remote to be considered a motivating factor in the tenure decision. The Board affirms the ALJ's analysis and conclusions that the protected activity of Johnstone and Korn prior to March 10, 1987, was minimal,[6] and that the Association failed to establish the exercise of protected rights was a motivating factor in the District's tenure decision.

We reverse the ALJ's finding that the District unlawfully discriminated against Eades-Boutry. In order to establish a

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[6]The ALJ properly found that Korn's conduct was limited to raising the issue of obtaining a temporary contract for herself during a chance meeting with Fritz. However, we reverse the ALJ's finding that such activity was not protected. This Board held in Pleasant Valley School District (1988) PERB Decision No. 708, that an employee has a statutory right to represent himself individually in his employment relations with the District.

prima facie case of discrimination or retaliation, a connection or "nexus" between the employee's protected activity and the employer's adverse action must be shown. If there is no direct evidence, a nexus can be established by circumstantial evidence and inferred from the record as a whole. (Novato Unified School District (1982) PERB Decision No. 210.)

The ALJ found that the Association established the inference that Eades-Boutry's protected activity was a motivating factor in the District's tenure decision. The ALJ's finding of nexus was based solely on uncontradicted testimony by Brough and McMurray, who testified that Superintendent del Prado said that Eades-Boutry knew one of the reasons for her non-reelection, and it had to do with her activities last summer. McMurray testified that upon hearing the statement, he surmised as to what Eades-Boutry could have done over the summer. After he recalled Eades-Boutry's request for CEA representation, McMurray testified that he concluded that del Prado must have been referring to such request. The ALJ concluded that since Eades-Boutry did not teach last summer, del Prado "had to be referring to her unemployment activities." We are unable to determine the reasons for the ALJ's conclusion, but disagree that such a conclusion can be drawn without other supporting facts. Del Prado's statement, standing alone, is far too general to speculate as to its precise meaning.[7]

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[7]Since we find that CEA did not support an inference that Eades-Boutry's activity was a motivating factor in the District's tenure decision, we find it unnecessary to determine whether

We conclude, therefore, that the statement relied upon by the ALJ falls short of supporting an inference that Eades-Boutry's activity was a motivating factor in the District's tenure decision.

ORDER

Based on the foregoing, the Board AFFIRMS the ALJ's dismissal of that portion of the unfair practice charge relating to Johnstone and Korn. As to Eades-Boutry, we REVERSE the ALJ's finding that the District violated section 3543.5(a) and (b) of the Act. Accordingly, Case No. SF-CE-1190 is DISMISSED.

Members Craib and Camilli joined in this Decision.

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contacting a union official for assistance on an unemployment insurance appeal is protected activity.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CUPERTINO EDUCATION ASSOCIATION CTA/NEA,	)	Unfair Practice Case No. SF-CE-1190
Charging Party,	)	
v.	)	
CUPERTINO UNION SCHOOL DISTRICT,	)	PROPOSED DECISION (11/3/88)
Respondent.	)	

Appearances: Ramon E. Romero, Attorney, for Cupertino Education Association CTA/NEA; Breon, O'Donnell & Miller by Keith V. Breon, Attorney, for Cupertino Union School District.

Before James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On May 18, 1987, the Cupertino Education Association CTA/NEA (hereafter CEA or Charging Party), filed an Unfair Practice Charge against the Cupertino Union School District (hereafter District). The charge was amended on June 29, 1987 and on August 25, 1987. On October 9, 1987, a complaint was issued by the regional attorney for the Public Employment Relations Board (hereafter PERB or Board). The complaint alleged that the District violated Government Code section 3543.5(a) when it failed to reemploy three teachers at the conclusion of their probationary period. The complaint

This proposed decision has been appealed to the Board itself and may not be cited as precedent unless the decision and its rationale have been adopted by the Board.

also alleged a derivative violation of section 3543.5(b).[1] On March 31, 1988, the Charging Party filed a motion to amend the complaint to conform to proof, alleging additional acts of protected activity.[2] A settlement conference was held; however, the matter remained unresolved.

On November 6, 1987, the District filed a Motion to Dismiss the Complaint and an Alternative Motion to Bifurcate the Hearing. Those motions were denied. Six days of hearings were held between February 8, 1988 and March 10, 1988. At the conclusion of the Charging Party's case in chief, the District was allowed to put on a partial defense as to some issues and then make a motion to dismiss the complaint. The District reserved its right to present the remainder of its defense case if the motion to dismiss was denied.

The District made its Motion to Dismiss on March 10, 1988. The motion was denied as to one teacher, Susannah Eades-Boutry.

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[1]The Educational Employees Relations Act (hereafter EERA or Act) is codified at Government Code sections 3540 et seq. Unless otherwise indicated, all statutory references in this decision are to the Government Code. Section 3543.5(a) and (b) state that it shall be unlawful 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.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.

[2]That amendment is hereby accepted.

The parties were ordered to brief the motion regarding the other two teachers, Barbara Korn and Patricia Johnstone. The District was ordered to go forward with the remainder of its defense as to Eades-Boutry; however, it chose not to put on any additional evidence and rested its defense.

Motions by the District that official notice be taken of certain public records and by the Charging Party to call additional witnesses were denied.

Transcripts were prepared, briefs filed, and the matter submitted for decision on August 5, 1988. This decision rules on the District's Motion to Dismiss regarding Korn and Johnstone, without the District having rested its case, and upon a closed record regarding Eades-Boutry.

FINDINGS OF FACT

This findings of fact section concerns the employment and protected activity of the three teachers over a period of several years, until their termination at the end of the 1986/87 school year.

1984/85 School Year

In June of 1984 (the end of the 1983/84 school year), the District, faced with declining enrollment and budget problems, issued approximately 100 layoff notices to teachers. Faced with a layoff, an unprecedented number of teachers took leaves of absences. Many also took advantage of a specially-devised District program allowing teachers to cut back to a 50 percent

teaching load and take a 50 percent leave. At the same time, many teachers retired. This left the District in the position of having layoffs in June and several vacancies they were unable to fill at the start of the next school year.

The collective bargaining agreement between CEA and the District governed the priority for reemploying teachers after layoff. The contract also provided a transfer procedure whereby remaining teachers were given priority to move into different teaching slots as they became open.

Because teachers who were on leave and reduced workload status had return rights, the District was unable to fill the vacancies with permanent employees. It therefore hired a number of temporary teachers throughout the District. One of those temporary teachers was Susannah Eades-Boutry.

By early June 1985, the District was still uncertain of its staffing needs for the following school year (1985/86) because individuals on leave and layoff status had not yet committed to return. CEA and the District had also agreed to extend, for a limited period, the final date for teachers to request a priority transfer. This delayed the District's ability to identify specific job openings which it might once again fill with temporary teachers.

Judith Fritz, the District's Director of Human Resources and Community Development, and Pat McCrery of the same office, held a meeting with the temporary teachers in late May or early

June of 1985 to explain the District's staffing plan and how it would impact temporary teachers. Fritz discussed the priority rights of returning teachers and transfers, and pointed out that temporary teachers would be contacted as soon as staffing was settled. Fritz indicated that, although there was a high probability that the District would need temporary teachers the following year, it could not guarantee employment and was not sure when it would be able to finalize temporary staffing.

Dorothy Brough, CEA President, attended the meeting and testified that one teacher, Eades-Boutry, spoke out in a manner critical of the District. Eades-Boutry asserted that other districts had their staffing already settled, and she did not understand why this District could not do a better job notifying temporary teachers of their employment status. Eades-Boutry also testified that Fritz became irritated at that same meeting when Eades-Boutry criticized the District for granting additional time to permanent teachers to request priority transfers. Some of the other temporary teachers nodded in agreement with Eades-Boutry's criticism.

Fritz testified that she recalled questions about why staffing decisions were taking so long, but had no specific recollection of criticism by Eades-Boutry. Pat McCrery had very little recall about the meeting. She could not recall whether Brough had been present and could not recall any specific questions or statements by Eades-Boutry.

