

**STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

SAN BERNARDINO ASSOCIATION OF  
SUBSTITUTE TEACHERS,

Charging Party,

v.

SAN BERNARDINO CITY UNIFIED SCHOOL  
DISTRICT,

Respondent.

Case Nos. LA-CE-4345-E  
LA-CE-4350-E

PERB Decision No. 1602

February 24, 2004

Appearances: Wohlner, Kaplon, Phillips & Young by Kenneth P. Young and Ralph M. Phillips, Attorneys, for San Bernardino Association of Substitute Teachers; Atkinson, Andelson, Loya, Ruud & Romo by Sherry G. Gordon, Attorney, for San Bernardino City Unified School District.

Before Baker, Whitehead and Neima, Members.

DECISION

BAKER, Member: These consolidated cases come before the Public Employment Relations Board (PERB or Board) on exceptions filed by the San Bernardino City Unified School District (District) to the proposed decision of the administrative law judge (ALJ). The charges filed by the San Bernardino Association of Substitute Teachers (Association) alleged that the District violated the Educational Employment Relations Act (EERA)<sup>1</sup> by retaliating against two substitute teachers for their protected activity. The ALJ found that the District violated EERA by removing the two substitute teachers from the eligibility list for employment because of their activities in the Association's organizing campaign. In reaching this finding,

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

the ALJ rejected the District's affirmative defense that it would have removed both teachers from the eligibility list even absent any protected activity.

After reviewing the record in this case, including the proposed decision, the District's exceptions, and the Association's response, the Board declines to adopt the proposed decision of the ALJ. Instead, the Board issues the decision below dismissing the charge and complaint.

### PROCEDURAL HISTORY

The Association claims that the District removed two substitute teachers from the employment eligibility list because of their support for the Association's organizing campaign. The District denies any wrongdoing and contends that it would have taken the actions complained of even in the absence of any protected activity.

On November 8, 2001, the Association filed an unfair practice charge in Case No. LA-CE-4345-E against the District alleging that the District removed substitute teacher Pat Johnson (Johnson) from the eligibility list because of her activities in support of the Association. On March 15, 2002, the Office of the General Counsel issued a complaint alleging that the District violated EERA section 3543.5(a) and (b)<sup>2</sup> by this conduct. In its answer to the complaint, the District denied any wrongdoing and raised mootness as an affirmative defense, claiming that Johnson had been reinstated.

On November 27, 2001, the Association filed an unfair practice charge in Case No. LA-CE-4350-E alleging that the District removed substitute teacher Carol Wright (Wright) from the eligibility list because of her activities in support of the Association. On February 9,

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<sup>2</sup>EERA section 3543.5(a) makes it unlawful for a school district to "[i]mpose ... reprisals on ... [or] ... discriminate ... against employees ... because of their exercise of rights guaranteed by this chapter." Section 3543.5(b) makes it unlawful for a school district to "[d]eny to employee organizations rights guaranteed to them by this chapter."

2002, the Office of the General Counsel issued a complaint alleging that the District violated EERA section 3543.5(a) and (b) by this conduct. In its answer to the complaint, the District denied any wrongdoing.

An informal settlement conference for both cases was held on May 15, 2002, at PERB's Los Angeles regional office, but the matter was not resolved.

A formal hearing on both cases was held on August 8 and August 9, September 9 and 13, 2002, in San Bernardino before an ALJ. After the filing of post-hearing briefs, the matter was submitted for proposed decision on November 27, 2002.

#### FINDINGS OF FACT

The District is a public school employer as defined in EERA section 3540.1(k). The Association is an employee organization as defined in Section 3540.1(d). Since December 6, 2001, the Association has been the exclusive representative, as defined in Section 3540.1(e), of an appropriate unit of the District's substitute teachers.

The District operates approximately 60 elementary, middle and high schools. It has approximately 590 substitute teachers on its Substitute Placement Information Network (SPIN) system<sup>3</sup>, of which approximately 230 are employed each school day. The District's substitute teachers are considered "at-will" employees who may be separated from employment at any time at the pleasure of the District. Despite their "at-will" status, at the end of each school year the District sends eligible substitutes a "reasonable assurance" letter regarding their employment prospects for the next school year.

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<sup>3</sup>SPIN is an automated system which telephones substitutes each school-day morning to offer them teaching assignments. Substitutes are selected in random order, unless they are name-requested by an individual school. Substitutes may also solicit their own assignments directly with a school, but the school must enter its request into the SPIN system. SPIN is operated through the Human Resources Department.

Hannah Ward (Ward), the District's director of certificated personnel, is responsible for staffing the District with sufficient substitutes. Ward testified that "reasonable assurance" letters are not sent to substitute teachers who have had numerous complaints filed against them or who have been found guilty of serious misconduct, e.g., violence against a student. Ward further testified that she has the authority to remove a substitute teacher from the SPIN system during the school year for misconduct. Where the misconduct involves allegations of physical force against students, Ward testified that she will immediately remove the teacher from the classroom pending a determination as to whether the use of force was reasonable and justified.

Harold Vollkommer (Vollkommer), the District's assistant superintendent of Human Resources for the past 2 1/2 years, is Ward's direct supervisor. Vollkommer has general oversight responsibility for the procurement of substitute teachers. Vollkommer testified that he is generally not involved in the specific removal of a substitute teacher from the SPIN system. According to Vollkommer's testimony, there are District policies regarding teacher behavior, as well as guidelines for taking action against teachers, which include the following: When a school principal submits a "do not use" request on a substitute teacher, Human Resources may remove the teacher from SPIN for that school only, without further investigation. When a complaint is initiated by someone other than a school principal, Ward should review the pertinent data, which usually requires that she meet with the accused teacher and make a determination as to the teacher's fitness for duty. If Ward's decision is to take adverse action, the teacher is always notified.

