

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ELIZABETH I. BADDOUR,)
)
Charging Party,) Case No. LA-CE-1986
)
v.) PERB Decision No. 885
)
SAN DIEGO UNIFIED SCHOOL DISTRICT,) June 14, 1991
)
Respondent.)
_____)

Appearances: George L. De La Flor, Attorney, for Elizabeth I. Baddour; Jose A. Gonzales, Assistant General Counsel, for San Diego Unified School District.

Before Hesse, Chairperson, Shank and Camilli, Members.

DECISION

SHANK, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Diego Unified School District (District) to a decision issued by a PERB administrative law judge (ALJ) after the case had been remanded to him pursuant to the Board order issued in the case of San Diego Unified School District, (1987) PERB Decision No. 631. Although the District had filed numerous exceptions to the ALJ's proposed decision, issued October 31, 1986 (Baddour I), in which the ALJ reinstated Elizabeth Baddour (Baddour) with back pay, the Board focused solely on the issue of the ALJ's failure to address the issue of collateral estoppel and remanded the case to the ALJ for a determination on that issue. On remand, the ALJ found that collateral estoppel does not apply to bar continued

litigation before PERB of the matter.¹ In the exceptions it filed to the ALJ's proposed decision in Baddour II, the District contends that the ALJ erred in finding collateral estoppel does not apply, and requests that the Board reverse the ALJ's determination on the collateral estoppel issue and rule on the remaining issues raised in the exceptions it filed to the ALJ's proposed decision in Baddour I.

We have carefully reviewed the entire record in this case, including the proposed decisions in Baddour I and Baddour II, all available transcripts, exhibits, exceptions and responses; have heard oral argument; and, in accordance with the discussion below: (1) affirm the ALJ's finding in Baddour II that the doctrine of collateral estoppel does not preclude PERB from consideration of the other issues raised in the exceptions to the proposed decision in Baddour I; and (2) reverse the ALJ's conclusion in Baddour I that the District violated the Educational Employment Relations Act (EERA or Act)² section 3543.5(a) by discriminating against Baddour because of the exercise of her EERA rights.

¹The proposed decision issued October 5, 1990 by the ALJ in San Diego Unified School District, Case No. LA-CE-1986 shall be referred to herein as "Baddour II."

²EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated all statutory references herein are to the Government Code.

STATEMENT OF THE FACTS

The following facts are summarized from the ALJ's proposed decision, with some additional information drawn from the record and added - for clarification.

Introduction

Baddour began working for the District in 1975 or 1976 as a teacher's aide, and later became a school bus driver. The District transports only special education students and students involved in its racial integration programs. In 1979, Baddour became a temporary, hourly school bus driver. In September 1980, she became a classified monthly bus driver with a one year probationary period. At this time, Charles Dion (Dion) became her immediate supervisor. Baddour's duties consisted of transporting severely emotionally-disturbed children between their homes and schools. Throughout the relevant time period, the exclusive representative for the monthly bus driver employees of the District was the Service Employees International Union, Local 102 (SEIU or Union).

From November 1980 until the time that she was terminated from her employment with the District, in June of 1983, Baddour was involved in a series of incidents with members of the public and various employees, both supervisory and rank-and-file. A summary of those incidents follows.

Riley School Students/Parents Conflict

One morning in mid-November 1980, two student passengers had conflict on Baddour's school bus. In the afternoon the same

students again caused a disturbance, and threatened to beat Baddour." Baddour arranged to meet the parents of these students at the bus stop. The parents were angry and hostile and reported Baddour's behavior to the District. Baddour also reported the incident to Dion, her supervisor, and requested a transfer to another bus. She was subsequently transferred to the integration section of the transportation department under the supervision of Stan Ross (Ross).

Performance Evaluation - 1980

In December of 1980, Baddour was due to receive her three-month probationary performance evaluation report. As Dion had been her supervisor for the majority of those three months, he was asked to prepare the report. Dion met with Baddour to discuss the report, and informed her that she needed improvement in her contacts with school staff, the public, and the students. He also negatively commented upon the fact that she would not use the school-sponsored behavior modification system. ... Baddour admitted she had not used the system because she believed that the system was ineffective. In the course of the discussion, Dion referred to the report he had received from the parents of the high school students who had the mid-November conflict on Baddour's bus. Baddour became very upset. In reviewing the report, she noticed strips of tape over portions of the first page of the report, masking derogatory material that remained intact on the two bottom copies. She refused to sign the report and asked to see Dan Stephens (Stephens), the Director of the

Transportation Department. When Dion told her that she would not be able to see Stephens, she jumped up, grabbed all three copies of the evaluation report and hurriedly walked towards the next building where Stephens' office was housed. Once Dion caught up to her outside Stephens' office, he asked her to return the report and, when she refused, requested that the school's security personnel be called. Baddour testified she felt physically threatened by Dion, so much so that she relied on this incident to support her refusal to meet with Dion several years later. Dion admitted to being angry at the time and to gesturing or talking with his hands, but denied threatening or making any threatening moves toward Baddour.

On February 11, 1981, Baddour filed a grievance alleging violations of the collective bargaining agreement (CBA), in that Dion failed to counsel her prior to the evaluation and failed to give her an opportunity to review and discuss the report. The grievance was dismissed as untimely. After she filed the February 11 grievance, her hours were reduced and she was sent to work with bus dispatcher, Donald Duggan (Duggan) at another bus yard. She asked Ross if he knew that Duggan had manhandled her in the past. Ross responded he was aware of that allegation, but reiterated that this was her new assignment.

Duggan's general character was testified to by a number of Baddour's witnesses, none of whom had anything good to say about him. The testimony revealed the following conflicts between Baddour and Duggan:

1. Baddour testified Duggan "manhandled" her in 1980. Although no specifics were given, the ALJ drew the inference that the handling was of a sexual nature;

2. Evelyn Bowen, a District bus driver, observed Duggan making an obscene finger gesture at Baddour;

3. Lynn Bonney (Bonney), a District trainer and bus driver, in October 1982 observed Duggan purposely wait for Baddour to walk all the way to her bus, 200 to 300 feet away, before calling her and giving her a piece of paper that he had in his hand the entire time. Once Duggan became aware that Bonney had observed his actions, he started up an obscene tirade against Baddour. Bonney subsequently reported the incident to management;

4. Bonney testified she had several conversations with Duke Williams (Williams), then the transportation services director, about Baddour, during which Williams made several negative comments about Baddour such as that she was crazy, unstable, and unsuitable for the position of bus driver. On one particular occasion, he mentioned that Baddour would not attend a performance evaluation without bringing in the union. Bonney testified that Williams stated: "She's got to go and get the union or get somebody outside the district every time we have a talk with her, you know. You can't even just counsel with her

Doesn't she know that we'll handle everything? We're like family here. We'll handle everything, right here within the department." Bonney further testified that Williams was very angry and upset when he made these statements;

5. Baddour and Duggan had various disagreements regarding Duggan's method of keeping time records by hand. A time clock was eventually installed. Whether the time clock was installed as a result of Baddour contacting the union is unclear--the District denies any knowledge of Baddour's involvement in the matter; Baddour's witnesses suggest she may have been involved, and the ALJ did not resolve the credibility conflict;

• 6. On March 6, 1981, Baddour went, with her SEIU representatives, to see management regarding the harassment she perceived she was receiving from Duggan. James Rhetta (Rhetta), the District's Director of Classified Personnel, informed her he would check out her complaints about Duggan, but reminded her she was just a probationary employee;

7. The day after her meeting with Rhetta, a tachograph check was placed on her assigned bus. For the next three or four months, she repeatedly had those checks on her bus. The testimony indicated that although tachograph checks are routine, the use of the method for three to four months for any one driver is unusual;

8. On May 11, 1981, Duggan filed an employee complaint against Baddour alleging "harassment or discrimination" due to her complaints about the manner in which he maintained the time records. In the complaint, Duggan noted that Baddour threatened him by going to the union. The record does not disclose the outcome of the complaint;

9. There was testimony from Ken McLaughlin (McLaughlin) that he observed Duggan notify Baddour, over the radio, that her car had been hit. McLaughlin testified that Duggan was "in good spirits about the whole thing."

Baddour's First Termination and Resultant Reinstatement

August to November 1981

In late May or early June 1981, Baddour was given a performance evaluation which recommended her termination on the grounds that she had been late to work and had burned a parking brake on the bus. Although she had a work order showing that the parking brake was defective prior to the date she was supposed to have burned it, Baddour received a notice of termination on August 6, 1981.

Baddour filed a charge with the federal Equal Employment Opportunity Commission (EEOC) complaining of the evaluation report and its accompanying termination recommendation, as well as the employee complaint that Duggan had filed against her. The EEOC complaint was settled, and Baddour was reinstated on November 5, 1981 with back-pay for the regular school year employment she missed. There was some testimony that the parties to the EEOC complaint agreed, during settlement negotiations, that Baddour was not to work with Duggan, Dion or Ross. Said agreement, however, if it existed, was not incorporated into the written settlement document. Baddour was returned to the special education section under the supervision of Al Lamar (Lamar). She remained under Lamar's direct supervision between November 1981 and September 1982.

After the EEOC directed Baddour to return to employment, she had a conversation with Stephens in which she informed him that she should have received back-pay for summer employment she missed due to her "termination" and that she intended to talk to the union about it.

Unfair Practice Charge Filed Regarding
District Summer Bus Driver Employment Practices

Some time between March and June of 1981, Baddour and three other bus drivers spoke to their union officials about the District's summer bus driver employment practices. The District had been offering its summer bus employment opportunities to the hourly bus drivers rather than the higher paid full-time employees in violation of the CBA. An unfair practice charge was filed against the District by the SEIU, but settled in February 1982 at a PERB informal conference. The only evidence at the formal hearing in this case that any member of the District's management or supervisory staff was aware of Baddour's involvement in the filing of the unfair practice charge, was Baddour's unsubstantiated statement that Williams had told other employees that Baddour was a "unionizer."

Conflict with Bus Aide Peguero and
Dion Regarding a July 6, 1982 Incident

On July 6, 1982, Baddour observed her bus aide, Rafael Peguero (Peguero), sitting in the driver's seat of her bus. Baddour had previously warned Peguero a number of times not to sit in the driver's seat and on this particular occasion ordered him to get out of her seat. A verbal confrontation ensued.

Eventually, Peguero accompanied Baddour on the bus to the school site where he then jumped off the bus and began talking angrily to his wife, who was at the site, half in English and half in Spanish. After the students had been unloaded, another verbal confrontation occurred between Peguero and Baddour with Peguero threatening to hit Baddour in the face and Baddour referring to Peguero as a "son of a bitch." When a bus driver called Baddour on the bus radio and asked her to report to Dion for counseling regarding the incident, Baddour responded on the radio, "Mr. Dion is not my supervisor," and did not in fact see him regarding this incident. At the time, her supervisor, Lamar, was on vacation, so Baddour reported the incident to Peter Goings (Goings), the training supervisor. Peguero subsequently submitted a written report in the form of a letter to the school district regarding the incident. The ALJ noted a credibility problem regarding the letter since he concluded that Peguero's verbal command of the English language was not consistent with the type of language contained in the letter. Peguero did testify that his daughter had helped him with the letter, and there was equivocal testimony that Peguero originally brought the letter into the office in Spanish.

When Baddour's supervisor, Lamar, returned from vacation, she was called in for a counseling session that she declined to attend without her union representative. The meeting was eventually rescheduled and two union representatives attended the meeting along with Baddour, John McConahey (McConahey) ,

Transportation Services Supervisor for Personnel Safety and Training, also attended the meeting. The outcome of the session was that the District would take action against Peguero and the incident was closed with regards to Baddour. The union representatives specifically asked if the papers regarding the incident would go into Baddour's records, and McConahey said they would not.

Baddour's Refusal to Accept Dion as Supervisor

As a result of an independent study commissioned for the purpose of increasing efficiency and decreasing expense, the transportation department was reorganized in the summer of 1982. Ralph 'Decatur' (Decatur) became supervisor of transportation for the integration program, and Lamar supervised transportation for the special education program. Lamar and Decatur reported to Stephens. Ross was the bus dispatcher who reported to Decatur, and Dion was the bus dispatcher who reported to Lamar. Thus, the only two first level supervisors of monthly bus drivers were Ross and Dion, and Baddour did not want to work for either of them. Ross was unacceptable because he had given her the unsatisfactory performance evaluation leading to her first termination, and Dion was unacceptable because she felt he had assaulted her during the incident over the December 1980 performance evaluation report. Nevertheless, the District assigned Baddour to work in Lamar's special education program directly under Dion.

In a counseling session in September 1982, Baddour expressed to Lamar her unwillingness to work under Dion. Not only was

Baddour physically fearful of Dion, but she felt that Dion was a liar. She also believed that the reassignment to Dion's supervision violated the term of the EEOC settlement agreement. Lamar offered to be present whenever Baddour had to meet with Dion. Lamar made efforts to get Baddour and Dion to sit down together. Lamar told Dion to be calm and professional when dealing with Baddour. He would remind Dion of this before counseling sessions with Baddour. Lamar arranged to have meetings with Dion in plain view. Baddour did not want two men in a room with her, so Lamar offered to have one of his two female staff members sit in on the meetings. In spite of these efforts, Baddour would not accept Dion as a supervisor.

