SUPERCEDED by amendment to EERA section 3543.5, subdivision (a) Stats. 1989, Ch. 313

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFF D. PAIGE, Charging Party,	)	Case No. LA-CE-2267
v.	)	PERB Decision No. 685
HACIENDA LA PUENTE UNIFIED SCHOOL DISTRICT, Respondent.	)	June 24, 1988

Appearances; Charles R. Gustafson, Attorney, California Teachers Association, for Jeff D. Paige; Wagner, Sisneros & Wagner by T. A. Wagner for Hacienda La Puente Unified School District.

Before Hesse, Chairperson; Porter, Craib, and Shank, Members.

DECISION

HESSE, Chairperson: This case arose out of an allegation by Jeff D. Paige (Paige) that the Hacienda La Puente Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA or Act)[1] when it refused to grant him a leave of absence, constructively

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 reads, in relevant part:

> It shall be unlawful for a public school employer to:
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> (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. (Emphasis added.)

discharged him, and refused to rehire him. Paige alleges that these adverse actions were taken in retaliation against him because he exercised rights protected under the EERA, specifically, the filing of a grievance. The matter was heard by a Public Employment Relations Board (PERB or Board) administrative law judge (ALJ). The ALJ ruled in favor of the charging party, and the District filed the instant exceptions. On review, we now dismiss the complaint for the reasons set forth below.

THE FACTS

Paige was employed full-time as a Sergeant by the California Highway Patrol (Highway Patrol or CHP). He also held a part-time "temporary" position with the District as an instructor in the Adult School. Paige taught courses to people who had been convicted of driving while intoxicated and were ordered by a judge to attend court program classes. The Court Programs were given year round, with classes given several times a year, during the fall, spring, and summer.

Paige's immediate supervisor was Madelyn Henderson, Director of Court Programs. Henderson was a member of Paige's bargaining unit. While Henderson had no authority to hire or fire anyone, she did screen requests for overtime compensation or leaves before passing the requests on to either the personnel office or to Adult School Director Don Roth.

In early 1984, Paige filed a grievance, on behalf of himself and other employees, alleging that they were owed pay

for their attendance at a workshop held outside the regular work week. The grievance also recited a list of complaints against Henderson, alleging that she acted in hostile and demeaning ways in her treatment of her co-workers at workshops and staff meetings. After the grievance was filed, the employees received the pay for attending the workshop. It is undisputed that, after the complaints about her were made by Paige, Henderson's relationship with him deteriorated, although, since Henderson had no actual authority to grant a leave to Paige or to hire Paige when he returned to the District, this animosity has no bearing on this case.

The events that gave rise to the charge in this case began in spring 1985. Paige, in his capacity as a full-time Highway Patrol Officer, received an offer of promotion to Lieutenant in late February 1985. Acceptance of the job, however, would mean a temporary (two to three months) assignment and transfer out of the area, beginning April 1, 1985. Paige would then be able to transfer back to the Hacienda La Puente area on July 1. Paige's acceptance of the promotion and transfer out of the area prevented him from completing his spring teaching assignment with the District.

On February 26, Paige advised Henderson that he accepted the promotion and would be gone for three months as of April 1, and that he was requesting a leave of absence. Henderson told

Paige that the District would be replacing him. In the belief that other employees had been granted leaves of absence under similar circumstances, Paige completed a request for a two-month leave of absence and directed it to Roth. In the request, Paige advised Roth that due, to his promotion in the Highway Patrol, Paige would have to leave the area and relocate temporarily and that he was requesting a leave of absence with permission to return to his teaching assignment at the conclusion of the leave. Paige took the request to Roth's office but was unable to discuss it with Roth as Roth was in conference and unavailable. Paige spoke with Assistant School Director Richard Fraley who suggested that Paige should seek an informal "inactive status" and that Fraley would talk to Roth about it. Neither party disputes that the only person who could grant the leave was Roth, and that Fraley's comments were only speculation as to what Roth might do with the request.

While waiting for a response from Roth to the leave request, Paige received a memorandum dated March 6 from Henderson, asking that he complete and submit a resignation form. Paige did not complete the form. Paige responded to Henderson's note with one of his own, indicating he wished to take a leave of absence rather than resign. Roth then visited Paige at the Court Programs Office and advised Paige that Roth could not let Paige have an informal absence of more than two weeks.

On March 14, Paige received Roth's letter, congratulating

Paige on his promotion but reiterating:

> Unfortunately, a leave of absence is not allowed for temporary employees. It will be necessary to replace you with someone else. However, should you return to this area, please check with me to see if we have any openings.

On March 25, Paige responded that he wanted Roth to reconsider the decision, and that he (Paige) had recruited other teachers to cover his classes for the time he would be gone. Paige indicated he had arranged for these substitutes because Fraley had suggested Paige could be placed on "inactive non-pay" status.[2] Paige had nine individuals sign a request to cover his hours, and inserted a statement that by signing, each individual was requesting a written response from the District. On pages two and three of the request, Paige asserted his superiority in education, experience and knowledge over the individual who had been chosen as his replacement, and stated that the selection of his replacement "appears to be 'questionable'? (The individual is the son of a boyfriend of the Program Staff Advisor.)" In addition, Paige raised his role in the 1984 pay grievance and emphasized that Henderson had been uncommunicative with him since the grievance, and appeared to want to get rid of him.^ Paige also welcomed

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2The testimony and the exhibits, however, show that while Fraley discussed "inactive" status with Paige, all parties involved knew that Roth was the only one who could grant a leave of absence. Fraley did not promise Paige a leave, and Paige understood that any comments made by Fraley were subject to Roth's approval.

3paige recounted his fear that Henderson was trying to

"any consideration the School District Superintendent and/or the Director of the Personnel Commission might offer," and sent copies of the request to the latter persons plus other persons including the exclusive representative.

On March 29, Roth, in a written response to Paige, stated:

> There is no authority under which a leave can be granted to other than a permanent certificated staff member.
>
> The authority of a site administrator to allow a "necessary absence" or "inactive status" has been limited to two weeks. Failure to report to work is cause for termination and would lessen your likelihood of being rehired; a simple resignation due to other obligations would not.

Paige then sent Roth on April 6 a conditional resignation in which he stated:

> [W]ith the understanding that I will be rehired and reinstated to my present position . . . upon my return in 60-90 days . . . I submit this resignation reluctantly [sic], but with the understanding that we have reached an understanding and binding agreement in this matter.

Paige again sent copies of the conditional resignation to numerous persons, including those to whom he had sent his March 25 request. By this time, Paige had assumed his new position with the CHP in Monterey.

"get rid of" him due to the prior grievance being filed by Paige, complaining about Henderson's actions. The record has no evidence to show that Henderson had any authority to fire Paige. Indeed, after the grievance was filed in 1984, the record supports a finding that Henderson took no retaliatory action against Paige in evaluations, scheduling, or compensation.

On April 15, Roth met with Court Programs' Instructor Connie Simpson, one of the nine persons who had agreed to cover Paige's hours. Roth showed Simpson Paige's multi-paged request and asked her if she knew what she had signed. Simpson told Roth that she refused to sign the request until Paige had removed some paragraphs concerning Paige's relationship with Henderson, that the additional pages were not attached when she signed it, and that she would have refused to sign it with the additional pages. Roth was visibly angry and told Simpson that Paige wanted to get his job back but that he would not be rehired after circulating such information to other people and recited some names that had no relevance to Simpson. Roth also stated that the information had been sent to the union or association. Roth indicated a "great deal of displeasure" that Paige had sent such information "to people outside the District, including the union."

On April 19, Assistant Superintendent James Johnson sent Paige a letter rejecting his conditional resignation and setting forth:

> The District does not accept conditional resignations. It must be unconditional and without limitations.