SPIN operator Robyn Davila (Davila), who is supervised by Ward, described essentially the same procedure: If the alleged misconduct is minor, such as tardiness, Davila will temporarily remove the teacher from SPIN for that school only, pending investigation of

the incident. If the complaint involves serious misconduct, Davila will contact Ward, who will decide whether to remove the teacher completely from SPIN. Ward may also completely remove a teacher against whom four or more “do not use” requests have been lodged. In any case, Ward will ask Davila to immediately prepare a letter informing the teacher of the action.

Davila testified that her office receives five to six complaints about substitute teachers per week. However, a Human Resources memo dated June 12, 2001, shows that only 13 substitutes did not receive “reasonable assurance” letters for the coming school year and were removed from SPIN. The memo indicates that four of the 13 were teaching in other school districts, three substitutes were on nine or more “do not use” lists, and one substitute had allegedly “repeatedly” accepted job assignments but did not show up for them. Davila testified regarding allegations against the other five as follows: two had struck children, one of whom was a preschooler; one spoke at school sites of her former life as a prostitute; one had numerous no-shows; and one had numerous incidents of inappropriate language and a “bad attitude” toward staff. The memo also shows that five substitutes were on four or more “do not use” lists; however, Davila testified that they were considered “borderline” and were not removed from SPIN and had apparently received “reasonable assurance” letters. However, Davila could not recall any of their alleged misconduct, except that one had cursed at students.

#### The Union Campaign

Prior to December 2001, the District’s substitute teachers were unrepresented. On May 31, 2000, Association President, Donald Hall (Hall) phoned Ward to advise her that a new union named the San Bernardino Association of Substitute Teachers would be organizing substitutes at all school sites, and reiterated this by letter of July 18, 2000. By letter to Hall dated July 26, 2000, Ward said she was forwarding his July 18 letter to Joe Woodford

(Woodford), assistant to the superintendent of employee relations and the district's chief negotiator.<sup>4</sup> By memo of October 12, 2000, Woodford informed the District's school principals of the campaign and cited guidelines for dealing with organizers. In November 2000, Hall distributed a memo addressed to all District principals, teachers, and staff, with a copy to Vollkommer, asking for their help in the campaign.

Over the next year, Hall sent numerous requests to Ward for the names of substitute teachers and other information, specifically noting that it was for the purpose of recruiting members. Ward provided this information. Other campaign activities included having substitute teachers and other Association supporters speak at District board meetings,<sup>5</sup> giving interviews to local newspapers, and mailing union literature. In addition, supporters distributed union flyers, posted them on bulletin boards, and solicited authorization card signatures at all school campuses as well as at District headquarters.<sup>6</sup> On July 12, 2001, having collected over 400 signed authorization cards, the Association filed an election petition with PERB. By memo of July 18, 2001, to "all site managers," Vollkommer announced the filing of the petition, instructed the posting of election notices, and again cited guidelines for dealing with union organizers. The mail-ballot election was held between October 29 and

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<sup>4</sup>Ward denied at the hearing that her letter was in response to Hall's letter, which she said she did not recall.

<sup>5</sup>Two substitute teachers spoke at the October 17, 2000, board meeting: Johnson and Howard Carmean, the Association's most active supporter. Four substitutes, all Association supporters, spoke at the January 16, 2001, meeting: Howard Carmean (Carmean), Wright, Philip Katich (Katich) and Sylvia Cichocki (Cichocki). Carmean and Katich did not receive "reasonable assurance" letters; thus, Cichocki was the only pro-union speaker whose SPIN status was intact at the beginning of the 2000-2001 school year. However, the complaint does not allege that Carmean or Katich were also victims of unlawful discrimination.

<sup>6</sup>Organizing at District headquarters was done once a month, on the 19<sup>th</sup>, when substitutes turn in their timesheets there.

November 11 and ballots were counted on November 20, 2001; the Association won the election and was certified as the exclusive representative of the District's substitute teachers on December 6, 2001.

Pat Johnson

Johnson had been a substitute teacher in the District's elementary and secondary schools from 1991 until 1992 or 1993, and then since 1999, with an unblemished work record prior to the events at issue herein. She was a principal Association supporter and campaigner. From September 2000 until September 2001, she passed out flyers, solicited authorization cards, and spoke about the Association to colleagues at the schools where she was assigned, as well as at District headquarters.<sup>7</sup> She obtained signatures on approximately 55 authorization cards, more than almost any other union campaigner. In addition, her name and phone number were written on campaign materials distributed to teachers, principals, and other District employees. She spoke critically of the wages and working conditions of District substitutes at a District board meeting in October 2000, and in local newspaper interviews published in September 2000 and August 2001.

On May 14, 2001,<sup>8</sup> an incident involving Johnson occurred at San Bernardino High School (SBHS). During one of her classes, she noticed a female student (referred to herein as WW) filling out pink office passes and handing them to two classmates. When Johnson questioned WW, she said a teacher gave her the passes so that she and two girlfriends could

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<sup>7</sup>Johnson did not know all of her fellow substitutes, nor most of the individuals employed at the District office; therefore, she spoke to everyone who went in or out of the building, from 2 or 3 p.m. until the end of the workday at 5 p.m.

