STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA TEACHERS ASSOCIATION, Charging Party, v. CALIFORNIA VIRTUAL ACADEMIES, Respondent.	Case No. LA-CE-5974-E PERB Decision No. 2584 September 21, 2018

Appearances: Jacob Rukeyser and Laurie Burgess, Attorneys, for California Teachers Association; Jackson Lewis by David Allen and Michael Wertheim, Attorneys, for California Virtual Academies.

Before Winslow, Shiners, and Krantz, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on California Teachers Association's (CTA) exceptions and California Virtual Academies' (CAVA) cross-exceptions to a proposed decision by an administrative law judge (ALJ). As relevant here, the complaint alleged that CAVA violated the Educational Employment Relations Act (EERA)[1] by terminating Stacey Preach's (Preach) employment in retaliation for her exercise of rights under EERA. The ALJ dismissed this allegation after concluding that while CTA established a prima facie case of retaliation, CAVA proved it would have taken the same action regardless of Preach's protected activity.[2]

[1] EERA is codified at Government Code section 3540 et seq. Unless otherwise specified all statutory references herein are to the government code.

[2] The ALJ also dismissed the complaint's other allegation, that CAVA interfered with Preach's rights by ordering her to cease distributing union materials during a professional

Having reviewed the proposed decision and the entire record in light of the parties' submissions, we reverse the proposed decision and find that CAVA violated EERA by retaliating against Preach.

FINDINGS OF FACT

CAVA describes itself as a network of 11 charter schools operating throughout the State. From 2007 until her termination in September 2014, Preach signed successive one-year employment contracts to teach high school art for one of the CAVA schools, CAVA at Kings.

The CAVA schools are called "virtual" academies because their teachers educate students from separate physical locations using information technology. This technology includes both "synchronous" and "asynchronous" education tools. Synchronous instruction methods include internet-based meeting software, which allows students and teachers to have live verbal or text-based conversations, or to participate in interactive visual presentations. Asynchronous tools include "virtual classrooms," where teachers leave lessons, homework, and announcements for students to review and complete on their own time. Teachers and students may also communicate via e-mail, telephone, and text message.

Each student also has a "learning coach," typically his or her parent. Learning coaches log student attendance, provide information to the teacher about the student, and attend meetings.

CAVA's High School Programs

As in traditional high schools, CAVA schools offer high school students instruction in both core subjects and electives. Each high school teacher provides subject-specific instruction, and is also assigned around 30 "homeroom" students. Teachers monitor "the big

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development meeting. Neither party's exceptions concern this allegation, so it does not concern us. (PERB Reg. 32300, subd. (c).)

picture" for their homeroom students: attendance, setting and meeting personal goals, and progress towards graduation. Each teacher is officially employed by an individual CAVA school, but may be assigned homeroom students from other CAVA high school programs.

Teachers at the CAVA schools are organized into teacher teams based on subject matter. During the 2013-2014 school year, each teacher team was supervised by a department coordinator. Department coordinators are also typically involved in teacher discipline. During the 2013-2014 school year, Preach's department coordinator was Jason White (White).

Department coordinators are directly supervised by regional program coordinators. Although they do not directly supervise teachers, regional program coordinators may assist department coordinators in that work, and they are primarily responsible for teacher discipline, including termination. During the 2013-2014 school year, Stacie Bailey (Bailey) was the regional program coordinator who supervised White.

CAVA employs two high school directors, who oversee all CAVA high schools and supervise the regional program coordinators. The directors do not directly support or supervise teachers. At the times relevant to this case, the high school directors were Cathy Andrew (Andrew) and Mina Arnold (Arnold). Andrew and Arnold reported to April Warren (Warren), CAVA's academic administrator. Warren reported to Katrina Abston (Abston), CAVA's head of schools.

CAVA's Discipline Procedures

The CAVA employee handbook includes a section entitled "GUIDELINES FOR APPROPRIATE CONDUCT," which lists inappropriate behaviors including "[f]alsifying employment or other Company student records."

The handbook also describes CAVA's discipline procedures. It states that employees may be disciplined for unsatisfactory performance, including violating the "Guidelines for Appropriate Conduct." The handbook further states:

> Before or during imposition of any discipline, employees may be given an opportunity to relate their version of the incident or problem at issue and provide any explanation or justification they consider relevant.
>
> Where appropriate and as circumstances may dictate, supervisors will follow a process of progressive employee discipline.

The handbook goes on to list different forms of discipline, in order of severity: (1) verbal counseling; (2) written counseling; (3) suspension; and (4) termination.

Finally, the discipline section of the handbook states:

> Notwithstanding the potential for less severe discipline before termination, the Company reserves the right to administer discipline in such a manner as it deems appropriate to the circumstances, and may, in its sole discretion, terminate an employee without prior discipline or without following a particular order of discipline.

Abston testified that CAVA does not always use progressive discipline, and identified falsification of student records as a matter that "always leads to immediate termination." She testified that there were other instances where CAVA terminated employees for falsifying student records, but did not identify the employees involved or specify the nature of their offenses. Andrew agreed that falsifying records was serious enough to justify immediate dismissal. Bailey similarly said that she had moved to terminate a teacher for severe misconduct without imposing progressive discipline. The example she gave was a teacher who left a test site while administering a state high school exit exam.

Teacher discipline is primarily the responsibility of regional program coordinators, in consultation with CAVA's human resources (HR) consultants. The high school directors and

the head of schools are not usually involved. Andrew testified that as a high school director, she had been involved in no more than five teacher terminations, aside from Preach's. In each of those other cases, Andrew received input from the regional program coordinator before making the decision to terminate, but she did not involve Abston in the decision. Abston likewise testified that she is not usually involved in teacher discipline, but is notified when the misconduct at issue is "severe."

The Individualized Learning Plan

Each CAVA high school student has an individualized learning plan (ILP). CAVA introduced the ILP process in the 2012-2013 school year. The ILP includes the student's transcript, test scores, courses taken, courses planned, and responses to a questionnaire about his or her interests and goals. The ILP process also includes a conference between the student and their homeroom teacher, to discuss the aforementioned documents in the context of the student's educational goals. This ILP conference is referred to in the record variously as the "live meeting," or the "meaningful conversation." In it, the homeroom teacher is to provide direct guidance and feedback about the student's progress toward their personal goals. According to Andrew, the live interaction between teacher and student is "where learning and engagement occur[]." She described the meeting as the "centerpiece" of the ILP process, because of the opportunity for teachers and students to interact on a personal level. In her view, this interaction improved student commitment toward the educational program. However, that level of engagement was not always realized in practice. Bailey said that she was once asked to complete around 20 ILP conferences in a single day, leaving time for only around 3 minutes per meeting.