Scheduled Performance Evaluation - October 1982

On October 14, 1982, a little more than one month after Dion became her supervisor, Baddour was requested to meet with Dion for a "scheduled performance evaluation." Knowing that she was not due for a scheduled evaluation, Baddour became suspicious and refused to attend without union representation. She informed McConahey that she was not due for a scheduled evaluation. McConahey, after checking the records, realized that Baddour was correct and informed personnel that the request for such an evaluation was in error. The matter continued to be the subject of communications to and from the personnel office. In one letter, Rhetta referred to the personnel manual section on "unscheduled" performance evaluations, even though it was Dion's contention that he had been told originally by the same personnel

department that the evaluation was a regularly scheduled one. (Unscheduled evaluations could be given to record either a marked deterioration or a significant improvement in employee performance between regularly scheduled evaluations.

As of October 28, 1982, Dion was still requesting that Baddour report for a "counseling session." As she anticipated disciplinary repercussions, she sought union representation, but Dion refused to discuss the matter with the union present. A meeting regarding this "scheduled" performance evaluation was never held.

Dispute Regarding Mechanical Condition of Bus No. 912

Baddour had insisted there were mechanical deficiencies in bus number 912. On November 8, 1982, Dion asked Baddour to meet with him to schedule a joint trip on the bus with the bus inspector in an attempt to locate the problem, if there was one. Baddour refused to meet with Dion without union representation, although it is not clear whether she knew of the scheduled "test" trip. Baddour had suspicions that someone had ordered the mechanics not to repair the bus even though the bus had been in the repair shop on a number of occasions. Dion, the safety inspector and the bus instructor eventually took the test ride themselves and found nothing wrong with the bus.

The District eventually dropped its request to discuss the matter with Baddour after a California Highway Patrol officer inspected the bus and ordered it repaired.

Unauthorized Use of Copy Machine in Purchasing Department

Dion testified that in October 1982, staff in the purchasing department complained to him that Baddour was using the joint purchasing/transportation department photocopier without permission. Effective September 27, 1982, transportation department staff were required to obtain a pass from their supervisor to use the copier.

On November 27, 1982, Dion requested that Baddour see him about Baddour's unauthorized use of the copier. Baddour responded by writing a memo to Lamar indicating she would not see Dion on what she characterized as a manufactured matter. There was no further demand for a meeting with Baddour after Lamar received her response.

Transportation Questionnaire - December 1982

In early December 1982, Dion left a note for Baddour to see him about her failure to complete a transportation questionnaire that was required of all classified bus drivers. Baddour was the only driver who never completed the questionnaire, nor did she ever meet with Dion about the matter.

Check-In Procedures - December 1982

In early December 1982, Dion requested that Baddour see him about difficulties his assistant, Matt Tsunoda (Tsunoda), was having with Baddour regarding early driver check-in procedures. Tsunoda had previously left two notes for Baddour asking her to come see him and she refused to see either Tsunoda or Dion.

"Unscheduled" Performance Evaluation - January 1983

On December 8, 1982, Dion prepared an unscheduled performance evaluation based on Baddour's refusal to respond to his requests to see him about various employment matters. In his note, he informed Baddour that she did not have the right to union representation. When Baddour appeared at the scheduled meeting with a SEIU representative, Dion refused to give the evaluation.

Upon receipt of a memo from Dion regarding Baddour's insistence on representation, McConahey sent memos to Harlan Price, a transportation department supervisor, and Rhetta indicating the Union was "interfering," and that Baddour did not keep her appointment for the session.

On January 10, 1983, Rhetta sent Baddour a letter regarding her having "refused to meet with Dion" and reminding her to meet with him without a union representative. Baddour had actually attempted, in either December or January, to meet with Dion with representation, or at least with witnesses in attendance, on at least two occasions.

On January 12, 1983, John Beard, executive business representative for the Union, sent a letter imploring the District to allow Baddour representation. Despite the fact that Baddour had informed him of attempts to meet with Dion, Rhetta sent a letter to Baddour indicating that he was recommending suspension for "refusing" to meet with Dion.

On January 19, 1983, Baddour sent a letter to Rhetta indicating that one week prior to his writing to her, she had arranged, through her attorney, to meet with Dion at his convenience. Rhetta withdrew the recommendation for suspension but did give Baddour an "official" letter of reprimand warning her not to disobey her supervisor again and that any repeat of such conduct would constitute insubordination.

On January 20, 1983, Baddour finally met with Dion to review the performance evaluation report. Pursuant to the arrangements through her attorney, she was allowed to tape record the meeting which occurred in a room with an open door. Although the primary subject of the evaluation was Baddour's repeated refusals to meet with Dion at his request, the evaluation included the Peguero incident, despite the fact that Baddour had been assured that the incident had been closed.

The performance evaluation contained unsatisfactory ratings in the areas of communication skills, working relationships, and adaptability/flexibility. A series of notes accompanied the report, including a note documenting Baddour's refusal to accept the reporting structure in the transportation services department and her failure to "respond in a timely fashion to supervisor's requests."

Baddour filed an employee complaint regarding the performance evaluation and letter of reprimand, as well as other incidents. The complaint was summarily denied.

Tardiness Counseling Session - Late January 1983

On January 21, 1983, Dion left Baddour a note directing her to see him regarding tardiness on two occasions. Baddour initially refused to meet with Dion, but did meet with him and Lamar near Lamar's desk later in the month. Helen White (White), a fellow bus driver, accompanied her as a witness. Baddour refused to speak to Dion and spoke to Lamar only. When Dion attempted to talk to Baddour in normal conversational tones, Baddour kept repeating, "I can't hear you. I can't hear you," even though he was standing no more than four feet away from her. What he was attempting to tell her was that there would be no counseling session so long as White was with her. Baddour then said, "then you refuse to meet with me." He said, "I will meet with you but it's - the way the contract is interpreted is that you are not allowed to have somebody with you," and then she walked away saying "he won't see me" and continued to shout that phrase down the office hallway.

Conflict with Barry Westover - January 1983.

On January 6 and again on January 25, 1983, Baddour and Barry Westover (Westover), a bus dispatcher/scheduler, exchanged a number of angry words. Baddour yelled at Westover and accused her of maligning her. On February 2, Baddour and Westover each accused the other of making an obscene finger gesture towards the other in the transportation yard parking area. On January 26, 1983, Westover wrote a letter to Lamar describing her view of this alleged finger gesturing incident.

Failure to Complete Route Audit Sheets
for New Supervisor Matt Tsunoda - Spring 1983

In February 1983, Dion became a transportation planner. Tsunoda became a senior bus dispatcher/scheduler, and Baddour's immediate supervisor. During the spring of 1983, Tsunoda counseled Baddour at least once a week, primarily on the subject of driving her personal vehicle onto the transportation parking lot in violation of department policy.

Tsunoda also complained of Baddour's refusal to complete bus route audit sheet reports which were to be completed on five consecutive days. Baddour claimed it was impossible for her to complete the reports since she was removed, at least once a week, from her route in order to attend various counseling sessions with Tsunoda. Tsunoda testified that Baddour went to only one counseling session in lieu of her bus route, and indicated that audit reports would only take a minute or so to complete. The ALJ noted there was no evidence proffered by either side to show why Baddour could not have completed four days, and obtained information on the fifth day from the substitute bus driver.

Complaints from Revere Development Center - Spring 1983

On April 13, 1983, Ray Campbell (Campbell), principal at Revere Development Center (Revere), complained to Lamar about Baddour's behavior with the Revere staff. He said that Baddour would become angry and curse at the Revere nurse, Beryl Mustol (Mustol), and that Baddour had a very explosive personality that made it very difficult to work with her. The principal also referenced a confrontation that Baddour had with one of her bus

aides, David Beard (Beard), in early spring 1983. Baddour had accused the aide of pushing a wheelchair at her and said that "he swings in those wheelchairs like a monkey." When Campbell attempted to get Beard's side of the story, every time Beard would open his mouth, Baddour would begin shouting at him again. Campbell did not want Baddour at his school site any longer.

Baddour had trouble with a number of aides for various reasons ranging from their failure to take care of their students properly, to their smoking on the bus. She also suspected that some of them were stealing money from her purse. At one time or another, she¹ asked that most of her bus aides be replaced, and considered only a handful of them competent. In his letter to Lamar, Campbell also stated that Baddour got into conflicts with many members of the Revere staff and that he had received many complaints about Baddour.

"Broken Door" Counseling Session - May 9, 1983

On May 9, 1983, Baddour attended a counseling session with Tsunoda and Lamar. According to Baddour, Tsunoda flipped through a series of completed complaint forms in front of her but declined to let her see them. A shouting match ensued with Baddour engaging in some cursing. Baddour then picked up the documents in question and proceeded to leave the meeting. When Lamar asked her to give back the documents, Baddour replied: "I'm not a dog. Save it for your wife." She then stormed out of the room slamming the door and damaging it in the process. Lamar and Tsunoda concluded Baddour was too emotionally upset to drive

her bus and sent a highway patrolman, who happened to be at the transportation department; after her,, to stop her from driving.

Alleged Violations of Policy Regarding
Personal Vehicles Driving Into the Headquarters Lot

Next to the transportation services department headquarters, there is a two and one-half acre open area. The area is used for parking some buses and contains various assigned parking spaces for clerical and administrative personnel. For a number of years, the area had become increasingly congested, especially during the peak bus route start up times, with the personal vehicles of bus drivers. The bus drivers would drive into the area to check in, check out, use the restrooms, use the telephone, or attend to any number of other short-term errands.

To relieve the congestion, the department issued a memorandum in February of 1981 prohibiting drivers from driving their personal vehicles onto the headquarters building area. Later, a sign was permanently displayed at the entrance to the yard reminding the employees of this prohibition.

The rules, however, were obeyed and enforced in an inconsistent fashion. For long periods of time, the area would be cluttered with personal vehicles, and then there would be a crack down and one of the administrative officials would be directed to issue citations. The form letters include written directions that the vehicle's owner had violated the department's policy and that "disciplinary action may result should you violate department: policy again." The citations, however, were rarely issued. The District's witnesses insisted that a verbal

reminder usually cured most employees of the practice and therefore the issuance of formal citations was not usually necessary.

The "Notice of Intention to Dismiss" issued to Baddour cited seven separate instances of insubordination between July 14, 1982 and May 3, 1983 based on Baddour's having failed to obey the "no drive-in" directive. Baddour insisted that the parking citation was used as a form of harassment against her, and insisted she was actually told only four times during her entire employment history that she should not drive onto the lot. Lamar, however, testified that he was aware of her being warned by himself or others six to eight times, and that he personally observed her driving onto the lot over ten times, although he did not write her up every time he saw her.

On April 19, 1983, Baddour came to the conclusion that she was the only one getting parking citations. She verbalized this belief in one of her counseling sessions with Lamar and Tsunoda stating that:

"When I see a policy about driving [onto] the lot that's fairly and consistently applied enforced for everyone, I'll stop doing it too. You can't show me a policy."
. . . "I'm sick of the harassment from you and the office bimbos."

(Transcript, Vol. 2, p. 175.)

The department justified its action in citing Baddour by stating that Baddour was the most persistent of all of the drive-in policy violators.

Alleged Violations of Policy Regarding
Taking Photos of Other Employees Parked in Headquarters Lot

Once Baddour became convinced she was the subject of discriminatory enforcement of the department drive-in policy, and upon the advice of her attorney, she began to take pictures of other employees driving their cars onto the lot. McConahey, after having received a complaint by an employee who had his picture taken by Baddour, told Baddour to stop the photographing as it was intimidating or harassing the individual employees. Baddour insisted there was no District policy prohibiting the photographing and continued to do it. One of the two employees identified as having complained about the photo-taking recanted, in his testimony, stating that, once he learned the reason for Baddour's photographing him, he did not object to it.

Decision to Dismiss

The District employs a merit system, and, therefore, has an intricate and well-defined disciplinary procedure for classified employees. The procedure is embodied in the Merit System Rules for Classified Employees of the San Diego Unified School District (Rules). The procedure has no requirement regarding progressive discipline. Although the transportation department policy manual contains a document entitled "administrative suspensions" which sets forth 42 potential offenses with two corresponding disciplines next to each offense, and suggests progressively more serious discipline for subsequent offenses, McConahey testified that the document was used when he first came on the job but was no longer in use at the time Baddour was disciplined. The

primary guideline in developing disciplinary recommendations, in McConahey's mind, was not progressive discipline but rather consistency.

In Baddour's case, Lamar did recommend that Baddour be transferred somewhere else before being dismissed, but Stephens concluded there was nowhere to transfer Baddour as she refused to work for any of the supervisors then working in the department. Baddour was served with her dismissal recommendation on May 21, 1983.

While Baddour awaited her termination hearing, she continued on the payroll, pursuant to the Rules, and was assigned to Lincoln High School as a school site bus driver. Although initially there was some concern about Baddour not being allowed time to take breaks or lunch periods, eventually this issue was resolved and Baddour's supervisor at the site was satisfied with her. She was well-liked and got along with the students, as well as the rest of the staff. Her supervisor told her that he would like her to stay on as the site driver.

Specific Incidents Used to Support Baddour's Dismissal

On August 2, 1983, Baddour was given a Notice of Intention to Dismiss. The Dismissal Accusation attached to that notice is the operative document setting forth the specific allegations supporting the dismissal. Baddour's Dismissal Accusation listed 48 incidents. In addition, there were five cumulative incidents listed, such as previous unsatisfactory performance reports and generalized statements such as "Baddour has repeatedly received

counseling and assistance regarding her performance, but has failed to demonstrate improvement despite such counseling and assistance."

The specific incidents supporting the dismissal were grouped within three general categories of: (1) insubordination; (2) failure to obey reasonable directions or observe reasonable rules; and (3) persistent discourteous treatment of fellow employees. Each of these general categories is tied into a specific article and paragraph of the Rules, but many of the specific incidents fall into all three of the general categories.