<sup>8</sup>All dates hereafter refer to the year 2001 unless otherwise specified.

attend a campus club. Johnson said she needed to verify this with the office, but in the meantime she considered the passes contraband and would confiscate them. Johnson reached for the passes in WW's hand, but WW pulled her hand away and said "no way"; Johnson then blocked the door and called security. Two campus officers arrived and spoke to the participants; the officers' written report states that WW was "completely out of hand and very disrespectful" and that the three girls were repeatedly cursing at Johnson, "getting directly in her face." The report states that the girls initially complained about Johnson picking on them, but did not accuse Johnson of touching them. Subsequently, one officer found a makeshift marijuana pipe with traces of the substance in it. It was not until WW became aware that the officer had found the pipe that she accused Johnson of assaulting her by grabbing, yanking, and scratching her arm. At the end of the school day, Johnson spoke with Bill McCluskey (McCluskey), the Vice-Principal of SBHS, about the incident. McCluskey said he had checked WW's arm, which had no marks on it, spoke to the girls, and suspended all three of them for misconduct. According to Johnson's testimony, McCluskey said everything was "taken care of."<sup>9</sup>

However, on that same day, unknown to Johnson, WW and her mother filed a complaint with the District's Affirmative Action Office, claiming that Johnson had yelled at the girls for no reason, tried to take WW's notebook, grabbed WW's arm and dug her nails into it. The complaint notes that McCluskey did not believe WW, but instead took Johnson's side against WW. Upon receiving the complaint, Assistant Affirmative Action Officer, Lucia Negrete (Negrete) telephoned McCluskey, who told her he had suspended WW and was in the process of investigating the incident. At the hearing, a copy of a May 17 email from

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<sup>9</sup>McCluskey was not called as a witness at the hearing.

McCluskey's secretary, Debra Walters (Walters), to SPIN operator Davila was produced. The email requested that Johnson not be assigned to SBHS pending the investigation. However, Davila testified that she does not know Walters and does not recall receiving the memo. Other than the May 17 memo, there is no evidence that any adverse action was taken against Johnson at this time, and she continued to receive SPIN assignments for the rest of the 2000-2001 school year. Over the next few days, McCluskey took the statements of three students: one student knew only that there was an argument between Johnson and WW; the two other students were the friends of WW involved in the incident, who both claimed that Johnson grabbed WW's arm and scratched it. McCluskey forwarded these statements and the security officers' report to Negrete.

Some time in May, Johnson received a "reasonable assurance" letter from Ward for the 2001-2002 school year. The exact date on which the letter was sent is unclear from the record. Thus, it is possible the letter was sent prior to the May 14 incident.

On June 29, six weeks after the May 14 incident, the filing of WW's complaint, and the receipt of the reports from McCluskey, Negrete telephoned Johnson for the first time, to inform her of the complaint and to get her version of the incident.<sup>10</sup> According to Negrete's notes taken immediately after the conversation, Johnson said the class was "disruptive and out of control" and she felt intimidated by WW, whom she described as a "big girl." Johnson denied having grabbed or scratched WW's arm.

Eleven days later, on July 10, Negrete interviewed five student witnesses to the incident, chosen at random. Witness statements written contemporaneously by Negrete

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<sup>10</sup>When asked at the hearing why it took over six weeks to begin her investigation, Negrete said it was because of her "caseload."

indicate that three students claimed Johnson had been rude to the class and had grabbed or pulled WW's arm; only one student said Johnson scratched WW. All five students said that WW and her friends cursed at Johnson.

After she completed her investigation, Negrete concluded that Johnson's eligibility to serve as a substitute teacher should be restricted. Negrete reached this conclusion despite the fact that the written reports of McCluskey and the security officers supported Johnson's version of events. Negrete claimed that her decision was based on Johnson's "unprofessional conduct," on her "loss of control" of the class, and on her "intimidation" by the students.

By memo dated July 12 to McCluskey, with copies to Ward and SBHS Principal Darryl Adams, Negrete reported that, "although there were conflicting versions of the altercation," it was determined that Johnson "had in fact put her hands on [WW]." Further, Negrete reported (erroneously) that all five students accused Johnson of being rude to the class. In conclusion, Negrete recommended that Johnson "not be utilized as a substitute teacher in the Senior High School educational setting." Negrete did not inform Johnson of her recommendation; instead, by letter of July 16, she told Johnson that "[t]he complaint filed against you by [WW] has been closed."<sup>11</sup> Negrete also told WW by letter that the investigation was completed, that although there were conflicting versions of the incident, "it was determined that Johnson had reacted in an unprofessional manner," and that "corrective action has been taken" by SBHS.

Since November 2000, when Negrete first came to the District, only three other complaints had been filed against substitute teachers. Negrete investigated these complaints

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<sup>11</sup>Negrete testified that she did not believe this statement was misleading, as Affirmative Action's involvement with the incident was completed. Negrete contended that, although it was her practice to inform teachers whenever she recommended adverse action, in this case she believed if Human Resources were to take any action against Johnson, it would be their responsibility to inform her.

and found only one, alleging “inappropriate behavior,” to have merit; that teacher received a warning but was not removed from SPIN. Johnson is the only substitute whom Negrete recommended to be removed from eligibility.

