

## The seal of the State of California is a circular emblem. It features a central figure, Minerva, seated on a rock and holding a grizzly bear. The background shows a landscape with a ship, a miner, and a plow. The words "THE GREAT SEAL OF THE STATE OF" are inscribed around the top, and "CALIFORNIA" is at the bottom. The word "EUREKA" is written above the central figure.

<sup>2</sup> The action taken by the District against Abrams is described alternatively throughout the record as a denial of Abrams' SP reapplication, a non-renewal of Abrams' SP position and

The Board has reviewed the entire record including the ALJ's proposed decision, the hearing transcripts and exhibits, the District's exceptions and Abrams' response to the exceptions. Based on this review and applying the relevant law, the Board finds the proposed decision to be well-reasoned, adequately supported by the evidentiary record and in accordance with the applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself, as supplemented by the following discussion of the District's exceptions. For reasons explained below, however, the Board does not adopt the ALJ's proposed order and notice. The order and notice of the Board in this matter are included at the end of the Board's discussion of the District's exceptions.

### SUMMARY OF FACTS

#### Abrams

Abrams worked as a teacher in the District, a public school employer under EERA, for 39 years. For the last eight years of her tenure with the District, starting in 2000, she also worked as a BTSA Induction Program SP.

Abrams was actively involved in Chula Vista Educators (CVE), an employee organization and exclusive representative. She considered herself "a voice and a force with the union" and was known by most teachers in the District as a union activist. From 1995 on, Abrams was a member of CVE's board of directors. Abrams was the California Teachers Association representative to the Committee on Accreditation workgroup. In the last couple of years, Abrams became very active in CVE when teachers with up to ten years of experience began receiving pink slips.

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a failure to reinstate Abrams to her SP position. These various descriptions all refer to the same occurrence, and the differences in phraseology are immaterial. The dispute between the parties concerns the District's motive for taking this action, not the nature of the action itself.

### The District

The Board of Education is composed of: David Bejarano; Larry Cunningham (Cunningham); Patrick A. Judd; Bertah J. Lopez; and Pamela B. Smith.

The Superintendent of the District is Lowell J. Billings, Ed.D (Billings). The Assistant Superintendent of Human Resources Services and Support is Thomas J. Cruz, Ed.D (Cruz). The Director of Human Resources Services and Support is Fran Lebron (Lebron).

The Cabinet is the Superintendent's executive board. The Cabinet is composed of the Superintendent, the Assistant Superintendent for Human Resources Services and Support, the Assistant Superintendent for Business Services, five Executive Directors from Instructional Services and the Communications Officer.

### The BTSA Induction Program

The BTSA Induction Program matches experienced teachers with participating/beginning teachers (PT) to give PT's training and assistance necessary for their professional development. The goals of the BTSA Induction Program are to improve the educational performance of students and to assist the PT's in meeting their credentialing requirements. In short, SP's serve in the role of mentor teachers. SP's serve a one-year term renewable on a year-to-year basis.

### The Collective Bargaining Agreement (CBA) Between the District and CVE

The BTSA Induction Program is addressed in Article 55.1 of the CBA, which provides:

The District and CVE will form a BTSA joint committee to establish rules and procedures to effect the provisions of this article provided that those rules shall be consistent with the statutory authority for the program and consistent with the current BTSA program design. . . .

.....

Should an SP fail to fulfill his or her roles and responsibilities, the committee may take action to remove the SP from the role

with or without cause. The joint committee may remove an SP from the position at any time for performance problems. Prior to the effective date of such removal, the committee will provide the SP with a written statement of the reasons for the removal, and at the request of the committee, will meet with him or her to discuss the reasons. The performance of the SP as an SP shall not be a component of the regular evaluation and shall remain a matter between the teacher and the committee.

### The BTSA SP Guidelines

The BTSA SP Guidelines enumerate the qualifications for the SP position:

#### **I. Qualifications**

- a. Professional Multiple Subject Teaching Credential or equivalent
- b. CTEL, CLAD/LDS or SB 1969/SB 395 Certification or BCLAD/BCC Certification
- c. A minimum of five successful years teaching experience in grades K-8, three of which are in the Chula Vista Elementary School District with strong recommendations from current /past principal(s)
- d. A strong role model and successful instruction leader based on previous knowledge, experience, activities, and accomplishments
- e. Permanent or retired teacher status in district

The reapplication process is described in relevant part:

#### **VII. Reapplication**

- a. The support provider submits a reapplication at the end of each term.
- b. The Advisory Board reviews the reapplication and makes a decision to renew or discontinue the support provider's position based on his/her adherence to set criteria and guidelines and the needs of the program.

Should an SP fail to fulfill his or her duties, the following steps are to be taken:

### **VIII. Support Provider Interventions**

The following steps will be taken should a support provider fail to fulfill his/her roles and responsibilities:

- The director talks with the support provider and drafts an action plan.
- If the action plan is not followed, the director brings the issue to the Advisory Board.
- The support provider's stipend may be withheld or discontinued based upon recommendation of the Board.
- The Advisory Board meets with the support provider and makes a decision to renew or discontinue the support provider's position.

#### The BTSA Advisory Board

Pursuant to the CBA, the BTSA Advisory Board, also referred to in the CBA as the BTSA joint committee, is composed of three appointments made by CVE and three appointments made by the District. At all relevant times here, members of the BTSA Advisory Board were: (1) Lebron; (2) CVE President Peg Myers (Myers); (3) Katy Croy, a Point Loma Nazarene University representative; and (4) Principal Tom Glover.<sup>3</sup>

#### Abrams' 2007-2008 Term and Reapplication for the 2008-2009 Term

Abrams served as a BTSA Induction Program SP for the eighth consecutive school year during the 2007-2008 term. She entered into an SP agreement for that term on or about September 10, 2007, agreeing to adhere to the SP agreement<sup>4</sup> and the BTSA SP Guidelines.

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<sup>3</sup> In another part of the record, the composition of the BTSA Advisory Board is described as including Kathleen Fernandez, a teacher. The exact composition of the BTSA Advisory Board is not material to the resolution of the disputed issue.