Johnson then advised Paige that an unconditional resignation was needed or the District would have to take other action because of Paige's inability to complete his spring assignment. Paige wrote a letter of resignation (dated April 22, 1985). This letter referred to an "agreement reached

between myself and Mr. Donald Roth. . . ." We find no evidence of any agreement between Paige and Roth, and note that Roth consistently told Paige that he would have to resign, as no leaves were available. Furthermore, this letter, while purporting to be an unconditional resignation, does indicate Paige will pursue "any rights I might otherwise have to a hearing in this matter before any court or board formed to hear such issues." The resignation was effective April 22 and formally accepted by the board of education on May 9.

Paige notified the District in early June that his temporary assignment to the Monterey Highway Patrol Office would end in July and he would be returning to La Puente. Paige asked that his employment with the District be "reactiveated" (sic) and that he be "reassigned my previous duties with the Court Programs Office" as of July 1, 1985. The letter was directed to Roth, but when Paige returned to the District on July 1, he learned that Roth would be on vacation until August 1.[4]

On August 9, Paige filed a "Complaint/Grievance" with the school board and with the California Department of Fair Employment and Housing, alleging racial and sex discrimination and unfair labor practices. The main thrust of the complaint was that Henderson had treated him negatively and discriminated against him in a variety of ways[5] because he was a Black male.

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[4]Paige also contacted both Fraley and Henderson, each of whom confirmed that personnel decisions were made only by Roth.

[5]In the complaint, Paige asserted that:

Paige further asserted that he believed he had become the object of this uncommunicative attitude as well as other negative treatment by Henderson for over a year, because of the "frustration and retribution" Henderson felt towards Black males resulting from the failure of Henderson's marriage to a Black male. Paige also accused Roth of engaging in a conspiracy with Henderson to deprive him of his constitutional equal protection rights.

Roth responded to Paige on September 18, informing the latter he had not been selected as a teacher for the 1985-86 school year. Through the union, Paige filed a grievance on September 26, alleging he had not been reinstated for retaliatory reasons. The District refused to process the grievance on the grounds that Paige was no longer an employee of the District and was therefore not covered by the collective

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> For more than a year Ms. Henderson-Maine would not speak to me unless she absolutely had to when passing in the hallways or about the program office. She readily spoke to and greeted Spanish surname males and white males working in the Court Programs.

Paige further asserted: (1) Henderson opposed Paige's attendance at District-funded educational seminars but endorsed attendance by non-Black employees; (2) a Spanish-surnamed individual was allowed to be away from the Court Programs for more than two weeks, but Paige was not, and that Henderson had falsely reported the Spanish-surnamed employee's absences as sick leave; (3) he was forced to resign his employment but a Spanish-surnamed employee was not; (4) a Spanish-surnamed individual was selected to replace him; (5) no other Black males were ever recruited to work in the Court Programs; and (6) non-Black males were given keys to the Court Programs Office, but Paige was not.

bargaining agreement.

The District did, however, permit Assistant Superintendent Tom Johnson to meet informally with Paige and an association representative. Johnson noted that he had merely reviewed the paperwork in the case to see that it was in order and had not investigated Paige's complaint. He indicated that he knew of no reason for Paige's not being rehired, but suggested that the reason might be personality differences between Paige and his supervisors. Johnson stated that even if he investigated further and found that the administrators or supervisors had done something wrong, he still would not order reinstatement for Paige. There is no evidence, however, that Johnson investigated beyond this meeting.

On October 23, 1985, Paige filed an unfair practice charge with PERB, alleging that the District violated EERA section 3543.5(a), (b), and (c). Subsequent to the withdrawal of charges 3543.5(b) and (c), a complaint issued on March 18, 1986, on a charge related to alleged violations of section 3543.5(a).

Following the hearing, the ALJ ruled in a proposed decision that the District had discriminated against Paige by denying his request for a leave of absence, constructively discharging him, and refusing to reinstate him to his former position. The ALJ found that Paige had engaged in protected activity by filing the 1984 grievance, and that the District would not have taken the adverse actions that it did had not Paige engaged in such activity. The ALJ ordered that Paige be reinstated to his

former position, that he receive back pay from the period of his resignation until his reinstatement, and that he be placed again on the District's list of substitutes (instructors).

The District filed timely exceptions to the proposed decision, arguing that charging party failed to meet his burden of proof, that he was not entitled to any leave of absence, that he voluntarily resigned, and that he was not an employee under the Act when he sought reinstatement. Further, the District argues affirmatively that it could not have accorded Paige different treatment from other employees (by granting him a leave) without violating the Act by negotiating with someone other than the exclusive representative. Charging party refutes these arguments and urges the Board to affirm the proposed decision.

DISCUSSION

Paige alleges three acts by the District that were adverse to him: (1) the denial of the leave; (2) a constructive termination;[6] and (3) the failure to rehire.[7]

Leave of Absence

The leave was denied on March 29, and thus beyond the six-month filing date required by EERA section 3541.5(a).

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[6]with reference to the first two allegations, we note that both matters raise a deferral-to-arbitration issue. The resolution of this issue, however, is not necessary inasmuch as both allegations were untimely.

[7]These are the formal allegations made in the complaint.

Independent of the charge being untimely, the record does not support a finding that the District unlawfully denied the leave of absence under EERA. (Novato Unified School District (1982) PERB Decision No. 210.)

Constructive Termination

The "constructive termination," i.e., the resignation, occurred on April 22. Thus, the allegation concerning this action too is untimely. While the first resignation was conditional, Paige's second resignation was made with full knowledge that he must either resign unconditionally or stay and teach his classes. He chose the former. Thus, the fact that the District did not accept the resignation until May 9 does not bring the resignation within the six-month limit. There is no indication that the acceptance by the school board, once the second, clarified, resignation was made, was anything other than a ministerial act.

Further, the foregoing discussion assumes that the resignation was truly a "constructive termination," an unwarranted assumption. The Board has previously discussed the standards to be applied to a situation when a resignation is alleged to be a constructive termination.[8] A charging party must show two elements: (1) that the burden imposed upon him

[8]See Marin Community College District (1980) PERB Decision No. 145, adopting the reasoning of the National Labor Relations Board in Crystal Princeton Refining Co. (1976) 222 NLRB 1068 [91 LRRM 1302].

must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign; and (2) the burden was imposed because of the employee's union activities. Here, we find that the charging party failed to prove the first element.

Paige resigned not because of a burdensome change in working conditions, but because of an opportunity for a promotion with his full-time employer. Paige had indicated on several occasions his desire to be promoted within the CHP, and his intention to accept a short-time, temporary transfer in order to effectuate such a promotion. No credible evidence was presented to show that Paige would have turned down the transfer if he knew he could not return to his 14-hour per week position with the District. Therefore, we reject the notion that Paige was constructively terminated. Rather, he resigned voluntarily. Thus, the action of resigning on April 22 was not only outside our six-month statute of limitations, it was not an adverse action caused by Paige's protected activity.

Failure to Rehire

The final action Paige notes as adverse to him is the failure to rehire. The failure to rehire occurred on September 18, and thus this allegation was timely. The problem with this allegation, however, is that Paige has no standing to invoke the protection of EERA. Paige was not an employee at the time he reapplied for employment.

On its face, the protection of EERA section 3543.5(a)

applies only to "employees."[9] The wording of this section differs in this respect from the National Labor Relations Act (NLRA) section 8(a)(3) as well as numerous other state laws.[10] The united States Supreme Court addressed the importance of the extension of NLRA protection to hiring in the seminal case Phelps Dodge v. NLRB (1941) 313 US 177 [8 LRRM 439]. In that case, the court noted

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

Thus, there are legitimate policy reasons behind the inclusion of applicants for employment under the protection of a labor statute. But the context in which the Phelps Dodge case arose differs greatly from EERA. The NLRA specifically

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[9]See footnote 1, supra.