The Fall 2013 ILP Process

When it was initially introduced, the ILP process was managed primarily by counseling staff. In the Fall 2013 semester, teachers began working with counselors on ILPs. Counseling staff gathered student grades, scores, and other records; teachers used those documents during the live conference conducted using CAVA's online meeting software. Teachers recorded all ILP conferences using the software system and maintained those recordings along with other student records. Teachers were required to hold conferences for all students and were expected to reach out to non-responsive students and attempt to hold the live meeting. Bailey testified that teachers were expected to call once, e-mail once, and call again. If the student remained unresponsive, the teacher could record the meeting without student participation. Once recorded, with or without student participation, teachers forwarded the recording to counseling staff, who finalized the ILP.

By November 20, 2013, Preach had completed the ILP conferences for all of her homeroom students, with the exception of one, SK.[3] In an e-mail on that date, White reminded Preach that she only needed to make one attempt to hold the conference, and "[i]f they don't show, still record it and it's done. Their participation is nice, but not mandatory this semester." Preach responded that SK's family "is very involved with management and K12 in VA.[4] I want to make sure I am giving them every opportunity. I have a week until Thanksgiving and I will get it by the deadline. Thank you for your concern. I want to make sure we handle this one with extra care."

[3] For privacy reasons, we identify the student by his initials.

[4] K12, Inc. is a curriculum and management company that provides services to the CAVA schools.

The Spring 2014 ILP Process

In Spring 2014, CAVA further increased the teacher's role in the ILP process. In addition to scheduling and holding ILP conferences, teachers also collected the student documents, updated the records, and finalized the ILP in CAVA's system. CAVA developed written instructions for the new process that semester, together with a companion tutorial video. CAVA also made a set of templates for teachers to use when communicating with students, scheduling the ILP conference, and holding the conference itself. These materials were sent to most department coordinators on December 20, 2013, right before the end of the Fall 2013 semester.

The Spring 2014 ILP process did not go smoothly. This was primarily because many of the required student documents were not immediately available. For instance, students' grades and test scores from the prior semester were sometimes missing or not recorded properly. This delayed the entire process because those records were needed for the ILP conferences. Teachers also complained that they were overworked with learning and completing the new duties during the already busy early semester period. As a result, many teachers failed to meet established deadlines for completing the ILPs, causing CAVA to push the deadline back several times. By the end of the semester, some teachers still had not completed all of their ILPs.

There was also some confusion over holding and recording ILP conferences when teachers were unable to reach the student or the learning coach. Whereas they had been instructed in Fall 2013 to reach out to the student/learning coach via one telephone call, one e-mail, and one additional telephone call before recording the conference without the student present, teachers were unsure how many attempts were required for Spring 2014. Senior

CAVA management later clarified that teachers were expected to e-mail a proposed meeting time for the ILP conference and then follow-up with at least two more e-mails and a telephone call.

In addition, the new instructions required teachers, not counselors, to complete the ILP process after the conference, by classifying each student's ILP as "Complete," or "In-Progress," depending on whether additional steps or documents were still needed on the ILP. According to the Spring ILP instructions:

> "**HS ILP – Qtr. 3 In-Progress**": This template would be used starting 1/16/14 – 3/24/14. Next, the "In Progress" would represent that either something is incomplete on the ILP Forms OR that the family/student did not show up for [the] conference. This applies to the K-Mail template to be used as well. Both the [learning coach] and [the] Student do not need to attend conference at the same time; one or the other is fine.
>
> "**HS ILP – Qtr. 3 Complete**": This template would be used starting 1/16/14 – 3/24/13 [sic]. Next, the "Complete" would represent that the ILP Forms are complete AND the family and/or student attended the conference. This applies to the K-Mail template to be used as well.

After recording the ILP conference, teachers uploaded the recording into CAVA's system, and then created a "note" using one of the two templates.

Teachers who recorded the ILP conference without the student or learning coach present were required to send the student and learning coach a link to the recording. Teachers were expected to continue reaching out to the student and learning coach with the goal of having some form of live conversation about the student's ILP. According to Bailey, the follow-up conversation could be informal and brief, meaning teachers could mark an ILP "Complete" if the student verbally acknowledged reviewing the ILP recording and indicated that he or she had no questions about the conference. If a teacher created an "In Progress" note

and later held the live meeting, the teacher was expected to create a new note using the "Complete" template.

In a February 6, 2014 e-mail regarding teachers' progress on their ILPs, Andrew noted that teachers had only completed 52 ILPs, far below expectations. She also said that "[a]n additional HS ILP was completed, but with the wrong template – this will need to be corrected. It is important that ILP's be completed correctly." Andrew acknowledged that there was "more than one" instance where an incorrect template was used to complete the ILP.

In another e-mail from February 6, 2014, Bailey explained to senior CAVA management that she had been instructing the teachers under her chain of command to "use the In Progress note if the family does not attend." She asked the group whether they should instead be using the "Complete" note in those instances. Abston replied that "[i]f the family doesn't attend, then the ILP is not complete." Similarly, Warren added, "The whole point of this is that there is a conversation with the student." In a separate e-mail conversation that day with the same participants, Arnold said, "We have always left [ILPs] marked as in progress, so let's please continue to do so unless I hear otherwise."

On February 12, 2014, Bailey e-mailed the teachers in her chain of command a message entitled "In-Progress ILPs." Bailey reiterated that the ILP instructions required teachers "to use the In-Progress note for ILPs that were either missing a document or not attended by the family." Bailey also stressed the importance of having a "meaningful conversation" with each student. She directed the teachers to continue reaching out to families who did not attend the ILP conference and that the teacher "will enter a new complete note once this conversation happens with the family. *No ILP can be considered complete without a live conversation*." (Emphasis added.)