<sup>4</sup> Under the SP agreement, the SP agrees to comply with specific criteria, which mirror Section III of the BTSA SP Guidelines describing the roles and responsibilities of the SP. These roles and responsibilities can be summarized as follows: maintain confidentiality;

In or around April 2008, Abrams submitted a BTSA SP Reapplication for 2008-2009, indicating that she would be willing to support up to two year round or traditional PT's.

The BTSA coordinator (also referred to as the BTSA director), Soung Wegenka (Wegenka), distributed a memorandum dated April 14, 2008, which noted:

It's a difficult and unfortunate time for all of us, especially our PTs, as we wait and wonder about potential cuts in our district. As far as BTSA is concerned, the Department of Education and the Commission on Teacher Credentialing are continuing to support it fully. It's a matter of whether or not our district will have PTs next year. I haven't heard anything yet, but as soon as I do I will let you know. In the meantime, let's think positively and try our best to continue with our work.

.....

#### INFORMATION

- Summer Training will be held on June 16 and 17 from 8:30-3:30 (location TBD). This is a mandatory training and part of your stipend. Therefore, if you are unable to attend, please let me know in advance so that we can make make-up arrangements. Although we are in limbo, we will continue with the training to prepare ourselves for 08-09.

Abrams received an e-mail from Kimberly Valdivia, the BTSA secretary, dated June 11, 2008, regarding the upcoming BTSA Summer Training for the 2008-2009 school year. The e-mail included a note from Wegenka, which stated in relevant part:

I'm glad that most of you will be returning and look forward to seeing you at Summer Training. (If you marked that you will be returning, you are good to go for 08-09). For those of you who will not be returning, I will miss you and wish you the best.

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develop a trusting, meaningful and supportive relationship with the PT; meet with the PT a minimum of one-hour per week; work with the PT on CFASST and develop an Individual Induction Plan; submit a monthly log documenting the weekly contacts (visits, e-mails, telephone calls) with the PT; collaborate with colleagues; and participate in BTSA trainings and activities.

On or around June 14, 2008, Abrams retired. On June 16 and 17, 2008, Abrams attended the BTSA Summer Training for the 2008-2009 school year.

Based on the above set of events, Abrams believed that her SP position had been renewed for the 2008-2009 school year. Then Abrams received a letter addressed to SPs from Lebron dated July 10, 2008, regarding the reapplication process:

The BTSA Advisory Board will review your reapplications. We will then notify you of the Advisory Board's decision. Our goal is to complete the reapplication process and have support providers in place by July 21, 2008.

The BTSA Advisory Board met on July 16, 2008. The Advisory Board reviewed the reapplications and the logs kept by the SP's documenting how often they met with their PT's. The Advisory Board determined that 14 of the SP re-applicants, including Abrams, had not met the one-hour per week meeting requirement.

According to Lebron, the Advisory Board recommended to the Cabinet that the 14 SPs not be renewed based solely on the Advisory Board's review of their logs showing a lack of compliance with the one-hour per week meeting requirement. Lebron testified: "After it went to cabinet, and then they came back and told us what their decision was, and then we notified the participants, or those that had reapplied, sorry."

By letter dated July 28, 2008, Lebron notified the 14 re-applicants of the decision not to renew them. Lebron stated in relevant part:

Before the start of the new school year, the Advisory Board reviews each application and makes a decision to renew or discontinue the support provider's position based on his/her adherence to set criteria and guidelines and the needs of the program.

After careful consideration, the Advisory Board has decided **not** to renew your Support Provider position. Should you have any questions regarding this decision, please contact Fran Lebron at [telephone number omitted].

(Bold in the original.) This letter was copied to Abrams' personnel file.

Approximately two weeks after the BTSA Advisory Board met, Myers learned that Wegenka had already told the SP's who had reapplied that they were coming back for the 2008-2009 school year. Myers met with Lebron and recommended that all the SP's be reinstated.

On Monday, August 4, 2008, Abrams sent Lebron an e-mail message requesting that Lebron call her. After an exchange of telephone and e-mail messages, Lebron sent Abrams an e-mail message on Saturday, August 9, 2008, which stated in relevant part:

Anyway, the BTSA Advisory Board . . . met and went through the BTSA SPs guidelines. We went through all the applications, the logs and any documentation turned in. We compared them to the agreement that was signed by the SPs. We then gave the names of those that met and did not meet the agreement to Cabinet for discussion and final approval with Lowell.

Part of the guidelines was the number of hours (one hour a week) that SPs were supposed to meet with their PTs and another part was the monthly logs to show the contacts made with the PTS. Many SPs did not meet that part of the agreement.

I hope this makes sense.

On August 11, 2008, Abrams met with Lebron in person. During this meeting, Abrams and Lebron reviewed data from Abrams' logs. It was Abrams' firm belief that she had met the minimum hours requirement and that her time records had been miscalculated. According to Abrams, Lebron agreed upon review of Abrams' logs that there had been a mistake and that Abrams had met the one-hour per week meeting requirement. Abrams testified that Lebron told her that the only reason she had not been recommended for renewal was because of the logs. Also according to Abrams, Lebron agreed to talk to Cruz and, if necessary, Billings.<sup>5</sup>

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<sup>5</sup> Not having heard back from Lebron after three and a half weeks, Abrams sent Lebron a follow-up e-mail message on September 4, 2008, stating: "[I]t was my understanding that you were going to push through corrective action, and that I would hear from you very soon."



Lebron testified about the August 11, 2008, meeting with Abrams as follows:

Q Did you tell her that the logs were incorrect and that you would fix them?

A Not that I would fix them. I told her that, yes, they were incorrect. And she had told me that she met at other times with them. And I said, okay, but I still don't have the documentation. And I told her that might have been the case but again, you know, I cannot fix a log because it's something that she has signed.

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Q Did you ever tell her that you thought she should be reinstated?

A No. I said that I would find out for her if they would reinstate her, because she had wanted to be reinstated. And I told her that, you know, I could let Dr. Cruz know of her desire to be reinstated. But I can't really make that decision. It's not up to me.

Lebron testified that she held similar meetings with other SP's whose reapplications were not renewed based on the Advisory Board's review of their logs. Sometime thereafter, Lebron met with Cruz for approximately 45 minutes to review the logs of these re-applicants. Lebron testified that after reviewing the logs with Cruz, she continued to believe that the Advisory Board's original determination was correct. The Cabinet, however, ultimately reinstated all but two<sup>6</sup> of the 14 re-applicants who initially had been told by the Advisory Board that they had not been renewed for the 2008-2009 term.