On this issue, the testimony of Eades-Boutry and Brough is credited. Their recall was specific and detailed. In contrast, Fritz admitted the subject was raised but could not recall who raised it. McCrery's recollections of the meeting were too vague to support any findings. Thus, it is found that Eades-Boutry did make comments critical of the District's employment procedures at the meeting.

At the same meeting, Fritz raised the issue of unemployment benefits for temporary teachers. Fritz explained that temporary teachers were entitled to file for unemployment benefits. If, however, they eventually accepted reemployment with the District, they would be obliged to repay any unemployment payments they had received over the summer. Fritz explained that if temporary teachers waited to file for unemployment payments until after staffing was settled, any payments they received would be retroactive to July 1. Temporary teachers would not therefore, lose anything by waiting to file for benefits until staffing was settled, and they would avoid the problem of having to repay benefits, if, in fact, the District did offer them a job the following year.

Nevertheless, Eades-Boutry filed for unemployment benefits immediately upon the end of the school year. She received payments until the third week in August, when she became aware that she would be reemployed by the District.

1985/86 School Year

At the beginning of the 1985/86 school year, Eades-Boutry was reemployed as a temporary teacher. For a portion of that year Eades-Boutry was a member of CEA's Representative Assembly.[3] There are approximately 50 members of the Representative Assembly. All are elected by bargaining unit members. Although CEA does not specifically inform the District of the identity of Representative Assembly members, each school site principal is generally aware of the representatives from that site. It was a common practice for the Assembly members to give a report at the end of each faculty meeting.

Barbara Korn and Patricia Johnstone were also employed during the 1985/86 school year, although not as temporary teachers. Both were hired in long-term substitute positions. Both had held other substitute positions during previous years, Korn since 1976 and Johnstone since 1981.

During the 1985/86 school year, Johnstone had been a long-term substitute for a teacher whose return date had been uncertain. Around April or May 1986, Johnstone sought to have her status changed to a temporary teacher since it appeared to her that she would be teaching the same position for the entire school year. Temporary teachers make a substantially

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[3]There is conflicting testimony whether Eades-Boutry was a member of the Representative Assembly during the 1984/85 school year rather than the 1985/86 school year. In either case, it was at least one school year prior to being dismissed and need not be resolved beyond that.

higher salary and have better benefits than substitute teachers.

Johnstone first approached her principal, Frank Clark, who inquired at the District office for her. Clark, however, was unable to clarify the District's policy since it had been such a long time since the District had hired any teachers. Clark suggested she wait and see whether the District would make her a temporary teacher.

After receiving encouragement from fellow teachers, Johnstone contacted CEA President Brough, and raised the issue with her. Brough offered to set up a meeting between Johnstone, herself and Fritz to discuss the matter.

That meeting took place June 5. When Fritz arrived at the meeting, she was surprised that Brough was present because long-term substitutes are not included in the certificated bargaining unit represented by CEA. Fritz indicated she welcomed Brough's presence and participation as long as they were not setting a precedent that substitutes were included in the bargaining unit.[4]

Fritz indicated she thought the meeting would be short because she could anticipate what they were looking for and that they would be pleased to hear what she had to tell them. Johnstone said she had been a long-term substitute the

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[4]Although Fritz was confused about the rights of an employee organization to represent employees not included within its bargaining unit, it is clear from the testimony of all present that Fritz did not limit Brough's representation of Johnstone.

entire year and would like to be on a temporary contract. Fritz confirmed that Johnstone's assignment was not a typical long-term substitute assignment, and that Johnstone had had to do all the presentation and follow-up for the class for the whole year. Fritz stated that although the District was not legally required to give her a retroactive temporary contract, it would be fair to do so. Fritz also indicated there was one other teacher in a similar situation.[5] Fritz said the school board would still have to approve the contracts, but that the District had done this in the past and she did not anticipate any problems obtaining approval. By all accounts, the meeting was friendly and amicable without pressure being exerted upon Fritz to make the changes.

Barbara Korn, who was in an identical situation, heard that Johnstone had been successful in her reclassification, and decided to pursue a temporary contract herself. In a chance meeting, Korn happened upon Fritz in the hallway of the District office. Korn mentioned that she had been working a full year in a single position and asked if there was any way she could be compensated as a temporary teacher. Fritz responded that the District was considering Korn and one other teacher for retroactive temporary contracts and that someone

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[5]Although Fritz did not identify her by name at that time, Fritz was referring to Barbara Korn.

would get in touch with Korn in about three days.

A few days later Pat DeMarlo,[6] of the Human Resources and Community Development Office, contacted both Korn and Johnstone, informing them that their retroactive temporary contracts had been approved and they should come to the District office to sign the contracts. Johnstone testified that when she signed the contract, DeMarlo seemed to be very pleased for her.

On April 17, 1986, Fritz held another meeting for temporary teachers similar to the meeting a year earlier. Fritz was accompanied by Pat DeMarlo. Fritz explained that the District was optimistic it would be able to rehire the temporary teachers, but that once again the District was unable to guarantee reemployment for the following year. Fritz explained the unemployment insurance process again: if the temporary teachers immediately filed, collected payments and were later reemployed, they would have to pay the money back. Fritz also stated that temporary teachers, whose performances were not satisfactory, had already been notified, so those present did not need to worry about that.

Eades-Boutry testified that she did not speak out during

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[6]At that time, DeMarlo was a bargaining unit member in an administrative internship program. As a teacher, DeMarlo had extensive involvement with CEA. From January 1984 to June 1985, she was CEA President. Prior to that, she had been treasurer. She had also served as recording secretary, chaired numerous CEA committees, and been active on numerous CEA negotiating teams. At the time of the hearing, DeMarlo was a principal in the District.

that meeting, but did meet with Fritz afterward. She told Fritz that she and her husband were buying a home, and without employment verification from the District, they would not qualify for the loan. Fritz agreed to provide employment verification, if Eades-Boutry would agree to sign a disclaimer statement that the District, by verifying her employment, in no way ensured her of a job the next year. Eades-Boutry agreed and Fritz turned in the employment verification. There did not appear to be any friction between Fritz and Eades-Boutry over this procedure.

Because she had been required to sign the disclaimer, Eades-Boutry felt she did not have a reasonable assurance of a job for the following year. At the end of the school year, she filed for unemployment benefits in the same manner as the summer before, and started receiving benefit payments right away. After about four weeks, she was notified by the unemployment office that the District had contested the payments because they were going to rehire her for the upcoming year. According to Eades-Boutry, this was her first real assurance of a job for the following year. Eades-Boutry contacted the District and Fritz confirmed that she would be rehired. Eades-Boutry's unemployment benefits were then cut off. Eades-Boutry did not appeal the cutoff of benefits.

Eades-Boutry later received a notice that the four weeks of benefit payments she had already received during the summer of 1986 were an overpayment. The notice indicated Eades-Boutry

would have to repay those benefits as well as the benefits received during the last two weeks of August 1985. She was also assessed a 30-percent penalty for both years for willfully making false statements in obtaining the benefits.

Eades-Boutry immediately contacted Bill McMurray, CEA Executive Director, and asked for representation in appealing the unemployment determinations. McMurray filed two appeals on behalf of Eades-Boutry, for 1985 and 1986. McMurray also contacted Fritz, informing her that CEA was representing Eades-Boutry in her appeal, and requesting certain documents from the District.

An unemployment hearing was held, at which Eades-Boutry was represented by McMurray. The administrative law judge for the Unemployment Insurance Appeals Board issued two decisions. The first, covering 1985, reversed the Employment Development Department entirely, upholding Eades-Boutry's position that she was eligible for benefits and did not make false statements in filing for the benefits.

The second decision denied Eades-Boutry's 1986 appeal. The decision held that an overpayment had been made and that Eades-Boutry had willfully given false statements in obtaining benefits, which justified a 30-percent penalty. Eades-Boutry appealed the 1986 decision. On appeal the Unemployment Insurance Appeals Board reversed the administrative law judge's

finding that Eades-Boutry had made false statements and therefore the penalty assessed against her was cancelled.[7]

1986/87 School Year

During this school year, Eades-Boutry, Korn, and Johnstone all received temporary contracts.[8] In the fall of 1986, the District realized it might be able to begin hiring teachers into probationary positions for the first time in several

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[7]Although McMurray began the appeal process during the summer of 1986, a final decision was not issued until February 5, 1987. This was after Eades-Boutry was given probationary status, but prior to receiving her notice of non-reelection. According to Fritz, the District's unemployment insurance program is administered by the county and not the District. Although the District was aware of the initial appeal it was not aware of the February decision until McMurray testified at this hearing.