In subsequent e-mails that day to senior CAVA management, Bailey expressed that the teachers she supervised were both confused and frustrated by the ILP process. She stated that in Fall 2013, "in progress ILPs were considered done and that is how we initially messaged them this semester." Two days later, Arnold responded that "for the recordings that [teachers] have done, they need to contact the family and have a live conversation with them to mark them as complete." Andrew also responded that "the ILP is not a box-checking activity. It is about the live conversation with the student and the connection this builds."

On February 25, 2014, Bailey sent a "Frequently Asked Questions" (FAQ) document to the teachers under her supervision elaborating on some common areas of confusion about the Spring 2014 ILP process. The FAQ sheet reiterated which template to use as follows:

- Q3 In Progress if no show or missing doc
- Q3 Completed if attended and all docs

On March 7, 2014, after it became clear that teachers were not completing ILPs at expected rates, Bailey e-mailed her concerns to senior CAVA management that teachers were unable to shift many ILPs from "In Progress" to "Complete" because students and learning coaches were recalcitrant in participating in the live meeting. Andrew responded that "in progress is okay . . . but complete is complete, whether or not it's in the teacher's control."

Bailey testified that during the Spring 2014 ILP process, approximately half of students had "[n]o recorded live conversation." Andrew also acknowledged that "[w]e know that there are teachers who failed to complete the ILP," and that none of those teachers were disciplined.

Preach's ILPs in Spring 2014

Most CAVA teachers received the Spring 2014 ILP instructions from their department coordinators around December 20, 2013. White, however, did not receive those instructions

until around January 16, 2014, the start of the Spring 2014 semester. Preach received the instructions from White sometime thereafter.

Preach was assigned 33 homeroom students in the 2013-2014 school year, including SK. On February 5, 2014, Preach e-mailed her homeroom students and learning coaches asking them to complete the new ILP questionnaire for Spring 2014. Her message mostly followed the standard template provided with the ILP instructions, except that Preach added: "If you wish to forgo the meeting, please return your completed questionnaire and notify your [homeroom] teacher."

SK's learning coach, KK,[5] responded to Preach's e-mail asserting that SK had already completed the questionnaire on January 16, 2014. Preach responded that SK may have completed the Fall 2013 ILP questionnaire, but that the Spring 2014 questionnaire was different. At hearing, Preach said that her students were confused about why they were going through the ILP process again so soon after completing the Fall semester ILP late in 2013. On February 6, 2014, she e-mailed her homeroom students explaining that CAVA was starting the ILP process anew in the Spring semester and announced that students who returned the new ILP questionnaires by the following week would be entered into a drawing for a prize Preach had purchased with her own personal funds.

Preach testified about participating in an e-mail conversation with her supervisor, White, on February 21, 2014. White asked Preach to update him on the status of her ILPs. He also reiterated the difference between "Complete" and "In Progress": "ILP's Complete: meaningful conversation had and all documents in families hand. ILP's In Progress: recorded but they were a no show and haven't been able to have that conversation yet[.]" In a

[5] To safeguard SK's privacy, we use KK's initials. KK is SK's mother and is employed by CAVA as a curriculum specialist. She is also on the governing board for CAVA at Sutter.

subsequent message to Preach, White offered to extend the expected deadline for completing her ILPs. On February 25, 2014, Preach responded that an extension was not necessary and that she expected to complete all of her ILPs later that day. Senior CAVA management were not included in this e-mail conversation.

On February 25, 2014, at around 1:20 p.m., Preach e-mailed SK, and other students who had not yet completed their ILP conferences: "I have a few openings for ILP meetings today. If you and/or your [learning coach] would like to reserve one of these spots, please let me know." Neither SK nor KK responded that day. Preach then proceeded to record SK's ILP conference without either SK or KK present. At around 3:42 p.m., Preach entered the recording into CAVA's system using the "Complete" template. At 5:44 p.m., Preach e-mailed SK and KK again stating: "Hello [SK]! Attached is your Spring ILP paperwork. Please let me know if you have any questions." The e-mail contained either attachments or links to the components of SK's ILP, including all required student records and the ILP recording she had made alone earlier that day.

KK responded to Preach's e-mail on February 27, 2014, making herself available for the ILP conference. KK did not recall any further communication from Preach about SK's ILP that semester. Preach testified that she spoke with SK and KK after February 25, but did not recall ever discussing SK's ILP.[6]

Preach testified that she participated in another e-mail conversation with White in May 2014. White again requested an update on Preach's progress towards completing her ILPs. Preach told White that a number of her remaining "In Progress" ILPs were because the

[6] Preach testified that she kept notes in which she tracked her communications with her students, but that she destroyed these notes after her termination because they contained student names.

students had never returned the initial questionnaire. On May 6, 2014, White replied, "I have great news for you: If you held the meeting (and the family was there or you have since talked to them) and have the transcript, test scores, and four year plan, then you can mark it complete without the questionnaire!" Preach said she continued to work on getting her remaining students to complete the questionnaire.

Preach testified that she believed she was in compliance with all requirements for the ILP process, and that she believed White was, or was at least capable of, double-checking all of her work.

The Union Organizing Campaign

On April 28, 2014, a group calling themselves the "CAVA Organizing Committee," e-mailed CAVA's leadership, including both Abston and Andrew. The e-mail stated in relevant part:

> In recent years, we have become increasingly concerned that some decisions made by CAVA negatively impact our students and our profession. Frequent policy changes, shifting class rosters, changes in responsibilities and increased workload make it harder to provide the education our students deserve. Though our dedicated colleagues are committed educators who work long hours and struggle to serve their students, it feels like it is never enough.
>
> After talking with hundreds of fellow CAVA educators from across the state, we have decided that it is time for a change. Specifically, we believe educators who work at CAVA ought to have a stronger voice in decisions that impact our school, our students and working conditions. That is why we have decided to organize a union here at CAVA with the California Teachers Association.

Preach was one of around 40 co-authors identified in the e-mail. Abston and Andrew acknowledged receiving the e-mail.