On August 18, 2008, the District posted a notice "Open to District Employees Only" advertising vacancies for 18 BTSA SPs (Notice). The four qualifications for the position listed in the Notice are identical to the first four qualifications listed in the BTSA SP Guidelines.

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<sup>6</sup> Cruz testified that Dennis Gascon (Gascon) was the only other SP besides Abrams who was not reinstated by the Cabinet.

The fifth qualification listed in the BTSA SP Guidelines, which requires the SP to be either a permanent or retired teacher in the District, was omitted from the Notice.

By letter dated September 17, 2008, Cruz informed Abrams that she was not selected for the 2008-2009 school year. The letter contained no explanation of the basis for the decision.

Abrams filed level I and level II grievances on October 3, 2008, and a second level II grievance on October 14, 2008. By letter dated October 16, 2008, Cruz dismissed Abrams' grievances on the ground that, as a retired teacher, Abrams was no longer covered by the CBA. Myers had earlier decided not to file a grievance on behalf of the 14 BTSA SPs whose reapplications had been denied because it was her understanding that the District was going to follow through with her recommendation that they all be reinstated.

On November 10, 2008, at 9:41 a.m., Cunningham left the following telephone message on Abrams' answering machine:

Joyce, this is Larry again. I've been in LA for the last five days, but give me a, give me a call on my cell phone. It's probably the easiest place to get a hold of me, [phone number omitted]. I talked to Lowell [Billings] and Tom [Cruz], and it really comes down to the point that they just wanted to go in a different direction. I mean, they felt that, you know, you've always been very negative about what the District did and where they were going and what direction they were going in, so they just felt that they wanted to go in a different direction. And so that's what they told me about it. So, if you want to discuss if [sic] further, give me a call, but that's what I got from it. Talk to you later. Bye.

On November 12, 2008, Abrams spoke to Cunningham by telephone. Admitted into evidence at the hearing was a note Abrams made memorializing their conversation:

I stated that I had given my heart and soul to the CVESD for 39 years. That, in all of those years of employment, not once was there a reference to my negativity in any evaluation that I had received. He said he thought that it was in reference to my association and activism in the union, CVE.

I stated I thought there were laws against being retaliated against because of my union participation.

I have been singled out and discriminated against.

By letter dated November 12, 2008, Myers requested that Cruz send Abrams a letter explaining the basis for the District's decision not to reinstate her. Myers' letter stated in pertinent part:

Usually, this letter would come from the BTSA Coordinator, but because the decision came from the Chula Vista Elementary School District cabinet and was not a recommendation from the BTSA Board, the letter must come from the district.

The Cabinet's Decision Not to Reinstate Abrams to the SP Position

By letter dated November 24, 2008, Cruz informed Abrams that the decision whether to renew the BTSA SPs for the 2008-2009 school year was made by the Cabinet. Cruz wrote in pertinent part:

Cabinet unanimously selected this year's participants based on their employment status, the success of students in their classroom, and their strong interpersonal skills. You were not selected because you did not meet the Cabinet's criteria.

At the hearing, Cruz testified that the Cabinet did not renew Abrams' SP position solely because of her interpersonal skills. In response to a question from the ALJ inquiring into the nature of the Cabinet's concern about Abrams' interpersonal skills, Cruz testified in pertinent part:

So the five executive directors and the superintendent are actually in those classrooms on a regular basis. And it was from, many of those folks had brought up concerns about her positive nature on matters, how she, her outlook and support of the District. And there were concerns that she may not be conveying the kinds of messages to our new teachers that we would prefer, because her interpersonal skills were abrasive and short whenever others had interaction with her.

During the 2007-2008 school year, however, no individuals at the Cabinet level had observed Abrams in either her teaching or SP role.<sup>7</sup> When asked to elaborate on Abrams' interpersonal skills during cross-examination, Cruz further testified:

As far as, and I'm using global generalizations, she didn't seem to be happy or content with the School District, critical about the District about management this, or principal this, or teachers this. It just seemed that Joyce was not a happy positive person in her interactions with the adults.

In contrast to Cruz's testimony that Abrams "was not a happy positive person in her interactions with adults," the direct documentary and testimonial evidence on this point supports the opposite conclusion as a factual matter. Performance evaluations date-stamped in Human Resources on January 5, 2006, September 21, 2004, June 24, 2002, September 5, 2000, May 20, 1998, and June 1, 1994 were received into evidence. The evaluation form is broken down into six evaluation components. The possible marks under each evaluation component are "unsatisfactory," "requires improvement" and "effective." Effective is the highest mark a teacher can receive on a performance evaluation. Abrams was evaluated as effective for every evaluation component on every performance evaluation form.

One of the evaluation components is entitled Professional Relationships With Students, Parents, Colleagues. What follows is a representative sampling of comments received by Abrams under this evaluation component:

Mrs. Abrams is a staunch child advocate. She helps students to recognize their strengths and talents, and she expects them to do their best. Joyce communicates frequently with parents in person, through phone calls, and through frequent newsletters. She encourages parent involvement in their children's education.

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<sup>7</sup> Prior to the 2007-2008 school year, two of these individuals had observed Abrams in her classroom on occasion. As there is no dispute that Abrams was renewed for the 2007-2008 school year, it must be concluded that whatever classroom observations there might have been prior to the 2007-2008 school year, none were found to be disqualifying.

Mrs. Abrams listens to her parents and devotes extra time to help parents help their children.

(January 5, 2006, performance evaluation.)

Mrs. Abrams has earned the respect of students, parents, and colleagues. She is a staunch child advocate, constantly focused on what is in the best interest of her students. She helps students to recognize their strengths, and settles for nothing less than [sic] their best. Parents frequently request Mrs. Abrams because of her high standards, rigorous curriculum, and the interest that she takes in the success of each student. Joyce communicates frequently and effectively with parents and encourages them to stay involved in their children's education. Colleagues respect Joyce's intelligence, knowledge, and experience. Joyce works closely with her shared contract partner to ensure that students receive a challenging and enriching educational program.

(June 24, 2002, performance evaluation.)