The 48 incidents can be grouped into general headings, as follows:

<u>Incidents</u>	<u>No. of Occurrences</u>
(a) Taking photographs of employees in headquarters lot	5
(b) Driving into the headquarters lot	7
(c) Rudeness to Barry Westover	6
(d) Rudeness to supervisors Dion, Tsunoda or Lamar	2
(e) Rudeness to Peguero - bus aide	1
(f) Grabbing from and refusing to return documents to supervisor	2
(g) Slamming door when leaving a counseling session	1
(h) Refusal to request bus from Don Duggan	1
(i) Failure to turn in bus audit	1
(j) Failure to notify supervisor when not able to report on time	1
(k) Refusal to meet with supervisor	21

On May 17, 1983, in conjunction with her dismissal and recommendation, Baddour received a Performance Evaluation Report. That report rated her in seven categories. She received "Meets Standards" in Job Skill Level and Observance of Safety/Health Standards; "Requires Improvement" in Observance of Work Hours and Productivity/Quality of Work; and - "Unsatisfactory" in Communication Skills, Working Relationships and Adaptability/Flexibility. There were a number of accompanying notes. One of these notes was as follows:

Ms. Baddour refuses to demonstrate a willing and cooperative attitude toward fellow employees. Good faith communication attempts by department staff are met with discourteous and abusive replies.

Her demeanor when discussing her assignments appears agitated, anxious and distressed. She demonstrates a complete lack of ability to converse in normal tones. This erratic behavior is detrimental to department operations, staff morale, and is totally unacceptable for drivers of pupil passengers.

Ms. Baddour still refuses to accept the re-organization of the Transportation Services Department. Ms. Baddour doesn't accept the change willingly. She does not accept the directions of her new supervisor in carrying out instructions and assignments. Due to her refusal to accept the changes in the department, the progress and performance of the Special Education Department is seriously impeded. Ms. Baddour's refusal to accept change cannot continue.

(Respondent's Exhibit B, pp. 2 and 3.)

1983 Summer School Employment Denial Grievance

The special education bus routes to which Baddour was assigned during the regular school year were continued during the summer. She had a regular 10-month assignment but, due to the

settlement that came out of the 1981 summer school unfair practice charge filed by SEIU on behalf of the regular permanent full-time bus drivers, she had an agreed-upon right of first refusal to summer school employment. During the 1983 spring semester, prior to being told that her supervisor was recommending her dismissal, she was asked if she wanted such an assignment. She stated that she did. On June 16, 1983, prior to the start of the summer session, she was told that she would not be given such summer employment due to her pending dismissal. She filed a grievance on July 26, 1983, regarding this denial of summer employment.

Once the District's decision to terminate was confirmed by the termination hearing officer, the District sent a letter to Beard stating, "Elizabeth Baddour was terminated effective November 16, 1983. It is the District's opinion that the grievance filed by Ms. Baddour is now moot." SEIU decided not to proceed with the case and no arbitration hearing was held.

• Baddour's Claim for Extra Time and Overtime Pay During Autumn 1983

Baddour submitted extensive and multi-faceted justification for overtime salary payment for the time she spent at Lincoln High School and was concurrently preparing for, and attending, her termination hearing. On February 15, 1984, the District offered Baddour a warrant in the amount of \$302.11 which "represents compensation for your wage claims set forth in your letter of * November 30, 1983, and is made pursuant to the settlement terms set forth in our letter of December 22, 1983."

The settlement offer of \$302.11 was satisfactory to Baddour, but the letter went onto state: "The above-identified warrant and the previous warrant for \$212.40 constitute full and final compensation for your services as a District employee." Baddour objected to this final language, and declined the check as she was concerned that she would, by accepting the tendered check, be giving up a part of her rights to a full settlement pursuant to this unfair practice charge. Baddour's attorney, in his brief, stated that the tendered amount of \$302.11, plus interest, is a satisfactory sum for payment of this claim.

PROCEDURAL HISTORY

Under the Rules, any classified employee served with a notice of dismissal may request a hearing before a hearing officer, but must base such request:

only on the following grounds:

- (a) That the procedures set forth by the Merit System Rules have not been followed by the Board of Education or its officers.
- (b) That sufficient cause does not exist to justify the action of the Board of Education.
- (c) That there has been an abuse of discretion. (Article IX, section 5 of the Rules)

The same Rules restrict the parameters of the hearing as follows:

The hearing shall be confined to the reasons for action set forth by the Superintendent of Schools in the written charges and to relevant defenses set forth in the appeal. (See Article IX, section 6 of the Rules.)

Pursuant to the Rules, Baddour requested a hearing. An **evidentiary** hearing to determine whether cause existed to dismiss Baddour commenced on September 27, 1983 and ended November 5, 1983 following 14 days of testimony.

On November 7, 1983, the hearing officer issued a decision finding cause existed to terminate Baddour. Baddour did not petition the superior court to set aside the hearing officer's decision. On November 16, 1983, Baddour was notified she was terminated effective that date.

On or about May 16, 1984, Baddour filed an unfair practice charge alleging she was denied summer employment in 1983 and was discharged in retaliation for her participation in protected activities.³

On November 16, 1984, a PERB Board agent issued an amended complaint alleging, in part, that the District denied Baddour summer employment in June, 1983 and discharged her in November, 1983 because: (1) she participated in a PERB unfair practice charge in 1981; and (2) she filed a grievance in July, 1983.

A PERB hearing on the amended complaint commenced on November 27, 1984. On that day, the District moved to dismiss the charges based, inter alia, on the grounds that the doctrine of collateral estoppel barred relitigation of the issue of cause for Baddour's dismissal. The ALJ denied this motion.

Specifically, in her charge, Baddour alleged she was denied summer employment in 1983 and was discharged in retaliation for filing a grievance in July, 1983, "participating in a class action unfair practice," and for filing charges with the EEOC.

The hearing concluded on January 2, 1985. On October 31, 1986; the ALJ issued a proposed decision (Baddour I) finding that the District violated EERA section 3543.5(a) when it terminated Baddour.

On November 20, 1986, the District filed a statement of exceptions to the proposed decision, raising approximately twenty-two separate grounds for reversal. Among other exceptions, the District asserted that the issue of sufficiency of cause for Baddour's termination had been conclusively decided against her in the prior dismissal proceeding.

On August 18, 1987, PERB issued its preliminary decision in Baddour I. Rather than adjudicating the merits of the District's exceptions, PERB remanded the case to the ALJ "for further hearing on the issue of the application of collateral estoppel to the proceeding."

Following remand, a transcript of the original dismissal proceedings was ordered prepared for use upon consideration of the case on remand. The original dismissal hearing was conducted over a period of fourteen days. The court reporting firm, however, was able to provide transcripts for only eleven of those days, having been unable to locate the court reporter who attended the hearing on October 17, October 19, and November 3, 1983. The partial original transcript of the dismissal proceedings was filed with PERB (dismissal transcript). Based on the dismissal transcript, the parties briefed the issue of the applicability of collateral estoppel.

On October 10, 1990, the ALJ issued his proposed decision in Baddour II on the issue of the applicability of collateral estoppel. The ALJ concluded collateral estoppel did not apply for two reasons:

1. There was no identity of issues in the dismissal and unfair practice hearings because the issue of the right to union representation at counseling sessions (purportedly present in the unfair practice hearing) was not addressed in the dismissal hearing; and

2. The dismissal proceeding Hearing Officer did not act in a quasi-judicial capacity.

On October 23, 1990, the District filed a statement of exceptions to the proposed decision in Baddour II arguing, preliminarily, that the ALJ erred in concluding collateral estoppel did not apply. The District incorporated into its exceptions, by reference, the exceptions originally filed, and not disposed of, in the appeal of the original proposed decision in Baddour I. The District also requested oral argument before the Board. The charging party filed a response to the District's exceptions.

Oral argument was granted and heard on April 3, 1991.

DISCUSSION

BADDOUR II

ALJ's Proposed Decision

As noted above, the ALJ's decision in Baddour II responds to the Board decision issued in Baddour I in which the Board

remanded the case to the ALJ "for further hearing on the issue of the applicability of collateral estoppel ...". On remand, the ALJ ordered the District to have a transcript prepared of the merit system dismissal hearing and requested that the parties file briefs and supplemental briefs of their respective positions. Having reviewed the transcripts and the briefs submitted by the parties, the ALJ concluded that the decision of Hearing Officer Nick Atma (Atma) in the merit system hearing does not collaterally estop the continued litigation of Baddour I.

In reaching his conclusion, the ALJ relied upon the tests traditionally employed for determining the applicability of collateral⁵ estoppel, as set forth in State of California (Department of Developmental Services), (1987) PERB Decision No. 619-S. In that case, the Board stated:

Collateral estoppel traditionally has barred relitigation of an issue if (1) the issue is identical to one necessarily decided at a previous proceeding; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." People v. Sims, supra, 32 Cal.3d at p. 484 (citations omitted).

For cases involving the collateral estoppel effect of administrative decisions, the California Supreme Court in People v. Sims, supra, adopted the standards formulated by the United States Supreme Court in United States v. Utah Construction & Mining Company (1966) 384 U.S. 394 [16 L.Ed.2d 642, 86 S.Ct. 1545]. There, the United States Supreme court stated: "When an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it, which the* parties have had an adequate opportunity to litigate, the courts have not

hesitated to enforce repose." (Id., at p. 422.) Thus, collateral estoppel effect will be granted to an administrative decision made by an agency (1) acting in a judicial capacity; (2) to resolve properly raised disputed issues of fact where (3) the parties had a full opportunity to litigate those issues.

In applying the test for the applicability of collateral estoppel to the facts before him in Baddour II, the ALJ first addressed the question of whether the "issue is identical to one necessarily decided at the previous proceeding."

The ALJ found that the dismissal transcript indicated that:

Baddour insisted that she be permitted to have a union representative present before she would agree to meet with her supervisor. (Proposed Decision, p. 3.)

The ALJ quoted Hearing Officer Atma's finding that:

The Employee asserted that attempts (to meet with her supervisor) were made to comply with such directives. But, the qualifications and conditions placed by the Employee amounted to rejections by the Employee of directives to schedule meetings or attend those schedules.

The Employee was as a result insubordinate. (Proposed Decision, p. 4, fn. 3.)

The ALJ also pointed out that a copy of the District's classified employee's CBA was introduced to show that this document gave Baddour no justification for insisting upon the presence of a representative. The ALJ concluded, however, that:

Nowhere in Hearing Officer Atma's decision was there a discussion of the PERB, NLRB or any other applicable labor relations law regarding the circumstances under which an employee has a right to have a representative present- 'during' specified meetings with a supervisor. (Proposed Decision, p. 4.)

The ALJ then noted that:

The issue, inter alia, addressed by the PERB ALJ in his [Baddour I] was whether Baddour, under the controlling EERA statutory and decisional law, was denied rights guaranteed by the law when she was denied representation at scheduled meetings with her supervisor. There is little doubt that this is an entirely different issue than the one decided by Atma.

(Proposed Decision, pp. 10-11.)

Thus, the ALJ concluded that the two decisions did not address the same issue, and that the decision in the dismissal hearing therefore did not collaterally estop the continued litigation of the decision issued by the PERB ALJ in Baddour I.

The ALJ next addressed the issue of whether the dismissal proceeding was judicial in character. He concluded that the dismissal proceeding was not judicial in character for the following reasons:

1. Arbitrator's awards are not given collateral estoppel effect and the merit system proceeding was akin to an arbitration;

2. The merit system rules are controlling as to whether the proceeding was judicial in nature, and they provide: (a) that the hearing officer is to be appointed by the District; (b) that the hearing officer's pay is to be determined by the District; (c) that one-half the hearing officer's fee is to be paid by the employee if the employee loses; (d) no reference to subpoena power, contempt power, or the right and obligation to call

witnesses; and (e) no standard regarding burden of proof or quantum of proof;⁴

3. There is no ultimate authority or agency acting in a "judicial capacity" behind the hearing officer's decision;

4. The merit system proceeding procedure has no bilateral validity because it is not created in concert with the employee representative;

5. There is no requirement that any portion of the hearing officer's decision be supported by reference to statutes or precedent; and

6. There is no evidence that the District gives instructions to its hearing officers regarding whether they are required to follow the rules of evidence and whether they must rule on objections, whether employees are entitled to cross-examination, or whether summation briefs may be filed.

Based on the above factors, the ALJ concluded that the authority exercised by Hearing Officer Atma in the merit system proceeding was administrative rather than judicial. The ALJ rejected the fact that Hearing Officer Atma may have conducted the hearing in accordance with some of the trappings of judicial authority as not determinative of whether the proceeding was judicial in nature. The ALJ also noted that the hearing was held by the same entity that decided to terminate Baddour and was dominated by the District itself. The ALJ took the position that

⁴Education Code section 45113 states the "Burden of Proof shall remain with the governing board," but there is no reference to that code section in the Rules.

if the hearing officer is not required to grant certain rights, there is a failure of due process, whether or not those rights **were in fact** granted.

