

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



WOODLAND EDUCATION ASSOCIATION,

Charging Party,

v.

WOODLAND JOINT UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. SA-CE-2089-E

PERB Decision No. 1722

December 13, 2004

Appearances: California Teachers Association by Ramon E. Romero, Attorney, for Woodland Education Association; Kronick, Moskovitz, Tiedemann & Girard by Roman J. Muñoz, Attorney, for Woodland Joint Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

NEIMA, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Woodland Education Association (Association) to a proposed decision (attached) of the administrative law judge (ALJ). The underlying unfair practice charge alleged that the Woodland Joint Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by discriminating against a teacher for exercising protected activities and by threatening other teachers. The ALJ sustained only the allegation that the District violated EERA by making threats.

The Board has reviewed the entire record in this matter, including the ALJ's proposed decision, the Association's exceptions and the District's response. The Board finds the ALJ's

¹EERA is codified at Government Code section 3540, et seq.

findings of fact and conclusions of law to be free of prejudicial error and adopts them as the decision of the Board itself, subject to the discussion below.

DISCUSSION

Prior to 2000, EERA section 3543 expressly provided that employees “shall have the right to represent themselves individually in their employment relations with the public school employer . . .” Then, inexplicably, the Legislature deleted the above-referenced language when it amended EERA section 3543 to include language discussing the imposition of fair share fees. As the ALJ stated, the deletion of this language is not to be treated lightly. Here, the original language granting employees the right to represent themselves “individually” formed the basis of the Board’s decision in Pleasant Valley School District (1988) PERB Decision No. 708 (Pleasant Valley). It was in Pleasant Valley where the Board construed that language as creating a protected right of self-representation.

It is a fundamental tenet of statutory construction that the “Legislature is deemed to be aware of existing laws and judicial decisions construing the same statute in effect at the time legislation is enacted, and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.' [Citations omitted.]” (Viking Pools, Inc. v. Maloney (1989) 48 Cal.3d 602, 609 [257 Cal.Rptr. 320]; see also, Long Beach Community College District (2003) PERB Decision No. 1564.) As such, the Board must presume that the Legislature was aware that the language it removed was the very language granting employees the right to self-representation. Thus, until the Legislature acts again, the Board has no choice but to conclude that the protected right of self-representation no longer exists under EERA.

Accordingly, the Board adopts the ALJ’s proposed decision.²

²In adopting the ALJ’s proposed decision, the Board does not adopt the dicta in footnote 20.

ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, it is found that the Woodland Joint Unified School District (District) violated the Educational Employment Relations Act (EERA) section 3543.5(a) and (b) of the Government Code provisions. The District violated EERA when its agent, Arturo Barrera, threatened teachers at the Rhoda Maxwell School by warning of reprisals because they took their complaints about him to the Woodland Education Association (Association) and ultimately to District administrators.

Pursuant to EERA section 3541.5(c), it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Threatening teachers with reprisals because of their exercise of the right to form, join and participate in the activities of an employee organization of their own choosing for the purpose of representation in all matters of employer-employee relations.

2. Interfering with the right of the Association to represent its members.

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

1. Post at all work locations where notices to certificated employees customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

2. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Woodland Education Association.

Chairman Duncan and Member Whitehead joined in this Decision.

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



After a hearing in Unfair Practice Case No. SA-CE-2089-E, Woodland Education Association v. Woodland Joint Unified School District, in which all parties had the right to participate, it has been found that the Woodland Joint Unified School District (District) violated the Educational Employment Relations Act (EERA) section 3543.5(a) and (b) of the Government Code provisions. The District violated EERA when its agent, Arturo Barrera, threatened teachers at the Rhoda Maxwell School by warning of reprisals because they took their complaints about him to the Woodland Education Association (Association) and ultimately to District administrators.

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

CEASE AND DESIST FROM:

1. Threatening teachers with reprisals because of their exercise of the right to form, join and participate in the activities of an employee organization of their own choosing for the purpose of representation in all matters of employer-employee relations.
2. Interfering with the right of the Association to represent its members.

Dated: _____

**WOODLAND JOINT UNIFIED SCHOOL
DISTRICT**

By: _____
Authorized Agent

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

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



WOODLAND EDUCATION ASSOCIATION,

Charging Party,

v.

WOODLAND JOINT UNIFIED SCHOOL
DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. SA-CE-2089-E

PROPOSED DECISION
(5/15/03)

Appearances: California Teachers Association by Ramon E. Romero, Staff Attorney, for Woodland Education Association; Kronick, Moskovitz, Tiedemann & Girard by Roman J. Muñoz, Attorney, for Woodland Joint Unified School District.

Before Ronald E. Blubaugh, Administrative Law Judge.

PROCEDURAL HISTORY

A union contends here that a public school employer terminated a long-term substitute kindergarten teacher because she spoke up for herself after a school principal shouted at her during a conversation they had in front of a school. The employer responds that the employee was terminated because she failed to assist a co-teacher with whom she shared a classroom.

This action was commenced on March 15, 2002, when the Woodland Education Association (Union) filed an unfair practice charge against the Woodland Joint Unified School District (District). On April 22, 2002, the general counsel of the Public Employment Relations Board (PERB or Board) followed with a complaint against the District. The complaint alleges that on or about September 17, 2001, teacher Louanne Lohman exercised rights guaranteed by the Educational Employment Relations Act (EERA or Act)¹ by meeting with her supervisor,

¹ The EERA is found at Government Code section 3540 et seq. Unless noted otherwise, all statutory references will be to the Government Code.

Principal Arturo Barrera, to express concern about the manner in which he had communicated with her regarding work-related issues. The complaint alleges that Ms. Lohman also engaged in protected conduct when on or about September 27, 2001, she informed Mr. Barrera that she would be represented by the Union at a meeting with him the following day. Because of these protected acts, the complaint alleges, the District through the acts of its agent Mr. Barrera terminated the employment of Ms. Lohman on September 28, 2001. As separate cause of action, the complaint alleges that on or about February 6, 2002, the District through its agent Mr. Barrera called a meeting at which he made threatening statements to teachers at the school. By these acts, the complaint alleges, the District retaliated against Ms. Lohman and interfered with both employee and Union rights in violation of section 3543.5(a) and (b).²

The District answered the complaint on May 17, 2002, admitting certain jurisdictional allegations but denying most of the facts and asserting various defenses. A hearing into these allegations was conducted in Sacramento on January 30 and 31 and February 21, 2003. Following the submission of post-hearing briefs, the matter was submitted for decision on May 5, 2003.