Joyce faces the challenge of collaborating with a grade level team whose members all have strong opinions. She faces this challenge with a positive attitude and makes every effort to keep her partners focused on what's best for the kids. Joyce has established a warm rapport with staff, students and parents and is always willing to help others. She communicates frequently and effectively with parents and encourages them to stay involved with their children's education. Her belief in children's potential is unmatched.

(May 20, 1998, performance evaluation.)

Mrs. Abrams has an excellent rapport with staff, students and parents. She will go out of her way to help others and she never gives up on a child. She believes that all children can and should experience success and will provide whatever assistance is needed to achieve that goal. She maintains close communication with parents to work together with them to provide the best learning experience possible for their child.

(June 1, 1994, performance evaluation.)

Robyn Kochon (Kochon) was Abrams' PT during the 2007-2008 school year. Kochon testified that she had a great experience working with Abrams, and considered Abrams to be

her mentor. She testified that Abrams was always available and had regular contact with her both in the classroom and by telephone and e-mail.

Emily Claypool (Claypool) was Abrams' PT in 2000. Claypool testified that Abrams was friendly, supportive, knowledgeable and available. She considered Abrams to be her mentor, and a strong advocate for teachers.

Jennifer Ware (Ware) worked with Abrams as a BTSA SP colleague, attending trainings and meetings with her. For the past four years, Ware served on the BTSA Leadership Board, which is composed of a handful of teachers who assist the BTSA coordinator with planning and training. Ware has known Abrams for ten to eleven years, and when asked directly about Abrams's interpersonal skills, testified that Abrams engages, listens and shares her opinions and that she has had only positive interactions with her.

#### The District's Knowledge of Abrams' Protected Activities

Cruz knew of Abrams' union activism. He testified as follows:

You know, frankly, I was, I knew she was involved with the CVE leadership, but whether she was a board of director or one of the 44 building representatives – they have a lot of positions. I don't know if she was on the board of directors, but I knew she was involved, an active member in the Association.

#### DISCUSSION

The ALJ concluded that the preponderance of the evidence showed that the District had an unlawful motive in denying Abrams' SP reapplication for the 2008-2009 school year within the meaning of EERA section 3543.5, subdivision (a).<sup>8</sup> In its exceptions, the District contends

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<sup>8</sup> EERA section 3543.5(a) provides that:

It is 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

that Abrams did not meet her prima facie burden; that the ALJ's proposed decision is not supported by the evidentiary record; and that the ALJ's proposed remedy is not appropriate.

#### Prima Facie Case

As stated by the ALJ, to demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), a charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the employee's exercise of those rights. (*Novato Unified School District* (1982) PERB Decision 210 (*Novato*).)

The District does not take issue with the ALJ's conclusions that Abrams' union activism was protected under EERA or that Abrams' union activism was known to the District. The thrust of the District's argument regarding the prima facie case is that Abrams failed to establish the fourth element, i.e., that the District took action against Abrams *because of* her union activism.<sup>9</sup> The District asserts that the record evidence does not support the ALJ's conclusion on this point.

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of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, 'employee' includes an applicant for employment or reemployment.

Subsequent to her reapplication for the SP position for the 2008-2009 school year and retirement, Abrams remained an "employee" within the protections of this statute given her status as an applicant for reemployment.

<sup>9</sup> In one of its exceptions, the District asserts that the record evidence does not support the ALJ's conclusion that the District's denial of Abrams' SP reapplication for the 2008-2009 school year constituted an adverse action. This exception is not grounded in fact or law, and therefore warrants only the following brief discussion. Abrams' reapplication was denied. As a result, Abrams did not receive the monetary stipend to which she otherwise would have been entitled. Under the reasonable person standard used by the Board in determining whether an employer has taken adverse action against an employee, the denial of Abrams' reapplication with its attendant loss of pay falls squarely within the ambit of an adverse action. (See,

The fourth element in the prima facie case is the line or link connecting the adverse action to the protected activity. (*The TM Group, Inc. and Kimberly Grover* (2011) 357 NLRB No. 98.)<sup>10</sup> It seeks to establish whether the employer acted with an unlawful motive. Motive may be proven either by direct or circumstantial evidence, or by a combination of both.

Unlawful motive is the specific nexus required in the establishment of a prima facie case. Direct proof of motivation is rarely possible since motivation is a state of mind which may be known only to the actor. Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole.

(*Trustees of the Cal. State Univ. v. Public Employment Relations Bd.* (1992) 6 Cal.App.4<sup>th</sup> 1107, 1124 (*Trustees of CSU*).)

Types of circumstantial evidence probative of unlawful motive, referred to in Board decisions as the “nexus” factors, include: the timing of the employer’s adverse action (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)); the employer’s disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); the employer’s departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); the employer’s inconsistent or contradictory justification for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); the employer’s cursory investigation (*City of Torrance* (2008) PERB Decision No. 1971-M); the employer’s offering of exaggerated, vague or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); employer

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*Newark Unified School District* (1991) PERB Decision No. 864; *Palo Verde Unified School District* (1988) PERB Decision No. 689.)

<sup>10</sup> It is appropriate that PERB take guidance from cases decided by the National Labor Relations Board where, as here, the statutes are sufficiently similar. (*Inglewood Teachers Assn. v. Public Employment Relations Bd.* (1991) 227 Cal.App.3d 767.)



animosity toward union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M); or any other facts that might demonstrate the employer's unlawful motive (*North Sacramento, supra*, PERB Decision No. 264).

The District argues that Abrams failed to present any direct evidence that the District's action was based on anti-union animus. This is the unusual case in which direct evidence does exist in the statements made by Cunningham. Notwithstanding these statements, the District's argument is fundamentally flawed in that the fourth element of the prima facie case may rest entirely on circumstantial evidence. As the court in *Trustees of CSU* stated, "[d]irect proof of motivation is rarely possible since motivation is a state of mind which may be known only to the actor." (*Trustees of CSU, supra*, 6 Cal.App.4<sup>th</sup> at p. 1124.)

Here, as the ALJ found, there is ample circumstantial evidence of unlawful motive. Regarding the timing of the adverse action, the District is correct that Abrams had been involved in her union for a long time without incident. There may not have been a single triggering event. As the ALJ observed, Abrams continued to serve as a member of CVE's board of directors until just prior to the denial of her reapplication. It is worth noting that the first time the District denied a reapplication of Abrams was immediately upon Abrams' retirement and loss of active union membership and membership on the CVE board of directors.