The ALJ also noted that there are two separate and distinct issues that were not the subject of the hearing officer's decision but which were raised in the unfair practice proceeding before PERB. Those issues are:

1. Whether that portion of the unfair practice charge challenging the District's denial of 1983 summer school employment to Baddour was barred by the six month statute of limitations; and

2. Whether the District unlawfully refused to pay overtimes/**that** was owing to Ms. Baddour in violation of section 3543.5 (a).⁵

Respondent's Exceptions Filed in Baddour II

The District excepts to the ALJ's proposed decision in **Baddour II** on the grounds that:

1. The ALJ erred in concluding that lack of identity of issues precludes application of the doctrine of collateral estoppel in this case;

2. The ALJ erred in concluding that the merit system dismissal proceedings, wherein the issue of cause for termination **was** tried, were not quasi-judicial;

3. The ALJ erred in not applying collateral estoppel to the **findings** of the merit system hearing officer that the cause for

⁵No* exceptions *were filed by either party to the ALJ's determination in Baddour I as to this issue. We will not, therefore, address the issue here.

the dismissal was misconduct and that Baddour would have been dismissed for misconduct regardless of her participation in protected activity; and

4. The ALJ erred in not requiring application of the doctrine of collateral estoppel to any issue of unlawful motivation for Baddour's termination which was raised, or could have been raised, in the dismissal proceeding.

The District incorporates, by reference, the exceptions it originally filed in Baddour I that were not addressed by the Board in its disposition of that case.

**Baddour's Response to Respondent's
Exceptions to Proposed Decision**

In her response to the District's exceptions in Baddour II, Baddour contends:

1. As the transcript is incomplete in that it lacks three days of testimony, the transcript cannot be relied upon to establish what occurred at the merit system hearing;

2. There is no identity of issues between the PERB hearing and merit system hearing because:

(a) evidence of all protected activities engaged in by the charging party was properly considered by the PERB ALJ; and

(b) the merit system hearing officer did not adjudicate the issue of retaliation for the exercise of protected activities;

3. The merit system hearing officer did not render a judicial or quasi-judicial decision; and

4. Policy dictates that the decision of the merit system hearing officer not be given collateral estoppel effect.

Analysis of District's Exceptions Filed in Baddour II

The District asserts three exceptions to the ALJ's conclusion that a lack of identity of issues between the merit system proceeding and the unfair practice charge proceeding precludes application of the doctrine of collateral estoppel.

The District's first argument is a technical one. The District contends that the issue of whether Baddour was dismissed based on her alleged protected activity of requesting union representation at counseling and performance evaluation meetings was never before" PERB. Since the issue was never properly before PERB, the District argues, the ALJ's refusal to give collateral estoppel effect to the merit system hearing officer's decision based on the fact that the representation issue was not adjudicated in the dismissal proceeding is erroneous.

The District's contention that the issue of Baddour's representational requests was never properly before the Board is based, in part, upon the fact that the amended complaint did not specifically reference Baddour's requests for representation as one of the protected activities motivating the denial of summer employment in 1983, or Baddour's discharge in November 1983. The amended complaint alleged that the District denied Baddour summer employment and then dismissed her because: (1) she participated in a PERB unfair practice charge in 1981; and (2) she filed a grievance in July 1983. The District notes that Baddour moved,

during the hearing, to amend her complaint to add the request for representation allegations, but then withdrew the motion.

Baddour's withdrawal of the motion, the District argues, supports its contention that the allegations regarding Baddour's requests for representation were not before the ALJ. Furthermore, the District contends, any claims based on allegations that Baddour requested, and was denied, union representation would be barred by the statute of limitations.

The District is correct in its assertion that any claim that the District violated EERA by denying Baddour union representation at various counseling and performance evaluation meetings is barred by the six month "statute of limitations," as | 5 the last of those requests occurred in January 1983 and the unfair practice charge was filed May 16, 1984. Baddour's contention, when she attempted to amend her complaint at hearing, however, was not that the denial of representation itself was a violation of EERA, but rather that the requests for representation constituted part of a pattern of protected activity that motivated the denial of summer school employment and dismissal. The statute of limitations does not preclude consideration of evidence of events occurring prior to the six month time period where such evidence sheds light on the alleged violation. (Lemoore Union High School District (1982) PERB Decision No. 271.) As the requests for representation are intertwined with the termination decision, the Board may consider the totality of evidence, including the requests for

representation, as background to Baddour's termination.

(California State University. Hayward (1991) PERB Decision No. 869-H.)

The fact that Baddour's requests for representation did not formally become part of the complaint is not determinative of the question of whether the issue of retaliation based upon those requests for union representation was properly before the ALJ. Applying, by analogy, the test for when the Board may entertain unalleged violations, we note that the unalleged facts are intimately related to the complaint, the conduct in question was part of the same course of conduct as alleged in the complaint, it was fully litigated and the parties had an opportunity to examine and cross-examine witnesses to the request for representation incidents. (Tahoe-Truckee Unified School District (1988) PERB Decision No. 668, pp. 6-10.) Thus, the issue of whether the District retaliated against Baddour based on her requests for representation was properly before the ALJ.

Next, the District argues that the ALJ erred in not applying collateral estoppel to the finding of the merit system hearing officer that cause existed to dismiss Baddour for misconduct. The District claims that even assuming, arguendo, the existence of an anti-union motive, the findings and conclusions of the merit system hearing officer conclusively established Baddour would have been discharged even if she had not engaged in protected activity.

The District's argument must be rejected for the reason that the merit system proceeding in this case dealt only with the issue of cause for termination and did not deal specifically with the underlying issue of whether Baddour's involvement in protected activities was the underlying motivation for that termination, a quite different question. Thus, although the decision in the dismissal proceeding answered the question of whether the District had cause, and therefore the option, to dismiss Baddour, the question of whether the District would have exercised that option to dismiss Baddour had she not been involved in protected activity was never addressed in that proceeding.

In fact, neither the transcript of the merit system proceeding nor the decision of the merit system hearing officer reflect that the issue of retaliation for protected activities was fully litigated. A review of the partial transcript of the merit system hearing does not reveal a full exploration of the issue of Baddour's involvement in protected activities under EERA. Neither the opening nor closing statements reference Baddour's participation in union activities. Neither Baddour's participation in the unfair labor practice in 1981 nor her filing of a grievance in July of 1983 are even mentioned in the partial transcripts of the merit system hearing. Baddour's requests for representation (which sometimes specified union representation and sometimes only specified the presence of an employee witness) at counseling and performance evaluation hearings are mentioned

in witness testimony, almost in passing, and then usually in connection with whether Baddour's putting conditions upon meeting with her supervisor was reasonable. The parties' CBA was introduced by the District solely to demonstrate that the District's denial of Baddour's request for a union representative at a particular counseling session was not in violation of the CBA.

Likewise, a review of the merit system hearing officer's decision does not clearly establish whether he considered the issue of the impact of Baddour's involvement in union activities on her dismissal. In fact, the only portions of the merit system hearing officer's decision that can possibly be construed as referencing Baddour's requests for union representation or involvement in other union activities appear in finding nos. 5, 12 and 16. Thus, the merit system hearing officer found:

5. The Employee failed to comply with directions to schedule and attend meetings with the Employee's supervisor and other Department of Transportation personnel as well as recognize a revised department structure.

The Employee's allegation of fear of harm was not reasonable and justification not to attend meetings was lacking.

The Employee's concerns as to potential harm were not supported based on evidence presented at this Hearing.

The Employee asserted that attempts were made to comply with such directives. But, the qualifications and conditions placed by the Employee amounted to rejection by the Employee of directives to schedule meetings or attend those scheduled. . (Sic.)

The Employee was as a result insubordinate.

12., The allegation of retaliation by the District against the Employee was not proven. Evidence of prior complaints by the Employee was not linked to the substances of the dismissal of the Employee.

16. The Employee's claim that the District was exercising this dismissal action due to the Employee's exercise of personal rights was without merit. The Employee sought to exercise personal rights and such exercise became wrongful when such exercise interfered with the rights of fellow Employees and the District's authority.

These findings of the merit system hearing officer are too ambiguous to be held determinative of the issue of whether Baddour was dismissed in retaliation for her involvement in union activities. As the PERB ALJ pointed out:

Nowhere in Hearing Officer Atma's decision was there a discussion of the PERB, NLRB or any other applicable labor relations law regarding the circumstances under which an employee has a right to have a representative present during specified meetings with a supervisor.

Perhaps more to the point, nothing in the decision clearly indicates whether the merit system hearing officer specifically considered whether Baddour's union activities impacted the District's decision to terminate Baddour.

Next, the District argues that even assuming the issue of retaliation for protected activity was not raised in the merit system proceeding, collateral estoppel should nevertheless apply because the issue could have been raised. In making this argument the District relies primarily on the case of Takahashi v. Board of Education (1988) 202 Cal.App.3d 1464 [249 Cal.Rptr.

578] (Takahashi). In that case, the court applied collateral estoppel to bar the plaintiff from pursuing a civil rights lawsuit on the grounds that the civil rights claims should have been raised as a defense in her hearing before the Commission on Professional Competence (Commission).

First, it is interesting to note that case precedent is not at all consistent in addressing the question of whether collateral estoppel can be applied to bar issues which were not, but could have been, litigated in a prior proceeding. Thus, in Knickerbocker v. City of Stockton (1988) 199 Cal.App.3d 235 at p. 245, [244 Cal.Rptr. 764] the Third District Court of Appeal described collateral estoppel as follows:

On the other hand, issue preclusion is just that; it prevents a party from relitigating an issue he fully and fairly litigated on a previous occasion. [Citation omitted]. But it is not a complete bar to the maintenance of another action between the parties. As we have noted, it operates only as an estoppel or conclusive adjudication as to those issues in the second proceeding which were actually litigated and determined in the first proceeding. [Citation omitted.]
(Emphasis added.)

In the case of State Personnel Board v. Fair Employment & Housing Commission (1985) 39 Cal.3d 422 [217 Cal.Rptr. 16] (SPB v. FEHC), the California Supreme Court specifically held that:

. . . the FEHC should be sensitive to the constitutional functions of the [SPB] and should take into account any prior determinations of the Board when a matter previously decided by that body comes before the FEHC. The degree of deference that should be given to the Board's findings and conclusions will depend on the individual case. If the FEHC is satisfied that a

particular issue presented to it was sufficiently explored and decided by the Board, then it may, in comity, bar relitigation of the issue.
(Id. at p. 443; emphasis added.)

In the course of its analysis, the court observed how authorities in other jurisdictions have resolved apparent conflicts between jurisdictions.

For example, the court noted that in Town of Dedham v. Commission (1974) 312 N.E.2d 548 [86 LRRM 2918] , the Massachusetts Supreme Judicial Court observed in a related context:

Considering the indissoluble linkage of the character of the tribunal, its procedure, and the substantive law that it enforces, [Fn. omitted.] it seems clear that the parties before the Civil Service Commission would not--and in the nature of things could not--secure from that body alone substantive rights equivalent to those assigned by the statute for enforcement to the other commission. So the idea of using the Civil Service Commission to act as a substitute for the Labor Relations Commission in cases involving employees in the civil service would turn out to be quite unsatisfactory. It must, after all, have been a prime legislative purpose in creating the Labor Relations Commission to promote uniformity rather than disuniformity of interpretation and application of the labor law.
(Id. at p. 2923.)

With regard to the question of whether collateral estoppel applies if an issue could have been raised before the first agency but was not actually raised, the court stated:

Although the charge before the Civil Service Commission was "insubordination," it was not improbable that the question of anti-union bias might come up in the unfolding of the facts as possibly qualifying or negating the

charge. The record, however, does not disclose that the question did come up; if it did, there is no indication of what attention it actually received. In this situation, it would be strange indeed to say that the Labor Relations Commission lacked "jurisdiction" to proceed with an inquiry into anti-union bias upon a complaint before it charging a prohibited practice. This consideration is enough to dispose of the present appeal.

We think we should go on to say that, had the Civil Service Commission examined into the motivation of the suspension as a phase of the question whether the employee was in fact insubordinate, and had it ruled against the employee, then the Labor Relations Commission, in comity, could properly take the ruling of the other agency into account as support for a determination to dismiss the employee's concurrent complaint charging a prohibited practice. But the Labor Relations Commission would not be deprived of "jurisdiction," and if not satisfied that the question of anti-union bias had been sufficiently explored, could decline to dismiss, issue its own complaint, and proceed to prosecute and later grant relief which might comprehend "reinstatement" and more.
[Fn. omitted.]
(Id. at p. 2924.)

Thus, there is authority and rationale to support an argument that collateral estoppel should operate only to bar relitigation of issues actually raised and decided in a prior proceeding.

Furthermore, Takahashi, relied upon by the District for the proposition that collateral estoppel bars litigation of the retaliation issue because it could have been raised in the dismissal proceeding, is distinguishable from the case before us. In Takahashi, the court specifically noted that Government Code sections 11505 and 11506 gave plaintiff "the right and power to assert any defense to the Incompetency charge, including defenses

based on allegations that her constitutional and civil rights were being violated." In contrast, the Rules governing Baddour's dismissal proceeding were ambiguous as to the nature of the defenses that could be raised and litigated.

The Rules provide, in pertinent part, that any classified employee served with a notice of dismissal may request a hearing before a hearing officer, but must base such request:

. . . only on the following grounds:

- a. That the procedures set forth by the Merit System Rules have not been followed by the Board of Education or its officers.
- b. That sufficient cause does not exist to justify the action of the Board of Education.
- c. That there has been an abuse of discretion.
(See Article IX, section 5 of the Rules.)

These same Rules restrict the parameters of the hearing as follows:

The hearing shall be confined to the reasons for action set forth by the Superintendent of Schools in the written charges and to relevant defenses set forth in the appeal.
(See Article IX, section 6 of the Rules.)