² In relevant part, section 3543.5 provides as follows:

It shall be unlawful for a public school employer to do any of the following:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

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

FINDINGS OF FACT

The District is a public school employer as defined in section 3540.1(k) of the EERA. The Union is an employee organization as defined in section 3540.1(d). At all times relevant, the Union has been the exclusive representative, as defined in section 3540.1(e), of an appropriate unit of the District's certificated employees. At all times relevant, Ms. Lohman was a public school employee as defined in section 3540.1(j).

A collective bargaining agreement was in effect between the parties during the relevant period.³ The agreement prohibits retaliation against employees because of their exercise of protected rights. The grievance procedure ends in binding arbitration. However, because the District refused to waive procedural defenses the unfair practice charge is not subject to deferral.⁴

In the summer of 2001,⁵ Ms. Lohman was enrolled in the teaching credential program at National University in Sacramento. She had an emergency credential but needed to complete her student teaching to receive an unrestricted credential from the State of California. At some point during the early weeks of summer, Ms. Lohman learned that a friend soon would be vacating a summer teaching job at the District's Rhoda Maxwell Elementary School

³ Counsel for the Union expressed some reservations during the hearing about whether the Union had ratified the agreement. I am convinced, however, by the testimony of Union President Janet Levers (Reporter's Transcript at Vol. 3, pp. 136-137) and District Associate Superintendent Dale Weatherford (Reporter's Transcript at Vol. 3, pp. 187-189) that the parties agreed to an extension of their existing contract. Pursuant to that extension the District granted unit members a pay increase in the fall of 2001. (See Joint Exhibit 1.)

⁴ See Reporter's Transcript at Vol. 3, pp. 191-192. Deferral is not appropriate unless the employer agrees to waive procedural defenses. (State of California (Department of Food and Agriculture) (2002) PERB Decision No. 1473-S.) The deferral requirement under the EERA is set out at section 3541.5(a)(2).

⁵ Unless otherwise indicated, all subsequent dates will be to the year 2001.

in order to take another position in the District. Ms. Lohman applied for the summer school position and got it, taking over the class after the second week of a six-week program.

During the summer session, Ms. Lohman learned that Maxwell School would have vacant positions in the fall. She applied for one of them and in mid-August she was interviewed by a panel composed of the principal, Mr. Barrera, and two teachers. Of particular interest to Ms. Lohman was a position as a 6th grade teacher. The other vacancies were that of 1st grade teacher and long-term substitute kindergarten teacher. During the interview, Mr. Barrera asked Ms. Lohman if she would be interested in the long-term substitute position and she replied that she would be. Later, he proposed her for the long-term substitute position, telling the others on the interview panel that it was harder to get a long-term substitute than a permanent teacher.

Ms. Lohman then went through a second interview with two kindergarten teachers, Estella Medina and Gloria Luna, sisters who taught morning and afternoon kindergarten sessions in a shared classroom. Ms. Medina was going on a pregnancy leave and Ms. Lohman, if hired, would replace her as the morning kindergarten teacher. Mr. Barrera wanted to be sure that both sisters would be comfortable with the person hired while Ms. Medina was on leave. The interview went well and several days later Mr. Barrera offered Ms. Lohman the substitute position replacing Ms. Medina who was not expected to return until March of 2002.

Ms. Lohman was hired effective August 17, the first day of work for new teachers. The first day of work for returning teachers was August 23. The first day of classes for students was August 27.

Although Mr. Barrera contended at the time he terminated Ms. Lohman that she was only a day-to-day substitute teacher, Ms. Lohman was told when she was hired that she would

be a long-term substitute. The evidence persuasively establishes that Ms. Lohman was a indeed a long-term substitute. Shortly after she was hired, Ms. Lohman was directed to attend new teacher meetings that took place before the returning teachers were required to start. Day-to-day substitutes were not required to attend. Ms. Lohman was introduced at faculty and parent meetings as the replacement for Ms. Medina. Day-to-day substitutes were not introduced at faculty or parent meetings. A phone number for Ms. Lohman was printed on the school intercom list and her name was carried in the fall version of the Maxwell School handbook for 2001-2002, along with that of Ms. Medina, as the teacher of the morning kindergarten class in Room B-3. The names of day-to-day substitutes were not printed on the intercom list or in the school handbook. Ms. Lohman was given a key to the classroom and the code to the building alarm. Day-to-day substitutes were not given a key or the code to the building alarm. Ms. Lohman's timesheet identified her as a "long-term sub." Most important, from the first day, Ms. Lohman was paid at the long-term substitute rate of \$185 per day and not at the rate of \$95 per day, which is the amount the District pays day-to-day substitute teachers. From this evidence, I find it clear that Ms. Lohman was hired as a long-term substitute teacher and remained such throughout her tenure with the District.

After she was hired, Ms. Lohman requested National University to make arrangements with the District so that her substitute kindergarten job also would qualify as her student teaching requirement. National was able to make this arrangement and assigned James Nelson, an employee of National, to be Ms. Lohman's student teacher supervisor. Jennifer Williams,⁶ a sixth grade teacher at Maxwell, was assigned to be her master teacher.

⁶ This teacher is variously referred to in the record as Jennifer Williams, her maiden name, and Jennifer Richter, her married name. At the time Ms. Lohman was employed by the

Mr. Barrera promised Ms. Lohman that she could finish her student teaching at Maxwell School should Ms. Medina return before the end of the school year.

In most District schools, kindergarten teachers assist each other during the portion of the day they are not teaching. Thus, the teacher not primarily responsible for the class at a given time walks around the room and helps students with the project for the day. Beginning the year prior to the arrival of Ms. Lohman, kindergarten teachers at Maxwell have not followed this practice. Mr. Barrera installed a program called "Reading Recovery" which was intended to get all 1st grade students up to grade level by the end of the year. The kindergarten teachers were trained in this program and during the hours they are not primarily responsible for teaching, they are assigned to work on an individual basis with 1st graders who were falling behind.

Ms. Luna continued her work in Reading Recovery in the fall of 2001. Therefore, she was not in the classroom when Ms. Lohman was teaching her morning kindergarten class. Ms. Lohman, however, had not completed training in Reading Recovery and that left her afternoons without any specific assignment. Ms. Lohman testified that she did anything Ms. Luna asked her to do: "I ran copies for her. I laminated things. I cleaned out cupboards. I organized stuff. I would run and get her a diet soda." Ms. Lohman said that during the afternoons she also did preparation for the next day and cleanup. On several occasions, she asked the other kindergarten teachers, Susan Ash and Chris Fabre, if there was anything she

District Ms. Williams went by her maiden name. References in this proposed decision will therefore use the maiden name.

could do for them. However, Ms. Lohman testified, she soon was told by Ms. Luna that she was not to work for the other kindergarten teachers and “that those people were not to be in her classroom and I was not to associate with them.”