[10]See Alaska PERA section 23.40.110(3) "A public employer may not discriminate in regard to hire or tenure of employment.;" Connecticut section 3 (sec. 5-272) "Employers or their representatives or agents are prohibited from discriminating in regard to hiring or tenure of employment."; Delaware section 4007, chapter 40, title 14 at Delaware Code, "It is an unfair labor practice for a public school employer to encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or terms and conditions of employment."; Florida, Florida Stats. 447.501 "Public employers are prohibited from encouraging or discouraging membership in any employee organization by discrimination in regard to hiring, tenure, or other conditions of employment."

uses the terminology "hiring" in the protections listed in section 8(a)(3). Thus, the Supreme Court was not extending the NLRA, to a group that had heretofore not been covered. Rather, it was securing the protection granted by statute to applicants.[11] The EERA lacks any such definitive protection for applicants. The extension of EERA to applicants can only be accomplished by the Legislature, not the Board.

Our colleague notes that he is compelled to dissent because the Legislature must have intended to include applicants in the protection of the statute. Such speculation, however, is not a basis for us to rewrite the statute. In truth, the following cannot be disputed.

First, the omission was intentional because it occurs not only in EERA but also throughout the entire scheme of public employment collective bargaining statutes, including the Higher Education Employer-Employee Relations Act (HEERA)[12] and the Ralph C. Dills Act.[13] Thus, the omission of applicants is unlike the duty of fair representation, a duty that was

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[11]Significantly, the federal courts have declined to read the Railway Labor Act to include applicants. Only where Congress made the inclusion of applicants clear do the courts so construe the statutes to cover hiring. (See Nelson v. Piedmont Aviation, Inc. (4th Cir. 1984) 750 F.2d 1234, cert. den. 471 US 1116; see also Airline Pilots Association v. United Air Lines (7th Cir. 1986) 802 F.2d 886, cert den. 107 S.Ct. 1605.)

[12]HEERA is codified at Government Code section 3560 et seq.

[13]Formerly known as SEERA, the Ralph C. Dills Act is codified at Government Code section 3512 et seq.

explicitly enacted in EERA and HEERA but inadvertently prescribed in the Dills Act only for employees who are not members of the exclusive representative organization. In the latter case, we could reasonably argue that the Legislature omitted by mistake a portion of the law covering all employees (both members and non-members of the exclusive representative organization), coverage that was included in sister-statutes, and was implied from the inclusion of other, related clauses in the statute.[14]

Here, since every other state and federal law of a similar nature is explicit in its inclusion of applicants,[15] we can only presume that the Legislature's failure explicitly to include applicants under all three statutes was intentional.

Moreover, the Legislature specifically did include protection in hiring under at least one labor statute. The Agricultural Labor Relations Act of 1975 (the same year EERA was enacted), prescribes "It shall be an unfair labor

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[14]See CSEA (Norgard) (1984) PERB Decision No. 451-S, wherein the duty of fair representation was implied, not express, under the Dills Act. See also California Correctional Peace Officers Association (Pacillas) (1987) PERB Decision No. 657-S.

[15]We are unpersuaded by the statutes listed by the dissent. In no state has a legislature excluded all hirees but the administrative agency then extended coverage to that group based on the implication that the Legislature meant to include them. In nearly every example mentioned by the dissent, at least one public sector law in each jurisdiction has explicitly included applicants, thereby permitting an argument that a governing body may have unintentionally omitted coverage of applicants under the other statutes in that jurisdiction. Here, none of the statutes involving public employees expressly includes applicants.

practice for an agricultural employer to . . . by discrimination in regards to the hiring or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization." (Labor Code sec. 1153.) (Emphasis added.) The fact that this comprehensive labor relations statute, using language quite different from the public employment statutes administered by PERB, specifically included protection for applicants in addition to employees leads to the obvious conclusion that the Legislature knew how to include applicants but meant to exclude them from EERA.[16] Further, when the Legislature has desired to cover both applicants and employees in employment practice statutes, it has done so by using specific language such as, "employee or applicant," "employee or prospective employee," or "to refuse to hire, or to discharge, or to discriminate in terms of employment," etc. (See Labor Code, secs. 431, 432, 432.2, 432.5, 432.7, 450, 921, and 922; Gov. Code, secs. 12940, 12941, 12943, 19701, 19702, and 19702.2.)

Second, the process of statutory construction is used only when a term is ambiguous. As noted by the California Supreme Court in West Covina Hospital v. Superior Court (1986) 41 Cal.3d

[16]We note that the State Supreme Court in Pacific Legal Foundation v. Brown (1981) 29 Cal.3d 168 recognized the ability of the Legislature to withhold certain power from PERB. That case, construing the constitutionality of the Dills Act, speaks only in terms of employees (never applicants) and notes that the State Personnel Board retained authority over civil service appointments. (Id. at 185.)

846, "We give effect to statutes according to the usual, ordinary input of the language employed in framing them. When statutory language is clear and unambiguous there is no need for construction, and courts should not indulge in it." (Id. at 850.)

The effort of the dissent to create an ambiguity over the meaning of the word employee where none exists is patently an act of desperation. The statute specifically defines employee as one "who is employed by [a] public school employer." The use of the present tense "is employed" supports the interpretation that employee was not meant to mean someone who "might be," "could be," "would be," or "should be" employed. The dissent can cite no case where a statute that used the term "employee" meant anything more than just that.[17]

Indeed, the Supreme Court's reluctance to construe an unambiguous term to denote anything other than the plain meaning of the word was shown in State Personnel Board v. Fair Employment and Housing Commission (1985) 39 Cal.3d 422. In that case, the State Personnel Board attempted to argue that the Fair Employment and Housing Act (FEHA) was inapplicable to the state. The court ruled that the exclusion of state employees from that act was unreasonable in light of the

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[17]The definitions cited by the dissent all apply to persons who form an employment relationship with the employer. Here, we are concerned with those persons who do not reach that point, i.e., they never have any employment relationship. Rather, the applicant remains outside the status of employer/employee.

unambiguous language of the statute, that the FEHA applied to employers, including "the state or any political or civil subdivision thereof. . . ." (Id. at 429.) Surely, this agency should be equally committed to construing an unambiguous term such as employee in a manner that is plain and obvious.

The dissent's citations of cases are inapposite because they all depend upon an initial determination that the term to be construed is ambiguous or unclear. Such is not the case here. Rather, we are more persuaded by Sutherland, who cited this noted opinion in his treatise on statutory construction:

> The courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a coordinate branch of the government. It is far better to wait for the necessary correction by those authorized to make them or, in fact, for them to remain unmade, however desirable they may be, then for judicial tribunals to transcend the just limits of their constitutional powers. (Railroad Commission of Indiana v. Grand Trunk Western Railway Co. (1913) 179 Ind. 255, 100 N.E. 852, cited in Sutherland, 2A Statutory Construction section 47.38.)

California has long recognized that such power to rewrite statutes, no matter how laudable the goal, does not belong to the courts. (Anderson v. I. M. Jameson Corp. (1936) 7 Cal.2d 60; People v. One 1941 Buick 8, 4-Door Sedan (1944) 63 Cal.2d 661; Richardson v. City of San Diego (1961)) 193 Cal.App.2d 648.) In Anderson, the court eloquently quoted an early decision of the Supreme Court in stating "It is a cardinal rule in the construction of statutes that the intent of the

legislator should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the act." (7 Cal.2d at 68.) (Citations omitted.) In Anderson, the court refused to interpret the word "inference" to include "presumption" because the two words were not synonymous. Neither are the words "employee" and "applicant" synonymous.

Thus, we find that, laudable as the dissent's goals may be, the unambiguous nature of the statute in question precludes us from usurping the duty of the Legislature, and that the policy reasons set forth in the dissent for including applicants in EERA are best directed to the Legislative branch.