Thus, the Rules give no fair notice that discrimination or retaliation may be raised as a defense. The ambiguity of the Rules as to whether the defense of retaliation for EERA protected activities could be raised in a dismissal proceeding further supports a conclusion that collateral estoppel should not apply to bar litigation of that issue before PERB on the ground it could have been raised.

Next the District argues that the ALJ erred in concluding that the dismissal proceeding was not quasi-judicial. As we

would find no identity of issues, we need not decide whether the dismissal proceeding was quasi-judicial.⁶

As we conclude that collateral estoppel does not apply to bar continued litigation of the issue of whether Baddour was dismissed in retaliation for the exercise of protected activities, we now turn to the remaining exceptions filed by the District in Baddour I.

BADDOUR I

ALJ Decision

The ALJ first addressed the issue of whether the District took its action against Baddour because of her protected activities. Preliminarily, the ALJ set forth the test for retaliation as established in Novato Unified School District (1982) PERB Decision No. 210 (Novato) as follows:

In order to establish a prima facie case, charging party must first prove the subject employee engaged in protected activity. Next, it must establish that the employer had knowledge of such protected activity. Lastly, it must prove that the employer took the subject adverse personnel action, in whole or in part due to the employee's protected activities.
(Baddour I, p. 79.)

The ALJ found that Baddour engaged in protected activities as follows:

⁶We note, however, that, in this particular case, the potential due process problem raised by the fact that we have no verbatim transcript of the hearing. (See People v. Sims (1982) 32 Cal.3d 468 [186 Cal.Rptr. 77] in which the California Supreme Court found a verbatim record of the proceedings" v to be a factor in, the determination of which a proceeding possessed a "judicial character.")

- (1) Baddour demanded that she be given union representation at the "scheduled" evaluation in October 1982,ⁱ the unscheduled evaluation in January 1983 and the unscheduled evaluation in May 1983.⁷
- (2) Baddour filed a grievance in the summer of 1983 over the District's failure to offer her summer employment;
- (3) Baddour participated in the 1982 "summer school employment" unfair practice charge;
- (4) Baddour had some involvement in the installing of a time clock at Base two.

Next, the ALJ examined the question of whether the District had knowledge of Baddour's protected activity. The ALJ concluded that:

There is no doubt that the District was aware of [Baddour's] insistence on representation at the three evaluation meetings. . . . The District was also aware that she filed a grievance in the summer of 1983 over the failure to offer her summer employment, as she filed it with the District itself. . . . (Baddour I, pp. 84-85.)

The ALJ recognized a proof problem as to the District's knowledge of Baddour's participation in the 1982 "summer school employment" unfair practice charge and the time clock placement. Nevertheless, the ALJ found that the evidence supported an inference that the District was aware Baddour was an outspoken advocate of union representation and would consult with the union

⁷In finding these requests for representation to be protected activities, the ALJ relied on the case of Redwoods Community College District (1983) PERB Decision No. 293. He noted that the collective bargaining agreement between the parties did not constitute a clear and unmistakable waiver of an employee's right to have a representative present at a meeting or conference which the employee reasonably believed would result in disciplinary action.

in any dispute she had with the department. The ALJ then listed what he referred to as 13 "separate manifestations of negative departmental interest in Baddour's activities,"⁸ noted testimony that Baddour's involvement in the time clock and summer school employment unfair practice charge was common knowledge among the drivers, and drew an inference that:

The totality of the evidence presented showed a pattern of activity on the part of the department which manifested its extreme sensitivity towards anyone that attempted to bring an outsider into the Department's affairs. Much of the sensitivity was directed towards Baddour. (Baddour I, p. 88.)

The ALJ concluded that the department's denial of any knowledge of Baddour's activities with regard to her protected activities was not credible.

The ALJ next turned his attention to the question of whether the District took action against Baddour because of her protected activities. The ALJ prefaced his discussion of this issue with a disclaimer that:

PERB is not empowered to determine whether the Respondent was justified in terminating its employment relationship with Baddour insofar as the reasons for such termination are not violative of the EERA. (Baddour I, p. 89.)

Nevertheless, the ALJ found it necessary to examine the reasons given for the termination to determine whether the reasons reasonably supported the termination or, conversely, whether they

⁸ These 13 examples generally involved testimony by witnesses who heard certain remarks from management regarding Baddour.

were pretextual. A determination that reasons given by the employer are not sufficiently plausible to support the termination, the ALJ noted, would give rise to an inference that there was some other reason for the termination, i.e. that the employee was terminated due to protected activities. The ALJ then proceeded to examine each of the incidents set forth in the Dismissal Accusation served on Baddour. His conclusions with respect to each of these incidents follow.

(1) Taking photographs of employees in headquarters lot.

The ALJ determined that the taking of photographs of other employees in the headquarters lot was not the type of activity that would cause an employee of the District to be disciplined and therefore was not reasonably relied upon by the District to support some level of discipline of Baddour.

(2) Driving into the headquarters lot on at least seven occasions.

The ALJ found that Baddour was the most persistent of the violators of the policy prohibiting employees from driving their personal cars onto the parking lot. The ALJ concluded that Baddour engaged in her confrontational behavior regarding the drive-in policy at a risk to her employment status and that the District was justified in taking some sort of action to punish her for this confrontational behavior.

(3) Rude to Barry Westover on six occasions.

The ALJ found neither Baddour nor Westover credible, relying on Westover's demeanor on the stand. The ALJ determined that

Westover had the capacity to openly antagonize and provoke, and therefore concluded that the District did not have reasonable cause to rely on Westover's complaints to support Baddour's discipline.

(4) Rude to supervisors Dion, Tsunoda or Lamar on two occasions.

Although the ALJ concluded that Baddour did make derogatory comments about her supervisor, Dion, in the presence of District employees, and although he recognized that unsubstantiated statements regarding one supervisor's lack of veracity are actionable, he nevertheless concluded that the District did not reasonably rely on Baddour's rudeness to Dion in support of its discipline of Baddour. He based his conclusion on the fact that record evidence indicated that Dion had lied in the past and that the District did not or could not provide evidence that Dion was truthful.

Regarding Baddour's treatment of Lamar and Tsunoda in an April 18, 1983 meeting wherein she shouted and cursed, picked up some documents that were being used by the supervisor in the counseling session and left the room slamming the door and thereby damaging it, the ALJ concluded that although an employee should not normally curse or shout at any other employee, especially his/her supervisors, nor should she grab papers or damage the door on her way out, in this case the supervisors were rude as well. The ALJ found that it was rude for the supervisors to reference complaint forms and then refuse the employee copies of them. Thus, the ALJ determined that Baddour's behavior was

not rude under all the circumstances and was not therefore reasonably relied upon to support her discipline.

(5) Rude to Peguero, bus aide, on one occasion.

Noting that if Baddour was rude to her bus aide, her bus aide was just as rude, the ALJ then found that the District had told Baddour that the incident with the bus aide was closed and that no mention of the incident would be placed in Baddour's file. The ALJ therefore determined that the District was estopped from relying on the incident to support the discipline.

(6) Baddour's Refusal to request bus from Don Duggan.

The ALJ found this incident not reasonably relied upon to support Baddour's discipline since: (1) Duggan had an unrebutted reputation as a lecher; (2) Baddour's previous contact with Duggan was a primary reason for her previous reinstatement; (3) Duggan had filed a written complaint that Baddour was threatening him by going to the union; and (4) Duggan had used abominable language to another employee about Baddour.

(7) Failure to turn in bus audit on one occasion.

The ALJ concluded that this incident was a bona fide example of insubordination and was reasonably relied upon to support the disciplinary action against Baddour.

(8) Failure to notify supervisor when not able to report on time on one occasion.

The ALJ found this incident a bona fide example of insubordination which the department reasonably relied upon to support its disciplinary action.

(9) Refusal to meet with supervisor on 21 separate ~~arate~~ occasions.

(a) The ALJ found that Baddour's failure to meet with her supervisor regarding evaluations was not reasonably relied upon by the department in her dismissal since Baddour's request for representation at those evaluations was within her right.

(b) Regarding Baddour's failure to meet with Dion regarding the Peguero incident, the ALJ noted that at the time Baddour refused to meet with Dion, Lamar was her actual supervisor, but he was on vacation. The ALJ found that Baddour reasonably refused to meet with Dion based upon a verbal provision of her EEOC settlement that she would not have to work for or with Dion, Duggan or Ross. The ALJ pointed out that Baddour did speak to a number of management personnel about the incident and cooperated fully with them and with her assigned supervisor when he returned.

(c) The ALJ noted that between October 12, 1982 and February 1, 1983, the department asked Baddour 12 separate times to see her supervisor about 6 separate business matters involving her status as an employee and her relationship to the department. On each occasion, Baddour would either ignore the "see me" notes entirely, or circumvent the matter by going above her supervisor and discussing the matter with Lamar. The department documented each of Baddour's refusals to see her supervisor.

• The ALJ places great emphasis upon the fact that when he asked Stephens, the manager who acted on the recommendation to

terminate Baddour, whether he was curious as to why Baddour refused to see her supervisor, he stated:

- I was curious, I'm sure, but my concern was the net result, the lack of performance and not being able to get those services out on the field the way we wanted them to.

Based on this testimony, the ALJ concluded:

The department's lack of interest in the reasons behind the refusal of one employee to report to her supervisor go beyond an appalling example of poor personnel practices. They suggest an ulterior motive on the part of the department, a motive that seems to be aimed more toward getting rid of a person who is insisting upon specified rights and/or refusing to tamely do what he/she is told than in solving the problem.

... (Baddour I, p. 103.)

The ALJ opined that the department's failure to take some sort of action against Baddour after the first two times she failed to meet with her supervisor supported an inference that the District was not interested in solving the problem but only in making sure it had sufficient ammunition to support Baddour's termination. The ALJ therefore concluded:

After a thorough analysis of all the evidence in the department's Dismissal Accusation, it is determined that although the department was justified, as early as September, 1982, in taking some sort of disciplinary action against Elizabeth Baddour, its failure to observe even the most basic of good personnel practices manifests an intent to justify termination rather than an honest attempt to solve an employer-employee relations problem. (Baddour I, p. 104)

Having concluded that the department's stated reasons for Baddour's termination were without sufficient evidentiary support, the ALJ then turned to examine what other reasons the

department management could have had for Baddour's termination. The ALJ cited the following events as attesting to the District's antiunion animus:

1. The department had nothing negative to say about Baddour's ability to drive the bus or take care of the children;

2. Williams was upset because "[Baddour's] got to go and get the union or get somebody outside the District every time we have a talk with her. . . .";

3. Rhetta considered Baddour a "trouble maker;"

4. When informed in 1981 of a perceived case of harassment of Baddour, the department, rather than investigating the harassment, placed a tachograph on Baddour's bus;

5. When it was reported to the District by another employee that a dispatcher, Duggan, was referring to female employees in derogatory terms, the District tried to get the reporting employee to change her report rather than disciplining the dispatcher; and

6. The documents supporting Baddour's termination were retained in violation of Education Code section 44031 in "Mr. Stephens' private files."

The ALJ concluded that the District's high level of sensitivity to criticism from outside sources, added to Baddour's vocal and high profile insistence on her rights, supports an inference the termination was motivated, in whole or in part, by her participation in protected activities.

Next, the ALJ addressed the issue of whether Baddour was sufficiently rude and insubordinate in that any District employee who had acted in such a way would have been terminated. The ALJ found that although Baddour may have been rude, her behavior was sufficiently provoked or otherwise justified. As to the insubordination charge and drive-in violations, the ALJ concluded that the District should have taken action other than merely documenting each violation and holding counseling sessions. As to Baddour's refusal to see her supervisor, the ALJ found the District should have immediately, at the first instance, scheduled a disciplinary meeting, notified Baddour of the impending discipline, allowed for a union representative at the meeting, and explained at the meeting she would be suspended for a limited period if she did not accept Dion as her supervisor. The ALJ found that the District could not avoid the problem and merely document instances of "refusal to meet with supervisor" and then insist that the additional acts of insubordination justified termination. Based on the above mentioned findings of fact, the ALJ concluded that Baddour was terminated because of her exercise of protected activity.

Next, the ALJ addressed the issue of whether that portion of the unfair practice charge regarding the District's denial of the 1983 summer school employment to Baddour was barred by the six month statute of limitations.

The ALJ applied the doctrine of equitable tolling to find that the summer school grievance, filed by Baddour on July 28,

1983, was timely. He found that the statute of limitations was tolled during the time Baddour prepared to file her written grievance until the time the grievance was declared moot by the District after the decision in the dismissal proceeding issued. The ALJ concluded that the determination as to the statute of limitations did not resolve the issue of whether the summer school employment denial constituted a violation of the Act. He held that since the finality of Baddour's termination was negated by his decision, the grievance would be reactivated.

i The ALJ next ruled on Baddour's contention that the department kept "bottom drawer" files and failed to give her timely notice of many of the documents that were used to substantiate her dismissal. As the District introduced no evidence of its own to counter Baddour's assertions in this regard, the ALJ accepted those assertions as true. The ALJ found that there was sufficient evidence to support an order that the tainted documents, those that were not shown to Baddour in a timely manner, should be deleted.

Finally, the ALJ denied Baddour's request for attorneys fees.⁹

⁹The ALJ also made findings of fact and conclusions of law on the issues of: (1) whether the District denied arbitration of Baddour's summer school grievance in violation of EERA section 3543.5(a); and (2) whether the District refused to pay overtime to Baddour in violation of EERA section 3543.5(a). As no exceptions were filed to the ALJ's conclusions regarding these issues, we do not address them here.