[8]During August 1986, DeMarlo contacted Johnstone and offered her the same position she had filled during the 1985/86 year. Because the return date of the regular teacher was still in question, the position was offered as a long-term substitute. When Johnstone stated her opposition to returning as a long-term substitute rather than as a temporary teacher, DeMarlo offered her a temporary position at a different school. Johnstone asked for and received time to think about her options. A few hours later DeMarlo called Johnstone back and offered her a temporary contract for the first half of the school year at her previous position. Johnstone accepted that offer. At the end of the first semester, when it was determined that the regular teacher was not returning, Johnstone was offered a temporary contract for the second half of the year.

Korn was offered a temporary position teaching third grade. She preferred to teach kindergarten, so she accepted a long-term substitute position with the understanding that the position would be made temporary if the regular teacher did not return. In October of 1986 Korn was given a temporary contract.

years. Fritz discussed with CEA the concept of moving temporary teachers into probationary status. CEA's response was very positive and urged the District to do it as early as possible. By November 1986, the District felt secure enough with projections regarding staffing needs to grant probationary status to all temporary teachers in their second year of temporary status. Eades-Boutry, Korn, and Johnstone were all included in this group along with 16 other teachers.

Just prior to Christmas break, Fritz informed CEA that Superintendent Yvette del Prado would recommend the action at the January board meeting. While CEA would have preferred that it had happened sooner, it exerted no particular pressure on the District to do so. CEA was generally quite pleased that the District was taking the action.

In changing their status to probationary, the District dealt with the temporary teachers as a group. There was no screening of individual teachers as to competency.

Once the temporary teachers were given probationary status, the District was faced with the decision of whether to grant tenure to the teachers. Because all the new probationary teachers had taught more than 70 percent of the previous school year, they were legally considered to be in their second year of probation. The Education Code section applicable at that

time[9] provides in pertinent part:

> The Governing Board shall notify the employee, on or before March 15, of the employees second complete consecutive school year of employment by the District. . ., of the decision to re-elect or not re-elect the employee for the next succeeding school year to such a position. In the event that the Governing Board does not give notice pursuant to this section on or before March 15, the employee shall be deemed re-elected for the next succeeding school year.

Therefore, even though the 19 teachers in question had only been granted probationary status on January 13, the board had to decide within approximately 60 days whether to grant them permanent status.

With that in mind, the superintendent's cabinet developed an approach for reviewing each teacher. The employment record for each probationary teacher would be reviewed along with recommendations from current supervisors, as well as previous supervisors. A February 4, 1987 memo, from Fritz to the certificated management team, indicated the process of developing recommendations "must be completed by March 3, 1987." In the event that a teacher had only had one evaluator during their period of employment, a second administrator would be assigned to help determine qualifications for tenure. No

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[9]Education Code section 44882, subdivision (b) was the governing statute during the relevant period. That code section has since been repealed and the governing statute for the non-reelection of probationary certificated employees is Education Code section 44929.21.

decision regarding reemployment was to be based solely upon the recommendation of a single administrator.

Of the 19 probationary teachers, only one had only one supervisor. In that case, a different administrator was assigned to review the tenure nomination and the decision process was completed at the same time as the other 18 probationary teachers.

The superintendent's cabinet gathered and reviewed information and recommendations during meetings in January, February, and early March. On March 9, the cabinet decided upon the final recommendation the superintendent would make to the school board.

During the closed session of the March 10, 1987 school board meeting, the superintendent recommended that four temporary teachers be given Notice of Non Re-election of Employment. The superintendent reviewed the process with the board and discussed each of the four teachers who were not being reemployed. The board then adopted the recommendation. Joan Barram, president of the school board at the time, testified there was nothing in its action to indicate that the board would be reconsidering its decision at a later date, or that they would extend any timelines for making the non-reelection decision. Barram understood that the board was making a final decision. Although she understood the board could always correct a mistake at some later date, no one ever

raised the possibility of giving out notices in order to give the District additional time to evaluate the teachers in question.

Non Re-Election Notice Meetings

Fritz had the responsibility of informing the teachers of non-reelection of employment. She had notices prepared[10] and planned to inform the teachers personally, as well as by certified mail. She contacted the site principals and scheduled meetings.

When Fritz contacted Frank Clark, the principal who supervised Johnstone and one other teacher who was being terminated, Clark requested that additional assistance be provided to the two teachers from his school. He had concerns about the teachers getting through the remainder of the school year and worried about repercussions in the community if it looked like things were not being taken care of for the rest of the school year. He wanted to ensure that teachers had assistance if they needed it.

On March 12, Fritz met with Clark and Johnstone. According

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[10]The notice was a letter to each of the four teachers, signed by Superintendent del Prado, stating:

> We have appreciated your time and efforts in performing your duties as a teacher in the Cupertino Union School District, but regret to inform you that the Board of Education has decided not to re-elect you as an employee for the 1987-88 school year.
>
> We wish you success in your future endeavors.

to Johnstone, Fritz gave her the letter, allowed her to read it and said it was mostly just a legality in case the District decided not to reemploy her. Fritz also stated that Johnstone should not be too alarmed by it and that she had a 99 percent chance of reemployment. Fritz also told Johnstone that attitude, team playing, and cooperation were of the utmost importance. Johnstone testified that Fritz said her non-reelection was not a question of competency; but rather the District wanted to do a little more looking and needed to do more evaluations. She said someone, other than the building principal, would evaluate Johnstone. They discussed potential evaluators and agreed upon a particular individual.

Johnstone's version is disputed by both Fritz and Clark.[11] According to Fritz, she began by saying it was an important meeting because the board had taken action on March 10 to not reemploy Johnstone. Fritz gave Johnstone the non-reelection letter, allowed her time to read it, then reiterated that the letter meant she would not be reemployed by the District the next year. Fritz indicated the District was not legally required to state reasons for its decision and that it did not intend to do so. She also indicated that the names of the non-reelected teachers would not be made public.

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[11]There are several meetings where there are major conflicts in testimony about the finality of the school board's March 10 non-reelection decision. Those conflicts in testimony will, to the extent necessary, be resolved in the discussion section of this Decision.

Johnstone's name would therefore be kept confidential unless she chose to make it public.

After Fritz explained what the District felt its obligations were, she informed Johnstone that she was free to contact CEA or legal counsel. Fritz testified that she also informed Johnstone that the District would continue to provide feedback on her teaching and/or release time for in-service training support while she was still there.

According to Fritz, Johnstone pressed to find out the reason for non-reelection, but Fritz repeated the District's position that it was not obligated to give reasons and that it chose not to do so.

Clark testified Johnstone was told she would not be employed again the following year. He testified that he understood from Fritz' presentation that Johnstone would be terminated at the end of the school year, but that if Johnstone needed help or support, the District would provide it until the end of the school year. He denied there was any indication the notice was merely a formality to allow the District more time to evaluate Johnstone.

After the meeting with Johnstone, Fritz and Clark met with the other teacher being terminated at Clark's school. After that meeting, Fritz went to a different school to meet with Eades-Boutry and her principal, Jerd Ferraiuolo.

According to Eades-Boutry, Fritz gave her the letter and explained that, under the Education Code, the District did not have to give reasons for non-reelection. Eades-Boutry testified that Fritz also explained that the notice was not a final decision. The District had 60 days in which it could reverse the decision, but that it had to give notice by March 15 or Eades-Boutry would become a tenured employee.

Fritz refused to give any reasons to Eades-Boutry for her non-renewal, but did tell her that she was not the kind of teacher the District was looking for. When Eades-Boutry asked what kind of teacher the District wanted, Fritz replied that there were many factors, including working well with children, parents and staff and being a team player.