It was Ms. Luna’s opinion that Ms. Lohman was not helping during the afternoon kindergarten sessions. Ms. Luna testified that she told Ms. Lohman at the time she was hired that they would be collaborating “with our lessons and generally everything we did.” However, she said, Ms. Lohman was not collaborating. Ms. Luna said she “didn’t know exactly” where Ms. Lohman was in the afternoon. Nevertheless, Ms. Luna did not complain to Ms. Lohman. She complained, instead, to Mr. Barrera. Asked why she did not inquire of Ms. Lohman about her absence in the afternoon, Ms. Luna explained: “I am not the confrontational type. I’ve never been that way.” She said she “would rather avoid anything that would – might even get close” to a confrontation.

Mr. Barrera testified that he received on-going complaints from Ms. Luna that Ms. Lohman was not helping in the afternoon. He said he told Ms. Lohman that she was supposed to be helping Ms. Luna in the afternoon but he could not identify when he did so. He said it could have been in either the week of September 3rd or the week of September 10th. Ms. Lohman testified that Mr. Barrera’s only comment to her about what she should be doing in the afternoon was a statement that she should be working with Ms. Luna and not the other kindergarten teachers. Ms. Lohman quoted her conversation with Mr. Barrera as follows:

. . . He said you do not work for Susan Ash or Chris Fabre. You work for Gloria Luna. You stay away from both of them. Gloria will never steer you wrong. You stay clear of the other two.

Mr. Barrera denied that he ever told Ms. Lohman to stay away from Ms. Ash or Ms. Fabre.

Under an arrangement worked out the prior spring, all four kindergarten teachers were scheduled two weeks into the school year to begin a joint program on Monday mornings. This arrangement called for all 80 morning and afternoon kindergarten students to attend Monday morning classes together. Students were to rotate through three different work stations with a teacher assigned at each location. Two of the work stations were in the kindergarten classrooms but one work station was in a reading lab not normally used for kindergarten instruction. In the week prior to the commencement of the Monday morning program, the teachers became concerned that the third work station had no scissors, glue, crayons or other supplies used by kindergarten students.

On September 14, the Friday before the program was to begin, all of the kindergarten teachers except Ms. Lohman went as a group to Mr. Barrera to express their concerns about the absence of supplies. Ms. Lohman was absent that day with strep throat. Ms. Fabre testified that Mr. Barrera started the conversation “somewhat defensive” and when they asked about the supplies, “he seemed to get a little more annoyed with us, and kind of told us that we had set this up so that we needed to deal with it.” The meeting ended without teachers securing any commitment that they would receive the requested supplies.

Ms. Lohman returned to work on Monday, September 17. At about 1 p.m. that day she approached Mr. Barrera who was standing in front of the school monitoring students as they were leaving campus for early dismissal. She told him that because of her illness she would not be preparing new lesson plans but would just roll over the lesson plan from the prior week. Ms. Lohman testified that Mr. Barrera then asked her how the Monday program was going. She replied that there still were no scissors, no glue, no crayons and other supplies and that her students are there without the supplies they need to perform. She continued:

. . . And he absolutely flipped into a new personality. He started yelling at me. There were students out there. Pointing his finger in my face, telling me that he was sick and tired of his Kindergarten staff. He told me – and I’ll never forget – I have 20 teachers on this campus and if I hear one more thing from the Kindergarten staff, I’m going to be sick. . . .

Ms. Lohman said she replied that she had just come to tell him about her lesson plans but he replied that she came to complain. Ms. Lohman said that after the conversation continued on in that fashion for a brief time and she excused herself and left.

Mr. Barrera testified that Ms. Lohman approached him when he was on bus duty in front of the school and began complaining about the Monday schedule. He said she tried to convince him that he should change the schedule and he responded that the other kindergarten teachers already had approached him about this subject. He described his demeanor as controlled and said he was not waving his arms. He said he listened to what Ms. Lohman had to say until she started getting into the Monday schedule and then he cut her off.

Jolie Hagopian, a witness to the conversation, provided an account similar to that given by Ms. Lohman. Ms. Hagopian testified that while she was standing a few feet away, she heard Ms. Lohman begin the conversation by speaking about her lesson plans. She testified:

. . . And Louanne Lohman was approaching him to talk about her lesson plans. And I overheard him getting very angry with her, as she was saying I was not here last week And he flipped it around to saying you Kindergarten teachers, I’m sick and tired of hearing about this; all that you do is complain. I have other teachers here that I’m concerned about.

Ms. Hagopian described Mr. Barrera as speaking “[S]tern, very stern” and “loudly.”

Ms. Lohman testified that she was upset by the conversation and decided that she would go back to Mr. Barrera and try and talk out the problem. Ms. Lohman testified that she found Mr. Barrera in the staff lounge putting pictures on the wall. She said she approached

him and asked if she could speak with him. She said he stopped what he was doing and said “you want some more of me?” She replied, “actually, yes, I do.” She said he pointed his finger at her and said, “then you will sit there and you will wait for me to be done.” She testified that when he had finished, they walked to his office and sat down. She testified:

. . . And I just said, Mr. Barrera, I’m not really sure what just happened between you and I, but it was not okay with me and you cannot treat me like that. And he stopped me, like, blunt in my tracks and he started point[ing] and screaming at me. The door was closed. And he said you came to me to complain. And I said wait a minute. . . . ¶ . . . And I said I came to you to explain to you why we didn’t have lesson plans. If you somehow perceived that I was coming to complain, I’m sorry, but that’s not why I came. . . .

She described the ensuing conversation as a “roller coaster ride” with Mr. Barrera alternately calming down and then yelling at her. She said she excused herself and departed at one point when he was calm.

On the following day, September 18, Ms. Lohman’s student teacher supervisor, Mr. Nelson, came to Maxwell School to do his first classroom observation of her. Mr. Nelson testified that when he arrived at the school Mr. Barrera called him into his office to tell him that things were not as good as he thought they should be with Ms. Lohman. Mr. Nelson said he understood the complaint “as being a peer relationship [issue] between . . . Louanne, and the other teacher who used that room with her.”

Mr. Nelson gave Ms. Lohman a generally positive evaluation on September 18. His only negative comment, if it could be described as negative, reads:

I would recommend a slight modification in your behavior. Be a little more gentle and be sure the children understand your directions.