District's Exceptions in Baddour I

The District's exceptions can be categorized into two groups. The first group of exceptions may be deemed "procedural." Thus, the District argues that the ALJ committed prejudicial error in denying the District's motions to dismiss the charge, complaint and amended complaint since: (a) the charge should have been dismissed because it failed to allege a prima facie case of reprisal; (b) Baddour did not establish a prima facie case that she was dismissed for having filed a grievance on July 26, 1983; (c) the amended complaint should have been dismissed because the PERB staff attorney had no authority "to" issue it; sua sponte; (d) the charge was not timely filed with respect to the alleged unfair practice of June 1983; and (e) the sufficiency of cause for Baddour's dismissal was conclusively established in the prior dismissal proceeding.

The District further contends that the ALJ committed prejudicial error in finding that the District violated the EERA based-on uncharged protected activities because: (a) the finding of a violation of EERA based on the uncharged alleged protected activities denied the District judicial due process; (b) Baddour, through her attorney, expressly elected not to amend the charge to include an allegation that she was dismissed because of her demand for union representation at counseling and performance evaluation sessions; and (c) consideration of the additional charges was barred by the statute of limitations.

Finally, the District argues that the ALJ erred in concluding that the documents relating to Baddour's termination, allegedly kept in violation of Education Code section 44031, should be deleted from her personnel file. The District contends that: (1) the Board agent dismissed Baddour's allegation that the District violated Education Code Section 44031; (2) the ALJ had no jurisdiction to order compliance with the Education Code; and (3) the ALJ's conclusion was not supported by the evidence.

The second group of exceptions filed by the District challenges the ALJ's Novato analysis. Thus, the District argues that Baddour's demand for representation at evaluation sessions and her activities related to the time clock were not protected/activities because: (a) neither the findings nor the evidence support the ALJ's conclusion that the time clock "activities" were protected; and (b) Baddour was not entitled to representation at performance evaluation sessions.

The District further contends that the ALJ erred in concluding the District had knowledge of Baddour's purported protected activities.

Additionally, the District challenges the ALJ's conclusion that Baddour's termination was motivated by retaliation for her participation in protected activities.

Finally, the District argues that the ALJ erred in concluding Baddour would have been retained but for the District's unlawful motivation in dismissing Baddour.

ANALYSIS OF DISTRICT'S EXCEPTIONS FILED IN BADDOUR I

The "Procedural" Exceptions

The District argues that the charge should, have been dismissed because it failed to allege a prima facie case of reprisal. The District bases this argument upon its contentions that: (1) the allegation in the complaint that Baddour "participated" in a class action unfair practice charge in 1981 is conclusionary; (2) the charge, complaint, and amended complaint are devoid of any facts demonstrating the District had knowledge of Baddour's alleged participation in the 1981 class action charge, and (3) the charge, complaint, and amended complaint failed to establish how Baddour's 1981 activities were a motivating factor in the District's adverse action of 1983 (i.e., "Baddour's dismissal").

The District made the same arguments in a motion orally at the hearing. The ALJ then correctly concluded that the allegation that Baddour "actively participated" in the unfair practice charge was sufficient, together with the allegation that the dismissal proceeding constituted retaliation for that participation, to constitute a prima facie case of violation of EERA.

Next, the District argues that Baddour did not establish a prima facie case, that she was dismissed for having filed a grievance on July 26, 1983. The District contends that although the formal Notice of Intention to Dismiss was not received by Baddour until August 4, 1983, the process of dismissal began

months earlier. In fact, as early as May 27, 1983, Stephens Recommended that Baddour be dismissed for insubordination. On June 17, 1983, Baddour and her attorney met with Rhetta, the director of classified personnel, to respond to the termination recommendation at a Skelly hearing. Baddour filed her written response to that recommendation on June 24, 1983 and filed her grievance on July 26, 1983.

In Charter Oak Unified School District (1984) PERB Decision No. 404 (Charter Oak), PERB held that the mere fact that a superintendent's notice of intention to dismiss was issued after, rather than before, the employee filed her grievance is insufficient to show the filing of the grievance motivated the reprisal. The evidence in Charter Oak showed the District had expressed dissatisfaction with the employee's performance before the grievance was filed. Similarly, in the instant case, the facts demonstrate that the dismissal recommendation was made long before Baddour filed her grievance. Therefore, the District's argument that Baddour did not establish a prima facie case, that she was dismissed for having filed a grievance on July 26, 1983, has merit.

The District's argument that the PERB staff attorney had no authority to issue an amended complaint sua sponte was also made orally before and rejected by the ALJ. The original charge had alleged that the District retaliated against Baddour "for participating in a class action unfair practice charge. . . ."

(Emphasis added.) The original complaint, alleged that Baddour's

protected activity consisted of "filing a class action unfair labor practice charge against the District with PERB in 1982. . . ." (Emphasis added.) After the District pointed out, in its August 17, 1984 motion to dismiss the complaint, that the case record established that Baddour did not actually file said unfair practice charge, the PERB regional attorney, on her own motion, issued an amended complaint which alleged that Baddour "actively participated in a class action unfair practice [charge] against the District in 1981."

It is clear that Board agents have the authority to amend a complaint to correct an error. The Legislature granted the Board broad powers with regard to the processing of unfair practice charges. (See EERA section 3541.3.) Under this authority, the Board has promulgated regulations regarding the issuance of a complaint. PERB Regulation section 32640(a) provides:

(a) The Board agent shall issue a complaint if the charge or the evidence is sufficient to establish a prima facie case. The complaint shall contain a statement of the specific facts of the respondent, and shall state with particularity the conduct which is alleged to constitute an unfair practice. The complaint shall include, when known, when and where the conduct alleged to constitute an unfair practice occurred or is occurring, and the name(s) of the person(s) who allegedly committed the acts in question. The Board may disregard any error or defect in the complaint that does not substantially affect the rights of the parties.

Even if the PERB regional attorney had not corrected her error by issuing an amended complaint, PERB regulations expressly allow the Board to "disregard any error or defect in the

complaint that does not "substantially affect the rights of the parties." Here, the amended complaint merely reflects the allegations in the original unfair practice charge. Such an amendment does not substantially affect the rights of the parties.

The Board also promulgated regulations for the amendment of a complaint before and during a hearing. (See PERB Regulations 32647 and 32648.) In determining whether an amendment is appropriate, the Board agent considers the possibility of prejudice to the respondent. As the amended complaint reflects the allegations in the original unfair practice charge, the Board finds there is no prejudice to the District.

The District next argues that the charge was not timely filed with respect to the alleged unfair practice of June 1983. The amended complaint alleges that Baddour was denied summer work on June 16, 1983. The unfair practice charge was filed on or about May 16, 1984.

Government Code section 3541.5 provides for the tolling of the six month statute of limitations "... during the time it took the charging party to exhaust the grievance machinery" in a contract that provides for binding arbitration. Since the agreement in the present case does not provide for binding arbitration, statutory tolling does not apply. (San Dieguito Union High School District (1982) PERB Decision No. 194, pp. 11-12; Poway Unified School District (1983) PERB Decision No. 350.)

Neither does the doctrine of equitable tolling apply, as the doctrine did not survive California State University (San Diego) (1989) PERB Decision No. 718-H (CSU (San Diego)). In that case, the Board held that the six month time period for filing a charge, in all three of the statutes which PERB interprets, is not technically a statute of limitations in that, it is not an affirmative defense. Further, the Board held that the six month deadline for filing a charge could not be waived by either party or by the Board.

• Following the reasoning in CSU (San Diego), the Board held in University Council American Federation of Teachers (1990) PERB Decision, Nov. 826, that because the doctrine of equitable tolling allowed the Board, in its discretion and in accordance with the principles of equity, to waive the six month statutory period, equitable tolling would no longer apply. Thus, the District's argument that the charge was not timely filed with respect to the alleged unfair practice of June 1983 has merit.

The District's contention that the ALJ has no authority to order compliance with Education Code Section 44031 has merit. (Tustin Unified School District (1987) PERB Decision No. 626.) The ALJ's order requiring the District to delete allegedly tainted documents from Baddour's personnel file is therefore unenforceable.

The Substantive Exceptions

In analyzing the District's challenge to the ALJ's Novato analysis, the first issue is whether Baddour engaged in protected

activity. The ALJ found that Baddour engaged in protected activity when she (1) requested, representation at evaluation meetings in October 1982, January 1983, and May 1983; (2) filed a grievance in the summer of 1983 over the District's failure to offer her summer employment; (3) participated in the 1982 "summer school employment" unfair practice charge; and (4) was involved in installing a time clock at Base Two.

It is well-established that the filing of grievances and unfair practice charges are protected activities. (North Sacramento School District, (1982) PERB Decision No. 264.)

The District argues that neither the findings nor the evidence support the ALJ's conclusion that Baddour engaged in protected activities relative to the installation of a time clock on Base Two. A review of the record supports the District's contentions that: (1) there is no evidence as to what Baddour's activities were with respect to the eventual placement of a time clock at Base Two; and (2) the ALJ made no findings as to the nature of the purported time clock activity. The District's argument that neither the evidence nor the findings support the ALJ's conclusion that the time clock activities were protected has merit.

The District next argues that Baddour's request for representation at evaluation meetings was not protected activity since Baddour was not entitled to representation at performance evaluations. The ALJ's conclusion that Baddour's demands for representation at performance evaluation sessions of October

1982, January 1983, and May 1983 were protected activities, was based upon his interpretation of PERB's holding in Redwoods Community College District, supra, PERB Decision No. 293, affd. in part in Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617 (Redwoods). With respect to the performance evaluation meetings, the Board finds Baddour's belief that the meetings may have resulted in discipline a reasonable one. Therefore, her request for representation constituted protected activity. (See California State University, Long Beach (1987) PERB Decision No. 641-H and California State University, Sacramento (1982) PERB Decision No. 211-H.)

In any event, the District argues that under Redwoods, Baddour was clearly not entitled to representation at either her October 1982 evaluation or her January 1983 evaluation. The District claims that the October 1982 evaluation was to have been a "routine" evaluation, not justifying representation under Redwoods. In fact, Baddour was originally told the October 1982 evaluation was a "scheduled" performance evaluation. Although the evaluation never took place, because it was later determined that it was not time for Baddour's "scheduled" evaluation, several memos were exchanged indicating that District management employees were unsure as to the exact nature of the evaluation (i.e., whether it was scheduled or unscheduled). The apparent confusion, and mixed messages from the District, in this regard created "highly unusual circumstances," especially when one

considers Baddour's prior employment history. As the evidence demonstrates that Baddour was entitled to a representative at the October 1982 meeting, her request for representation constituted protected activity.

Regarding the January 1983 evaluation meeting, Baddour was notified by letter dated January 10 1983 that the meeting was "to counsel and assist you in correcting areas of performance which may require improvement." The District argues that based on said letter, Baddour did not have reason to believe that the evaluation would result in discipline and was therefore not entitled to representation at that meeting. The District also relies on Vaf provision in the CBA which provides that an employee has the right to a representative of his or her own choice at a conference at which employee discipline is intended to be administered "when in the judgment of the District the primary purpose of the initial conference is to impose, or recommend the imposition of, discipline against the employee"

In fact, the January 1983 evaluation was an "unscheduled" evaluation and the District did, in fact, admit that the evaluation was prefatory to the termination of Baddour. There was testimony that the District intended to terminate Baddour at the time it scheduled the evaluation. Thus, Baddour was entitled to representation at the January 1983 evaluation and, therefore, her request for representation constituted protected activity.

The District also argues that the record does not contain any evidence to support the ALJ's finding that Baddour requested

representation at the May 1983 evaluation. The District's point in this regard is well taken.

Nevertheless, the record as a whole supports a finding that Baddour engaged in ongoing protected activity. In February 1981, Baddour filed a grievance over a reduction in hours. In March 1981, a Union representative accompanied Baddour to a meeting with Rhetta to discuss Baddour's problems with Duggan. In July 1982, a Union representative attended the meeting Baddour had with management to discuss the Peguero incident. In October and December of 1982 and January 1983, Baddour requested union representation in connection with the scheduling of performance evaluations sessions.

Next, the District argues that the evidence does not support the ALJ's conclusion that the "knowledge" prong of the Novato test was satisfied. The District argues that the record does not support the ALJ's finding that the District had knowledge of Baddour's 1981 meeting with SEIU about summer hiring practices, which meeting she contends constituted protected conduct. The record supports the District's contention in this regard. Baddour testified that she did not tell the transportation department staff that she had complained to the Union about summer hiring practices. Baddour alleges the District knew of her visit, yet stated "I'm not sure how" the District became aware.

The ALJ's conclusion, that since it was "common knowledge amongst drivers that Baddour was somehow involved in the 1981

unfair practice charge, then the District would have also known that the activity was based upon uncorroborated hearsay. Even assuming other drivers knew Baddour had had a meeting with her Union representatives in 1981, the ALJ made no findings as to how that information was conveyed to District managers.

Lamar, who recommended Baddour be dismissed, testified he had no knowledge of Baddour's 1981 meeting with her union representative. Additionally, the record is devoid of any proof whatsoever that any of the six people who reviewed Lamar's recommendation before it was finally approved had any knowledge of Baddour's participation in the 1981 unfair practice charge.

Baddour never raised the issue of her union activity with Rhetta when he first met with her to give her a chance to respond to the dismissal recommendation and, in fact, never complained she was being fired because of her union activity until May 16, 1984, when she filed her unfair practice charge. Thus, the evidence does not support a finding that the District had knowledge of Baddour's 1981 meeting with her Union representative.