Fritz' version of the meeting is that she started by informing Eades-Boutry that the school board had taken action, based upon an administrative recommendation, to not reelect her employment. Fritz gave her the letter and backup documents and suggested Eades-Boutry read them. Fritz explained that the District was not going to give any reasons for its action. She also explained that the District would not publicly name those teachers being terminated. Fritz also told Eades-Boutry that she should get another opinion as to her rights from CEA and/or legal counsel. Fritz testified there was no discussion about providing Eades-Boutry with additional assistance.

According to Ferraiuolo's testimony, Eades-Boutry was told that she was being dismissed. Eades-Boutry asked for specific reasons, but was not given any. He recalled a discussion of Eades-Boutry's rights to go to CEA. He had no recollection of any discussion about any further evaluations being done. Ferraiuolo testified that he could not think of anything in the meeting which would have given anyone the impression the decision was not final. Following the meeting Eades-Boutry sought additional information from him, but he referred her to the CEA.

Fritz was to meet with Korn that same afternoon, but because Eades-Boutry's meeting was late getting started, Korn had already gone home by the time Fritz arrived at Korn's school. Fritz was scheduled to be out-of-town the next day so she arranged for Pat DeMarlo to meet with Korn instead. Fritz gave DeMarlo instructions for the meeting, then contacted Brough. Fritz informed Brough that the District had taken action to not reelect four teachers and she did not want CEA to be caught by surprise. Brough asked who the teachers were, but Fritz would not tell her, saying it would be up to the teachers to make it public if they chose. Fritz went over the same information, in abbreviated form, regarding the District's legal basis for the action. Fritz indicated a willingness to meet to talk about it further if Brough wanted to. They agreed to meet the following Monday, March 16, in the afternoon.

The next day, March 13, DeMarlo met with Korn and her principal, Dennis Nakafuji. According to Korn, DeMarlo began by handing her the non-renewal letter and then explaining that the problem was that Korn had not had enough formal evaluations during the 1985/86 school year. According to Korn, DeMarlo indicated the District needed to take a closer look at her. The District would arrange for additional evalutions and that the non-renewal letter would be rescinded in May once they had additional observations.

Korn told DeMarlo that she was very shocked and upset that the District had waited until March to tell her if there had been a problem. DeMarlo indicated that Korn could talk to Fritz if she had any other questions. DeMarlo also told Korn that she had a right to seek assistance from CEA.

Nakafuji did not speak at all during the meeting. However, after the meeting, according to Korn, she told Nakafuji that she did not know why this was happening and that she was very upset and concerned. He warned her not to be adversarial or ask any questions if Korn was going to talk to Fritz, and not to align herself with anyone else.[12] Korn felt Nakafuji was

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[12]The comments of Nakafuji, as well as similar alleged comments attributed to Fritz, were not included in the complaint or the amended complaint as violations. The statements, particularly those attributed to Nakafuji, were not fully litigated. They, therefore, will not be entertained as unalleged violations of the Act. Santa Clara Unified School District (1979) PERB Decision No. 104. Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.

worried, upset, and extremely concerned for her. She did not feel Nakafuji threatened her, but rather warned her to be cautious.

DeMarlo's version of the meeting is that she gave Korn the letter and explained that she was not being renewed for the following school year. Korn kept asking why this was happening, indicating that she had not received notice that she was doing a bad teaching job and had always received good evaluations. DeMarlo testified that she explained to Korn several times that non-reelection of employment was separate from the evaluation process. DeMarlo explained to Korn that all probationary teachers received three evaluations during their probationary years. The first two had been finished, but the last one, scheduled for a May 1 deadline, had not yet been completed. The evaluation process was spelled out in a contract with CEA and would continue as planned, independent of the non-reelection of employment process. According to DeMarlo, stopping the evaluation process would be a violation of the contract.

DeMarlo specifically denied saying the non-reelection notice was merely a technicality because there had not been enough time to evaluate Korn. According to DeMarlo, Korn asked if the District could change its mind and DeMarlo answered yes, but DeMarlo denied saying anything about the non-renewal decision not being firm. DeMarlo testified that she had a

specific recollection of telling Korn "that the bottom line [is] you will not have a job in this District next year and should be out looking for one."

Nakafuji, who is no longer employed by the District, was not called to testify.

Post Meeting Actions

That evening Korn contacted Brough and asked for CEA assistance. Brough set up a meeting for the following Monday morning. Over the weekend Eades-Boutry and Johnstone also contacted the CEA for help.

Over the weekend Korn and her husband also telephoned both Sheri Skold, Korn's previous principal, and Fritz. In both conversations Korn sought, without success, to find out the reason for her termination. Skold listened to her then referred her to Fritz, and told her to contact CEA for assistance. Fritz maintained the position that the District was not required to give reasons and chose not to do so. Fritz also suggested that Korn contact CEA or an attorney to validate what the District was doing.

Fritz, DeMarlo, Korn and her husband, and McMurray attended the Monday morning meeting. Testimony regarding the meeting differs greatly. Korn's version is that Fritz reiterated the fact that there were not enough formal evaluations and that was why she received the notice. When Korn asked additional questions, Fritz told her that because of legalities she

could not give her any more information. She recalled Fritz quoting a law saying the District did not have to give just cause. According to Korn, McMurray asked additional questions; however, she could not recall their substance.

McMurray testified that Fritz opened the meeting by briefly explaining that the letter was necessary because the District had an obligation to notify people by March 15, if they were not going to reemploy them. McMurray sought the rationale for the non-reelection decision, but Fritz responded that new legislation allowed the District to not give reasons. McMurray challenged Fritz' position on the legality of the District process. When they realized they would not be able to resolve their differences they agreed to set that issue aside for the time being. McMurray testified he tried to ascertain why the District chose that particular method to accomplish what he considered to be the dismissal of probationary teachers. According to McMurray, Korn kept asking what she could do to correct any deficiencies in her performance, if there were any. Fritz responded that the notice was not based upon her performance. In referring to Korn's teaching skills, Fritz said something to the effect that "if it's not broken, don't fix it." Fritz indicated that it may well be that the performance, as reflected through evaluations, was satisfactory, but the District needed to take a more global look. There were going to be additional evaluations and

observations before the end of the year so the District would have a more complete picture. The meeting ended with a reference to follow-up observations of Korn by individuals from the District office.

According to Fritz, she began the meeting by reiterating the process used to determine that some probationary teachers would not have their employment renewed. Fritz says she reviewed the same information that had been told to the individual teachers earlier, except she did not repeat the teacher's right to representation because Korn was already represented at the meeting by McMurray. Fritz testified that Korn and McMurray repeatedly questioned why Korn was not being reemployed and Fritz kept repeating that she would not give any information about Korn's performance because they were not going to discuss the reasons for the District's action. Fritz adamantly denied ever referring to Korn's teaching skills with the phrase "if it's not broken, don't fix it."

DeMarlo testified that, in response to a question from McMurray, Fritz indicated the evaluation process would not stop because evaluations were something that the teachers would carry with them no matter what district employed them.

Later that afternoon there was another meeting between Fritz, DeMarlo, McMurray and Brough. At the meeting McMurray continued to ask for more details of the District's actions,

stressing that the teachers had nothing but positive evaluations and had the support of their staff and colleagues. Fritz indicated the teachers had been flagged because of discussions with their principals and people with whom they had worked, but would not give any specific details.

Fritz indicated that two of the teachers would be receiving support in the form of co-evaluators. McMurray asked if the other two teachers could have the same thing and Fritz agreed.

According to McMurray, Fritz said the District had determined that it needed to take a further "global" look at the individuals because the performance reflected on their evaluations was not sufficient information for the decision.

Fritz testified that although she could not recall who first raised the issue, at some point the parties discussed the possibility of teachers resigning prior to any official action by the board. That would have put the teachers in the position of having left the District on their own volition, and they would not have to say they were released by the District when they sought work elsewhere.