Based on Negrete’s July 12 memo, Ward instructed Davila to remove Johnson completely from the SPIN system. Ward testified that her decision to remove Johnson from the SPIN system was because there was an undetermined amount of force used by Johnson. Ward felt that her responsibility for student safety required her to remove Johnson from the classroom until Ward could determine whether the force was reasonable and justified. Ward did not notify Johnson of her decision; she testified that she believed this was Negrete’s responsibility, as the complaint had been filed with Affirmative Action, notwithstanding that Ward knew the complaint had already been closed.

As a result of Johnson’s removal from SPIN, she was not offered any assignments at the beginning of the 2001-2002 school year. On October 11, while at District headquarters renewing her credentials, she asked Davila why she had gotten no calls.<sup>12</sup> According to Johnson, Davila told her there was a letter taking her off SPIN, but refused to let her see the letter. Davila did not deny telling this to Johnson, but when asked at trial whether Ward asked her to send Johnson a letter, or whether she sent one at all, or when, her testimony wavered back and forth; she offered a variety of excuses for her loss of memory on this issue.

After speaking with Davila, Johnson then met with Ward, who told her that Affirmative Action had made the decision to remove her from SPIN, although Ward did not reveal that Negrete’s recommendation only concerned high schools. Ward told Johnson that she herself

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<sup>12</sup>Substitute teachers do not receive District assignments during the summer break. Thus, Johnson had no knowledge of adverse action until the new school year began.

did not have all the information and was not clear on what had happened, therefore Johnson should speak with Negrete. At some time after that conversation, Ward phoned Negrete and asked for more details about the May 14 incident. According to Negrete's notes, Ward told Negrete that teachers may legally use reasonable force to take passes from a student and that there must be justification for completely removing a substitute from SPIN. Further, Ward opined to Negrete that Ward did not believe there was any reason to prohibit Johnson from teaching at schools other than SBHS. Negrete informed Ward that she would reexamine the case and call Ward back.

On October 17, Johnson met for the first time in person with Negrete, who told her that it was Ward who made the decision to remove her from SPIN. After Johnson presented her defense, Negrete said she would recommend to Ward that Johnson be precluded only from high school assignments.

By memo to Ward dated October 22, Negrete said she saw no reason why Johnson could not be assigned to elementary and middle schools, however, Johnson should not be sent to high schools because she was "intimidated by the size of the students and the lack of classroom management."<sup>13</sup> Based on Negrete's recommendation, Ward notified Johnson by letter of October 22 that she had been removed from SPIN for high schools, but could serve as a substitute in elementary and middle schools.

On October 26, Ward, after speaking again with Negrete, decided she would allow Johnson to serve at any high school which requested her by name, except SBHS where she

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<sup>13</sup>It is undisputed that Johnson's only reference to size was that WW was a "big girl." When asked at the hearing why she used the plural "students" in her memo to Ward, Negrete said this was based on her interviews with Johnson and the five student witnesses, and on the "climate in the classroom." However, she could not describe that climate with any specificity.

could not serve at all, and so notified Johnson. It is undisputed that by this time, Ward knew Johnson had not used unreasonable force or broken any law in the May 14 incident. Yet, when asked at the hearing why she was still restricting Johnson's eligibility, Ward said it was a combination of Johnson's use of "undetermined force" and her "intimidation" by the students. Ward testified that she knew of no other substitute being removed from SPIN because of her perception of a classroom.

Vollkommer testified candidly and with clear memory on all issues except for those specifically relating to Johnson. Thus, although he acknowledged speaking with Ward about Johnson's situation, he could not recall whether it was between July (when she was completely removed from SPIN) and October (when she was removed from only high schools except by name request), or only after October. Further, when asked whether he and Ward had discussed the legal implications to the District of removing Johnson from SPIN and whether he had cautioned Ward in this regard, Vollkommer appeared unsettled, took a long pause, and answered that he did not recall.<sup>14</sup>

### Carol Wright

Wright has been employed by the District as a substitute teacher for approximately 20 years, primarily in special education.<sup>15</sup> She joined the Association in October 2000, and became active in its organizing campaign. She attended union meetings at restaurants and colleagues' homes, participated in phone-banking, and solicited authorization card signatures at the various schools to which she was assigned. She also spoke at a school board meeting on

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<sup>14</sup>The ALJ found Vollkommer's demeanor in this regard suspicious. The Board finds no grounds to dispute this finding.

<sup>15</sup>"Special education" refers to the teaching of physically, mentally and psychologically impaired students.

January 16, 2001, along with nine other substitute teachers. Wright spoke about wages and working conditions, and said that there was “need for a union,” although she did not mention the Association by name.

On October 16, 2001, Wright was sent for the first time to Lytle Creek Elementary School, where she was assigned to a pre-school classroom. According to Wright, she was showing a tambourine to the class. To demonstrate its sound, she shook it, then asked a young boy to hold out his elbow or knee, which, according to Wright, she “gently tapped” with the tambourine. Wright was not aware of any problem with the class, and no one from the school spoke to her about any problem with it.

However, Guillermina Jackson (Jackson), Lytle Creek’s principal, testified that the two aides in Wright’s classroom complained about her behavior to Jackson’s secretary, Chris Perez (Perez), who in turn reported it to Jackson.<sup>16</sup> Jackson claimed she then spoke to one of the aides, who stated that Wright had been “abrupt” with the class and had “tapped” two students on the head with a few flat sheets of paper. The aide did not describe how forceful the tapping had been, nor did she mention anything about a tambourine. Jackson did not receive any complaints from parents. Nevertheless, she instructed Perez to send a “do not use” email to Jimmi Mitchell (Mitchell), District Coordinator of State Pre-School Programs. Jackson testified that she told Perez to send the email on October 16, the day of the incident; yet, for reasons unexplained except for Jackson’s claim that Perez had a heavy workload, Perez did not send the email until October 23, one week later. Jackson acknowledged that she did not know whether Wright was reassigned to Lytle Creek between October 16 and October 23, and there is no evidence that she made any effort to find out.