On May 6, 2014, Abston e-mailed the teachers and other staff at all CAVA-affiliated schools stating:

> Good Afternoon CAVA Staff,
>
> It has come to my attention that many of you received an unsolicited email last night in addition to the continued unwanted phone calls. I once again would like to apologize for the fact that one of our CAVA colleagues has taken our personal information and shared it with others, without our consent. Many have asked if this was legal and I would think that it is not; at minimum however this was a breach of our trust in one another. We truly regret the inconvenience that this non-authorized use of our contact sheet has caused.
>
> Please do not be intimidated nor persuaded by the emails; the continuous and disruptive phone calls nor the untruths that are circulating from them. You are absolutely NOT obligated to respond or participate in any way. We know that the union will use lies and any trick in the book to get you to sign their petition so that CTA can start collecting your dues. When looking at the campaigns that they have supported and the position that CTA has taken **AGAINST** charter schools, it is clear that their motivation is for dues collection and not support of the charter school employee. It is somewhat dumbfounding to me why one would ever wish to support an organization that wants to cut the funding and close charter schools.
>
> As always please contact me with any questions you may have.
>
> Warm Regards,
>
> Katrina

On or around May 9, 2014, CTA filed a petition with PERB to represent a unit of all rank-and-file teachers and other non-supervisory certificated positions. Abston received a copy of that petition.

In or around July 2014, a group identifying itself as the "CAVA Organizing Committee California Virtual Educators United, CTA/NEA" sent Abston a letter stating that PERB had determined that a majority of all CAVA-affiliated teachers supported the union petition. The

group requested that Abston voluntarily recognize the union. Preach was one of around 50 co-authors. Andrew also acknowledged seeing the letter.

Summer 2014 Regional Training Sessions

On August 11, 2014, Preach attended an in-person regional training session for CAVA teachers. To show her support for CTA's organizing drive, Preach wore yellow clothing and a button with the phrase "I'M IN" to signify her support for CTA's recognition petition. She encouraged other teachers to do so as well.

Preach attended another CAVA-sponsored training session on August 18, 2014 where she again wore her union button. Preach and other union organizers set up some tables with baked goods, coffee, and materials supporting the organizing effort. Andrew was also at the training and acknowledged seeing Preach wearing her union button at some point. The ALJ found that Andrew likely observed Preach wearing the union button at either the August 11 or the August 18 training, due to the relatively few in-person interactions among CAVA staff.[7] There is also no dispute that Andrew knew the button was a demonstration of support for CTA.

On August 19, 2014, KK attended a CAVA training session in her role as a CAVA curriculum specialist. At that session, KK spoke with Andrew about SK's education. KK said she was pleased with SK's new homeroom teacher for the 2014-2015 school year and that SK had had a "wonderful ILP conference" with her recently. KK said that SK's homeroom teacher in the 2013-2014 school year, i.e., Preach, did not conduct a live ILP conference in Spring 2014.

KK did not request that any action be taken against Preach. In a sworn declaration submitted with CAVA's response to the unfair practice charge, Andrew averred that KK was

[7] Neither party excepted to this finding.

"upset to learn that she and [SK] were denied the benefit of a full ILP process during the 2013-2014 school year." However, at hearing Andrew admitted that KK was not upset or angry about the lack of a live ILP conference.

Andrew testified that following this conversation, she decided to investigate "the concern that the ILP had not been done."

Announcement of Majority Support

On August 28, 2014, the CAVA Organizing Committee e-mailed teachers stating that PERB had verified that a majority of staff supported the recognition petition and that CAVA was contesting that determination. The e-mail listed both a website and an e-mail address to "stay informed about Union news and communication." Preach was one of around 30 listed co-authors. Andrew testified that she saw this e-mail around the time it was sent.

Andrew's Investigation of Preach

Andrew reviewed various records as part of her investigation of Preach. Those records showed that Preach recorded SK's ILP conference on February 25, 2014, and designated the ILP as "Complete" that same day before sending the recording to SK and KK. Andrew also reviewed the conference recording and found that neither SK nor KK had participated. Andrew reviewed Preach's e-mails with SK and found that no ILP conference had been scheduled via e-mail. She also saw Preach's message suggesting to all her students that they could forgo the ILP meeting, and she saw the lack of any follow-up e-mail after Preach e-mailed SK a copy of the conference recording. Andrew also reviewed telephone logs, where teachers may—but are not required to—make a record of significant conversations with students. There was no record of a live meeting scheduled or held via telephone.

During the hearing, the parties stipulated that Andrew also reviewed some ILP records for some of Preach's other homeroom students, but that her review of those records did not form the basis of CAVA's eventual termination decision. The parties also stipulated that Andrew did not review Preach's communications with KK.

Andrew did not meet with Preach during her investigation, nor did she direct others to do so. Andrew also did not speak with Preach's supervisor, White, or with White's supervisor, Bailey, and she did not review any e-mails between Preach and White.

Based on her investigation, Andrew concluded that Preach should not have designated SK's Spring 2014 ILP as "Complete," because she had conducted the ILP conference by herself and had not spoken to SK or his coach, KK.

The Decision to Terminate Preach's Employment Contract

On September 3, 2014, Andrew e-mailed Abston and Warren, stating that she "wanted to reach out" to Abston "on this matter." At hearing, Andrew admitted that she had not involved Abston in previous termination decisions. When asked to explain why she had done so this time, she variously responded, "Why wouldn't I?" and "No particular reason."

In her e-mail, Andrew described her conversation with KK, her resulting decision to investigate Preach, and her findings.

Abston replied seven minutes later: "Are you stating that she lied or falsified these documents? If so, we would need to move forward with termination as that is what occurs with falsification of documents."

Andrew responded later that day, stating, "I want to be careful here. [KK] is an engaged parent who said that the live conversation was not offered to her." Andrew explained her conclusion that Preach "had no intention of having a live conversation" after marking the

ILP complete and that "this indicates that once the ILP was recorded, it was, in her mind, considered complete."

Andrew, Abston, and Warren exchanged further e-mails, some of which included CAVA's HR consultants, Casey Johnen (Johnen) and Cara Gartman (Gartman). Johnen asked how CAVA could prove that Preach actually falsified records, specifically that no live meeting occurred. Andrew reiterated that Preach had marked SK's ILP "Complete" before sending him a copy of the ILP conference recording. She admitted being unable to prove definitively from the documents that Preach did not call SK or his learning coach to schedule the conference, but expressed certainty that KK would have participated in the ILP meeting if one had been offered. At no point during this e-mail exchange was there any mention of the widespread problems during the Spring 2014 ILP process.