Regarding disparate treatment, Abrams was one of 14 re-applicants found by the Advisory Board not to have satisfied the one-hour per week meeting requirement. The recommendation of the Advisory Board to the Cabinet was that none of the 14 be renewed.<sup>11</sup>

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<sup>11</sup> The District asserts that Myers' participation in the Advisory Board's evaluation process negates any possible retaliatory motive given Myers' position as CVE President. Subsequently, however, Myers recommended that all 14 re-applicants be reinstated. Moreover, the Cabinet, not the Advisory Board, made the decision not to renew Abrams' SP position. The District also asserts that the selection of other union officers as SP's similarly

Even after meeting with Cruz to review the logs, Lebron continued to believe that all 14 had failed to comply with the meeting requirement. The Cabinet selected 12 for reinstatement, and singled out two for non-renewal, including Abrams. Neither party developed the record on the circumstances surrounding the non-renewal of Gascon, nor is it known whether he actively sought reinstatement, as was the case with Abrams. Whatever the motive for the District's action regarding Gascon, Abrams was treated differently than 12 other similarly situated re-applicants.

Regarding departure from established procedures and standards, retired teacher status is permitted under the BTSA SP Guidelines. When the District posted the Notice, the District removed this qualification and opened the hiring process to District employees only. The District's removal of the retired teacher status qualification is inconsistent with both the BTSA SP Guidelines and the CBA, which provides that the rules established by the Advisory Board to effectuate the BTSA Induction Program be consistent with the "current BTSA program design." Given Abrams' newly retired status, the District's action had the specific effect of disqualifying Abrams from the selection process. In his letter to Abrams of November 24, 2008, Cruz informed Abrams that she was not selected because she "did not meet the Cabinet's criteria," which included "employment status." Cruz's letter deviates from Lebron's letter of July 28, 2008, in which Lebron informed the 14 re-applicants that the Advisory Board "has decided **not to renew**" their SP positions "based on his/her adherence to set criteria and guidelines and the needs of the program." Given that the language in Lebron's letter is identical to the language in section VII(b) of the BTSA SP Guidelines entitled

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negates any possible retaliatory motive. The legality of the District's action turns on the District's motive. While the fact that other union officers have served as SP's may indicate that the District's anti-union animus is not sweeping in its reach, it does not prove that such animus did not exist toward Abrams.

“Reapplication,” it is reasonable to conclude that the Advisory Board used the established set of criteria to evaluate the re-applicants and the Cabinet used a new set of criteria when it denied Abrams’ reapplication. The “Cabinet’s criteria” matched neither the criteria listed in the BTSA SP Guidelines nor the criteria listed in the District’s own Notice (with the exception of employment status).

Regarding the offering of exaggerated, vague or ambiguous reasons, as the ALJ correctly noted, Abrams was at first given no explanation for the denial. Then she was told that she did not meet three criteria – employment status, success of students and interpersonal skills. Finally, Cruz testified that the only basis for the denial was Abrams’ interpersonal skills, which the ALJ noted had never been the subject of an investigation or a bad evaluation. The District argues that it was not required to offer Abrams an explanation. Whether the District is correct<sup>12</sup> is not particularly significant given that the District did in fact make such an offering in this case. The Board must evaluate that offering to determine whether the reasons given by the District were the true cause of the action taken. There are variations and weaknesses in the District’s offering that raise suspicions as to the District’s motive in denying Abrams’ reapplication.

In addition to all of the above circumstantial evidence of unlawful motive, there is also direct evidence of unlawful motive in the statements made by Cunningham. The District excepts to the ALJ’s finding that Cunningham told Abrams the reason that the District rejected her was anti-union animus. According to a telephone message left by Cunningham on Abrams’ answering machine and a document memorializing a conversation they had the next day, Cunningham had talked to Billings and Cruz about Abrams and told Abrams that “he

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<sup>12</sup> Section VIII of the BTSA SP Guidelines entitled Support Provider Intervention would appear to suggest otherwise.

thought that it was in reference to my association and activism in the union, CVE.” Therefore, the ALJ’s finding is based on record evidence and need not be disturbed.

The District argues that Cunningham’s statements are hearsay and, therefore, cannot support a finding of retaliatory motive. The District fails, however, to address the ALJ’s specific conclusions of law that: (1) Even as inadmissible hearsay, Cunningham’s statements can be used to corroborate the other evidence of retaliation (PERB Reg. 32176);<sup>13</sup> and (2) as admissions of a party, Cunningham’s statements are admissible as independent evidence of retaliation (Evidence Code, § 1220). We find no error in the ALJ’s analysis.

The District also argues that the ALJ was wrong to “insinuate” that the District had decided not to call Cunningham to testify. After leaving the record open to receive testimony from Cunningham upon the request of Abrams’ attorney and the agreement of the parties, the ALJ received notice that the parties had agreed to close the record. There is no evidence to support the District’s assertion that Abrams decided not to call Cunningham because she realized that his testimony would not support her case. The ALJ stated:

If Cunningham had been misquoted or misunderstood, the District could have called him to testify; indeed the record was left open for that very purpose. But the District did nothing.

We do not agree with the District’s characterization of the ALJ’s statement as insinuating that it was the District’s decision not to call Cunningham to testify. The ALJ’s point, with which we agree, is that if the record had to be set straight, the District had the opportunity to do so but chose not to. While the District is correct that Cunningham’s statements conveniently serve Abrams’ case, there is no reason as an evidentiary matter to discredit them.

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<sup>13</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Based on all of the above, we conclude that Abrams presented a prima facie case of discrimination. At this point, the burden shifts to the District.