Mr. Nelson testified that he frequently gives the same recommendation to other beginning teachers. He said he thought the classroom instruction was good.

Mr. Barrera decided to terminate Ms. Lohman on or before September 19. He testified that on that date he learned at a meeting of District administrators that another District school was planning to hire one or more teachers and would soon be conducting interviews. He said he made arrangements on September 19 to participate in the interviews to find a replacement for Ms. Lohman. Mr. Barrera testified that he made the decision to replace Ms. Lohman sometime during the week of September 10 but said he could not provide an exact date because he did not write it down.

Mr. Barrera testified that he decided to terminate Ms. Lohman because she was not a good personality match for Ms. Luna and because she was not helping Ms. Luna during the afternoons. He said he contacted District Superintendent Linda Weesner, Associate Superintendent of Educational Services LuAnn Boone and Associate Superintendent Weatherford prior to terminating Ms. Lohman. He said that after checking with the District's legal counsel, Mr. Weatherford told him that because Ms. Lohman was a substitute the District would be on solid ground to terminate her.

Mr. Weatherford testified that he first learned about the termination of Ms. Lohman after "it had been done." He said he had no prior opportunity to investigate or determine whether it would be a fair thing to terminate Ms. Lohman. He said his investigation was conducted after she already had been released.

Mr. Nelson conducted two more classroom observations of Ms. Lohman, on September 24 and on September 26. On the observation of September 24, Mr. Nelson wrote:

Some need to modify your leadership by mellowing your directions and displaying more patience when you correct a child.

Ms. Lohman was much distressed by this comment. She said Mr. Nelson had arrived late and some of the entries on the observation form were drawn from a lesson plan for the day which she had not followed. She believed the comment about a need for patience was not based on anything that happened in the classroom.

Ms. Lohman testified that she called Mr. Nelson that evening and he told her that on his first visit Mr. Barrera had expressed some concerns about her and that he thought she was “overbearing” and for Mr. Nelson to see what he thought. Ms. Lohman said Mr. Nelson told her that he entered her classroom expecting her to be overbearing and he made the comment in the evaluation as a way to help her. He said he volunteered to return and to another observation.

Mr. Nelson could not recall a telephone conversation with Ms. Lohman but he testified to a similar conversation. Mr. Nelson testified:

I think I mentioned that he’d talked with me and I – this is the reason for that last comment about being a little more gentle with kids in terms of helping them understand what they’re to do and so on.

Ms. Lohman’s master teacher, Ms. Williams, testified that Mr. Nelson had reported to her also that he had been affected by derogatory comments by Mr. Barrera. Ms. Williams testified that,

. . . Mr. Nelson came out and saw me on the 25th and apologized immediately and said that Mr. Barrera had talked to him before the observation and had obviously influenced his observation.

In his final observation on September 26th, Mr. Nelson made no mention of any need for Ms. Lohman to be more gentle with students. Indeed, he complimented her for her interaction with students writing,

Your management of the children was very positive. You are very aware of the need to be positive and supportive of the children.

He described the session as a “[v]ery good lesson” and told her to “[k]eep up your good work.”

By September 26th, however, the firing of Ms. Lohman was nearly in place.

Mr. Barrera and Ms. Luna spent the morning of September 26 at Dingle School interviewing kindergarten teachers. The following day, Mr. Barrera hired Rachel Burt as a long-term substitute kindergarten teacher. Mr. Barrera’s calendar for September 27 shows a 3 p.m. appointment with Ms. Burt. Mr. Barrera testified that he offered her the job at that time. Later that day, Mr. Barrera asked Ms. Lohman to come by his office at 1 p.m. the following day, Friday, September 28. Ms. Lohman testified that she understood that the meeting was to be about an incident in which one of her students was hit by a 1st grader. Mr. Barrera testified that he did not offer any reason for the meeting.

At the end of the teaching day on September 27, Union field representative Marlene Bell met with teachers in a classroom at Maxwell School. Ms. Bell went to the school at the request of Union members to listen to their expressions of concern about Mr. Barrera. Various teachers, including Ms. Lohman, described incidents and problems they had had with the principal. After hearing about these incidents, Ms. Bell arranged for Union President Levers to accompany Ms. Lohman to her meeting the next day with Mr. Barrera. Ms. Lohman placed a note in Mr. Barrera’s box advising him that a Union representative would accompany her to the meeting the next day.

When Ms. Levers walked into Mr. Barrera’s office with Ms. Lohman the following afternoon, Mr. Barrera asked her if the Union was representing substitute teachers. There followed a brief discussion about whether Ms. Lohman was a day-to-day substitute or a

long-term substitute teacher. Mr. Barrera then handed to Ms. Lohman a letter that in its entirety reads: "This letter is to inform you that as of this date your services will no longer be needed." No other explanation was given for the termination.

On the day before the firing, Mr. Barrera went to see Ms. Williams and asked how Ms. Lohman was doing. Ms. Williams replied, "great." Ms. Williams testified that she had no clue that Ms. Lohman was about to be fired. Mr. Nelson testified that he did not recommend that Ms. Lohman be fired and could see no reason for it because she was doing fine. Mr. Barrera did not observe Ms. Lohman in the classroom and there is no evidence he spoke to anyone but Ms. Luna and Ms. Williams about Ms. Lohman's performance.

On October 3, Mr. Barrera spoke with Kathryn Brown, the lead supervisor of student teachers at National University, and asked for a meeting with her. He testified that he told her that he wanted to talk about Mr. Nelson. The meeting took place the following day and Mr. Barrera testified that he told Ms. Brown that in his view Mr. Nelson had not done a good job communicating with him. Mr. Barrera testified that he did not talk about the reasons why he terminated Ms. Lohman.

Ms. Brown testified that when Mr. Barrera called her he asked for a meeting but declined to tell her the purpose of the meeting. Ms. Brown brought Caroline Miller, another National employee, into the meeting when Mr. Barrera arrived the next day. Ms. Brown said Mr. Barrera spent the meeting talking not about Mr. Nelson but about Ms. Lohman and the reason she was terminated. Ms. Brown took notes during the meeting and a typewritten version of the notes, prepared by her shortly thereafter, was introduced at the hearing. According to the notes, which Ms. Brown also affirmed in the hearing, Mr. Barrera stated that when he met Mr. Nelson he asked him to "watch specifically her relationship [with] the other

staff members” and also to see “how she came across to the children.” Mr. Barrera also told Mr. Nelson that he considered Ms. Lohman to be “inappropriately loud in her communications.” According to the notes, Mr. Barrera also told Ms. Brown that he “warned” Ms. Lohman not to jump into the middle of the “situation” at the school, “but she did just that.” Ms. Miller corroborated Ms. Brown’s version of the meeting with Mr. Barrera.