McMurray followed up the meeting by writing to Fritz on March 20. The letter expressed concern about the manner in which the District had "summarily non renewed (dismissed) the probationary contracts for teachers." The letter also expressed skepticism regarding the District's refusal to give

any reasons for the non-renewal vote "other than the District 'wants to take a further look' at these individuals before granting them a permanent status." The letter concluded by urging the District to rescind its actions.

McMurray and the CEA leadership followed up the March 20 letter with a campaign to publicize the issue, in hopes of persuading the school board to rescind its action. McMurray traveled to at least a dozen schools in the District speaking on the subject. Eventually, letter writing and telephone campaigns were organized. Parent groups were also enlisted in the CEA effort to save the teachers. School board meetings were picketed. CEA newletters, vehemently critical of the District's actions, were published, and newspapers, television and radio stations were contacted to generate publicity on behalf of the teachers and put pressure on the school board. According to Fritz, except for starting arrangements to comply with CEA's request for co-evaluators for all four of the non-reelected teachers, she took no further follow-up action at that time. As far as the District was concerned, there was no further action necessary.

McMurray made a presentation to the school board on March 24. He expressed his concerns that co-evaluators had not yet been assigned and asked what the board was going to do. The board president simply acknowledged McMurray's remarks and

made no statements. Following the Board meeting, in a closed session, Fritz informed the Board that they were going to assign co-evaluators to all four teachers.

McMurray wrote a follow-up letter to Fritz on April 6, urging the board to rescind its earlier action. In his letter McMurray also requested that if the action was not going to be rescinded, all parties should be notified so they could make other employment decisions.

On March 25, Fritz went to Korn's classroom to tell her that Sheri Skold, her former principal, would be her co-evaluator. Korn testified that Fritz also told her the District was very concerned about her because she had brought her husband to the earlier meeting. Fritz stayed for a long time, discussing how the District had made mistakes in past tenure decisions. She said she was worried how Korn would look in the future and that the District needed to watch her for a while. According to Korn, Fritz also told her there was a lot of hope that Korn would be able to keep her job.

Fritz described the meeting as a broken record. Korn kept asking what she could do and who she could talk to. Fritz kept telling her that she could not give her advice. According to Fritz, she did, however, tell Korn that if she had other meetings she would be better off having someone from CEA with her rather than her husband, because CEA would be more familiar with the process.

Fritz met with Johnstone two days later on March 27, to inform her that Pat McCrery would be her co-evaluator. Johnstone testified she was not sure why Fritz came to see her, but that Fritz said the District had not appreciated it when another teacher brought a CEA official and her husband to a meeting, and that it was important to be cooperative with the District and not adversarial. She also told her not to align herself with other teachers.[13] However, when Johnstone had told Fritz that she had already gone to CEA, Fritz responded, "well that's your right to do that, of course."

According to Fritz, Johnstone kept asking if there was anything she could do to keep her job. Fritz kept responding that she could not give her any advice, but that she would tell her the same thing she told another teacher; that if she wanted help, it should not be from a parent or husband unless they were familiar with the process. Fritz says she suggested that Johnstone get advice from legal counsel or CEA. Johnstone indicated that parents had contacted her and asked what they could do. Fritz responded that Johnstone should do whatever she felt was necessary, but whatever Johnstone did with parents was irrelevant and would not have any bearing on the matter.

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[13]Like the comments of Nakafuji, these statements are not being entertained as unallaged violations of the Act. Santa Clara, supra.

Eades-Boutry was not informed about a co-evaluator until April 1. Eades-Boutry requested a meeting with Fritz in the hope of changing the District's mind due to her particular circumstances. Eades-Boutry started the meeting by stating she was not there to find out why the District had decided not to rehire her. She said they both knew what the reasons were and it did not have anything to do with what went on in the classroom. Eades-Boutry testified that Fritz nodded in agreement to that statement. Eades-Boutry went on to explain that she only planned to teach one more year, then she and her husband would be moving out of the area. Eades-Boutry planned on going to graduate school. Eades-Boutry proposed that she be hired for just one additional year, and said she would be willing to take the job under any circumstances, even a temporary or probationary position. Eades-Boutry also offered to sign a notarized statement that her employment would be limited to one year. According to Eades-Boutry, Fritz said she would take everything Eades-Boutry had said back to the cabinet, the group that had decided not to rehire her for the coming school year, and would get back to her.

Fritz testified that although she agreed to take Eades-Boutry's proposal to the cabinet, she told Eades-Boutry she would recommend against it. Eades-Boutry requested that Fritz let her know of the cabinet's decision prior to the April recess so Eades-Boutry could use the time to look for work if

they decided against her. Fritz agreed to do that.

One day before the April vacation, Fritz informed Eades-Boutry that the District would not agree to her proposal and that she should continue her job search.

That same day Clark confirmed with Johnstone that she would not be rehired.

Also just prior to the April vacation, Dennis Nakafuji, Korn's principal, told her that "things weren't good" but that he would go to Fritz and speak on her behalf. He also encouraged Korn to talk to del Prado, but that she should go alone, not align herself with anyone who would cause trouble, and not do anything that would be considered adversarial.

During the April vacation, Pat McCrery called Korn and told her that the District would not be rescinding the letter. Korn then decided to meet with del Prado. The meeting occurred on April 27 at del Prado's office.

Like most other meetings in this case there are two versions of the del Prado/Korn meeting; one version is Korn's and the other as told by del Prado and Fritz. Korn testified on two occasions, during both direct and cross-examination that no one else was present during the meeting. When asked on a third occasion whether Fritz had been present, Korn changed her testimony and said that Fritz was present, but only briefly to clarify some issue that Korn could not recall. According to Korn, she asked del Prado to reconsider the decision not to rehire her. Del Prado said she had three criteria for granting

tenure: the individual had to be a good teacher, had to be bright and had to be a team player. Del Prado said Korn was obviously a good teacher and was very bright, but she questioned whether she was a team player. They discussed those criteria with Korn arguing that she met all the criteria. Del Prado said none of the other teachers had come to her, but because Korn had come to del Prado, her whole case would be reopened and she would be reevaluated. Korn testified that del Prado ended the meeting by stating the meeting was a secret and that no one else was to know what they had discussed.

Del Prado and Fritz testified they were both present during all but the initial few moments of the meeting with Korn. According to del Prado, she and Korn spoke socially for a few minutes about their common New York backgrounds. Then, as soon as Korn asked a substantive question, del Prado asked Fritz to join them. Del Prado testified that Korn spent much of the meeting arguing that the process was unfair and that she felt a single individual was out to get her. Del Prado sought more details about the individual, but Korn would not give her the name of that person. Del Prado was surprised to learn Korn had received good letters of recommendation and was nominated by colleagues at her school for a Teacher of the Year Award. Del Prado told Korn she would review the process to make sure it was not a single individual who was standing in the way of her tenure and that she would ensure that a co-evaluator would be assigned to Korn.

Both Fritz and del Prado testified that Korn suggested that she resign and be hired back by the District for a new probationary period. Fritz, however, suggested there were legal problems associated with that, and the District probably would not be willing to do that.

After the meeting with Korn, del Prado informed the school board that she was going to review the process to ensure that it had been fair. During her review she spoke with Fritz and all other members of the cabinet, as well as each of the administrators who had recommended against someone receiving tenure. After her review she reported her conclusion, that the process had been fair, to the board.

CEA, on behalf of the teachers, continued to press for a meeting with the school board regarding the terminations. While they were denied a meeting with the entire school board, McMurray and Brough did meet on one occasion with del Prado, Fritz and the board vice president, and on another occasion with both the president and vice president of the board.

During one of the meetings, when del Prado was told the teachers did not know the reasons for their terminations, she stated "Susie [Eades-Boutry] knows one of the reasons and it had to do with her activities last summer." Del Prado's statement is significant because the school board based its non-reelection decision upon her recommendation. Her statement was overheard by two CEA officials who testified prior to del Prado. Del Prado testified at length later in the hearing and

did not deny the statement or in any way rebut the earlier testimony of McMurray and Brough.

Board President Joan Barram also met directly with Korn. During that meeting Korn indicated she felt a single individual was blocking her tenure over something that had happened in her past when she was a parent activist at one of the District schools. Barram responded that she would not allow Korn to be blackballed and would assure that the decision was based upon the evaluation of Korn's work performance by more than one administrator.