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<sup>16</sup>Neither Perez nor the aides were called as witnesses at the hearing.

The email accused Wright of having a cold tone of voice, being abrupt with the children, and hitting them with “objects such as paper,” as well as with a tambourine, to get their attention. This was the first written complaint Mitchell<sup>17</sup> had received regarding a substitute teacher, and she received only one other shortly before the instant hearing. After receiving Perez’ email, Mitchell spoke with Jackson, who confirmed that she did not want Wright at her school. Mitchell testified that she also spoke with the two classroom aides, who claimed Wright was harsh with the children, and they were afraid of her and did not respond well to her. According to Mitchell, the aides reported that Wright threw paper at the students and hit one with a tambourine. However, Mitchell did not speak with Wright, as she “did not feel the need to.” Mitchell then sent an email to Davila on October 23 stating that she had received “numerous complaints” about Wright, and requesting that Wright be removed from the SPIN list for child development. In this regard, Mitchell testified that, a few months before the Lytle Creek incident, “several” parents<sup>18</sup> at other schools had phoned her to complain that their children were afraid to go to school because Wright was loud and harsh, and that a classroom aide and unidentified administrator(s) had complained to her about Wright’s harshness. Mitchell did not provide any details about these complaints, nor did she document any of them, nor was Wright ever notified of them, nor did the District take any action against Wright based on them. Mitchell contended at trial that it is her practice not to document or discipline teachers for just a few complaints, and it was only after the October 16 incident that she decided enough complaints had been lodged against Wright to justify requesting her SPIN

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<sup>17</sup>Mitchell is responsible for staffing nine pre-school classrooms for children ages 3 to 5, and six child-development classrooms for children under 3.

<sup>18</sup>Upon further examination at hearing, Mitchell reduced the number of complaining parents from “several” to “maybe two or three.”

removal. However, Mitchell also testified that Wright was the first substitute she had ever received complaints about, plus one other a few days before the hearing. Mitchell did not notify Wright of her request.

Ward claimed that, after learning of Mitchell's email to Davila, she spoke with both Mitchell and Jackson about the Wright incident. However, Mitchell denied that she spoke with anyone from the District after she sent her email. Based on the fact that the ALJ had previously found portions of Ward's testimony not credible, the ALJ credited Mitchell's testimony over Ward's on the issue of whether Mitchell and Ward spoke about Wright.

Further, Ward did not explain at hearing what Jackson had said about the Wright incident, nor did Ward claim that she relied on Jackson in any way in making her decision about Wright. To the contrary, Ward stated, more than once, that her decision was based on Mitchell's email. Accordingly, the ALJ concluded that Ward had no conversation with Jackson. Thus, Ward, relying on Mitchell's email allegation that there were "numerous" complaints about Wright, decided to take Wright completely off the SPIN system. Ward claims this was justified by Wright's having received a "do not use" request from one school in 1997, and a written notice for late cancellation of an assignment in early 2001.<sup>19</sup>

By letter of November 1, Ward informed Wright of her decision and asked for Wright's response. In her response of November 8, Wright explained that she had only tapped a student on the elbow to demonstrate how to use the tambourine, and denied hitting any student; she also included several letters of praise and recommendation from various District teachers and

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<sup>19</sup>In December, Ward printed out a copy of Wright's record, showing that she had five "do not use" requests since 1995, and one "preferred" recommendation in 1994. However, Ward was not aware of this record until after she restricted Wright's eligibility. Therefore, this record of Wright's could not have played a part in Ward's actions.

management personnel, as well as her resume. Based on Wright's response, Ward decided to reinstate Wright to SPIN by name request only, and so notified her by letter of November 15.

However, Wright did not obtain any name-request assignments. Wright claims that she received four SPIN messages for name requests, but by the time she responded, the assignments had been given to other teachers. In early December, Wright learned that she had been name-requested to a child development class. She phoned Davila to find out if she could take the assignment; Davila reported this to Ward, who phoned child-development coordinator Anita Rae (Rae).<sup>20</sup> According to Ward, Rae told her that Wright could not serve; Ward said she needed that in writing; and Rae then made a written request that Wright be taken off the SPIN child development list. Ward complied with the request, but there is no evidence that Wright was ever notified.

#### ISSUES

1. Did the District remove Johnson from the SPIN system because of her activities on behalf of the Association, in violation of EERA section 3543.5(a) and (b)?
2. Did the District remove Wright from the SPIN system because of her activities on behalf of the Association, in violation of EERA section 3543.5(a) and (b)?

#### DISCUSSION

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employees exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced

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<sup>20</sup>Rae was not called as a witness at the hearing.

the employees because of the exercise of those rights. (Novato Unified School District (1982) PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.)

EERA section 3543(a) guarantees to public school employees the right to “form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.” In the instant cases, both Johnson and Wright exercised their protected rights by their activities in support of the Association’s organizing campaign, and the District imposed adverse action against them by removing them from the SPIN system, thereby limiting their ability to receive substitute teaching assignments. The issues yet to be decided, then, are whether the District had knowledge of their Association activities, and whether it took action against them because of these activities.