National placed Ms. Lohman in another school district where she completed her student teaching successfully.

By letter of October 3, Ms. Bell on behalf of the California Teachers Association made a “formal complaint” to the District against Mr. Barrera. Ms. Bell summarized much of what she had been told by teachers attending the after-school meeting with the Maxwell School staff on September 27. Among the many accusations in the lengthy letter, Ms. Bell wrote that from the information provided to her by employees it appears “that Mr. Barrera leads by intimidation, humiliation, and reprisal.” She asked the District “to conduct a complete and thorough investigation of the leadership practices of Mr. Barrera, and take appropriate corrective action to ensure the safety and well being of employees and students.”

The District employed an attorney to investigate the complaint. The attorney interviewed teachers at the school and prepared a report which was not given to Mr. Barrera and which was not introduced into the record.

On February 6, 2002, Mr. Barrera called a meeting of teachers at Maxwell School. Cynthia Lanier, a 3rd grade teacher at Maxwell, said Mr. Barrera began by saying he wanted to “apologize to those of you who are not involved in this” and it was “only a few teachers.” She said he continued by stating:

. . . we're lining up our guns and the Union's lining up their guns; I'm forced to take this up a notch, you know; things are going to change around here. . . .

She said it was clear that Mr. Barrera's comments were about Union activity. She said no teacher spoke during the meeting.

Ms. Williams also recalled Mr. Barrera starting the meeting by expressing an apology "to those of you staff members that are not involved in this. . . ." She said he then "went into continuing the complaints about him" and continued:

. . . he says something to the fact of you have chosen to take this forward, we decided to turn it up a notch, you better bring your big guns to the table because the District is bringing their something. Very threatening. Then he just said, this meeting is over, and everybody was silent. . . .

Mr. Barrera testified that he started the meeting by apologizing to the staff and expressing regret for the climate at the school. He said he told the teachers:

. . . it was unfortunate that we had gotten to a point where we could not any longer just sit down one-on-one and talk alone. That we have to have – and I used a phrase and I don't recall exactly if it was top guns or big guns – along with us in order for us to communicate. I said I accept responsibility for anything that I have done, but that there are other people that need to accept responsibility for the climate that existed.

In a February 15, 2002, letter to Ms. Bell, Associate Superintendent Weatherford responded to the Union's complaint against Mr. Barrera. In his letter, Mr. Weatherford stated in relevant part:

While it is difficult to make definitive findings regarding the specific incidents, we have determined that the facts you presented show some conflicts between Barrera and the staff. We want to assure you that the District is currently in discussions with Barrera to find an appropriate remedy for the issues you brought to our attention.

On February 26, 2002, Ms. Bell wrote again to the District, this time complaining about Mr. Barrera's conduct at the staff meeting of February 6. She observed that teachers in the room "felt threatened by Barrera's behavior and statements" and several teachers immediately contacted the Union. She asked the District once more to investigate Mr. Barrera.

Mr. Weatherford testified that he did investigate what occurred at the February 6 meeting and concluded that Mr. Barrera did make the statements attributed to him in the letter written by Ms. Bell.

Mr. Barrera went on administrative leave in March of 2002 and resigned from the District at the conclusion of the school year.

Credibility Resolution

During the course of his testimony, Mr. Barrera was asked if he had ever yelled at a teacher while he was principal at Maxwell. He said he had not. When asked if he had ever lost his temper with a teacher at Maxwell, he replied, "Not to my recollection."

In rebuttal to this response, Ms. Hagopian testified that following the Christmas break in Mr. Barrera's second year at Maxwell he had yelled at her in front of students. She said she had asked him for help in rearranging her classroom which had been disturbed and turned into "a total disaster" by a construction crew working in there over the holiday break. When Mr. Barrera refused to get help, Ms. Hagopian called the District superintendent who sent a maintenance crew to assist her. Ms. Hagopian testified that after Mr. Barrera learned she had gone to the superintendent he went to her classroom, pointed at her and told her "never to go above his head." She said his voice was "loud" and his tone of voice was angry.

This incident was witnessed by Ms. Williams who said Mr. Barrera "yelled at her [Ms. Hagopian] in front of students and a parent that was in my classroom." Ms. Williams also

testified that she had observed Mr. Barrera “yell and scream” at a 5th grade teacher whom he accused of being late back to her classroom from lunch. In fact, Ms. Williams testified, the teacher was not late back from lunch and Mr. Barrera apparently had thought she was a primary grade teacher whose lunch period would have been over by that time.

The conflict in testimony about whether Mr. Barrera ever yelled at a teacher during his time at Maxwell is reflective of a series of conflicts between the testimony of Mr. Barrera and that of other witnesses. Mr. Barrera testified that he did not yell at Ms. Lohman when she approached him on September 17, while he was on bus duty in front of the school. Ms. Lohman and Ms. Hagopian testified that Mr. Barrera did yell at Ms. Lohman.

Mr. Barrera testified that he warned Ms. Lohman that she was supposed to be helping Ms. Luna during the afternoons. Ms. Lohman testified that Mr. Barrera did not tell her she was supposed to occupy her afternoons assisting Ms. Luna. Rather, Ms. Lohman testified, Mr. Barrera told her she was to stay away from Ms. Ash and Ms. Fabre. Mr. Barrera denied that he said anything about keeping away from Ms. Ash and Ms. Fabre.

Mr. Barrera testified that he checked with Mr. Weatherford before he terminated Ms. Lohman and that Mr. Weatherford said that the District would be on solid legal ground. Mr. Weatherford testified that when he first learned about the termination of Ms. Lohman it was already an accomplished fact.

Mr. Barrera testified that he went to National University to complain about Mr. Nelson and made every effort not to say anything about Ms. Lohman because it was a personnel matter. Ms. Brown, corroborated by Ms. Miller, testified that Mr. Barrera spent his time with them explaining why he had terminated Ms. Lohman and made no complaint against Mr. Nelson.

Mr. Barrera testified that his comment at the February 6, 2002, meeting with teachers was a benign observation that people no longer could sit down one-on-one and talk but had to bring their “top guns or big guns” along in order to communicate. Ms. Lanier testified that Mr. Barrera used a much more threatening phraseology, warning that “we’re lining up our guns and the Union’s lining up their guns [and] I’m forced to take this up a notch.” Ms. Williams also recalled a more threatening phraseology with Mr. Barrera warning that “we decided to turn it up a notch” and the Union better bring its “big guns to the table because the District is bringing their something.”