Throughout their employment within the District, none of the three teachers received any unsatisfactory evaluations. The record is replete with excellent letters of recommendations from their principals, both before and after the notice of non-reelection; letters of commendation; and complimentary memos from other administrators and teachers. Eades-Boutry's principal also contacted people in another school district on her behalf when she was applying for a job in that district. No documents or personnel records were introduced which indicated any lack of teaching skills as a basis for which a non-reelection decision was made.

ISSUE

Did the District violate section 3543.5(a) and (b) by denying Patricia Johnstone, Barbara Korn, and Susannah Eades-Boutry reemployment because of their exercise of rights protected by the EERA?

DISCUSSION AND CONCLUSIONS

In Novato Unified School District (1982) PERB Decision No. 210, the Board set forth the standards to be applied in cases where employers are alleged to have discriminated against employees because of an exercise of protected rights. Under the Novato test, a prima facie case of discrimination or reprisal for protected activities is established if the charging party can prove that the employee participated in protected activities, the protected activity was known to the employer, and the action of the employer was motivated, at least in part, by the employee's protected activities.

If the charging party establishes a prima facie showing sufficient to support an inference that the exercise of protected rights was a motivating factor in the employer's action, the burden shifts to the employer to prove that its action would have been the same in spite of the protected activities. The test adopted by PERB is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence to determine whether an action would not have been taken against an employee, "but for" the exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal. 3d 721, 727-730; Wright Line, Inc. (1980) 251 NLRB 150

(enforced in part 1st Cir. 1981) 662 F2d 899.[14] Hence, assuming a prima facie case is present, an employer has the burden of producing evidence that its actions would have occurred in any event. (Martori Brothers, supra at 730.)

In weighing whether the protected activity of the teachers influenced the District's reemployment decision, the issue that must be decided first is the date of the actual decision. Protected activity occurring after the District had decided to deny reemployment obviously could not have been a motivating factor in the dismissals.

Timing of the Non-Reelection Decision

The most significant conflict in evidence presented at the hearing centers on when the non-reelection decision was actually made. Charging Party argues that notices of non-reelection were given out to provide the District with additional time within which they could further evaluate teachers and make a final decision. If this argument is adopted, it means that the teachers engaged in a great deal more protected activity before a firm termination decision was made, than if the argument is rejected. The District, argues

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[14]The construction of provisions of the NLRA as amended, 29 USC 151 et seq. is useful guidance in interpreting parallel provisions of the EERA. (See San Diego Teachers Association v. Superior Court (1979) 24 Cal. 3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal. 3d 608, 616; compare sec. 3543.5(a) of the Act with sec. 8(a) (1) and 3 of the NLRA, also prohibiting interference and discrimination for the exercise of protected rights.)

that a final decision had been made prior to the March 15 statutory deadline, and any subsequent reviews of the process do not detract from the finality of the earlier decision. For numerous reasons set forth below, I conclude that the non-reelection decisions were firm when they were adopted by the school board on March 10, 1987.

One of several factors leading to this conclusion is the credibility of the witnesses attending the meetings where teachers received non-reelection notices. Although Barbara Korn appeared to be honest and very sincere in her testimony, her recollection about certain aspects of key meetings was admittedly very hazy. For example, during the Monday morning meeting of March 16, McMurray challenged the manner in which the District chose to dismiss the probationary teachers. Yet Korn's recollection was that McMurray asked some questions, but she could not recall their substance. Another example is the two occasions Korn testified she met with del Prado alone. It was not until she was specifically asked about Fritz' presence that she recalled that Fritz was in the meeting. Even then Korn had no recollection of the substance of Fritz' participation.

The credibility of Judith Fritz suffers from her inability to get to the point, excessive drama and theatrics; factors which would ordinarily raise suspicions as to the veracity of a witness. Nevertheless, Fritz' testimony included greater

detail about facts which were corroborated by other, more credible witnesses.

Pat DeMarlo was clearly the most credible witness to testify. Her testimony was forthright and specific. Her demeanor was impressive and she appeared willing to tell the truth regardless of its impact upon her directly. Furthermore, she had a very impressive history of being a strong employee advocate and appeared to have a good relationship with the Charging Parties.

The District's version is also supported by the credible testimony of Clark and Ferraiuolo that nothing was said in the meetings which could have given the impression the decision was not final. Both seemed to testify about this issue without understanding the legal significance of their testimony. Their testimony on this issue appeared candid and unrehearsed in response to questioning by the undersigned.

Standing alone, there is no reason to discredit the testimony of Johnstone and Eades-Boutry on this issue. However, when considering their testimony against the weight of other conflicting credible testimony which is supported by the additional evidence set forth below, their testimony on this issue appears less plausible than the District's version.

For example, when Eades-Boutry was given her notice by Fritz, there was no discussion at all about further evaluations or the District needing more time to make the decision. According to Eades-Boutry, she was told directly she was not

the kind of teacher the District was looking for. The fact that co-evaluators were not discussed in her meeting supports the District's position that co-evaluators were suggested first by Clark as support for his two teachers. Co-evaluators were offered for the other two teachers after being requested by McMurray. This is inconsistent with CEA's assertion that the District was trying to buy additional time to evaluate the teachers.

When DeMarlo informed Korn of the non-reelection decision, she did so pursuant to instructions given her by Fritz. In doing so, she went to great lengths to make several points. One was that Korn would not be rehired the next year. According to DeMarlo's very credible testimony, she told Korn the bottom line was that Korn would not have a job in the District next year. Second, she made sure Korn was aware she had rights to representation by CEA. A third point that DeMarlo covered several times was that the evaluation process was independent of, and separate from, the tenure process. The evaluation process would continue pursuant to the contract, but the tenure decision had already been made. Since DeMarlo was operating upon Fritz' instruction for the meeting, there is reason to believe that Fritz had the same agenda in her meetings with the other affected teachers.

Furthermore, if the teachers were given reassurrances that the notices were a mere technicality to allow more time for missed evaluations, that there was a 99 percent chance of

reemployment, and that there was no problem with their teaching skills, then the teachers clearly must not have believed those statements. The teachers and their representatives immediately, and continuously, pressed for additional reasons for the action taken. If they had already been told the action had been taken to allow the District extra time to complete an evaluation process, why then would they keep demanding reasons from the District?

Also, the District continuously maintained that since it was under no legal obligation to provide reasons for the action, it would not do so. If the District had already given the reason to the teachers, why would it so adamantly maintain the right not to give reasons?

If the teachers had been told the notices were given to allow extra time for evaluations, why, at the March 16 meeting, were the parties even discussing the concept of the teachers resigning so they would have a clean slate when looking for work in other school districts? That type of discussion is consistent only with the District's assertion that the teachers had been told they were being terminated.

There is also no evidence whatsoever that the school board had been led to believe, or did or said anything itself, that would indicate that the decision was anything but firm as of March 10.

Furthermore, the record does not support a finding that the District required more time to complete its evaluation process for the teachers in question than it did for the other 15

probationary teachers. The Charging Party argued that the cabinet's review process required all teachers under consideration to receive formal evaluations from more than one District administrator before a reemployment decision could be made. The record does not support that argument. Rather, the record shows a District concern that the tenure decision should not be the responsibility of a single administrator. The review process did not, however, rule out feedback from previous supervisors just because the administrator had supervised the teacher in a long-term substitute assignment, or because the supervisor had not given formal evaluations.

All three teachers had worked for more than one supervisor, so, under the cabinet's review process, they did not need additional evaluations. Only one of the 19 probationary teachers had worked for a single supervisor and the District did not need extra time to make a decision regarding that teacher.

Finally, the District's position is also supported by the plain language of the non-reelection letter. It stated:

> . . . the Board of Education has decided not to re-elect you as an employee for the 1987-88 school year.

This conclusion is not undermined by the fact that the teachers were again told in April that the decision would not be rescinded. When McMurray wrote to Fritz on April 6, 1987, reiterating his earlier request that the board rescind their decisions, he also requested that the District notify the

teachers if the decisions were not going to be rescinded.