Furthermore, we are unpersuaded by the dissent's view that employers will begin blatant discrimination against applicants who are pro-union. This decision does not abrogate the right of a union to file a charge alleging a violation of 3543.5(b). Certainly any overt discrimination against an applicant would interfere with a union's right to organize, and any remedial order issued by this Board to remedy such interference could direct an employer to hire such a discriminatee. The scenarios envisioned by the dissent need never happen.[18]

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[18]We note that the unfair practice charge and complaint identify Paige alone as the charging party. Here, the association was never a party to the action, and violation of 3543.5(b) was not litigated because the charging party withdrew that allegation of his charge. He had no standing to raise the Association's rights independently.

Finally, even if Paige had standing under the Act, we do not concur with the ALJ's analysis that concluded the District violated EERA. Applying the standards used by the Board in Novato Unified School District, supra, we do not find that the record supports that the District was motivated improperly in failing to rehire Paige.

Paige asserted that prior to the grievance, he had a good relationship with Henderson: They communicated freely, talked frequently, and he would spend time in her office talking before his assignments. Following the grievance, however, Paige contends that Henderson became distant, passed him in the hallway without speaking, and communicated with him by way of notes. The record shows that except for Henderson's failure to communicate with Paige, there was no change in Paige's evaluations, assignment, or hours, and he was hired in the Courts Program for the summer and fall of 1984, as well as the spring of 1985.

While Henderson may have been ired by the grievance filed against her, she was a member of the bargaining unit not a management employee. Furthermore, she was not in any position to hire Paige. Roth, who had the authority to hire Paige, allegedly made one comment that showed he could have had anti-union animus. But, applying the shifting burden of proof, the District proved that it would have taken the same course of action despite any protected activity on Paige's part. The position sought by Paige no longer existed. It had been filled

some months before, and Paige had no vested entitlement to return at that new teacher's expense. Thus, we find that even if Paige had standing, he did not show that the District had no legitimate reason for refusing to employ him.

In sum, we reverse the ALJ's order on the grounds that the denial of the leave and constructive discharge charges were untimely and, as to the failure to rehire, that Paige was not an employee at the time he sought reemployment.

ORDER

The complaint against the Hacienda La Puenta Unified School District is hereby DISMISSED in its entirety.

Member Shank joined in this Decision.

Member Porter's concurrence begins on page 23.

Member Craib's concurrence and dissent begins on page 24.

Porter, Member, concurring: I concur that the complaint should be dismissed. The leave of absence and constructive discharges were untimely and, even if timely, the evidence does not establish that the District acted unlawfully. As to the District's failure to rehire Paige, I agree that applicants are not "employees" under EERA, and that, even if applicants are "employees," the evidence does not establish that the District unlawfully failed to rehire Paige.

Member Craib, concurring and dissenting: I concur in the dismissal of the allegations concerning the leave of absence and the constructive discharge. The first is unquestionably untimely. While I believe it more proper to consider the statute of limitations as running from the date of acceptance of the resignation (May 10), I would nonetheless find that no constructive discharge had occurred.[1]

I am compelled to dissent from the majority's dismissal of the allegation that the District discriminatorily refused to rehire Paige.[2] In a decision that can only be described as

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[1]First, it is questionable whether the denial of the leave of absence was sufficiently coercive or intolerable as to constitute a constructive discharge. More importantly, I would find that Paige failed to prove that the leave of absence was unlawfully denied. Specifically, the evidence supports the District's assertion that there was no contractual or extra-contractual policy providing for such leaves for temporary employees. In addition, Paige failed to provide persuasive evidence that similarly situated employees had been granted such leaves in the past.

2The ALJ found that the refusal to rehire Paige was unlawfully motivated and I would affirm. In my view, the record reflects an unrebutted prima facie case of discrimination. The record reveals that Paige's immediate supervisor, Madelyn Henderson, harbored animus toward Paige ever since his 1984 grievance over pay for attending a mandatory workshop. Perhaps most damaging was testimony that Don Roth, director of the court programs and Henderson's supervisor, angrily stated that Paige would never be rehired because of his activities in contesting the denial of a leave of absence. Lastly, there is evidence that Paige received the "run around" when he sought to be rehired and that Roth's supervisor, Tom Johnson, conducted nothing but a cursory investigation of the failure to rehire. The District called no witnesses and presented no exculpatory documentary evidence regarding this allegation.

Rather than adopt the ALJ's findings of fact, the majority has chosen to provide its own selective recitation of facts in

shocking, the majority today holds that the EERA does not protect hirees from discrimination. I submit that this emasculation of a statute the Board is charged with administering and enforcing is both illogical and without legal basis and will serve only to seriously undermine the Board's credibility.

The majority maintains that the EERA unambiguously extends coverage only to present employees. Yet nowhere in the statute is there a phrase or passage which compels such a limitation. Rather, the majority relies on an assumption that the term "employees" in section 3543.5(a) and the term "employed" in section 3540.l(j) can only be reasonably construed to refer to those already in an existing employment relationship.[3] As explained below, these terms are anything but unambiguous and the majority's insistence that they are is most perplexing. It

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order to buttress its alternative holding that Paige was not discriminatorily refused reemployment. In reality, the facts are largely undisputed and I would adopt the ALJ's findings of fact, with the exception of his conclusion regarding the District's leave of absence policies. Rather than repeat them here, I have provided those findings (pp. 3-15 of the proposed decision) as an attachment to this concurrence and dissent.

3section 3540.l(j) defines a "public school employee" or "employee" as "any person employed by any public school employer . . . ." (Emphasis added.)

Section 3543.5 states:

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

is not necessary to rewrite the statute or usurp the proper role of the Legislature to conclude that hirees are protected from discrimination. All that is required is an intelligent construction of the statute.

First, one need look no further than a dictionary to discover the patent ambiguity in the term "employed." The word "employ," when used as a transitive verb, as it is in section 3540.1(j), means "to use or engage the services of" or "to provide with a job that pays wages or a salary or with a means of earning a living." Webster's Third New International Dictionary, Unabridged, (1976) G. & C. Merriam Co. This definition clearly includes the process of employing, i.e., hiring. Other dictionaries even use the word "hire" in their definitions (See, e.g., Funk & Wagnalls Standard College Dictionary (1974) Funk & Wagnalls Publishing Co., Inc.;

> employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.
>
> (d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548). (Emphasis added.)

employ - "1. To engage the services of; hire"). In contrast, when used as a noun, Webster's defines the word "employ" as "the state of being employed." It is the definition of "employ" as a noun that the majority would apply to the verb "employed" appearing in section 3540.l(j).[4]

Had the Legislature intended to extend the protections of the Act only to present employees, it could have clearly done so through any of several alternative phrasings in section 3540.l(j). Most obviously, a "public school employee" could have been defined as "any person presently employed by any public school employer . . . ." Or the noun form of the word could have been used to unambiguously connote present employment; for example, "any person in the employ of any public school employer."[5] Instead, the Legislature chose a phrasing that is most reasonably construed as connoting both present employment status and the process of being employed.

While the majority errs in finding "employed by" unambiguous when viewed in isolation, the error is then

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[4]Nor does the particular form of the verb used, in this case, is employed, change its meaning. Its usage in the context of section 3540.l(j) does not connote that the process of employing has already transpired, but is instead merely the result of the passive construction of the sentence in which it is used.

[5]Another example of unambiguous phrasing is found in the Railway Labor Act (RLA), which defines "employee" as "every person in the service of a carrier" (45 U.S.C, section 151, Fifth, emphasis added). Based on the critical phrase "in the service of," this definition has been held to exclude applicants. Nelson v. Piedmont Aviation, Inc. (4th Cir. 1984) 750 F.2d 1234, cert. den. 471 U.S. 1116.

compounded by the majority's refusal to consider the statute as a whole in determining the meaning of the phrase. It is axiomatic that the meaning of a word or phrase is dependent, in part, upon the context in which it appears. To maintain otherwise is both illogical and contrary to generally accepted principles of statutory construction.