According to the e-mail exchange, Johnen and Gartman were ambivalent about whether Preach should be terminated, stating "Ok, then we could go either way with this one." Abston, however, favored termination. On September 8, 2014, she stated, "If we are 100% sure and [KK] is willing to sign something, if needed, that the meeting did not take place NOR did Stacie [*sic*] attempt to schedule one, I would like to terminate." Shortly after that, Abston e-mailed that she had spoken with KK, who was "absolutely willing to sign an affidavit if needed."

Abston later reiterated her desire to terminate "if there are no hesitations from the group." After Andrew responded that she had "no reservations," Abston e-mailed Johnen:

> Please let us know what you need and when this will occur. This will need to be coordinated very closely with tech. *This is not going to go well.* I think that during the call [Gartman] or [Johnen] should quote the ethic infraction and how that could damage your credential. I'm sure that Jolene could give you the exact wording. This would be same that we used against that

> man that was termed 2 years ago for falsifying work records. *She needs to know this is serious and not retribution for something else. . . .*

(Emphasis added.)

The Termination Statement

At Johnen's direction, Andrew drafted a formal termination statement, which was finalized on September 11, 2014. Andrew testified that she had prepared similar documents in the past, but that discipline was not among her typical job duties. In the termination statement, Andrew asserted that Preach "falsified ILP records during Spring 2014." Andrew detailed her investigation, including the fact that Preach recorded SK's ILP conference alone and then listed the ILP as "Completed" before sending him a copy of the recording. She also stated that CAVA informed Preach that "ILPs must have a live conversation in order to be marked as complete." She stated that Preach was informed of this requirement both in CAVA's training materials and in an e-mail from Bailey dated February 12, 2014.

Abston and Gartman spoke with Preach by telephone on September 11, 2014. Gartman informed Preach that her employment was being terminated. Preach requested union representation for the discussion, but Gartman and Abston denied this request. They explained that no union was recognized at the time, that the decision to terminate was already final, and that the conversation would not be postponed. Abston said that if Preach wanted to hold another conference at a later date, CAVA would consider it. Preach was sent a copy of the termination statement.

During the hearing, Andrew acknowledged that Preach's actions would not have been considered falsification if Preach had used the "In Progress" template for SK's ILP. Andrew also acknowledged that other teachers who used the wrong template had been allowed to

correct their mistakes. Preach had not been given the opportunity to do this, according to Andrew, because the error was discovered during a subsequent school year.

DISCUSSION

I. Standard of Review of a Proposed Decision

Our review of a proposed decision is de novo. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.) Thus, we may draw from the factual record inferences contrary to the ALJ's, and we may reverse the ALJ's conclusions of law. (*Ibid.*) However, we defer to the ALJ's findings of fact that incorporate credibility determinations, unless there is evidence to support overturning them. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 12.)

II. Retaliation

The complaint alleges that CAVA violated EERA section 3543.5, subdivisions (a) and (b) by retaliating against Preach for her exercise of rights guaranteed by EERA. To establish a prima facie case of retaliation, the charging party must prove 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 adverse action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*).) If a prima facie case is established, the burden then shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action regardless of the employee's protected activity. (*Santa Ana Unified School District* (2012) PERB Decision No. 2235, p. 13.)

A. Prima Facie Case

1. Protected Activity and Employer Knowledge

As the ALJ correctly found, Preach engaged in protected activity by co-authoring e-mails from the union organizing committee to other CAVA employees and to Abston, and by wearing a pro-union button and distributing union materials at the CAVA training sessions on August 11 and 18, 2014.

The ALJ also correctly found that Andrew and Abston admitted seeing the correspondence co-authored by Preach, and that Andrew admitted seeing Preach wearing a pro-union button at the training sessions.[8]

We also find that Abston had a specific awareness of Preach's organizing activity. Abston testified that she did not know most of the people listed on the organizing committee's correspondence, and "didn't know Ms. Preach before all of this started." We are not required to accept such a self-serving denial, and may instead find employer knowledge based on "circumstantial evidence and inferences drawn from the record as a whole." (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13 (*Palo Verde*).) Abston's denial that she knew Preach or was aware of her organizing activity is especially unconvincing in light of her warning that the telephone call to inform Preach of her termination "is not going to go well," and that Preach would need to be convinced that "this is serious and not retribution for something else." Of course, this can be expected for almost any termination, and it seems unlikely that CAVA's senior management and human resources consultants needed to be

[8] CAVA attempts to downplay the significance of Preach's pro-union button by asserting that "there is no evidence that this button identified any labor organization, or any union organizing drive, either expressly or by reference." The ALJ found, however, that Andrew understood the button to be supportive of CTA's organizing effort. CAVA did not except to this finding, and we find no basis to disturb it.

informed of this. In the absence of another explanation—and CAVA has not offered one—we infer that Abston was not simply stating the obvious. Rather she had reason to believe that the telephone call with Preach would be uniquely unpleasant, and that Preach would think her termination was "retribution for something else." And, also in the absence of another explanation, we infer that this "something else" was Preach's organizing activity.[9]

2. Adverse Action

The ALJ also found, and there is no dispute, that the termination of Preach's employment was an adverse action. (See, e.g., *Jurupa Unified School District* (2015) PERB Decision No. 2450, p. 7 (*Jurupa*).)

3. Unlawful Motive

We turn next to the evidence of unlawful motive, which can be established "by either direct or circumstantial evidence, or a combination of both." (*Omnitrans* (2010) PERB Decision No. 2121-M, p. 10.) When relying on circumstantial evidence, as CTA is here, the charging party must prove: (1) close timing between the protected activity and the adverse action; and (2) some other facts indicating an unlawful motive, such as disparate treatment, departure from established procedures, a cursory investigation, or providing either no explanation for the action or multiple, contradictory explanations. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 29-30.)

[9] Further evidence of Abston's knowledge was supplied by Preach's testimony that during the August 11, 2014 training session, she overheard Abston remarking on Preach's involvement in the organizing campaign. This testimony was uncontradicted; Abston was not recalled to the stand to dispute it. Although CAVA attempted to discredit Preach's testimony by asking Preach about the number of CAVA teachers and the likelihood that Abston would have recognized or remembered Preach, we find this effort unavailing and credit Preach's testimony.

a. Timing

CTA has established suspiciously close timing. Preach began her organizing activities around April 2014, and she engaged in visible protected activity by wearing a union button and operating CTA's information table at a CAVA-affiliated training at two training sessions in early August. The latter of these training sessions took place just a day before Andrew decided to investigate whether Preach had properly completed SK's ILP. Moreover, CAVA terminated Preach on September 11, 2014, two weeks after Preach co-authored the August 28, 2014 e-mail update about the union campaign.