#### Knowledge of Union Activities

The Novato standard requires that the employer have actual or imputed knowledge that the employee engaged in protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227 (Moreland)). Here, the District claims that Ward, the primary decision-maker, had no personal knowledge of the protected activities of Johnson and Wright. During the hearing, Ward denied all knowledge of the Association’s campaign, the election petition, and the mail ballot election; she even denied seeing the election notices which were posted at all school sites. Ward proffered that, because the Association did not have a contract with the District, it was not within her area of responsibility to take any action with regard to them, thus she was not aware of their activities. She admitted knowing that Hall was seeking information on substitute teachers, and that she provided the information, but she denied

knowing his purpose. At the hearing, when shown Hall's letter of July 18, 2000, informing her of the Association's intent to organize, Ward testified that she did not recall receiving the letter, and would not even admit that her own letter of July 26 was in response. She also was shown a letter addressed to her from Hall dated May 10, 2001, complaining about the removal of another substitute from SPIN and requesting an investigation. In response, Ward testified that she did not recall receiving the letter and that no investigation was conducted. Ward also did not recall seeing Woodford's or Vollkommer's memos regarding the campaign and the petition. She denied attending District board meetings, seeing local newspaper articles or campaign tables set up outside the District's headquarters, where her own office is located, or having any knowledge of Johnson's or Wright's involvement.

In contrast to Ward's professed lack of knowledge, both Ward's supervisor and at least one of her subordinates<sup>21</sup> admitted they were aware of the Association's campaign.

Vollkommer, Ward's supervisor, acknowledged that he and his staff were generally aware of the Association's campaign, perhaps as early as July 2000. Further, he testified that the campaign received "a lot of attention" from himself and Ward, as they frequently discussed Hall's numerous information requests to Ward. Vollkommer recalled seeing local newspaper articles regarding the campaign, and attended District board meetings during the period. However, although he recalled Hall and Howard Carmean speaking at those meetings in support of the Association and campaigning at District headquarters, he did not recall Johnson or Wright ever speaking, and he denied knowing anything about their involvement in the

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<sup>21</sup>There is evidence in the record that Jackie Pullen (Pullen), a Human Resources employee under Ward's supervision, was aware of the Association campaign. The record also reveals that during the campaign Pullen made negative remarks about teachers having to pay union dues.

campaign or with the union. Both Vollkommer and Woodford also sent memos to principals and other administrators regarding the campaign and the election. Hall announced the campaign early on by memo to Ward in July 2000, and by letter to principals, teachers and staff in November 2000; and during the campaign, he sent numerous information requests to Ward, stating in many of them that it was for recruitment.

Further, the ALJ found that the Association's campaign was widespread and highly visible. The Association distributed and posted flyers throughout the District, including at the District's headquarters. The Association's campaign was also the focus of several local newspaper articles, of speeches made at District board meetings, and in election notices posted at all school sites.

As for Johnson, her campaign activities were extensive, prolonged, and also highly visible. She appeared in local newspaper articles, passed out flyers - many containing her name and phone number - at several school sites and at District headquarters, solicited the Association's support from substitutes as well as from the many others to whom she spoke, gathered over 50 authorization cards, and spoke at school board meetings.

Wright did not have Johnson's degree of visibility in the campaign. However, she was one of the early activists, solicited authorization cards at various school sites, and spoke of the need for a union at the District's January 16 board meeting. In addition, she attended the Association's meetings and participated in its phone banks.

Given the evidence cited above, the ALJ did not credit Ward's denials about having no knowledge of Johnson's and Wright's protected activities. To the contrary, the ALJ found that it strained credulity that someone in Ward's position could have ignored the Association's campaign and Johnson's and Wright's role in it. Based on the entirety of the evidence, the

ALJ concluded that Ward had full knowledge of the Association's campaign and of Johnson's and Ward's support of the campaign. Having reviewed the entire record, the Board finds no reason to disturb the ALJ's finding on this issue. Accordingly, the Board finds that the Association has established the second prong of the Novato standard.

#### Nexus Between Union Activity and Adverse Action

Having established that Johnson and Wright participated in protected activities and that the District had knowledge of such activities, the Association must now establish a connection, or nexus, between that activity and the adverse action taken by the employer. (Novato; Regents of the University of California (1983) PERB Decision No. 319-H.) This may be done by circumstantial evidence since direct proof is seldom available. (Contra Costa Community College District (2003) PERB Decision No. 1520.)

Circumstantial evidence of nexus includes the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct. (North Sacramento School District (1982) PERB Decision No. 264 (North Sacramento)). However, timing, without more, does not demonstrate the necessary "nexus." (Moreland.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague,

or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive (Novato; North Sacramento).

1. Johnson

With respect to Johnson, the ALJ found multiple factors evincing the District's unlawful motive. First, the District did not remove Johnson from the SPIN system until the Association filed its election petition. Specifically, although Johnson's altercation with WW and the filing of WW's complaint took place on May 14, Johnson was not removed from SPIN until July 12, two months later, on the same day the Association filed its election petition. On that day, Negrete sent her memo to McCluskey recommending Johnson's partial removal from SPIN, and on that same day or within days thereafter, Ward took her off SPIN completely. This precluded Johnson from receiving any assignments until October 22, when Ward reinstated her for elementary and middle schools, and October 26, when Ward reinstated her for high school name requests.