The District further contends that it did not have knowledge of Baddour's purported time clock "activities." As noted above, the District's contention in this regard has merit in light of the fact that nothing in the evidence establishes the nature of these "activities." The ALJ did not make any findings as to what role Baddour played, if any, in the installation of the time clock. Neither was there any evidence that District management

was ever made aware of Baddour's possible involvement in the time clock issue. The District's argument that the District did not know of Baddour's purported time clock "activities" therefore has merit.

Notwithstanding the validity of the District's arguments as to the lack of evidence of the District's knowledge of Baddour's participation in the 1982 unfair practice charge, and her involvement in the time clock installation, the District's knowledge of Baddour's reliance on the Union for representation purposes cannot be disputed.

The District next argues that the ALJ erred in concluding that Baddour's termination was motivated by her participation in protected activities. In Novato, the Board enumerated factors which may support an inference of unlawful motive. The Board stated:

The timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards when dealing with such employees, and the employer's inconsistent or contradictory justifications for its actions are facts which may support the inference of unlawful motive, (Id., at p. 7.)

The District argues that application of these Novato factors to the present case requires a conclusion that Baddour's dismissal was not unlawfully motivated.

The District contends that the timing of the termination did not raise an inference that the motivation for the termination

was Baddour's participation in protected activities. Baddour filed her first grievance in February, 1981. Notably, the termination proceedings against Baddour commenced in May, 1983, two months before she filed her July 26, 1983 grievance. Most meetings at which Baddour had representation occurred in 1981 and 1982. Baddour's latest request took place in January of 1983. ... Baddour finally agreed to meet with Dion that same month without representation after the District agreed Baddour could tape the meeting and have the door of the meeting room remain open. The recommendation for termination came four months after the January request for representation. Since the timing of the termination is not linked to any of Baddour's protected activities, the District's contention that the timing of the protected activities does not support a finding of unlawful motivation has merit.

The District further argues that the ALJ made no significant findings of disparate treatment. To support this argument, the District notes that Baddour was the only employee who: made obscene gestures; was rude; used obscene language towards and about other employees; yelled out and called her supervisors "bimbos"; slammed the door to her supervisor's office off the hinges; contentiously refused to perform assignments given to her by her supervisor; drove onto the parking lot in violation of District policy anytime she pleased, despite numerous warnings that she was not to do so; referred to her supervisor's wife as a dog; on two occasions, grabbed documents from her supervisor without permission and ran off with them; refused to respond to

notes imploring that she see her supervisor; refused to accept any of the District's supervisors as her supervisor; was the subject of complaints by a school principal who had received complaints from many people about her; would suddenly explode into terrific anger; cursed at a school nurse; and would lose her temper and lose control of herself so it would become impossible to talk to her.

Contrary to the District's contentions, the evidence suggests that other employees (e.g., Westover) used obscene language or finger gestures from time to time. The record as a whole, however, suggests, that Baddour's conduct in this regard was part of a pattern of abusive, discourteous conduct directed at fellow employees and supervisors.

While testimony supports Baddour's contention that Baddour received far more "see me" notes than other employees, the record also reflects that the notes were in response to Baddour's repeated refusals to take instruction from her supervisors.

There is no evidence that the behavior of other employees necessitated that they receive "see me" notes.

Admittedly, the record contains evidence that the District was keeping a close watch on Baddour. For example, the District failed to explain why a tachograph was placed on Baddour's bus for an extended period of time. This incident, however, is insufficient to raise an inference that Baddour's termination was motivated by her participation in protected activities. Notwithstanding the fact that Baddour may have received some

reflects that the unfavorable treatment was clearly precipitated by Baddour's unprotected misconduct.

Next, the District argues that the evidence does not demonstrate that the District departed from established procedures in dealing with Baddour. There was no established, regularly utilized system of progressive discipline. Nevertheless, the record clearly indicates that Baddour was apprised of her duties, was repeatedly counseled regarding poor performance, received a letter of reprimand for refusing to meet with her supervisor, and was given ample opportunity to correct her behavior.

Furthermore, the District argues, Baddour did not establish that the District offered inconsistent or contradictory justifications for its actions. Baddour's very first performance evaluation in December 1980 indicated that she needed improvement in her contacts with the staff, the public, and the students. The performance evaluation Baddour finally received in January 1983 rated her as unsatisfactory in her working relationships, communication skills, and ability to adapt. In goals and objectives, Baddour was to "respond in a timely fashion to supervisor's request" and "observe [the] reporting structure created by department reorganization." Additionally, on January 25, 1983, she was given a letter of reprimand by the director of classified personnel for failure to follow his directives. The Dismissal Accusation included the same problems

referenced by the District in earlier performance evaluations, counseling sessions and the letter of reprimand.

The District also argues the ALJ took it upon himself to retry the dismissal accusation against Baddour. Although the District correctly analyzes the factors that the ALJ should have taken into consideration in determining whether the District's motivation for the termination was unlawful, the District's assertion that the ALJ was bound to accept the hearing officer's findings as to particular incidents as conclusive is rejected. As the Board finds that the doctrine of collateral estoppel does not apply to the merit system hearing, the ALJ was not bound to accept the hearing officer's findings and conclusions.

Nevertheless, the Board concludes that the ALJ did err in finding sufficient proof of unlawful motivation. Even assuming the ALJ is correct in his determination that the department's failure to employ good personnel practices suggests a motive aimed more toward getting rid of Baddour rather than solving the problem, the evidence simply does not support a finding that the District's reasons for getting rid of Baddour were connected to her participation in activities protected under EERA. While the fact that Baddour filed an EEOC charge and was reinstated once that charge was settled may have affected the District's treatment of Baddour thereafter, the filing of an EEOC charge is not protected activity. (See Regents of the University of California (Yeary) (1987) PERB Decision No. 615-H, wherein the Board held that filing a California Department of Fair Employment

and Housing claim is not protected activity.) The record does not support the ALJ's finding of a nexus between Baddour's participation in protected activity and her termination. Although Baddour's filing of grievances and involvement of SEIU in her ongoing battles may not have endeared her to the District and may, in fact, have added to the District's perception of Baddour as a troublemaker, and while the District's personnel practices may not have been exemplary, the evidence is insufficient to raise an inference that it was Baddour's union activities that motivated the District to take the actions it took.

Yet the result in this case would be no different even if this Board were to conclude that a tenuous nexus existed between Baddour's protected activity and her termination, i.e., that the evidence raised an inference of unlawful motivation. We are convinced that the District would have dismissed Baddour even if she had had no involvement in protected activity.

Preliminarily, we reject the District's assertion that the ALJ unlawfully retried the sufficiency of the cause for dismissal and that he should have been bound by the findings of the merit system hearing officer. As noted above, the ALJ was not collaterally estopped by the dismissal proceedings from determining the legal issue of whether Baddour was terminated because of her protected activity. Neither was the ALJ bound to adopt the factual findings of the merit system hearing officer regarding specific incidents. The hearing officer's decision in

the dismissal proceeding is too ambiguous to give a clear picture of exactly what incidents were litigated. The ambiguities cannot be resolved by looking to the transcripts, as the transcripts are incomplete.

Although the merit system hearing officer may have determined whether there was sufficient cause to provide the District with the option of terminating Baddour, we are not convinced that the merit hearing officer addressed the issue before this Board; i.e. whether the District would have exercised that option but for Baddour's protected activity.

The record clearly demonstrates that Baddour would have been dismissed regardless of whether she had engaged in protected activity. Notwithstanding his conclusion that the District was not justified in terminating Baddour, the ALJ concluded that Baddour was guilty of the following misconduct:

1. Baddour was the most persistent of the violators of the prohibition against unauthorized entry and parking in the transportation yard.

2. Baddour's violations of the prohibition against driving into the transportation yard on five separate occasions "support some level of discipline of Ms. Baddour."

3. "[B]addour has the capacity to provoke, as well as to become a screamer and verbally hostile." (Baddour I, p. 93.)

4. Baddour made derogatory comments about her supervisor, Dion, in the presence of District employees.

5. On April 18, 1983, Baddour shouted and cursed at her supervisor Tsunoda, took papers from him without permission, and slammed and damaged the office door. This was the occasion during which she called her supervisors "bimbos."

6. On April 18, 1983, Baddour took a counseling session report from her supervisor, without permission and refused to sign it. "This is sufficiently improper behavior so as to constitute insubordination and . . . was reasonably relied upon . . . to support some level of discipline of Ms. Baddour." (Baddour I, p. 98.)

7. Baddour refused to complete and deliver the bus route audit sheets to her supervisor. The ALJ found this refusal to be "a bonafide [sic] example of insubordination" and was reasonably relied upon to support disciplinary action. (Baddour I, pp. 98-99.)

8. Baddour's failure to notify her supervisor when not able to report to work on time on one occasion was a "bonafide [sic] example of insubordination" and was reasonably relied upon to support disciplinary action. (Baddour I, p. 99.)

9. On September 10, 1982, Baddour refused to accept Dion as her supervisor following a reorganization of the Transportation Department. On October 12, 1982, Baddour refused to meet with her supervisor, Dion, in regards to her unauthorized use of the copying machine. "On September 10, 1982 and again in October 1982, Baddour violated one of the most basic duties an employee

has the duty to obey all lawful instructions of his/her supervisor* (Baddour I, pp. 103-104).

The ALJ's findings of insubordination by Baddour indicate that the District would have dismissed Baddour even if she had not engaged in protected activity. The courts and the National Labor Relations Board (NLRB) have long recognized an employer's right to discharge employees for insubordination, notwithstanding the existence of a prima facie reprisal case. The California Supreme Court has found cause for the dismissal of an insubordinate employee, notwithstanding that employee's participation in protected activities. (Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 730-731 [175 Cal.Rptr. 626].) The Ninth Circuit Court of Appeals has ruled that an employee who requested representation at a meeting between him and his supervisor to discuss the employee's tardiness, was not permitted representation, and who called his supervisor a "sucker" and walked out of the meeting, was lawfully suspended. (NLRB v. U.S. Postal Service, (1982) 9th Cir. 689 F.2d 835, 839 [111 LRRM 2621].) Similarly, in Spartan Stores, Inc. v. NLRB, (6th Cir. 1980), 628 F.2d 953, 957-58 [105 LRRM 2293], the court held that an employee did not have an objectively reasonable fear of discipline when advised at the beginning of a meeting with his supervisor that discipline would not be imposed, and was properly discharged for disregarding his supervisor's orders by walking out of a meeting with them.

In NifB v. Coca-Cola Bottling Company. (6th Cir. 1980) 616 F.2d 949; 950-951, [104 LRRM 2819], the court found that an employee was lawfully discharged for being insubordinate to her supervisors, despite the employee's support of the union. The court in another case upheld the discharge of an active union supporter for insubordination to supervisors, being fresh with female employees, and for repeated absences from work. (District 65 Distributive Workers v. NLRB. (D.C. Cir. 1978) 593 F.2d 1155, 1165-1166 [99 LRRM 2640].)

In Court Square Press, Incorporated (1978) 235 NLRB 106 [98 LRRM 1076] the NLRB upheld the discharge of an employee who had been disrespectful and insubordinate to his supervisor on at least two occasions, had been repeatedly warned against violating company rules, and had low productivity. The Board therein, adopting the decision of the administrative law judge, concluded:

Even though Respondent knew of Sweeney's prior union activity and had been charged with having committed prior discriminatory acts, Sweeney's statements to supervisor Gardiner to "flake off" and "Yeah, yeah, goody, goody" in the presence of the other employees, among his other harassing behavior and poor production, forced Respondent, even though Sweeney was a known past union advocate, to take the disciplinary action, it took in terminating Sweeney. Respondent had tolerated Sweeney to the point where the supervisor had threatened to quit if Sweeney remained. The right of an employer to maintain order and insist on a respectful attitude by its employees toward their supervisors is an important one.

"Verbal abuse directed at an employee's supervisor . . . would, if left undisciplined, tend to diminish the respect

of other employees for their employer and encourage insubordinate conduct by them."

(Id. at p. 109.)

Likewise, the NLRB has also found justified, the discharge of an employee for referring to his supervisors by insulting names and for his confrontational style of problem solving.

(Transportation Manpower Services of Ohio, Incorporated (1984)•••••
270 NLRB 415 [116 LRRM 121=6].)

The record herein solidly establishes that Baddour would not have been retained, regardless of her protected activity. Baddour engaged in numerous instances of insubordination, rudeness to Supervisors, and other misconduct, warranting her dismissal.

For example, Mustol, the nurse for the District for over twenty-seven years and assigned to Revere School, was called as a witness. Baddour came in contact with the staff at Revere because she drove special education pupils to and from school. Mustol testified that Baddour was very explosive, profane, would burst into terrific anger/would scream and yell, and lose self-control of herself. Mustol also testified that Baddour would be impossible to talk to when she went out of control. Baddour had cursed and yelled at Mustol several times.

Other staff at Revere also complained about Baddour. Mustol's characterization of Baddour's behavior, together with Baddour's outbursts of December, 1980, April 18, 1983, and May 9, 1983, wherein she grabbed Dion's and Tsunoda's papers during counseling sessions and then ran off with them; her referral to

her supervisors as "bimbos," and her disrespectful remarks to Lamar all demonstrate Baddour's lack of self-control and explosiveness.

Other reasons for Baddour's termination included her refusal to accept Dion as her supervisor. The evidence demonstrates Baddour never made an effort to act in a professional manner towards Dion. Baddour's conduct towards Dion related to a December 1980 incident where Dion followed Baddour after she grabbed counseling documents off his desk and ran out of Dion's office. Although Dion got upset and followed Baddour, the testimony indicates he did not curse, threaten, strike, or attempt to strike or assault Baddour. Nevertheless, over two ... years after the December 1980 incident, Baddour claimed to be in fear of her life from Dion because of that incident.