While there is ample authority for the proposition that extrinsic indicia of intent are employed only where the word or phrase at issue is first found to be susceptible to more than one interpretation, there is no dispute that the statute as a whole must be considered in ascertaining the meaning of a particular provision or portion thereof. One of the best statements of this principle appears in Nunez v. Superior Court (1983) 143 Cal.App.3d 476, 191 Cal. Rptr. 893:

> One of the common techniques of statutory construction, besides being always a starting point, is to read and examine the text of the act and draw inferences concerning meaning from its composition and structure.
> (Citing 2A Sutherland, Statutory Construction (4th Ed. 1973) section 47.01).

Further,

> . . . regard is to be had not so much to the exact phraseology in which the intent has been expressed as to the general tenor and scope of the entire scheme embodied in the enactments.
> County of Los Angeles v. Frisbie (1942) 19 Cal.2d 634, In re Marriage of Cary (1973) 34 Cal.App.3d 345, 109 Cal. Rptr. 862.

A review of the EERA reveals a comprehensive collective bargaining scheme for the public schools. Section 3540 of the

Act states, in pertinent part:

> It is the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the public school systems in the State of California by providing a uniform basis for recognizing the right of public school employees to join organizations of their own choice, to be represented by such organizations in their professional and employment relationships with public school employers, to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

Section 3543.5(a), supra, expressly prohibits discrimination or reprisal based upon activity protected by the statute, namely, organizational activity.[6] It is indisputable that the right to organize is seriously undermined if the employer may lawfully refuse employment to applicants (or former employees) due to previous union activities or expressions of support for an existing exclusive representative. The statement of the U.S. Supreme Court in Phelps Dodge v. NLRB (1941) 313 U.S. 177, cited by the

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[6]Section 3543, which generally describes employee rights under the Act, states, in pertinent part:

> 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.

This provision has been held to protect activities in support of a union other than one's own, which is consistent with protection for hirees based on previous union activities. See McPherson v. PERB (1987) 189 Cal.App.3d 293.

majority, bears repeating here:

> Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

Clearly, the express right to engage in organizational activities contained in sections 3540 and 3543 and the general prohibition against discrimination for engaging in those activities contained in section 3543.5(a) are patently inconsistent with the exclusion of hirees from the Act's protection. When these expressions of intent, which appear on the face of the statute, are properly considered in construing the meaning of the word "employed" in section 3540`.l(j), it is difficult to see how anyone could maintain that hirees are unambiguously excluded from the Act's protections.

In analyzing the intent underlying the use of certain words, the following authorities provide guidance:

> " . . . the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in [the word's] interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted even though the ordinary meaning of the word is thereby enlarged or restricted and especially in order to avoid absurdity or to prevent injustice.
> The People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville (968) 69 Cal.2d 533, citing People v. Asamoto (1955) 131 Cal. App.2d 22.

> When a statute is theoretically capable of more than one construction we are obliged to choose which most comports with the intent of the Legislature.
> Southern California Gas Co. v. Public Utilities Commission (1979) 24 Cal.3d 653, 156 Cal. Rptr. 733; Moyer v. Workmen's Compensation Appeals Board (1973) 10 Cal.3d 222, 110 Cal. Rptr. 144. See also, Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 104 Cal. Rptr. 761; Gage v. Jordan (1944) 23 Cal.2d 794; In re Haines (1925) 195 Cal. 605, 234 P. 883.
>
> The general objective of the provision is a prime consideration; it is to be construed with a view to promoting rather than defeating its general purpose.
> See Redevelopment Agency v. Malaki (1963) 216 Cal.App.2d 480.
>
> . . . (the legislative) purpose of a statute will not be sacrificed to a literal construction of any part of the act.
> Select Base Materials, Inc. v. Board of Equalization (1959) 51 Cal.2d 640.

Plainly, we must construe the Act in a fashion which will effectuate legislative intent and, as excluding hirees from protection would render hollow employees' express right to engage in union activities, we are obligated to select instead a construction that furthers that right.[7]

[7]The majority's willingness to find a violation of employee organization rights in cases (unlike the present one) where the employee organization files the charge does not alleviate the problem. Ordering that an individual be hired as a remedy for a violation of an employee organization's rights, when that violation is essentially of a derivative nature, is a proposition of dubious propriety. I would personally be quite hesitant to order such a remedy, as I am sure my colleagues would be when faced with an actual case. A discriminatory failure to hire is fundamentally in derogation of the individual applicant's rights. Absent protection for such individuals, the chilling effect upon union activities remains. Moreover, the majority's professed willingness to

While the exclusion of first-time applicants itself seriously undermines the protections otherwise afforded by the Act, a potentially more serious problem arises with regard to rehiring situations, as is shown by the instant case. Here Paige was a former employee who asked to be rehired only a few months after a reluctant resignation. He undeniably engaged in protected activity while in the employ of the District and was, in my view, discriminated against because of that activity. Though he was not presently employed at the time he was not rehired, the genesis of the dispute, indeed, of the animus that prevented his rehiring, took place when even the majority would agree that Paige was protected by the Act. The magnitude of this problem is apparent when one considers that the public schools frequently engage the services of part-time and temporary employees whose present employment status may be severed and reestablished on a regular basis. Indeed, anyone who is hired on the basis of yearly contracts (and who is not tenured) may have a gap in present employment status between contracts. Such contracts are common among certificated employees and, while many are informed of their status for the succeeding school year prior to the expiration of the existing contract (and thus would be protected even under the majority's view), many are not. For example, the standard contract might

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lessen the deleterious effects of its decision by finding a violation of union rights, j^ the union is a party to the case, does not obviate the need to judge the propriety of its conclusion that hirees themselves are not protected.

run from September through June and rehiring decisions might not be made until July or August. Under the majority's view, anyone working under such a system would be unprotected from a discriminatory failure to rehire due to previous protected activity. The gaping hole in the protections of the Act under the majority's view and, thus, the abrogation of the express purpose of the Act, is apparent.

In support of its tortured construction, the majority puts great weight upon the absence of any express mention of hiring in section 3543.5(a). As will be discussed infra, the presence or absence of such language is not determinative. Moreover, we are fortunate to have an expression of legislative intent which explains the choice not to make a "laundry list" of outlawed forms of discrimination. The source I speak of is the Final Report of the Assembly Advisory Council on Public Employee Relations (March 15, 1973)(hereafter "Advisory Council Report"). As the California Supreme Court has stated on several occasions, "Statements in legislative committee reports concerning the statutory objects and purposes which are in accord with a reasonable interpretation of the statute are legitimate aids in determining legislative intent." Southern California Gas Co. v. Public Utilities Commission, supra, 24 Cal.3d 653, 659; Southern Pacific Co. v. Industrial Accident Commission (1942) 19 Cal.2d 271.

The Assembly Advisory Council (Advisory Council or Council), created by House Resolution 51, adopted June 22, 1972, was charged with, inter alia, reviewing the effectiveness

of then-existing statutes pertaining to public sector labor relations and proposing a new statutory framework. While the Council's proposed statute (which would have covered virtually all public employment) was not adopted by the Legislature, it was nevertheless the impetus for the passage of the EERA. The EERA is remarkably similar to the Advisory Council's proposed statute and, to the extent of those similarities, the Advisory Council Report is of relevance in determining legislative intent. See Healdsburg Union High School District, et al. (1984) PERB Decision No. 375 and San Diego Teachers Association et al. v. Superior Court (1979) 24 Cal.3d 1, 11.

Section 3507(a) of the proposed statute enumerates employer unfair practices. Like section 3543.5 of the EERA, proposed section 3507(a) does not expressly mention hiring. Further, proposed section 3507(a)(1) contains the identical anti-discrimination language as EERA section 3543.5(a), supra;

> 3507.(a) It shall be unlawful for an employer to:
>
> (1) 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.