The ALJ also found evidence of the District's departure from established procedures and standards. District witnesses concurred that the District's long-established practice was to notify a teacher, including a substitute teacher, whenever she was to be removed, in part or in whole, from the SPIN system. However, Johnson was not notified of her removal from SPIN until she herself inquired on October 11, after not receiving any assignment calls since the start of the new school year. Indeed, Johnson had no reason to believe that she had been removed from the SPIN system since Negrete had informed her that the affirmative action complaint was "closed." Both Negrete and Ward testified that they believed it was the other's responsibility to notify Johnson; however neither of them determined whether Johnson had in

fact been notified, and neither of them acknowledged, even at hearing, that any notice should have been given.

Next, the ALJ found evidence of inconsistent and contradictory justifications by District witnesses. In July, Negrete notified WW that the investigation into her complaint had been completed and that it had been determined that Johnson had acted in an unprofessional manner towards WW. Negrete further stated that corrective action had been taken by SBHS. At the same time, Negrete notified Johnson that the complaint was closed and gave no indication that there had been a finding that Johnson had acted unprofessionally or that corrective action would be forthcoming. Further, in her initial recommendation to remove Johnson from serving as a substitute at SBHS, Negrete cited her finding that Johnson had used an undetermined amount of force on WW. In October, Negrete reiterated the same recommendation to Ward, but stated that it was because Johnson was intimidated by the size of high school students. At hearing, Ward offered no clear rationale for her October decision to continue restricting Johnson from teaching at high schools, but rather waffled back and forth between the “undetermined force” and Negrete’s October recommendation.

Based on the above factors, the ALJ found that the Association had established a nexus between Johnson’s protected activity and her removal from SPIN in July and her restriction from teaching at high schools implemented in October. Thus, the ALJ found that the Association had established a prima facie case of retaliation by the District. After reviewing the entire record, the Board finds no reason to disturb this finding.

## 2. Wright

With respect to Wright, the ALJ also found multiple factors evincing the District’s unlawful motive. First, like Johnson, Wright was also removed from SPIN just a few days

before the start of the election. Thus, the District's timing is suspect. (North Sacramento.) Further, the ALJ found inconsistencies and contradictions among the various District witnesses. For example, in Mitchell's email to Davila, she accused Wright of receiving "numerous complaints." However, except for the October 16 incident, Wright was never notified of any other complaint. At hearing, Mitchell testified that she had previously received two or three complaints from parents about Wright. These complaints apparently were not serious enough for Mitchell to document or investigate. Yet, at the same time, the complaints were apparently serious enough to serve as a partial basis for Wright's removal from SPIN.

Finally, at the Human Resources level, Ward spoke with no one, and took Wright completely off the SPIN list although Mitchell had recommended Wright's removal only from child development. Ward's proffered justification was that Wright had a record of misconduct. However, Ward did not access Wright's full record until December. Thus, Ward was not aware of the previous parental complaints when she made the decision to remove Wright from SPIN in November.

Based on the above factors, the ALJ found that the Association had established a nexus between Wright's protected activity and her removal from SPIN in November. Thus, the ALJ found that the Association had established a prima facie case of retaliation by the District. After reviewing the entire record, the Board agrees that the Association has established a prima facie case. However, the Board notes that, unlike Johnson, Wright received prompt notice of her removal from SPIN which allowed her to promptly respond. As such, the prima facie case established by Wright is weaker than that of Johnson.

## District's Affirmative Defense

Once the charging party has established its prima facie case, the burden then shifts to the employer to show that it would have taken the adverse action even in the absence of the employee's protected activity. (Novato; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169].) The District asserts that it would have removed Johnson and Wright from SPIN even in the absence of any protected activity. In the proposed decision, the ALJ rejects the District's defense, finding that the District failed to meet its burden of proof. As discussed below, the Board rejects the ALJ's conclusions on this issue.

### 1. Johnson

The District argues that Johnson's initial removal from SPIN was justified because of Negrete's finding that Johnson had used an undetermined amount of force with WW. In considering this argument, it is important to note that there is no evidence that WW, or any of the students who supported WW's allegations against Johnson, had knowledge of Johnson's protected activities or harbored any anti-union animus. Similarly, the Board does not believe there is sufficient evidence to find that Negrete had any knowledge of Johnson's protected activities or harbored any anti-union animus.<sup>22</sup>

In addition, it is also important to note that whether Negrete's finding constitutes "just cause" for discipline is not at issue since Johnson was an at-will employee. Similarly, the accuracy or thoroughness of Negrete's investigation is not at issue. (See e.g., Moreland, p. 15 ["Disciplinary action may be without just cause where it is based on any of a host of improper

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<sup>22</sup>In the proposed decision, that ALJ discredited Negrete's testimony that she had no knowledge of Johnson's protected activities. The ALJ apparently imputed Ward's knowledge of such activities to all the District's employees, including Negrete. The Board does not believe that imputing knowledge to such a broad spectrum of employees is warranted.

or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board is therefore without power to remedy.”].) Thus, the mere fact that the ALJ found deficiencies with Negrete’s investigation does not mean that Negrete must have been motivated by anti-union animus. This is especially true in this case since there is no evidence that Negrete had knowledge of Johnson’s protected activities.