### The Affirmative Defense

The District argues that Abrams had the burden of proof at the hearing. The burden of proof, however, shifts to the employer once the prima facie case is established. Under the burden-shifting framework, the employer bears the burden of proving it would have taken the same action even in the absence of the protected activity. (*Novato, supra*, PERB Decision No. 210; *Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Bros. Distributors*); *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083, 1089; *enfd* on other grounds (1<sup>st</sup> Cir. 1981) 662 F.2d 899, *cert. denied* (1982) 455 U.S. 989.) Thus, “the question becomes whether the [adverse action] would not have occurred ‘but for’ the protected activity.” (*Martori Bros. Distributors, supra*, 29 Cal.3d at p. 729.) The “but for” test is “an affirmative defense which the employer must establish by a preponderance of the evidence.” (*Trustees of CSU, supra*, 6 Cal.App.4<sup>th</sup> at p. 1130 citing *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 302-304.) When conducting the “but for” analysis, “PERB weighs the employer’s justifications for the adverse action against the evidence of the employer’s retaliatory motive.” (*Baker Valley Unified School District* (2008) PERB Decision No. 1993.) When evaluating the employer’s justification, the question is whether the justification was “honestly invoked and was in fact the cause of the action.” (*The TM Group, Inc. and Kimberly Grover, supra*, 357 NLRB No. 98, citing *Framan Mechanical Inc.* (2004) 343 NLRB 408.)

The District cites Abrams’ interpersonal skills as its justification for the adverse action. Cruz testified that “Joyce was not a happy positive person in her interactions with the adults.” Cruz explained that his testimony was based on observations made by Cabinet-level

individuals. None of those individuals, however, observed Abrams in the classroom during the 2007-2008 school year. In addition, if deficiencies in Abrams' interpersonal skills had been discovered in the 2007-2008 school year (or before), Section VIII of the BTSA SP Guidelines would have required the BTSA director to talk to her and draft an action plan as a first step at intervention. Under the CBA, the Advisory Board could have taken action to remove Abrams from her SP position because of her interpersonal skills. If the Advisory Board had done so, Abrams would have been entitled to a written statement of the reasons for removal prior to the effective date of removal. There is no evidence the BTSA director ever talked to Abrams about her interpersonal skills, nor is there any evidence that the BTSA director drafted an action plan addressing any deficiencies in Abrams' interpersonal skills. Similarly, there was never an effort made to remove Abrams from her position as an SP because of her interpersonal skills.

Based on those who interacted with Abrams on a regular basis as PT's, colleagues and evaluators, Abrams' interpersonal skills appear to be without reproach. Two former PT's and one SP colleague testified credibly that Abrams' interpersonal skills were not lacking in any respect. As her colleague, Ware, testified, Abrams engages, listens and shares her opinions. Ware testified that she has had only positive interactions with her. Abrams was given the highest mark, "effective," for all evaluation components on Abrams' performance evaluations including the evaluation component relating to Abrams' interpersonal skills. As consistently reflected in the comments section under this evaluation component, Abrams had a positive attitude, excellent rapport with adults and children and all the communication skills necessary to be an effective educator. While Abrams' performance as an SP was not a component of the regular performance evaluation, Abrams' performance evaluations nonetheless aid in our

evaluation of the District's proffered reason for denying Abrams' reapplication. Based on all of the above, the District's proffered reason cannot be credited.

Weighing the District's justification for the adverse action against both the circumstantial and direct evidence of the District's retaliatory motive, we cannot reconcile any other result than the one reached by the ALJ.

#### The Remedy

The District excepts to every facet of the ALJ's remedy – the cease and desist order, the order requiring rescission and destruction of the letters denying Abrams' reapplication, the reinstatement order, the backpay with interest order and the order requiring the posting of a notice. The ALJ's remedy is designed as a typical make-whole remedy authorized under EERA section 3541.5, subdivision (c), which provides:

The board shall have 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.

The District raises a concern regarding the indefiniteness of the reinstatement order. Because SP's serve a one-year term renewable on a year-to-year basis, the District contends that the reinstatement order should not be construed as permanent. While the District is correct on that point, the limited term nature of the SP position raises a larger concern relating to the reinstatement order.

The number of SP's selected for any given year is dependent on the number of PT's in the BTSA Induction Program. An order requiring that Abrams be reinstated for the current 2011-2012 school year is unfeasible, as we can safely assume that PT's currently in the BTSA Induction Program have already been placed with their respective SP's. Consequently, in lieu of reinstatement, we find that Abrams is entitled to back pay through the current term in order

to make Abrams whole for the unlawful retaliatory action taken against her by the District. For the 2012-2013 school year, however, renewal of Abrams' SP position will be subject to the application/reapplication process, meeting the current qualifications for the position, the needs of the BTSA Induction Program and whatever other requirements or considerations as would apply to all applicants/re-applicants.

Although the SP position is renewable on a year-to-year basis, we find that the back pay order should not be limited to the 2008-2009 school year. Abrams served as an SP for eight consecutive years and there is every indication she intended to serve well into her retirement. She testified at the hearing in pertinent part:

Yes, I chose Chula Vista very carefully to teach in because it represented, and actually still does, what I believe in, in education, offering modern, up-to-date technique in teaching kids and celebrating learning. I loved every year I taught, and still have – many of my associations are with people I taught with and to. I loved being a teacher every moment of every day. **And one of the reasons that I wanted to continue being a BTSA support provider, it would give me that continuation of teaching new teachers that love of learning and love of teaching kids to want to be life-long learners.**

(Emphasis supplied.)

Given Abrams' uninterrupted past service as an SP and her stated intention to continue to serve into her retirement years, we find that were it not for the District's violation of EERA in regards to the 2008-2009 school year, Abrams would have continued to reapply and been selected to serve. The Board has awarded back pay in similar circumstances where the evidence showed that, but for the unlawful discrimination, the employer would have contacted the employee for successive limited term positions. (*Los Gatos Joint Union High School District* (1980) PERB Decision No. 120.) Therefore, given the Board's broad remedial powers (*Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178) and statutory directive under EERA section 3541.5, subdivision (c), the



Board finds that back pay through the current term is warranted as just and proper under the unique circumstances of this case. (*Id.* at p. 190 [“a back pay award is a reparation order designed to restore the status quo which would have prevailed but for the wrongful act”].)<sup>14</sup>

#### The Timeliness of Abrams’ Response to the Exceptions

Although the proof of service of the District’s statement of exceptions indicates that the statement of exceptions was served by facsimile transmission and by mail on March 7, 2011, Abrams’ attorney asserts that she did not receive the statement of exceptions by facsimile and therefore calculated the deadline for filing the response based on rules applicable whenever a document is served by mail. Based on the documentation she submitted including her own declaration, a declaration from her secretary and a copy of the facsimile transmission log, we find that Abrams’ attorney was justified in so doing.