Neither does the review by Barram nor del Prado undermine the firmness of the March 10 decision. Barram's review was conducted to satisfy herself that no single individual was blackballing Korn. While the evidence regarding del Prado's investigation is more contradictory and less conclusive, it appears she reviewed the process itself for fairness and not the qualifications of the individual teachers.

Finally, the firmness of the March 10 decision is not undercut by the District's consideration of alternative proposals. The District considered proposals by Korn that she resign and be rehired for a new probationary period, and by Eades-Boutry that she waive tenure in exchange for one more year of employment. The District also discussed the possibility that teachers resign to avoid dismissal. There is, however, nothing to suggest that consideration of these proposals caused the District to waiver from its initial decision to dismiss the teachers.

Having concluded that a firm decision to reject the probationary teachers was made on March 10, it is appropriate to analyze the allegations of retaliation based upon conduct prior to the March 10 decision.

Johnstone and Korn

The protected activity of both Johnstone and Korn prior to March 10, 1987, is minimal at best.

CEA's efforts in the fall of 1986 to persuade the District to change temporary teachers to probationary status fails to establish protected activity on the part of Johnstone and Korn. There is no evidence that either teacher played a role in CEA's efforts or were singled out in any way by the union from the rest of the group. Neither does the record establish that CEA pressured the District to make the change nor played a significant role in the decision to name probationary teachers.

Johnstone's only protected activity occurred during April or May of 1986, when she sought the assistance of CEA President Brough in obtaining a temporary contract. Brough set up a meeting between Fritz and Johnstone and was present during the meeting. Fritz had anticipated Johnstone's request and readily agreed to recommend the change to the Board. That had been done in the past with other teachers and Fritz anticipated no problem meeting the request. There was no particular pressure exerted upon Fritz and the meeting was, by all accounts, a pleasant, amicable exchange.

Korn's protected activity prior to March 10 was even less substantive. Korn raised the issue of obtaining a temporary contract during a chance meeting with Fritz, without ever having sought the assistance of CEA. Although Korn may have been partly motivated or encouraged by Johnstone's successful meeting with Fritz, the record does not establish that Korn was acting in concert with Johnstone or any other employees, or

with the union. Therefore, Korn's action in seeking a temporary contract for herself, without union assistance and not in concert with other employees, is not protected activity under the Act. See Regents of the University of California (1984) PERB Decision No. 449-H adopting the administrative law judge's opinion and cases cited therein.

Assuming, for argument sake only, that the Charging Party has demonstrated protected activity on the part of both Korn and Johnstone, the record does not support a finding that the protected activity was in any way a motivating factor in the District's tenure decision. Any protected activity was minimal at best, involving no hostility or ill will between the parties. No pressure was exerted upon the District to award retroactive temporary contracts. It did so voluntarily and, according to Johnstone's own testimony, the District seemed pleased to be able to do so.

Additionally, the timing of the protected activity suggests little connection to the tenure decision. The protected activity occurred during a prior school year. Had the District wanted to rid itself of Korn and Johnstone due to their activity in 1985/86, it could easily have done so at the end of that year. It was under no obligation to offer them new contracts for the 1986/87 school year, yet it did so. Had the District been motivated by the protected activity, it would have been much simpler to drop them at that time, rather than

rehire them the next year, grant them probationary status, and then go through a comprehensive tenure review process in order to retaliate against them.

In California State University, Sacramento (1982) PERB Decision No. 211-H, issued the same day as Novato, the Board stated:

> Where a Charging Party presents evidence in an effort to prove its allegation that protected activity was a motivating factor in an employer's decision, the employer may, of course, respond in its case-in-chief by introducing evidence of its own in an attempt to rebut the inference that such motivation was a factor. If successful in this endeavor, then it is, of course, unnecessary for the employer to demonstrate that it would have made the same decision in the absence of the protected activity.

Thus, if the District is able to defend against the complaint by eliminating an element essential to CEA's prima facie case, the burden of showing that the District would have taken the action anyway, would not shift to the District. The District would therefore be under no obligation to give its reasons for the non-reelection.

In this case, the District was able to prove that all but the most minimal amounts of protected activity of Johnstone and Korn occurred after the District had decided to deny reemployment to the teachers. All the substantial efforts of Johnstone, Korn, and CEA to retain their jobs, which were clearly protected activity, could therefore not have been a

motivating factor in the decision.[15] Absent a nexus between protected activity prior to March 10 and the reemployment decision, the Charging Party has failed to establish a prima facie showing that an exercise of protected rights was a motivating factor in the District's action, the burden of proof therefore never shifted to the District.

The District's motion to dismiss will be granted as to Korn and Johnstone.[16]

Eades-Boutry

Unlike Johnstone and Korn, Eades-Boutry did engage in more

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[15]This includes, but is not limited to, seeking assistance from CEA, their many meetings trying to learn the reasons for their non re-election after they received their notices, their efforts to organize and mobilize other teachers and parent groups, picketing school board meetings and other pressure exerted upon school board members and administrators, and criticism of the District through newsletters, and radio and television interviews.

[16]The Charging Party makes a burden of proof argument regarding the District's motion to dismiss which requires brief discussion. CEA argues that San Juan Unified School District (1977) PERB Decision No. 12 requires that when ruling upon a motion to dismiss an unfair practice complaint during the course of a formal hearing, all the evidence presented by the charging party must be assumed to be true. This argument is misplaced. In San Juan, the Board was ruling upon a dismissal of allegations in a charge prior to a formal hearing. In such cases, the allegations must be assumed true because the charging party has not yet had an opportunity to put evidence on the record. The same standard is not applicable to dismissal motions made after the charging party has offered its case. Once a charging party has offered evidence on the record, that evidence may be balanced against the record as a whole in determining the weight it is due.

substantial protected activity, known to the District, prior to the reemployment decision. During a portion of the 1984/85 or 1985/86 school year, Eades-Boutry was a member of the CEA Representative Assembly. Her activities on behalf of CEA were known at least by her site principal, if not other District management. It was a common practice for CEA representatives to report on Assembly activities to the staff at the conclusion of faculty meetings.

In the spring of 1985, Eades-Boutry also spoke out in a manner critical of the District, in general, and of Fritz, in particular. Eades-Boutry questioned the slowness of the District in notifying the temporary employees of rehire possibilities for the following year. She was also critical of the District for extending the final date for priority transfer requests from permanent teachers. Eades-Boutry's comments regarded a matter of concern to all the temporary teachers at the meeting and she appeared to have some support for her criticism from some of the other temporary teachers in attendance. Thus, her comments were not limited to purely personal griping about her own situation. It could also be argued that Eades-Boutry was attempting to assert an obligation under the contract requiring an earlier deadline for transfer requests. Such conduct would still be protected, even if Eades-Boutry's interpretation of the requirements under the contract was erroneous. Baldwin Park Unified School District (1982) PERB Decision No. 221.

Eades-Boutry also engaged in protected activity when she sought the assistance of CEA in appealing adverse unemployment insurance decisions. The decisions resulted from the District contesting her right to benefits. The District was aware she was represented by CEA because McMurray informed Fritz. The appeals, which disputed information presented by the District, were completely successful regarding one year and successful in removing penalties for the second year.

The District argues that Eades-Boutry's efforts regarding unemployment benefits were not protected. It cites Meyers Industries, Inc. (1986) 281 NLRB No. 118, affirmed Prill v. NLRB (Meyers Industries, Inc.) (D.C. Cir. 1987) 835 F. 2d 1481 and NLRB v. City Disposal Systems, Inc. (1984) 465 U.S. 822, for the proposition that her actions were unprotected because they were neither concerted nor an assertion of rights contained in a collective bargaining agreement.

Had Eades-Boutry not sought assistance from CEA, but instead pursued the appeal on her own, the District would prevail in that argument. See D & D Health Associates (1984) 270 NLRB 181, where an employee applied for unemployment benefits on her own behalf. The NLRB found that that activity, taken for the employee's own interest, could not be afforded protected status. In Eades-Boutry's case, however, it is not her application for benefits or the actual appeal which is the

protected activity. What is protected is Eades-Boutry's action seeking assistance from CEA regardless of the underlying issue. Section 3543 provides:

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

The EERA provides Eades-Boutry with a right to assistance from a union and her actions were no less protected because she needed help on an issue affecting only her at the time.