At page 77 of the Advisory Council Report, the Council discusses why it chose the language it did for section 3507(a):

> In our view, the statement of prohibited practices should be in general terms, and no effort should be made to compile a long list of proscribed acts. We so recommend because administrative agencies and courts are likely to construe such a list as excluding

> any conduct not specifically mentioned, and experience has demonstrated that even the ablest draftsmen cannot anticipate or accurately describe every kind of conduct that the Legislature would probably want to outlaw. The better approach, it seems to us, is to cast the statutory prohibitions in terms that alert the parties to what is forbidden, but permit the Board some discretion and flexibility in applying them.

Thus, the absence of any express mention of hiring was not due to a desire to exclude hirees from coverage, but to reflect the Advisory Council's view that such provisions are better couched in general terms.

At page 34 of the report, the Advisory Council, in discussing the interplay of the proposed statute with existing civil service systems, states:

> We believe, however, that civil service will continue to fulfill an important function in hiring procedures—i.e., recruiting, examination, and placement—and perhaps other essential areas as well.

This discussion appears in a portion of the report entitled "Nature and Scope of Proposed New Law." If the proposed statute was intended to avoid any effect upon hiring, such a discussion would have been unnecessary and, in fact, nonsensical. In sum, legislative history does not support the view that hirees were intentionally omitted from the protection of the EERA; indeed, it supports the view that the intent was that hirees were to enjoy protection.[8]

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[8]As the majority notes, the analogous provisions of the other two statutes administered by PERB (the Ralph C. Dills Act and the Higher Education Employer-Employee Relations Act)

As the majority points out, the seminal case on discrimination in hiring under the NLRA is Phelps Dodge Corp. v. NLRB, supra. As the majority also points out, the court in that case relied in part upon the express mention of hiring in section 8(a)(3) of the NLRA. Nevertheless, the case is instructive, not only for the passage quoted earlier, but also for its comments on the general nature of labor relations statutes. Labor relations statutes are inevitably drafted using very general language, in essence, providing a set of principles which require a substantial amount of interpretation by the courts or by boards such as PERB. The U. S. Supreme Court in Phelps Dodge Corp. summarized this reality as follows:

> Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precisions of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act.

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contain language very similar to that in EERA. This simply shows that the Legislature was consistent in drafting these three statutes and that they therefore should be similarly construed. Contrary to the majority's assertion, this consistency is of no probative value in determining whether the statutes afford protection to hirees.

While the court in Phelps Dodge Corp. noted the existence of language in section 8(a)(3) specifically mentioning hiring, a later case reveals that the inclusion of hirees under the NLRA is not dependent upon that language. In Associated General Contractors of America, Houston Chapter (1963) 143 NLRB 409, enfd 349 F.2d 449 (5th Cir. 1965), cert. den. 382 U.S. 1026 (1966), the NLRB was faced with the issue of whether an employer must bargain over use of a hiring hall. The employer argued that the absence of language in NLRA section 8(d)[9] referring to hiring required a result different from that reached in Phelps Dodge Corp. The NLRB concluded that "'employment' connotes the initial act of employing as well as the consequent state of being employed." Surely, "employed by," and even "employee," must logically carry the same meaning.

While many public labor relations statutes in other states specifically prohibit discrimination in hiring, many do not.[10] Yet, there is no indication that this distinction is intended to include or exclude hirees, as the case may be.

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[9]Section 8(d) defines the scope of representation under the NLRA as "wages, hours, and other terms and conditions of employment."

[10]A sample of those which do not specifically prohibit discrimination in hiring follows: Municipal Employee Relations Act, Section 7-467 et seq., General Statutes of Connecticut; School Board-Teacher Negotiations Act, Section 10-153a et seq., Title 10, Chapter 166, General Statutes of Connecticut; Section 1301 et seq., Part 1, Title 19, Delaware Code (public employees); Section G-401 et seq.. Title 6, Subtitle 4, Code of Maryland (certificated school employees); Section 6-501 et seq., Title 6, Subtitle 5, Code of Maryland (non-certificated school employees); Section 48-801 et seq., Revised Statutes of

Instead, it appears that some statutes are merely drafted with more specificity. In fact, apparently there are no reported court cases expressly dealing with this issue.[11] While the majority would likely attach a different significance, I believe common sense dictates the conclusion that only very rarely would a litigant have the audacity required to assert that such a statute does not cover hirees.

There is also little consistency even within particular states. For example, while the statute covering most public employees in Delaware (see fn. 9) makes no specific mention of

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Nebraska (public employees); Public Employees' Fair Employment Act, Section 200 et seq., Article 14, Laws of New York; New York City Collective Bargaining Law, Section 1170 et seq., Admin. Code of the City of New York; State and Political Subdivision Employment Relations Act, Section 1 et seq., Chapter 15-38, Century Code of North Dakota; Teacher Collective Bargaining Act, Section 1.01 et seq., Chapter 15-38, Century Code of North Dakota; Section 509.1 et seq., Chapter 7, Title 70, Oklahoma Statutes (teachers); Public Employees Collective Bargaining Act, Section 101 et seq., Chapter 41.56, Title 41, Revised Code of Washington; Section 010 et seq., Chapter 28B.52, Title 28B, Revised Code of Washington (community college district academic personnel).

The majority's statement that "every other state and federal law of a similar nature is explicit in its inclusion of applicants" is simply false. All of the above are collective bargaining laws which grant the right to engage in union activities and prohibit discrimination based on those activities. Any distinctions in other aspects of these laws are not relevant to the issues in this case.

[11]As will be discussed infra, precedent under New York's Taylor Law implicitly extends coverage to hirees.

Nor are there any reported cases under the Meyers-Milias-Brown Act, Government Code section 3500 et seq., a California statute covering local government employees which has analogous provisions essentially identical to those in the EERA.

hiring, the statute covering public school employees does (Delaware Code, Section 4001 et seq., Chapter 40, Title 14). Similarly, while statutes in Washington covering public employees and academic personnel in community college districts do not specifically mention hiring (see fn. 9), the Educational Employment Relations Act (Revised Code of Washington, Section 010 et seq.. Chapter 41.59, Title 41) and the Washington State Ferry System Collective Bargaining Act (Revised Code of Washington, Section 1 et seq., Chapter 15) expressly outlaw discrimination in hiring. To conclude that the legislatures in these states intended to protect some public employees from discrimination in hiring but not others is to conclude that those legislatures are arbitrary and illogical. A more plausible conclusion is simply that the difference in language was not intended to affect the scope of the statutes, but instead simply reflects the fact that legislatures sometimes choose to make express what is necessarily implied by other provisions of a statute.

While there are no reported cases holding that the absence of specific mention of hiring in a statute excludes hirees from the protection of that statute, precedent under New York's Public Employees' Fair Employment Act (commonly referred to as the "Taylor Law," see fn. 9) indicates that such a statute does protect hirees. In Elba Central School District and Elba Faculty Association (1983) 16 PERB par. 3024 (affirmed by the New York Supreme Court, Appellate Division, in Elba Central School District v. Harold R. Newman (1984) 476 NYS 2d 949), the

New York Public Employment Relations Board (N.Y. PERB) without specifically discussing coverage of hirees, found that the district unlawfully failed to rehire a teacher whose employment status, like that of the charging party in the instant case, had lapsed for several months.[12] In Brighton Central School District (1986) 19 PERB par. 3032, the N. Y. PERB dismissed as untimely an allegation involving a refusal to hire a former bus driver of the school district . The N.Y. PERB's discussion in the case appears to assume that the claim would have been cognizable had it been timely filed.

Somewhat ironically, a review of labor relations statutes from other states which expressly outlaw discrimination in hiring also supports my construction of the EERA. Many of these statutes define "employee" using the same operative language found in EERA section 3540.1(j), i.e., "employed by."[13] Thus, it is clear that such language does not connote the exclusion of hirees, but is, in fact, commonly viewed as consistent with their inclusion.

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[12]The teacher's annual appointment expired on June 30, 1981. She inquired in August of 1981 about reappointment and was told in September that she would not be rehired. The evidence revealed that the school district normally made and announced such rehiring decisions each August for the upcoming school year.