Under PERB Regulation 32310, a response to a statement of exceptions must be filed within 20 days following the date of service. In this case, the 20<sup>th</sup> day fell on Sunday, March 27, 2011. There are two potentially applicable filing extensions relevant here. A five-day extension applies to any filing made in response to a document served by mail (PERB Reg. 32130, subd. (c)) (5-day extension) and an extension to the next regular PERB business day applies whenever the last day to file a document falls on a weekend or holiday (PERB Reg. 32130, subd. (b)) (weekend extension). The former extension shall be applied before the latter extension. (*Ibid.*) Applying the 5-day extension first, as required, the last day in which to file the response was Friday, April 1, 2011. Abrams’ attorney, however, filed the response

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<sup>14</sup> The Board recognizes that the remedy in this case reflects, in part, the length of time this case was pending before the ALJ and on appeal to the Board prior to issuance of the Board’s decision. In cases such as this, in which a respondent invokes the Board’s processes by electing to go to hearing following issuance of a complaint by the General Counsel and files exceptions to the ALJ’s proposed decision, it runs the risk that exhaustion of the Board’s administrative procedures will increase its liability in the event its appeal is unsuccessful.

on Monday, April 4, 2011 presumably because she incorrectly applied the two extensions discussed above. Therefore, the response is untimely.

PERB Regulation 32136 provides:

A late filing may be excused in the discretion of the Board for good cause only. A late filing which has been excused becomes a timely filing under these regulations.

The Board has found good cause when a party makes a conscientious effort to timely file and the late filing was caused by circumstances beyond the party's control, such as a mailing or clerical error. (*United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325.) If the reason for the untimely filing is "reasonable and credible," the Board evaluates whether the opposing party would suffer any prejudice as a result of the excused late filing. (*Barstow Unified School District* (1996) PERB Order No. Ad-277.)

Under the unique circumstances of this case, in the exercise of the Board's discretion, we find that there is good cause to excuse the late filing. Abrams' attorney made an honest mistake, as a result of which she was off by one day in calculating the last day to file the response. As there is no prejudice to the District, the late filing is excused and is deemed timely filed under PERB Regulation 32136.

### ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Chula Vista Elementary School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by retaliating against Joyce Singer Abrams (Abrams) for her union activity.

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:

Retaliating against Abrams for her union activity.

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

1. Rescind and destroy the letters dated September 17 and November 24, 2008, denying Abrams' reapplication to be a support provider.
2. Pay Abrams back pay with interest at the rate of 7 percent per annum covering the school years 2008-2009, 2009-2010, 2010-2011 and 2011-2012.
3. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District 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 it 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.
4. 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. The 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 Abrams.

Members McKeag and Dowdin Calvillo join 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. LA-CE-5289-E, *Joyce Singer Abrams v. Chula Vista Elementary School District*, in which all parties had the right to participate, it has been found that the Chula Vista Elementary School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by denying the reapplication of Joyce Singer Abrams (Abrams) to be a support provider, because of her union activity.

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

A. CEASE AND DESIST FROM:

Retaliating against Abrams because of her union activity.

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

1. Rescind and destroy the letters dated September 17 and November 24, 2008, denying Abrams' reapplication to be a support provider.

2. Pay Abrams back pay with interest at the rate of 7 percent per annum covering the school years 2008-2009, 2009-2010, 2010-2011 and 2011-2012.

Dated: \_\_\_\_\_

CHULA VISTA ELEMENTARY SCHOOL  
DISTRICT

By: \_\_\_\_\_  
Authorized Agent

THIS IS AN OFFICAL NOTICE. IT MUST REMAIN POSTED FOR ATA 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



JOYCE SINGER ABRAMS,

Charging Party,

v.

CHULA VISTA ELEMENTARY SCHOOL  
DISTRICT,

Respondent.

UNFAIR PRACTICE  
CASE NO. LA-CE-5289-E

PROPOSED DECISION  
(February 15, 2011)

Appearances: California Teachers Association by Brenda Sutton-Wills, Staff Counsel, for Joyce Singer Abrams; Fagen Friedman & Fulfrost by Susan B. Winkelman, Attorney, for Chula Vista Elementary School District.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a union board member alleges that a school district retaliated against her, in violation of the Educational Employment Relations Act (EERA).<sup>1</sup> The district denies any violation.

Joyce Singer Abrams (Abrams) filed an unfair practice charge against the Chula Vista Elementary School District (District) on January 21, 2009. The Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint against the District on March 23, 2009. The District filed an answer on April 13, 2009.

PERB held an informal settlement conference on April 24, 2009, but the case was not settled. PERB held a formal hearing on December 16 and 17, 2009. The record was left open until February 11, 2010, but no further evidence was offered. With the receipt of post-hearing briefs on March 15, 2010, the case was submitted for decision.

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq.

## FINDINGS OF FACT

The District is a public school employer under EERA. Abrams was an employee under EERA, and she was a member of the board of directors of Chula Vista Educators (CVE), an employee organization and exclusive representative.

In the spring of 2008, Abrams reapplied to be a support provider for the District's Beginning Teacher Support and Assessment (BTSA) program. At the time, Abrams had been a support provider for almost eight years, and a teacher for almost 39 years. She retired as a teacher on June 14, 2008, but under District guidelines she was still qualified to be a support provider.

On September 17, 2008, District Assistant Superintendent Thomas Cruz (Cruz) sent Abrams a letter informing her, without explanation, that she was not selected to serve as a support provider for the 2008-09 school year. Abrams contacted members of the District's Board of Education, among others, for an explanation. On November 10, 2008, District board member Larry Cunningham (Cunningham) left her a phone message stating:

I talked to Lowell and Tom [Cruz] and it really gets down to the point that they just wanted to go in a different direction. I mean, they felt that you've always been very negative about what the district did and where they were going and what direction they were going in. So, they just felt that they wanted to go in a different direction and that's what they told me about it. So, if you want to discuss it further, give me a call. Anyway, that's what I got from it.

"Lowell" was District Superintendent Lowell Billings, who did not testify at the PERB hearing.