CAVA claims the record establishes only a "very attenuated" five-month gap between Preach's initial protected activity and her termination. We reject this approach, which improperly ignores Preach's subsequent protected activity. In determining close timing, the Board looks at the dates of all protected activity, not just the earliest. (See *County of Riverside* (2009) PERB Decision No. 2090-M, p. 35.) The record shows that Preach engaged in protected activity throughout the five months leading up to her termination, including some immediately before Andrew commenced her investigation. This close timing supports a strong inference of unlawful motive. (See *Los Angeles Unified School District* (2012) PERB Decision No. 2244, p. 10.)[10]

b. Other Circumstantial Evidence

There is extensive additional evidence of unlawful motive in this case. We begin with the exaggerated and shifting justifications for Andrew's initial decision to investigate Preach. (See, e.g., *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision

[10] In any event, a five-month lapse of time is sufficient to establish a prima facie case. (See, e.g., *Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H, pp. 12-13 [lapse of between 6 and 7 months "minimally sufficient" to support prima facie case].) CAVA ultimately does not dispute this.

No. 2031-M, p. 18; *Oakland Unified School District* (2007) PERB Decision No. 1880, p. 13.) Andrew's sworn declaration in CAVA's response to the charge attested that KK was "upset" that SK did not receive the benefit of a live conference for his Spring 2014 ILP. But Andrew admitted at hearing that this was not true; KK was not upset, did not complain, and did not request an investigation. Andrew thus exaggerated KK's statements about the Spring 2014 ILP in an attempt to justify the decision to investigate Preach as responding to a serious parental complaint. Moreover, Andrew's decision to investigate the "concern that the ILP had not been done" is suspicious in light of Andrew's own acknowledgment that many ILPs had not been completed. Although Andrew testified that she investigated only if a parent raised an issue, the only parent who did so was KK. Thus, Andrew's explanation merely leads back to her suspicious characterization of KK's statements.

The manner in which Andrew conducted her investigation was also suspicious. (See *North Sacramento School District* (1982) PERB Decision No. 264, p. 26 [cursory or inadequate investigation]; *Santa Clara Unified School District* (1979) PERB Decision No. 104, p. 15 [departure from established procedures].) The ALJ found that CAVA undertook only a superficial investigation before terminating Preach, based on the fact that CAVA: (1) did not interview Preach, or explain its failure to do so; and (2) did not interview either of Preach's supervisors, Bailey and White, or otherwise involve them in the decision-making process.

CAVA's exceptions to these conclusions are unpersuasive. It claims that "Preach herself declined a chance to give her side of the story," relying on Abston's testimony that Preach did not respond immediately to Johnen's attempts to schedule the termination meeting. But CAVA cites no evidence that this was a meeting to allow Preach to give her side of the story. Quite the contrary: when Preach did respond later the same day and requested union

representation, she was informed that the termination decision was already final and the conversation would not be postponed.

CAVA also argues, based on *City of Santa Monica* (2011) PERB Decision No. 2211-M (*Santa Monica*), that CTA failed to show that CAVA had a routine practice of interviewing witnesses in record falsification cases. In *Santa Monica*, the Board concluded that the failure to interview a probationary employee or witnesses to the employee's purported misconduct was not evidence of unlawful motive, where there was videotape of the employee's conduct, and it was not shown that the employer typically interviewed employees under those circumstances. (*Id.* at p. 15.)

We disagree that *Santa Monica*, *supra*, PERB Decision No. 2211-M, applies here. As the ALJ noted, once an employer undertakes an investigation into alleged misconduct, its failure to conduct the investigation in a fair and impartial manner can be evidence of nexus. (*Woodland Joint Unified School District* (1987) PERB Decision No. 628, p. 6, fn. 3.) Similarly, when an employer interviews only witnesses against the employee, and not others who might offer a competing version of events, the Board has found a suspiciously cursory investigation. (*Jurupa*, *supra*, PERB Decision No. 2450, p. 23 and proposed decision at p. 32.) Here, CAVA did interview one witness: KK. Specifically, it was Andrew's discussion with KK that prompted the investigation, and Abston spoke to her again to confirm her willingness to "go on record" that Preach never offered SK or KK an ILP meeting. And despite declining to interview Preach, or her closest supervisors, White and Bailey, Andrew had no trouble drawing conclusions about what was "in [Preach's] mind" when she uploaded the templates for

SK's ILP.[11] Such a one-sided investigation suggests that CAVA was not interested in obtaining evidence that might conflict with its desired result.

As for the failure to involve Bailey or White in the decision-making process, CAVA argues that there was insufficient evidence of a practice of regional program coordinators, such as Bailey, being involved in termination decisions. The evidence does not support this argument. CAVA claims that Bailey testified that the 2013-2014 school year was the first in which regional program coordinators had authority to make disciplinary decisions. In fact, Bailey's testimony was that regional program coordinators were always responsible for making the termination decision, but that 2013-2014 was the first school year in which regional program coordinators were responsible for making the *telephone call* to inform teachers of their termination. Moreover, CAVA's failure to interview White was a particularly stark departure from impartial investigation procedures, given that White was an integral witness to Preach's handling of her Spring 2014 ILPs.

Adding to the suspicious nature of the decision-making process was the unexplained involvement of Abston. Abston testified that she would become involved where the misconduct was severe, and offered falsification of records as an example of severe misconduct. But Andrew did not explain her decision to involve Abston by reference to the severity or type of Preach's purported misconduct. Andrew's initial e-mail to Abston provided

[11] Consulting White or Preach, for instance, might have revealed to CAVA Preach's knowledge that KK was a board member and her earlier insistence on giving KK and SK every opportunity to fully complete the Fall 2013 ILP. It also might have revealed Preach's belief that White was double-checking all of her work.

The ALJ hypothesized that White was not consulted because he was no longer employed by CAVA when Andrew conducted her investigation. This explanation was not offered by CAVA, and, as CTA points out, is not supported by the evidence. Bailey testified that White was not offered a department coordinator position for the 2014-2015 school year. There was no evidence that White was no longer employed by CAVA.

no explanation for why she "wanted to reach out" to Abston "on this matter"; it is not even clear that Andrew believed at that point that Preach's conduct could be classified as falsification of records. And when asked at hearing to explain why she had involved Abston, Andrew's first response was rhetorical ("Why wouldn't I?") and her second was literally "[n]o particular reason."