[13]For example: Public Employment Relations Act, Section 1 et seq., Chapter 20, Iowa Code, section 3(3)—"'Public employee' means any individual employed by a public employer . . ."; Public Employment Relations Act, Section 89-1, Chapter 89, Hawaii Revised Statutes, Section 89-2(7)—"'Employee' or 'public employee' means any person employed by a public employer . . ."; Illinois Public Labor Relations Act, par. 1601

In sum, the majority's interpretation of the EERA as excluding protection of hirees from discrimination based on union activities (or sympathies) is utterly without foundation. The majority's insistence that EERA section 3540.1(j) unambiguously defines "employees" as only those enjoying a present employment status is without support whether the operative terms are viewed in isolation or, more properly, in the context of the statute as a whole. Further, extrinsic indicia of legislative intent, authorities from other jurisdictions and, indeed, logic and common sense reveal the clearly erroneous nature of the majority's decision.

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et seq., Chapter 48, Illinois Revised Statutes, Section 3(n)—"'Public employee' or 'employees,' for the purposes of this Act, means any individual employed by a public employer . . ."; Public Employee Relations Act, Section 447.201 et seq., Chapter 447, Florida Statutes, Section 447.203(3)—"'Public Employee' means any person employed by a public employer . . ."; Municipal Employment Relations Act, Section 111.70(1) et seq., Chapter 111, Subchapt. IV, Wisconsin Statutes, Section 111.70(1)(b)—"'Municipal Employee' means any individual employed by a municipal employer . . . ." (Emphasis added.)

Respondent then filed a Motion for a Continuance on June 4, 1986. The motion was granted, and the hearing was rescheduled for July 11, 1986. On that date a formal hearing was conducted before the undersigned.

Post-hearing briefs were received by the PERB by September 25, 1986. the matter was then submitted for proposed decision.

II. FACTS

A. Background

The aspect of Respondent's operation at issue in this case is its Adult School. The school offers services in various areas, including one called the "Court Programs." Under the Court Programs' umbrella are such things as Traffic Violators School, "Understanding Alcoholism" program, and the "Drinker, Driver Program" or SB-38 Program, the last of which offered classes for people required by court order to attend as a result of a conviction of driving while intoxicated.

Jeff Paige began working for the District in early 1979 as a driving instructor, and in the fall of that year began serving as a counselor in the SB-38 program. During 1984 and the spring of 1985, Paige was a counselor, group facilitator, and a substitute teacher in the SB-38 Program and the Traffic Violator School. Paige worked a 14-hour-per-week teaching schedule in a year-round program (12 months). By virtue of that schedule, a collective bargaining agreement covering certificated employees (including Paige) designated

him as a temporary, part-time employee.[2]

Paige's immediate superior was Madelyn Henderson, Director of the Court Programs. Although she was a member of the same bargaining unit as Paige, she acted as a conduit for the administration vis-a-vis Court Programs employees in several areas. The record evidence indicates that she had the ability to influence upper management decisions concerning employees in her program. She had to be consulted before a decision was made as to Paige's leave request described below. She set up workshops for staff and, via memoranda to staff, required their attendance. Anyone not able to attend was directed to provide justification directly to her. She assigned tasks to employees, including Paige. She sent a memo to staff reflecting her satisfaction with their attendance at one workshop. Employees, including Paige and Contois Simpson regarded her as their "boss." She was the target of at least one employee group grievance, as detailed below. Requests for such things as overtime compensation, leaves, etc. were screened by her before being approved.

B. Alleged Retaliatory Conduct by the District

Paige alleged that, after filing a class action grievance

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[2]Paige's interpretation of the contract (during his testimony) was that if one took the number of hours he worked on a yearly basis and "compressed" these down to a school year, then he would have an hourly average exceeding the number required to become permanent. While novel and interesting, there is no evidence to support this interpretation, and it is unpersuasive.

against Henderson on behalf of himself and fellow employees, he was "set up" for termination without the possibility of reinstatement. This "set-up" consisted of representations by supervisors which led him to believe he was entitled to a temporary leave of absence (a detrimental reliance on those representations), a subsequent denial of his leave request, an eventual coerced resignation under threat of termination, and a later refusal to re-employ him.

On January 25, 1984, Madelyn Henderson issued a memorandum to staff, requiring that they attend a workshop she scheduled for Sunday, February 26, 1984. Anyone who anticipated not being able to attend was instructed not to simply leave a message with the secretary, but to clear it directly with Henderson. A few days before the event, she assigned Paige the task of covering "the fine points of record keeping" at the workshop.

The day following the Sunday session, Paige and other attendees submitted payroll documents, which contained a request to be paid for working that Sunday, to Henderson. These requests were rejected. Paige filed a second request with an attached note to Henderson, indicating that she had "whited out" his first request without notifying him and demanding that it be submitted to the personnel office. Henderson then wrote to Paige, informing him that she had decided to forward his request to Adult School Assistant Director Richard Fraley.

Not having received an indication of whether the Sunday pay would be granted, Paige, being the union representative for Hacienda La Puente Teachers Association, on the (Proctor) campus, filed a grievance on March 14, 1984 against Henderson, on behalf of himself and the other teachers who had attended the workshop. Paige's name appeared prominently on every page of the multi-page grievance and his signature was on the last page.

The grievance was expanded to include, besides the Sunday pay issue, complaints regarding Henderson's treatment of employees - accusations of threats of dismissal, hostile conduct, throwing a book at an employee, and demeaning employees during staff meetings.[3] After the grievance was filed, and through the intervention of then-superintendent Russell Ribb, all the employees received pay for having attended the Sunday workshop.

From that point on, Paige's relationship with Henderson deteriorated. Whereas they had previously chatted and communicated in a free and friendly manner, Henderson then became distant and non-communicative. She spoke to Paige only when required to or when he initiated a conversation. She stopped greeting Paige as they passed each other in hallways and upon their first contact of the day. She began

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[3]The record indicates that, although Henderson's conduct toward other employees may have been unfriendly, she and Paige got along well prior to February 1984.

communicating with Paige by written notes or memos even when they were both at work. This practice apparently continued up through March of 1985, when Henderson left him a note to fill out a resignation form, as will be detailed below.

Being an employee of the California Highway Patrol when he was not working part-time for the District, Paige occasionally received temporary employment offers that led to promotions within that Department. In about the fall of 1984, several such offers were presented to him. He turned each of them down because they required that he relocate to another city for an extended period of time (6-7 months), after discussing these with Henderson. He informed her that he was turning them down because they required him to be away for too long and because he wanted to maintain his employment relationship with the District.[4] Therefore, he said he would wait until a promotional assignment of a shorter duration came along. Henderson told him not to worry, that something would come along.

In the spring of 1985, Paige received another opportunity to be promoted to lieutenant, which required that he accept a temporary assignment in Monterey, California for a period of two to three months, beginning on April 1, 1985. Relying on previous knowledge that other employees had been granted leaves for extended periods and upon Henderson's implication that a

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[4]Paige was still working part-time for the District and lived in nearby Diamond Bar, California.

temporary absence due to promotional assignments would not pose any problems, Paige accepted the offer to go to Monterey.[5]

Paige subsequently prepared a memorandum requesting a two-month leave of absence and explaining his reasons therefor. He submitted the request to Henderson in late February 1985, and personally delivered a copy to Adult School Director Don Roth's office. When he presented the request to Henderson, and explained about having accepted the offer to go to Monterey, she told him "we're going to replace you."

At the time Paige delivered a copy of the request to Roth's office, the latter was in conference with someone else. However, Fraley was available to discuss Paige's request. In that discussion, Fraley informed him that he did not have to go the "leave of absence" route, and that "we can do that informally." Fraley informed Paige that all he had to do was to find substitutes to fill his position until he got back and the District could place him (Paige) on "inactive status" in the interim. Paige agreed to proceed as Fraley suggested. Fraley told him that the procedure should be no problem, that he would relate the matter to Roth and that, although Henderson had to be consulted first, Roth would then get back to Paige with the result.