In 1982, the Transportation Department was reorganized pursuant to a Price-Waterhouse study. Prior to the reorganization, Baddour had worked for supervisors other than Dion*for one year and ten months. Dion replaced Lamar, who was at the time Baddour's supervisor. Dion and Ross were the only two bus driver supervisors, and she did not like either one.

Although Lamar attempted to work with Baddour to assure her that Dion would be kept in line, counseled Dion to assure he would act in a professional manner, and assured Baddour she could have a woman in the room when she met with Dion, Baddour consistently refused to meet with Dion. Even after Tsunoda took Dion's place as Baddour's supervisor, Baddour continued to engage

in acts of insubordination. She refused to complete audit sheets. Briber being asked to do so, she continued to drive onto the parking lot in violation of District policy, and she continued to behave inappropriately in counseling sessions. Eventually, Baddour refused to work for Tsunoda as well. In fact, Baddour refused to work for any available supervisor.

" In the end, it was not Dion who recommended her dismissal. Her dismissal was precipitated by her blatant defiance of Tsunoda's directives. She was the only driver who time after time drove onto the lot against District policy after being warned numerous times against doing so. She was the only driver who said she would drive onto the lot anytime she pleased. Even McLaughlin, her witness, testified he stopped driving onto the lot after Tsunoda warned him once. Baddour was the only driver who refused to complete the audit sheets; called Lamar and Tsunoda "bimbos"; ran off with Tsunoda's papers on two occasions; slammed Lamar's door off its hinges; referred to Lamar's wife as a dog and refused to accept every available supervisor. Based on Baddour's repeated acts of insubordination, the Board finds that the District would have terminated Baddour even if she had not been involved in protected activities. Accordingly, the Board finds the District did not violate EERA section 3543.5(a) in dismissing Baddour.

ORDER

The unfair practice charge in Case No. LA-CE-1986 is hereby
DISMISSED.

Member Camilli joined in this Decision.

Chairperson Hesse's concurrence begins on p. 84.

Chairperson Hesse, concurring: With regard to the merits of the underlying termination I agree with the majority's findings and conclusions that: (1) the evidence does not support a finding of nexus between Elizabeth Baddour's (Baddour) participation in protected activity and her termination; and (2) even if nexus were established, the San Diego Unified School District (District) had a legitimate business justification for Baddour's termination.

Although I also agree with the majority's conclusion that the doctrine of collateral estoppel does not apply to the termination decision, I reach this conclusion based on a different analysis. Based on the different issues presented, the different burdens of production, and the termination proceeding's lack of judicial character, I conclude that the doctrine of collateral estoppel should not apply to the termination decision.

Collateral Estoppel Analysis

In People v. Sims (1982) 32 Cal.3d 468 [186 Cal.Rptr. 77] (People v. Sims) the court found that collateral estoppel applies if:

(1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated;

(2) the previous [proceeding] resulted in a final judgment on the merits; and

(3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]. [Fn. omitted.]

(Id. at p. 484.)

For cases involving the collateral estoppel effect of Administrative decisions, the California Supreme Court in People v. Sims adopted the standards formulated by the United States Supreme Court in United States v. Utah Construction and Mining Company (1966) 384 U.S. 394. There, the United States Supreme Court stated:

When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose.

(Id. at p. 422.)

Thus, collateral estoppel effect will be granted to an administrative decision made by an agency acting in a judicial capacity to resolve properly raised disputed issues of fact where the parties have a full opportunity to litigate those issues.

In deciding whether the doctrine of collateral estoppel applies to the termination proceeding, I am guided by my concurrence in Trustees of the California State University (SUPA) (ia90) PERB Decision No. 805b-H (CSU (SUPA)). In my concurrence, I found the doctrine of collateral estoppel was inapplicable due to the different issues decided by the Public Employment Relations Board (PERB or Board) and the State Personnel Board (SPB) and the different burdens of production placed upon the parties by PERB and the SPB. Further, I declined to apply the doctrine of collateral estoppel due to the inherent differences in the jurisdiction of PERB and the SPB, as well as public policy considerations. In CSU (SUPA), I found the issue of whether

cause exists for discipline was different than determining the underlying motivation for discipline. Pursuant to Novato Unified School District (1982) PERB Decision No. 210, the Board found that the discipline was motivated by the employees protected activity. In contrast, the SPB decided the issue of whether or not California State University (CSU) had cause for its discipline of the employee. I found that SPB's limited statutory jurisdiction over CSU employees did not include a determination whether the discipline was motivated by the employee's protected activity.

As with the SPB, the merit system rules for classified employees of the District limit the grounds for a dismissal and termination hearing. The merit system rules set forth seven grounds for dismissal, namely, (1) incompetency, (2) insubordination, (3) conviction of specified crimes, (4) political activity on the job, (5) persistent discourtesy, (6) incapacity, and (7) absence from duty without leave. The merit system rules, provide that a classified employee served with a notice of dismissal may request a hearing before a hearing officer, but must base such a request on the following grounds:

- (a) That the procedures set forth by the Merit System Rules have not been followed by the Board of Education or its officers.
- (b) That sufficient cause does not exist to justify the action of the Board of Education.
- (c) That there has been an abuse of discretion.

Article IX, section 6 of the merit system rules also restrict the parameters of the hearing as follows:

The hearing shall be confined to the reasons for action set forth by the Superintendent of Schools in the written charges and to relevant defenses set forth in the appeal.

In addition to the different issues decided by the termination proceeding and PERB, the burden of producing evidence upon the parties is also different. The District asserts that its merit system rules are based on Education Code section 45113, which provides that "[t]he burden of proof shall remain with the governing board, and any rule or regulation to the contrary shall be void." As in CSU (SUPA), the burden of proof is on the party taking the disciplinary action. In contract, PERB requires that the charging party, the employee in this case, present evidence showing that the discipline was imposed because of her exercise of protected activities.' Consistent with my concurrence in CSU (SUPA) I find that the doctrine of collateral estoppel should not apply as the different issues and burdens of producing evidence fail to satisfy the requirements of People v. Sims.

In addition to the different issues and different burdens of producing evidence, I find that the termination proceeding was not made by an agency acting in a judicial capacity. In determining whether an agency is acting in a judicial or quasi-judicial capacity, there seems to be a lack of specific guidelines. Generally, the analysis involves a determination that the procedures and decision resemble a judicial decision with respect to the procedure each party has the opportunity to use; (4 Davis, Administrative Law Treatise (2d ed. 1983) sec. 21:3, p. 53.)

In People v. Sims, the court discussed the standard and factors used to determine whether an agency is acting in a judicial capacity. The court admitted that there was uncertainty and confusion in caselaw as to whether decisions of an administrative agency may collateral estop a later action. The court stated, "[t]he problem seems to lie in the varying types of administrative agencies and their procedures, and widespread disagreement whether their decisions are judicial, quasi-judicial, or administrative only." (Id. at p. 477, quoting Williams v. City of Oakland (1973) 30 Cal.App.3d 64, 68 [106 Cal. Rptr. 101].) In seeking to determine whether a California Department of Social Services (DSS) hearing decision may have collateral estoppel effect, the court found appropriate guidance in United States v. Utah Construction Company, supra, 384 U.S. 394. There, the United States Supreme Court stated that collateral estoppel may be applied to decisions made by administrative agencies "when an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . ." (Id. at p. 422.) To ascertain whether an administrative agency is acting in a judicial capacity, the federal courts have looked for factors indicating that the administrative proceedings and determination possess a "judicial character."

In People v. Sims, the court concluded the hearing conducted by the DSS was a judicial-like adversary proceeding. The court

"noted the fact that statewide and local administrative agencies are prohibited from exercising... "judicial power" by the California constitution does not mean that agency proceedings and determinations may never be judicial in nature. With regard to the DSS hearing, the court found the statute required that the hearing be conducted in an impartial manner and that all testimony be submitted under oath or affirmation. Further, the DSS allowed each party to call, examine, and cross-examine witnesses, as well as to introduce documentary evidence and make oral or written argument. At the request of the county or respondent, the chief referee was required to subpoena witnesses whose expected testimony would be material or necessary to the case. It was also required by regulation that a verbatim record of the testimony and exhibits introduced at the hearing be maintained." In addition, the parties received from the DSS a written statement of the reasons why the hearing officer exonerated the respondent of the fraud allegations. Finally, the court determined the hearing officer's decision, itself, was judicatory in nature. The decision involved the application of a rule to a specific set of existing facts, rather than the formulation of a rule to be applied in all future cases. After the decision had been adopted by the Director of the DSS, the county had both the right to seek a rehearing before the agency and the right to petition for review in superior court.

Finally, the court noted that although the hearing was not conducted according to the rules of evidence applicable to

judicial proceedings, this difference did not preclude a finding that the DSS was acting in a judicial capacity. The court noted that collateral estoppel effect is given to final decisions of constitutional agencies such as the Worker's Compensation Appeals Board and the Public Utilities Commission even though proceedings before these agencies are not conducted according to judicial rules of evidence. The court stated the pertinent inquiry is whether the different standard for admitting evidence at the hearing deprived the parties of a fair adversary proceeding in which they could fully litigate the issue(s). In this case, the court determined the hearing did not deprive the parties of a fair adversary proceeding.

In People v. O'Daniel (1987) 194 Cal App. 3d 715 [239 Cal.Rptr. 790], "the court followed the guidance set forth in People v. Sims to determine, whether a prison disciplinary hearing was judicial in character. Unlike the situation in People v. Sims, the court determined the prison disciplinary hearing was not judicial in character. The court found the prison disciplinary hearing was not conducted by a judicial officer acting in a judicial capacity. California Administrative Code section 3315 provided that the prison disciplinary hearings may be conducted by a "senior hearing disciplinary officer," who in this case was a correctional officer at the institution. Thus, the prison disciplinary hearing was not heard by a judicial officer or other official with legal background or training. Further unlike the situation in People v. Sims, the prison

disciplinary hearing did not require that the hearing be conducted in an impartial manner and that all testimony be submitted under oath or affirmation. In People v. Sims, the hearing officer was a neutral and detached judicial officer not affiliated with any of the parties. Specifically, the hearing officer was from a separate state agency and not an employee of one of the parties. For all these reasons, the court held that the doctrine of collateral estoppel did not apply.

In Carmel Valley Fire Protection District v. State of California (1987) 190 Cal.App.3d 521 [234 Cal.Rptr. 795], the court concluded the State was collaterally estopped from attacking the State Board of Control's findings. The court determined that all the elements of administrative collateral estoppel were present. With regard to whether the administrative agency was acting in a judicial capacity, the court found the State Board of Control was created by the State Legislature to exercise quasi-judicial powers in adjudging the validity of claims against the State. At the time of the hearing, the State Board of Control proceedings were the sole administrative remedy available to local agencies seeking reimbursement for State-mandated costs. In particular, the State Board of Control examiners had the power to administer oaths, examine witnesses, issue subpoenas, and receive evidence. Further, the hearings were adversarial in nature and allowed for the presentation of evidence by the claimant, the Department of Finance, and any other affected agency.

In applying these cases to the District's termination proceeding, I conclude that the termination hearing was not judicial in character. Article III of the merit system rules for classified employees provides that the "... Hearing Officers shall be appointed by the Board of Education consistent with the needs of the district." Further, Article III of the merit system rules provides, in pertinent part, that:

The Hearing Officers may receive a stipend commensurate with services rendered. The amount of any stipend shall be established by separate action of the Board of Education whose discretion in this matter shall be complete and final. If the appeal is denied, the appellant shall share equally in the cost of the stipend for the Classified Employees Hearing Officer.

While Article III also provides for a nomination procedure for the appointment of hearing officers, the administrative law judge found the interrelationship between the appointment authority of the Board of Education and the nomination authority of the various local officials was unclear. Despite this fact, I conclude that the District's unqualified appointment of the hearing officer does not result in an independent, unbiased, and neutral proceeding.

Article IX, section 6 of the merit system rules for classified employees contains the only reference to the hearing procedures:

Conduct of Hearing.

A Hearing Officer shall begin the hearing within fifteen (15) days from the day a written request for hearing and a written answer to the charges is received by the

Board of Education. The hearing date may be continued for one time at the request of the district or the employee with the approval of the Hearing Officer upon the showing of good cause. Additional continuances may be obtained by mutual agreement of the parties involved. The hearing shall be confined to the reasons for action set forth by the Superintendent of Schools in the written charges and to relevant defenses set forth in the appeal. Equal opportunity shall be afforded the Board of Education and the employee to present evidence. The findings of the Hearing Officer shall be rendered in writing to the employee and the Board of Education within seven (7) days after the hearing is closed. The decision of the Hearing Officer in each case is final and effective when rendered.

These procedures fail to grant the hearing officer any authority to subpoena witnesses or documents. Additionally, there is no procedure allowing the parties to call, examine and cross-examine witnesses. The procedures do not require that a record of the hearing be maintained or a written statement of reasons for the hearing officer's decision. Further, there is no requirement that the testimony be under oath. As there are no procedures granting the hearing officer the power or authority to conduct a judicial-like hearing, I conclude that the hearing is not judicial in character. Further, the fact that the hearing officer is appointed by the District to conduct the termination hearing casts doubt on whether the hearing officer is indeed neutral.

Based on the termination proceeding's lack of judicial character, as well as the different issues presented and

different burdens of production, I conclude the doctrine of collateral-estoppel "should not apply to the termination decision.