We also find further evidence of unlawful motive when Abston suggested that Preach be informed that her action could "damage" her teaching credential. The ALJ declined to rely on this statement as evidence of nexus because it occurred only in internal discussions and was not ultimately communicated to Preach. We acknowledge that management officials must have leeway to debate personnel decisions without fear that any slight misstatement will lead to a finding of unlawful motive. Still, we cannot endorse a categorical rule making internal discussions off-limits. Abston's statements to other CAVA managers are probative of the issue—Abston's state of mind and motivation for terminating Preach.

Here, CAVA introduced no evidence that Preach's purported misconduct could affect her credential, nor did it attempt to explain why Abston asserted that it could. In the absence of a credible and innocent explanation, we infer that Abston either sought to bolster the case for termination or to implicitly threaten Preach with additional harm if she challenged the termination. The fact that this assertion was not passed along to Preach *is* relevant—it would be stronger evidence of unlawful motive if CAVA had actually communicated such an unfounded threat to Preach—but Abston's statement nevertheless provides at least some evidence of unlawful motive.

Abston's statement included still more evidence of unlawful motive that the ALJ did not consider. Abston expressed certainty that the termination was "not going to go well," and

that Preach would need to be convinced that "this is serious and not retribution for something else." As we have already explained, we infer, in the absence of any attempt to explain these statements, that "something else" referred to Preach's union activity. Abston's impulse to voice these concerns is curious, given the fact that Abston made her comments to other high-level managers and HR staff (in other words, those least likely to need a reminder that an employee discharge might result in a legal dispute), as well as the lack of evidence that Preach was unusually litigious or disputatious. We therefore view Abston's remarks as an instance of protesting too much, suggesting an unlawful motive.[12]

We find further evidence of unlawful motive in Andrew's admission that Preach might have been afforded the opportunity to correct her use of the wrong template if it had been discovered earlier. This option was not available, according to Andrew, because it was not discovered until a new school year had begun. Andrew did not explain why the passage of time transformed a correctable mistake into an intentional falsification of student records, punishable by immediate termination.

Finally, Abston's May 6, 2014 e-mail regarding the ongoing union organizing campaign demonstrated animus toward CTA and its employee organizers. The ALJ analogized this case to *Jurupa, supra*, PERB Decision No. 2450, in which a human resources officer

[12] Contrary to the concern of our concurring colleague, we are not "open[ing] the door to liability any time management expresses concern that a retaliation claim might arise from a disciplinary action." We agree with our colleague that management should be encouraged to have frank internal discussions before undertaking disciplinary action. But finding unlawful motive in Abston's statements here does not implicate these policy concerns. Those statements were not, as the concurrence suggests, an assessment of "whether discipline or termination [was], in fact, justified by the employee's misconduct or [was] instead motivated by an improper consideration." This is illustrated by the timing of Abston's statements: *after* the decision to terminate Preach had been made. Thus, Abston was not assessing whether termination was appropriate, but strategizing how to dissuade Preach from challenging her termination, namely, by exaggerating the consequences of her purported misconduct.

asserted that all claims made in a group grievance were false and motivated by a personal dispute with her. The Board found this statement to be evidence of animus because it demonstrated hostility to all the grievants based on their protected activity. (*Id*. at pp. 19-21.)

CAVA's exceptions argue that Abston's e-mail was a protected statement of opinion, not a demonstration of animus. We reject this argument. We have recognized that an "employer may freely express or disseminate its views, arguments or opinions on employment matters, unless such expression contains a threat of reprisal or force or promise of benefit." (*Hartnell Community College District* (2015) PERB Decision No. 2452, p. 25 (*Hartnell*).) But we have typically applied this standard to determine whether the employer's speech interfered with employee rights. (See, e.g., *ibid.*; *Chula Vista City School District* (1990) PERB Decision No. 834, pp. 10-13.) We have never applied it to determine that an employer's hostility toward collective bargaining or other protected activity is off limits for purposes of evaluating unlawful motive. (Cf. *Sonoma County Junior College District* (1991) PERB Decision No. 895, adopting proposed decision at p. 21 [finding animus based on administrator's statements at hearing that he was "not pleased" that employees were organizing because collective bargaining would "endanger" relationship between management and employees].) Nor has the National Labor Relations Board (NLRB). (See *CSC Holdings, LLC* (2017) 365 NLRB No. 68, *17 ["[A]n employer's expression of views or opinions against a union, which cannot be deemed a violation in and of itself, can nonetheless be used as background evidence of antiunion animus on the part of the employer"].) An employer's clear and unequivocal hostility to collective bargaining, even if accomplished without threats of reprisal or promises of benefit, gives rise to a logical inference that it might target union supporters for adverse

action. Thus, regardless of whether Abston was expressing a protected opinion, we find that her hostility toward unions and CTA in particular is evidence of unlawful motive.

Even if the safe harbor for statements of opinion did apply in this context, many of Abston's statements went beyond protected statements of opinion. "The safe harbor for employer speech does not apply . . . to advocacy on matters of employee choice such as urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship or deliberate exaggerations." (*Hartnell, supra*, PERB Decision No. 2452, p. 25.)