On November 12, 2008, Abrams called Cunningham. She asked Cunningham to "explain [the reference to] negativity," and he told her he "thought it was in reference to [her] association and [her] activism with the Union." Cunningham did not testify at the PERB



hearing, but the record was left open for the specific purpose of receiving his testimony in some form. Eight weeks after the hearing, on February 11, 2010, the undersigned received notice that the parties had agreed to close the record without further evidence.

On November 24, 2008, Cruz sent Abrams a letter stating in part:

The decision for approving BTSA Support Providers for the 2008-09 school year was made by Cabinet. Cabinet is comprised of the Superintendent, Assistant Superintendents, and the Executive Directors. Cabinet unanimously selected this year's participants based on their employment status, the success of students in their classroom, and their strong interpersonal skills. You were not selected because you did not meet the Cabinet's criteria.

Cruz testified that Abrams was not selected "because there were concerns about her interpersonal skills."

Cruz further testified that Cabinet members had raised concerns about Abrams' "positive nature on matters" and "her outlook and support of the District." He later explained:

As far as, and I'm using global generalizations, she didn't seem to be happy or content with the School District, critical about the District about management this, or principal this, or teachers this. It just seemed that Joyce was not a happy positive person in her interactions with the adults.

Cruz also testified that he knew Abrams was "involved with the CVE leadership," but the Cabinet did not discuss that fact. Cruz was the only Cabinet member to testify at the PERB hearing.

As a teacher, Abrams had been evaluated every two years in various areas, including "professional relationships with students, parents [and] colleagues." Since at least 1998, Abrams had received the highest possible rating ("effective") in this area. The comments on her 2002 evaluation are representative:

Mrs. Abrams has earned the respect of students, parents, and colleagues. She is a staunch child advocate, constantly focused

on what is in the best interest of her students. She helps students to recognize their strengths, and settles for nothing less [than] their best. Parents frequently request Mrs. Abrams because of her high standards, rigorous curriculum, and the interest that she takes in the success of each student. Joyce communicates frequently and effectively with parents and encourages them to stay involved in their children's education. Colleagues respect Joyce's intelligence, knowledge, and experience. Joyce works closely with her shared contract partner to ensure that students receive a challenging and enriching educational program.

One of Abrams' former BTSA teachers testified that Abrams had been "very helpful."

Another testified that Abrams was friendly, supportive and "a strong advocate for teachers." A former colleague testified that Abrams was "a very direct person," with whom she "only had positive interactions." There was no evidence of any negative interactions, or of any District investigation of Abrams' interactions.

Abrams was one of only two support providers whose reapplications were denied by the District. She was one of 14 that the District's BTSA advisory board had not recommended, because they had not logged enough hours with their BTSA teachers. The Cabinet did not deny any reapplications on that basis, however.

### ISSUE

Did the District retaliate against Abrams?

### CONCLUSIONS OF LAW

EERA section 3543.5 states in part:

It is 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.

For purposes of this subdivision, Abrams remained an “employee” even after her retirement as a teacher, because she was an applicant for reemployment as a support provider.

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), a charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

Although the timing of the employer’s adverse action in close temporal proximity to the employee’s protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or “nexus” between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) 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; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416); (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; *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*)); (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; *San Leandro, supra*, 55 Cal.App.3d 553); (4) the employer’s cursory investigation of the employee’s misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer’s failure to offer the employee justification

at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210.)

In the present case, Abrams exercised her rights under EERA as a leader of CVE. As acknowledged by Assistant Superintendent Cruz, the District knew about Abrams' union activity. The District took adverse action against Abrams by denying her reapplication to be a BTSA support provider.

There is ample circumstantial evidence that the District denied Abrams' reapplication because of her union activity. The denial followed her service as a member of the CVE board of directors. She was one of only two support providers whose reapplications were denied. Cruz's letter to Abrams of September 17, 2008, gave no explanation for the denial. Later, Cruz's letter of November 24, 2008, explained that Abrams did not meet three vaguely described criteria ("employment status," "success of students" and "interpersonal skills"). Still later, Cruz testified only that there were concerns about Abrams' "interpersonal skills," which had never been the subject of an investigation or a bad evaluation.

Cruz specifically testified about concerns regarding Abrams' "support of the District," and that she was "critical about the District about management this, or principal this, or teachers this." It is not always a union leader's job, however, to support the employer. It is sometimes a union leader's job to be critical of management.

On top of all this, Abrams testified without contradiction that District board member Cunningham, explaining the District's denial of her reapplication, told her that the District found her "very negative," and he thought "it was in reference to [her] association and [her] activism with the Union." If Cunningham had been misquoted or misunderstood, the District could have called him to testify; indeed, the record was left open for that very purpose. But the District did nothing.

Even as hearsay, Cunningham's statements to Abrams were admissible to corroborate the other evidence of retaliation. (PERB Reg. 32176.)<sup>2</sup> Furthermore, as admissions of a party, the statements are also admissible as independent evidence of retaliation. (Evidence Code, § 1220.)

In short, the preponderance of evidence shows that the District denied Abrams' reapplication to be a support provider because of her union activity, and for no other reason. The District is therefore found to have retaliated against Abrams in violation of EERA section 3543.5(a), as alleged in the PERB complaint.

#### REMEDY

EERA section 3541.5(c) states:

The board [PERB] shall have 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.

In the present case, the District has violated EERA by denying Abrams' reapplication to be a support provider in retaliation for her union activity. It is therefore appropriate to order the District to cease and desist from such retaliation against Abrams and other employees, to

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<sup>2</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

rescind and destroy the letters denying Abrams' reapplication, to reinstate Abrams, and to pay Abrams back pay with interest. It is also appropriate to order the District to post a notice incorporating the terms of the order. (*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 Chula Vista Elementary School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3540 et seq., by retaliating against Joyce Singer Abrams (Abrams) for her union activity.

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:

Retaliating against Abrams and other employees for their union activity.

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

1. Rescind and destroy the letters dated September 17 and November 24, 2008, denying Abrams' reapplication to be a support provider.
2. Reinstate Abrams as a support provider.
3. Pay Abrams backpay with interest at the rate of 7 percent per annum until she is reinstated or refuses reinstatement.
4. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District 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 it 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.

5. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent 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 Abrams.

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 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 95811-4124  
(916) 322-8231  
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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Thomas J. Allen  
Administrative Law Judge