The Charging Party has, therefore, shown that Eades-Boutry engaged in protected activity which was known by the employer.[17] The Charging Party must next show a connection between Eades-Boutry's protected activity and the decision not to reemploy her.

Eades-Boutry's experience as a CEA assembly member is much too remote and sketchy to be believed as a motivating factor in her discharge. She was a representative for less than a school year one or two years prior to her discharge. There was no evidence that she engaged in anything controversial or hostile, that she filed any grievances or represented employees in grievances, or that she took any action whatsoever that might invoke a retaliatory response from the District.

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[17]For the same reasons as discussed for Korn and Johnstone, CEA's limited efforts to obtain probationary status for all temporary teachers is not considered as protected activity engaged in by Eades-Boutry.

Similarly, her complaints to Fritz at the 1985 meeting of temporary teachers were remote and isolated. Following Eades-Boutry's criticism, the District rehired her not once, but for two additional school years. Following a similar temporary teacher meeting in 1986, the District made a special accommodation for Eades-Boutry so that she could get a home loan approved. Had Fritz had retaliation on her mind at that point, it would have been very easy for her to have disrupted Eades-Boutry's plan to buy a house. Instead, Fritz went out of her way to figure out how she could turn in an employment verification to Eades-Boutry's bank.

There is evidence, however, that Eades-Boutry's other protected activity, seeking help from CEA for her unemployment appeals, did play a role in her termination. There is uncontradicted testimony that the superintendent admitted that one of the reasons for Eades-Boutry's discharge was "her activities last summer." Since Eades-Boutry did not teach during the summer, del Prado had to be referring to her unemployment activities. She had filed for benefits, which she had done the year before under similar circumstances, and she had sought CEA assistance in appealing the adverse rulings. If del Prado was referring to Eades-Boutry seeking union assistance for the unemployment appeal, it would be an unlawful retaliation against her because of her exercise of rights protected by the EERA.

Other than del Prado's statement, the District has adamantly refused to provide any reasons for their decision. Thus, the evidence of the reasons for the dismissals remains solely within the control of the District. Under Grimsley v. Board of Trustees (1987) 189 Cal.App. 3d 1440, the District is under no legal obligation to provide reasons for non-reelection at the time the decision is made. It is, however, appropriate to require the District to justify its decision once the Charging Party has supported an inference that Eades-Boutry's protected activity was a motivating factor.

When the District's motion to dismiss was denied as to Eades-Boutry, the District was to go forward with its reasons for the non-reelection. Instead, the District chose to rest its defense and not put on any additional evidence. It is therefore proper to draw an adverse inference from the District's failure to produce evidence, solely within its control, which could have explained del Prado's statement. See Regents of the University of California (1987) PERB Decision No. 640-H, where the Board found it proper to draw an adverse inference regarding the contents of a tape recording which the University refused to produce at a hearing. Evidence code section 413 states:

> In determing what to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or to deny by his testimony such evidence of facts in the case against him. . .

See also Martin Luther King Sr. Nursing Center (1977) 231 NLRB 15, citing 29 Am.Jur.2d section 1 which states:

> Where relevant evidence which would properly be a part of a case is within the control of the party whose interest it would naturally be to produce it, and he fails to do so, without satisfactory explanation, the [trier of fact] may draw an inference that the evidence would have been unfavorable to him.[17]

Based upon this adverse inference, it is concluded that del Prado's statements, referred to Eades-Boutry's seeking union assistance for her unemployment insurance appeals. The Charging Party has, therefore, met its burden of showing Eades-Boutry engaged in protected activity, which was known to the District, and which was a motivating factor in the non-reelection decision. The burden of proof then shifted to the District and the District has failed to offer evidence that its action would have been the same in spite of the protected activity. By denying Eades-Boutry reemployment because of her protected activity, the District has violated section 3543.5(a). By retaliating against an employee for seeking assistance from CEA, the District has also denied CEA the right to represent its members and violated section 3543.5(b).

All other allegations regarding Barbara Korn and Patricia Johnstone are DISMISSED.

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[17]See also Avon Convalescent Center, Inc. (1975) 219 NLRB 1210; Bricklayers Union Local No. 1 of Missouri (St. Louis Home Insulators, Inc.) (1974) 209 NLRB 1072.

REMEDY

Section 3541.5(c) empowers PERB 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.

In this case, the District has been found to have violated section 3543.5(a) and (b) by denying Susannah Eades-Boutry reemployment. The remedy for such violations should be designed to restore, so far as possible, the status quo ante. Santa Clara Unified School District, supra. It is therefore appropriate that the District be ordered to return Eades-Boutry to employment and to make her whole for any losses she suffered as a result of the District's unlawful actions. Pursuant to State of California, Department of Transportation (1984) PERB Decision No. 459-S, reimbursement for any monetary losses shall include interest at the rate of ten (10) percent per annum. The District shall be entitled to offset from any amount owed pursuant to the Order, the value of wages and benefits secured from alternative employment during the period of liability.

It is also appropriate that the District be ordered to cease and desist from its unfair practices and to post a notice incorporating the terms of the Order. The Order should be subscribed by an authorized agent of the Cupertino Union School District indicating 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 return to the status quo ante. 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 (1978) PERB Decision No. 69; Pandol and Sons v. Agricultural Labor Relations Board (1979) 98 Cal App.3d, 587; NLRB v. Express Publishing Co. (1941) 312 U.S. 426.

Attorneys fees requested by the Charging Party are denied. The District has not engaged in repeated and flagrant violations of the law. The District's defenses against the charges were not frivolous and unwarranted, but were rather at least debatable. King City Union High School District (1982) PERB Decision No. 197. See also D & H Manufacturing Co. (1978) 239 NLRB 51 and Tydee Products (1972) 194 NLRB 1234.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the Cupertino Union School District and its representatives shall:

1. CEASE AND DESIST FROM:

(a) Violating section 3543.5(a) by denying Susannah Eades-Boutry reemployment in reprisal for her exercise of protected rights;

(b) Violating section 3543.5(b) by denying the Cupertino Education Association CTA/NEA the right to represent its members;

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

(a) Reinstate Susannah Eades-Boutry to a teaching position equivalent to that which she held at the time she was unlawfully denied reemployment.

(b) Make Susannah Eades-Boutry whole for any losses she suffered as a result of the District's failure to reemploy her. Reimbursement for any monetary losses shall include interest at the rate of ten (10) percent per annum.

(c) Within ten (10) workdays of service of a final decision in this matter, post at all school sites and all other work locations where notices to employees are customarily placed, copies of the notice attached hereto as an appendix. The notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that the notice is not reduced in size, altered, defaced, or covered by any other material.

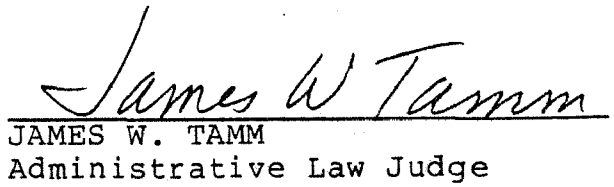
(d) Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the San Francisco Regional Director of the Public Employment Relations Board in accordance with her instructions.

It is further ORDERED that all other allegations of the charge and complaint regarding Patricia Johnstone and Barbara Korn are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final unless a party files a timely statement of exceptions with the Board itself at the headquarters office in Sacramento within twenty (20) days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Calif. Admin. Code, tit. 8, pt. III, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing, ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Calif. Admin. Code, tit. 8, pt. III, sec. 32135). Code of Civil Procedure section 1013 shall apply. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall

accompany each copy served on a party or filed with the Board itself. (See Calif. Admin. Code, tit. 8, pt. III, sec. 32300, 32305, and 32140.)

Dated: November 3, 1988



JAMES W. TAMM
Administrative Law Judge