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[5]Paige testified that several other named employees had been granted similar leaves. Other than a stipulation that one employee was on sick or accident leave, the only evidence regarding these is Paige's hearsay accounts, which cannot, by themselves, support a finding. (8 Cal.Admin. Code section 32176.) These are used herein only to explain Paige's conduct.

Rather than hearing from Roth, Paige received a written request from Henderson on March 6 that he complete and submit an attached resignation form by the following day. Although both were present at work during the day, Henderson chose to leave her memo in Paige's box just prior to her departing for the day.

In an immediate responsive memorandum to Henderson, Paige informed her that he was not submitting a resignation form because he did not wish to resign but was very happy with his position and desired to remain in the employ of the District. He added that he wanted to go on inactive status for a short period and to resume his responsibilities upon his return.

About a week later, on March 14, Paige received a letter from Roth, informing him that a leave of absence "is not allowed for temporary employees." Although Paige had not yet resigned, and though there was no reference to Fraley's offer to place Paige on "inactive status," Roth wrote that, "It will be necessary to replace you with someone else."

On March 25, 1985, Paige frantically submitted a memorandum to Roth requesting that he reconsider his decision. In that memo, Paige recounted his discussion with Fraley wherein an accord was reached that he (Paige) would be placed on inactive status. Paige included a list of nine qualified instructors, already in the program, he had recruited to cover his classes during the absence. Each instructor had committed himself/herself to substitute by signing opposite their names

on the first page of Paige's memo.

Paige's request also included a discussion of his protected activities (including his duties as union representative and his grievance against Henderson), Henderson's attitude following that activity, and his fear that they were trying to "get rid" of him.

In response, Roth wrote the following in a letter to Paige dated March 29, 1985:

> There is no authority under which a leave can be granted to other than a permanent certificated staff member.
>
> The authority of site administrator to allow a "necessary absence" or "inactive status" has been limited to two weeks. Failure to report to work is cause for termination and would lessen your likelihood of being rehired; a simple resignation due to other obligations would not.

Roth did not explain the authority under which he could grant a "necessary absence" or "inactive status." Other than Paige's testimony regarding Fraley's representations, the record is devoid of evidence specifying that "leave" policy. It does not appear in the pertinent collective bargaining agreement.

Having already relocated temporarily to Monterey, Paige submitted a conditional resignation to Roth on April 6, 1985. He wrote that it was "with the understanding that I will be rehired and reinstated to my present position . . . upon my return in 60-90 days."

Between late March and mid-April 1985, Roth had been conducting an inquiry about Paige's "request for

reconsideration" of March 25. According to the testimony of Contois Simpson, a colleague of Paige who had committed herself to substitute for a portion of Paige's assignment, she was contacted by Roth about the document. With a demeanor that Simpson described as "very angry," Roth asked her if she had signed Paige's document and whether she had any idea what she had signed. He asked her if she recognized the attached pages that referred to Paige's activity as a union representative and of the problems with Henderson. Simpson replied in the negative.

Roth told Simpson that "Paige actually wanted to get his job back," but that he "would never be rehired by the District." He expressed his displeasure with the fact that Paige "had gone outside the District, including [to] the union."

On April 19, Assistant Superintendent for Personnel James Johnson wrote to Paige informing the latter that the resignation would not be recommended to the board of education because the District did not accept conditional resignations. He asked Paige to immediately tender an unconditional resignation, "or the district will have to take other action based upon your inability to complete your spring assignment."[6]

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[6]Although not clear from the record, it appears that Paige's assignments were covered, during his absence, by a substitute.

Paige submitted a second resignation on April 22, attached to a letter in which he took issue with the notion that conditional resignations were not permitted. He added that, in order to preclude any adverse action on his employment by the District, he was submitting a second resignation, to be effective April 22, but that such did not "vitiate my previously submitted documents and in no way waive any rights I might have." He requested that the entire issue be presented to, and heard before, the board of education. Finally, he asked that the matter be discussed with his union, and that it act as coordinator in the matter.

By letter dated May 10, 1985, James Johnson informed Paige that the board had accepted his resignation, effective April 22, at its meeting of May 9. No mention was made as to whether the board had discussed the matter of the conditional resignation or whether he would be reinstated upon his return. There were no communications between Paige and District administrators between May 10 and early June, 1985.

On June 2, 1985, Paige wrote a letter to Roth, and sent copies to other District administrators including James Johnson, requesting that his employment with the District be reactiviated and that he be assigned his previous duties effective July 1, 1985, by which time his temporary assignment in Monterey would have been completed. There was no response from Roth or anyone else in the administration.

Paige attempted to contact Roth by telephone on July 1, 1985, but was told by a secretary that he would be on vacation until the first part of August. She told Paige that Fraley, who was filling in for Roth, would return the call. When Fraley returned the call on July 3, Paige told him he was ready to be "reactivated" to his former position. In reply, Fraley said that he lacked the authority to accomplish that, but that he (Paige) should talk to Henderson and Roth.

Paige then called Henderson the same day. She told him that Roth did the hiring and the firing in the Program and that she was powerless to act on the matter.

Not having received a response from Roth, Paige again wrote to him on July 30, 1985, advising him of his availability for reinstatement and renewing his requests. In addition to stating his desire to be reactiviated to his former position, Paige asked that his name be restored to the list of substitutes for Traffic Violator School and drug abuse classes, areas in which he had taught before and was credentialed to teach. Although Paige asked for a timely response, Roth did not reply until September 18, 1985.

In the interim, on August 9, 1985, Paige filed a complaint with the Department of Fair Employment and Housing, alleging racial and sex discrimination and unfair labor practices. In support of such charges, Paige included allegations of retaliation by Henderson and others because of his union activity described above. He filed an identical complaint -

labelled "Discrimination Complaint/Grievance" - with the District's governing board, leaving copies at the appropriate office. Also included was a claim that he was forced to resign his position as a result of a conspiracy between Henderson and Roth. Paige received no response from the District to his "Complaint/Grievance."[7]

Roth's entire response to Paige's summer correspondence consisted of the following words in a letter dated September 18, 1985:

> I have reviewed your application for re-employment. You have not been selected as a teacher for the 1985/86 school year.

No mention was made regarding Paige's request to be restored to the substitute list, nor was an explanation given for the denial of employment, or for the delay in responding.

Through his union, Paige filed a formal grievance on September 26, 1985, requesting reinstatement to remedy the District's alleged retaliatory conduct. The District refused to entertain the grievance on the grounds that Paige was no longer "an employee" of the District, as defined by the collective bargaining contract.

James Johnson, by now District Superintendent, did allow Paige and his union representative, Raymond Lopp, to meet informally with Assistant Superintendent of Continuing Education Tom Johnson, about the dispute. Tom Johnson was

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[7]No evidence was offered regarding the resolution of the claim by the Department of Fair Employment and Housing.

Roth's immediate superior.

In the course of that discussion, occurring on about October 1, 1985, Tom Johnson stated that the extent of his investigation into Paige's charges consisted of his review of documents to see "if the papers were in order," and that he had not spoken to any witnesses. Johnson did acknowledge that his review indicated that the supervisors and the administrators had "done something wrong," but stated that he was not about to take disciplinary action against them, nor would he reinstate Paige. He explained that he and his wife had been very good friends with Henderson since she had begun her employment with the District.

Paige was not offered employment in any capacity with the District subsequent to the above date, nor was he informed that he could teach as a substitute. No legitimate reasons were ever given to Paige for the District's refusal to reinstate him.

The District did not call any witnesses to testify about the events, and offered no documents other than a collective bargaining agreement, in support of its case.

III. DISCUSSION

Section 3543.5(a) of the Act prohibits discriminatory action against employees for engaging in conduct protected by the EERA, including,

> [T]he 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.