In order to credit Mr. Barrera’s version of events, I would have to discredit Ms. Lohman, Ms. Hagopian, Ms. Williams, Mr. Weatherford, Ms. Brown, Ms. Miller and Ms. Lanier. This I decline to do. I find that Ms. Lohman, Ms. Hagopian, Ms. Williams, Mr. Weatherford, Ms. Brown, Ms. Miller and Ms. Lanier gave internally consistent testimony and that their descriptions of events were consistent with each other. Ms. Brown and Ms. Miller were entirely disinterested witnesses who could neither gain nor lose anything as a result of the outcome of this hearing. Mr. Weatherford was a management employee who certainly had nothing to gain by offering a different version of the events that preceded Ms. Lohman’s termination than that offered by Mr. Barrera.

Based upon this credibility resolution, I find that Mr. Barrera did not advise Ms. Lohman that she was supposed to be in the classroom every afternoon assisting Ms. Luna. All he told her was to keep away from Ms. Ash and Ms. Fabre. I conclude further that on September 17, Mr. Barrera did yell at Ms. Lohman when she approached him in front of the school to discuss her lesson plans. I find that Mr. Barrera did not obtain Mr. Weatherford’s approval prior to dismissing Ms. Lohman and that Mr. Weatherford was unaware that she was

to be dismissed until she already had been terminated. Finally, I conclude that at a meeting with teachers on February 6, 2002, Mr. Barrera warned that “we’re lining up our guns and the Union’s lining up their guns [and] I’m forced to take this up a notch.”

ISSUES

1. Did the District retaliate against Ms. Lohman because of her exercise of protected rights and thereby violate section 3543.5(a) and/or (b) when Mr. Barrera terminated her employment on September 27?

2. Did the District interfere with the right of employees to participate in the activities of the Union and thereby violate section 3543.5(a) and/or (b) when Mr. Barrera made allegedly threatening remarks to teachers on February 6, 2002?

CONCLUSIONS OF LAW

Retaliation

Public school employees have the protected right under section 3543(a)

. . . 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. . . .

It is an unfair practice under section 3543.5(a) for a public school employer to “[i]mpose . . . reprisals on employees, to discriminate . . . or otherwise to interfere with, restrain, or coerce employees because of their exercise of [protected] rights”

In order to prove an allegation of discrimination, the charging party must first demonstrate that the aggrieved employee engaged in protected conduct. The charging party must then show that the employer knew of the employee's protected act⁷ and that the employer

⁷Moreland Elementary School District (1982) PERB Decision No. 227.

took an adverse action against the employee. The adverse action cannot be speculative but must be an actual harm. (Palo Verde Unified School District (1988) PERB Decision No. 689 (Palo Verde).

Upon a showing of protected conduct and adverse action, the party alleging discrimination must then make a prima facie showing of unlawful motivation. Under Novato Unified School District (1982) PERB Decision No. 210 (Novato), unlawful motivation occurs where an employer's action against an employee was motivated by the employee's participation in protected conduct.⁸ Motivation is determined by a review of direct and circumstantial evidence to see whether, but for the exercise of protected rights, the disputed action would not have been taken against the employee.⁹

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the respondent to produce evidence that the

⁸Indications of unlawful motivation have been found in many aspects of an employer's conduct. Words indicating retaliatory intent can be persuasive evidence of unlawful motivation. (Santa Clara Unified School District (1979) PERB Decision No. 104.) Another indication of unlawful motivation has been found in the close proximity of an employer's adverse action to the employee's protected conduct. (North Sacramento School District (1982) PERB Decision No. 264.) Other indications of unlawful motivation have been found in the employer's: (1) disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District, *supra*, PERB Decision No. 104.); (3) inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) cursory investigation of the employee's misconduct; (5) failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) 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 School District, *supra*, PERB Decision No. 264.)

⁹See Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 727-730 [175 Cal.Rptr. 626]; Wright Line, Inc. (1980) 251 NLRB 1083 [105 LRRM 1169] *enf.*, in relevant part (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513].

action "would have occurred in any event." (Martori Brothers Distributors v. Agricultural Labor Relations Bd., *supra*, 29 Cal.3d at 730.) If an employer respondent then shows misconduct on the part of the employee, the employer's action against the employee,

. . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. [*Ibid.*]

The Union argues that Ms. Lohman engaged in three acts of protected conduct: (1) her representation of herself on September 17, regarding how Mr. Barrera had spoken to her at their meeting in front of the school earlier that day; (2) her complaint on September 17 regarding the lack of supplies;¹⁰ and (3) her attendance at a Union meeting on the evening of September 27 and subsequent assertion of the right to be represented by the Union at a meeting with Mr. Barrera the following day. The Union argues that Mr. Barrera was directly involved in the first two of protected acts. The Union applies the small plant doctrine in asserting that Mr. Barrera can be presumed to have learned about her attendance at the Union meeting. The Union notes that Ms. Lohman notified Mr. Barrera in writing that she would be represented by the Union at their meeting on September 28. Finally, the Union finds circumstantial evidence of unlawful motivation in the timing of Mr. Barrera's decision to terminate Ms. Lohman, in Mr. Barrera's cursory investigation of Ms. Lohman's alleged failure to assist Ms. Luna, in his inconsistent justifications and his history of animus toward the Union and its adherents.

The District argues that the termination of Ms. Lohman could not possibly have been based on her September 27 attendance at the Union meeting and subsequent representation by the Union. By the time of those events, the District observes, Mr. Barrera already had decided

¹⁰ This assertion is raised for the first time in the Union's brief.

to replace Ms. Lohman and had hired her replacement. As to Ms. Lohman's act of self-representation, the District continues, the Union has failed to establish that this was the reason Ms. Lohman was terminated. The District argues that the Union has failed to establish unlawful motivation in the discharge. Moreover, the District continues, the evidence establishes that Ms. Lohman had documented problems in her work performance. Not only did Ms. Lohman fail to assist Ms. Luna, the District argues, but she also was impatient with children as documented by the observation of Mr. Nelson from National University.

Ms. Lohman did engage in protected conduct when on September 27 she attended a Union meeting and wrote a note advising Mr. Barrera that she would bring a Union representative with her to the meeting the following day. However, as the District observes, this protected conduct could not possibly have motivated Mr. Barrera to terminate Ms. Lohman because by September 27 he already had decided to fire Ms. Lohman and had hired her replacement. Indeed, Mr. Barrera and Ms. Luna occupied part of September 26 interviewing candidates to replace Ms. Lohman. The Union can prevail, therefore, only if Mr. Barrera terminated Ms. Lohman because of her exercise of some other protected act. The complaint alleges that Ms. Lohman engaged in another protected act when she represented herself at a September 17 meeting with Mr. Barrera.