Since there is no evidence that Negrete was motivated by anti-union animus, the issue before the Board is not the legitimacy of Negrete’s investigation, but Ward’s actions in response to it. The evidence establishes that Ward received Negrete’s July 12 memo which recommended that Johnson be prohibited only from teaching at the high school level. Ward did not immediately follow Negrete’s recommendation, but instead completely removed Johnson from the SPIN system. Ward testified that she did so because of Negrete’s finding that Johnson had used an undetermined amount of force. Ward testified that when allegations of unnecessary or excessive force are levied against a substitute, it is her policy to completely remove the substitute from SPIN until an investigation can be completed. Given the District’s responsibility for the safety of its students, the Board not only finds such a policy reasonable, but prudent. Accordingly, the Board finds that the District has established that Johnson would have been completely removed from SPIN immediately after Ward received the July 12 memo even in the absence of any protected activity.

Subsequently, Ward contacted Negrete to obtain further information regarding the finding of “undetermined” force. It is worth noting that according to Negrete’s notes of her conversation with Ward, Ward cautioned Negrete that teachers are only prohibited from using unreasonable or unnecessary force. Negrete then agreed to reexamine Johnson’s case. After

her review, Negrete reiterated her recommendation that Johnson not teach at the high school level. Ward subsequently accepted this recommendation.

While the ALJ faulted Ward for not conducting her own investigation into the May 14 incident, there is no evidence in the record that Ward had such a responsibility given that Negrete had already investigated the matter. Moreover, there is nothing in the record to suggest that Ward knew, or should have known, of any deficiencies in Negrete's investigation. In the end, Ward merely followed the recommendation of the District's trained investigator who recommended that Johnson not teach at the high school level. Given the seriousness of the allegations and the District's potential liability in the matter, Ward's actions are understandable. The Board is satisfied that the District has established that Ward would have followed Negrete's recommendation even absent Johnson's protected activities. Accordingly, the charge and complaint against the District with respect to Johnson must be dismissed.

## 2. Wright

The District also argues that Wright would have been removed from SPIN even absent her protected activities. As with Johnson, Wright was removed after allegations of improper behavior. According to Jackson, two teachers' aides complained that Wright was abrupt with a class of pre-schoolers and would hit them with objects, such as paper, to get their attention. It is important to note that there is no evidence that the two teachers' aides had knowledge of Wright's protected activities or harbored any anti-union animus. Because there is no evidence that the teachers' aides were motivated by anti-union animus, the issue before the Board is not the legitimacy of the allegations against Wright, but Ward's actions in response to it.

As already discussed, as a result of the complaint Jackson initiated a request to have Wright removed from the SPIN system for child development. The request was eventually

received by Ward who testified that upon receiving Jackson's request, she completely removed Wright from the SPIN system pending an investigation. Ward's actions were consistent with her testimony that when allegations of unnecessary or excessive force are levied against a substitute, it is her policy to completely remove the substitute from SPIN until an investigation can be completed. Ward testified that she followed this policy in Wright's case since Wright was accused of hitting students with objects. Given the District's responsibility for the safety of its students, the Board not only finds such a policy reasonable, but prudent. This is even more true when dealing with pre-schoolers, who are perhaps more vulnerable than older students. Accordingly, the Board finds that the District has established that Wright would have been completely removed from the SPIN system immediately after the complaint by the teachers' aides even in the absence of any protected activity.

Subsequently, Ward informed Wright of her removal from SPIN and provided her an opportunity to respond to the complaint. Wright responded by denying the allegation that she "hit" her students. After reviewing Wright's response, Ward reinstated Wright to the SPIN system on a "request only" basis.

As discussed above, it is important to note that it is not the Board's duty to determine whether "just cause" existed for the action taken against Wright. It is similarly not the Board's duty to determine whether Ward's investigation of the complaint against Wright was fair. The issue before the Board is whether Ward would have placed Wright on "request only" status absent any protected activity. Here, two teachers' aides complained of Wright's abrupt behavior with children and, most seriously, accused her of hitting the students to get their attention. In her response, Wright admits that she "gently tapped" one student but argues that her action was "grossly misinterpreted" as hitting.

After considering all the evidence, the Board finds that the District has met its burden to establish that Ward would have placed Wright on “request only” status even absent any protected activity. Here, Wright admitted to “tapping” one of the students. Since Wright was an at-will employee, Ward was not required to hold an evidentiary hearing to determine whether Wright’s “tapping” of the student was cause for discipline. Ward had every right to take the action she did based on nothing more than her belief that Wright should not have been “tapping” students in the first place. As the Board has recently held, a school district is entitled to set a higher standard for its at-will employees. (Bellevue Union Elementary School District (2003) PERB Decision No. 1561.) Accordingly, the charge and complaint against the District with respect to Wright must be dismissed.

#### ORDER

The unfair practice charges and complaints in Case Nos. LA-CE-4345-E and LA-CE-4350-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member Whitehead joined in this Decision.

Member Neima’s concurrence and dissent begins on p. 30.

NEIMA, Member, concurring and dissenting: I concur with the majority's findings of fact and its conclusion that the San Bernardino Association of Substitute Teachers (Association) established a prima facie case of unlawful discrimination. However, I must dissent from the majority's finding that the San Bernardino City Unified School District (District) established its affirmative defense that it would have dismissed both teachers even absent any protected activity. I find evidence in the record that the District failed to follow its own procedures for investigating charges of misconduct against substitute teachers. Given that the District failed to follow its own procedures, I would not find that the District established its affirmative defense. Accordingly, I would affirm the administrative law judge's proposed decision finding that the District violated the Educational Employment Relations Act by discriminating against the two teachers for protected activity.