Prior to legislative amendments in 2000, section 3543 read in its entirety as follows:

Public School employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified

pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response. [Emphasis added.]

The underlined language above was construed in Pleasant Valley School District (1988) PERB Decision No. 708 (Pleasant Valley) as granting employees a protected right of self-representation. The underlined language, the Board wrote, “clearly permits and protects” employee self-representation. The rationale in Pleasant Valley, however, is based entirely upon the statutory right of public employees “to represent themselves individually in their employment relations with the public school employer.” With the legislative amendment of 2000,¹¹ this language no longer is contained in section 3543.

As now written, section 3543 does not identify either a right of employees “to represent themselves individually in their employment relations with the public school employer” or a right “to refuse to join or participate in the activities of employee organizations.”¹² With the

¹¹ Stats. 2000, chapter 893.

¹² Section 3543 as currently written reads in its entirety as follows:

(a) Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. If the exclusive representative of a unit provides notification, as specified by subdivision (a) of Section 3546, public school employees who are in a unit for

change, the EERA thus joins the Higher Education Employer-Employee Relations Act (HEERA)¹³ in not having a provision specifically protecting an employee's act of self-representation. (See HEERA sec. 3565.) By contrast, the Meyers-Milias-Brown Act (MMBA)¹⁴ and the Ralph C. Dills Act (Dills Act)¹⁵ both specifically protect the right of public employees "to represent themselves individually in their employment relations with" public employers. (MMBA sec. 3502 and Dills Act sec. 3515.)

which an exclusive representative has been selected, shall be required, as a condition of continued employment, to join the recognized employee organization or to pay the organization a fair share services fee, as required by Section 3546. If a majority of the members of a bargaining unit rescind that arrangement, either of the following options shall be applicable:

(1) The recognized employee organization may petition for the reinstatement of the arrangement described in subdivision (a) of Section 3546 pursuant to the procedures in paragraph (2) of subdivision (d) of Section 3546.

(2) The employees may negotiate either of the two forms of organizational security described in subdivision (i) of Section 3540.1.

(b) Any employee may at any time present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

¹³ HEERA is found at section 3560 et seq.

¹⁴ The MMBA is found at section 3500 et seq.

¹⁵ The Dills Act is found at section 3512 et seq.

The omission of language from the EERA and HEERA is not to be treated lightly. Such omissions are "strong evidence of a contrary legislative intent." (Regents of the University of California v. Public Employment Relations Board (1985) 168 Cal.App.3d 937, 945 [214 Cal.Rptr. 698] (Regents)). This seems especially true where the Legislature has removed a right that was contained in the EERA for 25 years. It may well be that the Legislature intended to take the EERA away from permissive individual representation that historically has been a characteristic of California public sector labor laws and move the EERA toward the collective-representation-only model that marks federal labor relations statutes covering the private sector.¹⁶ Whatever the purpose, the Board cannot ignore the change and thus "rewrite the statute to suit its notion of what the Legislature must have intended to say." (Regents at p. 945.)

It is tempting to try to find a right of self-representation in the newly renumbered section 3543(b) which permits a school employee to "present grievances to his or her employer, and have such grievances adjusted, without the intervention of the exclusive representative." The language in section 3543(b) has been part of the EERA since it was enacted and apparently was modeled after the proviso in National Labor Relations Act (NLRA) section 9(a).¹⁷

¹⁶ See, e.g., Meyers Industries (1984) 268 NLRB 493 [115 LRRM 1025] (Meyers Industries).

¹⁷ The NLRA is codified at 29 U.S.C., sec. 141 et seq. The proviso in NLRA section 9(a) reads in relevant part as follows:

... Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective

The NLRA section 9(a) proviso, however, has not been found to create a separate protected right. The federal courts have limited the application of the section 9(a) proviso by reading its intent very narrowly. The courts find the proviso to be nothing more than an authorization for an employer to entertain grievances from individual employees without liability for bypassing the exclusive representative. "The Act nowhere protects this 'right' by making it an unfair labor practice for an employer to refuse to entertain such a presentation" (Emporium Capwell Co. v. Western Addition Community Organization (1975) 420 U.S. 50, 61, fn. 12 [88 LRRM 2660, 2665], citing with approval Black-Clawson v. Machinists (2nd Cir. 1962) 313 F.2d 179 [52 LRRM 2038, 2042].) The federal analysis of the section 9(a) proviso was adopted by the PERB in Chaffey Joint Union High School District (1982) PERB Decision No. 202 (Chaffey) as the appropriate interpretation of section 3543.¹⁸ Based upon the federal interpretation of section 9(a) of the NLRA as adopted in Chaffey, I conclude that section 3543(b) cannot be read to create in the EERA a protected right of self representation.

From the 2000 revision of section 3543 and the cases cited above, I conclude that the EERA no longer protects employees who represent themselves individually in their employment relations with their public school employer. Therefore, although the evidence is compelling that Mr. Barrera terminated Ms. Lohman because she represented herself in the

bargaining contract or agreement then in effect: Provided further,
That the bargaining representative has been given opportunity to
be present at such adjustment.

¹⁸ It is proper to take guidance from cases interpreting the NLRA when interpreting California labor relations statutes with parallel provisions. (Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

September 17 meeting with him,¹⁹ I conclude that her act of self-representation was not a protected act.

The Union for the first time here asserts that Ms. Lohman also engaged in protected conduct when she complained to Mr. Barrera about the lack of supplies for kindergarten students. The Union argues that participation in informal employee organizations is a protected activity, citing State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S. Thus the Union concludes Ms. Lohman was protected when she spoke to Mr. Barrera about school supplies.

In arguing that Ms. Lohman was terminated because she spoke to Mr. Barrera about a shortage of kindergarten supplies the Union asserts an unalleged violation. This contention was not set forth in the charge or in the complaint. The District had no notice of this assertion and it has not been litigated. (See Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.) It is, therefore, not properly before me and will not be considered.²⁰

¹⁹ The first credible evidence of Mr. Barrera's dissatisfaction with Ms. Lohman is found in his comments on the morning of September 18 to Mr. Nelson, the student teacher supervisor from National. This was the day after Ms. Lohman represented herself by telling Mr. Barrera that "you cannot treat me like that." By September 19, two days after Ms. Lohman's act of self-representation, Mr. Barrera already was making arrangements to interview candidates to replace her. He made this decision without seeking any input from either Mr. Nelson or Ms. Williams, the master teacher. He did not clear his decision in advance with Mr. Weatherford. I have found that neither Mr. Barrera nor Ms. Luna told Ms. Lohman that she was supposed to spend more time in the afternoon helping Ms. Luna. Thus, the decision to fire Ms. Lohman was made immediately after her act of self-representation. Ms. Lohman was never told of her alleged deficiencies and was given no opportunity to correct them. The pre-termination investigation was cursory to non-existent.

²⁰ I would observe that even if the argument were properly before me, it could not be sustained. Ms. Lohman did not go to Mr. Barrera to represent other kindergarten teachers. She went to Mr. Barrera to explain why she did not write new lesson plans for the week. Thus cases holding that an employee is protected when asserting rights on behalf of co-workers (e.g., Contra Costa Community College District (2003) PERB Decision No. 1520; Churchill's Restaurant (1985) 276 NLRB 775, 777 [120 LRRM 1233]) are inapplicable. I would note,

Accordingly, the allegation that the District terminated Ms. Lohman because she engaged in protected conduct must be dismissed.

Interference

Public school employees have the protected right under EERA section 3543:

. . . 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. . . .

It is an unfair practice under section 3543.5(a) for a public school employer "to interfere with, restrain, or coerce employees because of their exercise of" protected rights.

In an unfair practice case involving an allegation of interference, a violation will be found where the employer's acts interfere or tend to interfere with the exercise of protected rights and the employer is unable to justify its actions by proving operational necessity.

(Carlsbad Unified School District (1979) PERB Decision No. 89.)²¹ In an interference case, it

finally, that it is not at all clear that teacher requests for student crayons and scissors fall within the EERA scope of representation or that a person representing co-workers about a non-negotiable matter engages in protected conduct.

²¹ The Carlsbad test for interference provides, in relevant part, as follows:

2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

is not necessary for the charging party to show that the respondent acted with an unlawful motivation. (Regents of the University of California (1983) PERB Decision No. 305-H.)

The Union argues that when Mr. Barrera “angrily remarked at a faculty meeting that the District was lining up its ‘guns’ and warned that he was going to take things ‘up a notch’” teachers in attendance were susceptible to intimidation. The Union argues that given the history of Mr. Barrera’s conduct with teachers at Maxwell, the comment could only be interpreted as a threat and was an unfair practice.

The District argues that an employer is entitled to express its views on employment related matters. The District characterizes Mr. Barrera’s remarks at the February 6, 2002, staff meeting as permissible expressions of opinion. The District argues that Mr. Barrera made no threat of reprisal or force. The District argues that Mr. Barrera’s use of the term “big guns” or “top guns” could not reasonably be characterized as a warning to bring firearms to the campus.

The issue in an interference case involving statements made by an employer agent is whether the employer's speech was coercive and thereby interfered with employee exercise of protected rights. In Rio Hondo Community College District (1980) PERB Decision No. 128 (Rio Hondo), the Board explained the rule as follows:

... an employer's speech which contains a threat of reprisal or force or promise of benefit will be perceived as a means of violating the Act and will, therefore, lose its protection and constitute strong evidence of conduct which is prohibited by section 3543.5 of the EERA. [Fn. omitted.]

The effect of the employer conduct is measured against an objective standard and not whether

5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

a particular employee actually felt intimidated. (Clovis Unified School District (1984) PERB Decision No. 389 (Clovis.))

On February 6, 2002, Mr. Barrera stood in front of an assembly of Maxwell School teachers and warned that “we’re lining up our guns and the Union’s lining up their guns [and] I’m forced to take this up a notch.” This comment was made following a District-conducted investigation of Mr. Barrera’s conduct toward his staff, an investigation instigated by the Union. Mr. Barrera permitted no questions or remarks from teachers. Mr. Barrera had a history of yelling at teachers, berating them in front of others and losing his temper in front of them. His comments on February 6, 2002, plainly were aimed at those teachers who took their complaints about his misconduct to the Union. His warning that he was going “to take this up a notch” was a clear threat to teachers not to engage in the protected activity of going to the Union. Any teacher, hearing this comment, reasonably would feel threatened. (Clovis.)

Mr. Barrera, as principal, was an actual agent of the District and his threat is binding upon the District. (See discussion in Compton Unified School District (2003) PERB Decision No. 1518.) Mr. Barrera’s threat was the type of conduct that is inherently destructive of statutorily protected rights. The District has presented no evidence that Mr. Barrera’s bold threat of retaliation was occasioned by events beyond the District’s control. Indeed, the District has not even shown an operational necessity that would justify Mr. Barrera’s threat against teachers because of their exercise of protected rights.

Accordingly, I conclude that the District interfered with employee rights when Mr. Barrera threatened teachers at a February 6, 2002, meeting at the Rhoda Maxwell School. Mr. Barrera’s threat was a violation of section 3543.5(a). Because Mr. Barrera’s threat would have the natural effect of discouraging employees from participating in the activities of the

Union, the threat also interfered with the ability of the Union to represent its members. When employees are intimidated not to participate in Union activities, the collective strength of the Union is weakened, thereby interfering with its ability to represent its members. For this reason, I find also that the District's failure to act also violated section 3543.5(b).

REMEDY

The PERB in section 3541.5(c) is given:

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

Although the District no longer employs Mr. Barrera, it is appropriate nevertheless to issue an order directing the District to cease interference with the protected activities through threats of reprisals by its agents. It is further appropriate that the District be directed to post a notice incorporating the terms of the order. Posting of such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, is being required to cease and desist from this activity, and will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (Placerville Union School District (1978) PERB Decision No. 69.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law and the entire record in the case, it is found that the Woodland Joint Unified School District (District) violated Government Code section 3543.5(a) and (b), provisions of the Educational Employment Relations Act (Act). The District violated the Act when its agent, Arturo Barrera, threatened

teachers at the Rhoda Maxwell School by warning of reprisals because they took their complaints about him to the Woodland Education Association (Union) and ultimately to District administrators.

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Threatening teachers with reprisals because of their exercise of the right to form, join and participate in the activities of an employee organization of their own choosing for the purpose of representation in all matters of employer-employee relations.

2. Interfering with the right of the Union to represent its members.

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

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

2. Upon issuance of a final decision, make written notification of the actions taken to comply with the Order to the Sacramento Regional Director of the Public Employment Relations Board in accord with the director's instructions.

All other allegations against the District that are set out in the complaint in case SA-CE-2089-E are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(c).)

Ronald E. Blubaugh
Administrative Law Judge