Although some of Abston's statements might be considered protected opinions, many were not. In particular, Abston questioned the legality of the organizers' "unsolicited email" and "unwanted phone calls," accusing organizers "at a minimum" of a "breach of our trust in one another." It also assured employees that the organizers would use "lies and any trick in the book to get you to sign their petition so that CTA can start collecting your dues." Thus, Abston took aim at the organizers for soliciting their co-workers to support unionization in general and CTA in particular. The solicitation of union support and membership during non-work time and in non-work areas lies at the core of EERA's protections. (*Long Beach Unified School District* (1980) PERB Decision No. 130, p. 12.) There is no evidence to support Abston's assertion that CTA's organizing tactics included anything that might reasonably qualify as "lies" or "trick[s]." In criticizing this protected organizing activity as possibly illegal, a breach of "trust," and involving "lies" and "trick[s]," Abston sailed well outside the safe harbor for protected employer speech.[13]

[13] CTA has not argued, and we do not find, that Abston's statements constituted independent unfair practices. It is, however, well settled that evidence of other unfair practices

CAVA's exceptions also question the relevance of Abston's animus, arguing that it was actually Andrew who made the decision to fire Preach. This argument is not well taken. For one thing, Abston was the head of schools and just two rungs above Andrew on CAVA's management ladder, and she directed her comments to all CAVA staff. We reasonably infer that Andrew, who was admittedly aware of the organizing campaign and Preach's participation in it, was also aware of CAVA's official opposition to that campaign, as expressed in Abston's e-mails. The anti-union animus expressed by Abston in those e-mails is probative of CAVA's culture and the atmosphere in which the decisions to investigate and terminate Preach were made. (Cf. *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 539 [in an age-discrimination case, "an age-based remark not made directly in the context of an employment decision or uttered by a non-decision-maker may be relevant, circumstantial evidence of discrimination"]; *Brewer v. Quaker State Oil Refining Corp.* (3d Cir. 1995) 72 F.3d 326, 333 [statement by company CEO, who was not involved in the employment decision, was relevant circumstantial evidence because "a supervisor's statement about the employer's employment practices or managerial policy is relevant to show the corporate culture in which a company makes its employment decision"].)[14]

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committed by the respondent may be relevant evidence of unlawful motive. (See *City of Oakland* (2014) PERB Decision No. 2387-M, p. 35.)

[14] The concurrence finds this conclusion inconsistent with *Walnut Valley Unified School District* (2016) PERB Decision No. 2495 (*Walnut Valley*) and *San Bernardino City Unified School District* (2004) PERB Decision No. 1602 (*San Bernardino*). It is not. Both of those cases involved a decision-maker who lacked actual knowledge of the employee's protected activity. (See *Walnut Valley*, at p. 21; *San Bernardino*, at p. 25, fn. 22.) In both cases, we found it inappropriate to *automatically* impute another management official's knowledge of the protected activity. That was the type of "reverse subordinate bias liability" we declined to recognize in *Walnut Valley*.

CAVA's argument also ignores the specific evidence that Abston led the charge in favor of firing Preach. Even assuming Andrew ultimately decided to fire Preach (which is not at all clear from the record), Abston at least influenced that decision. Her bias may be imputed to Andrew on that basis as well. (See *Santa Clara Valley Water District*, *supra*, PERB Decision No. 2349-M, p. 34.)

In sum, we find ample circumstantial evidence that CAVA's termination decision was made in response to Preach's ongoing organizing activity. Accordingly, we agree with the ALJ that CTA established a prima facie case of retaliation.

e. CAVA's Burden of Proof

To meet its burden of proving that it would have discharged Preach regardless of her protected activity, CAVA must establish: "(1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity." (*Palo Verde*, *supra*, PERB Decision No. 2337, pp. 18-19.) CTA excepts to the ALJ's conclusion that CAVA met this burden.

Thus, the Board will impute to a decision-maker ignorant of the employee's protected activity the knowledge of another management official only if: (1) the non-decision-maker was motivated by the employee's protected activity to provide information to the decision-maker; (2) the non-decision-maker intended for his or her conduct to result in an adverse action; and (3) the non-decision-maker's conduct caused the decision-maker to take adverse action against the employee. (*Walnut Valley*, *supra*, PERB Decision No. 2495, p. 21.) Under those circumstances, the non-decision-maker has "'effectively tainted the decision-making process for the employer as a whole." (*Id.* at p. 22, quoting *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 33.)

Here, Andrew knew about Preach's protected activity. There is no need to impute Abston's knowledge to Andrew. Rather, we are recognizing that in light of Andrew's knowledge of Preach's activities and of the anti-union animus of her superior, Abston, it is more likely than not that Andrew's decision-making with respect to Preach was tainted by that animus, even if Abston did not directly participate in Andrew's decision. Nothing in *Walnut Valley* or *San Bernardino* is to the contrary.

Preliminarily, CTA urges us to apply NLRB case law barring an employer from meeting its burden of proof when its proffered reason for taking the adverse action was discovered through an investigation that was itself tainted by unlawful motive. (See, e.g., *Consolidated Bus Transit, Inc.* (2007) 350 NLRB 1064, 1066 (*Consolidated Bus*); *Supershuttle of Orange County, Inc.* (2003) 339 NLRB 1 (*Supershuttle*); *Kidde, Inc.* (1989) 294 NLRB 840, 850.) In those circumstances, the employer "has created its own barrier to satisfying its burden of proof." (*Supershuttle, supra*, at p. 1.)

For instance, in *Consolidated Bus, supra*, 350 NLRB 1064, a bus driver was fired for failing a driving test, but the evidence revealed that he was subjected to the test only because he had engaged in protected activity. Similarly, in *Supershuttle, supra*, 339 NLRB 1, an employee was fired for making false statements during an investigation that was only initiated because of his manager's anti-union animus. And in *Kidde, supra*, 294 NLRB 840, the employer offered "a multiplicity of reasons" for hiring a private investigator to conduct surveillance of its delivery drivers, and a "multiplicity of reasons" for selecting a particular driver to be the first subject of surveillance. This led to the conclusion that the investigation was undertaken specifically because of the employee's protected activity. In each case, the employer was precluded from relying on the results of its unlawfully motivated investigation.

CAVA argues that adopting this NLRB rule would require overturning "many years of PERB[-]established precedent." We disagree. The burden-shifting framework we apply in retaliation cases derives directly from NLRB precedent, specifically *Wright Line, A Div. of Wright Line, Inc.* (1980) 251 NLRB 1083 (*Wright Line*). (See *Novato, supra*, PERB Decision No. 210, pp. 3, 14.) The rule CTA urges us to adopt is part of the same body of case law; it represents a specific type of case in which the employer cannot meet its burden. (See, e.g.,

Kidde, *supra*, 294 NLRB 840, 840, fn. 3 ["In adopting the judge's *Wright Line* analysis . . ., we rely in particular on those cases holding that employee[] misconduct discovered during an investigation undertaken because of an employee's protected activity does not render a discharge lawful"].) We find this rule reasonable and entirely logical. CAVA cites no case in which we have rejected this rule, and offers no persuasive reason we should decline to adopt it. Accordingly, we hold that an employer may not rebut a prima facie case of retaliation by introducing evidence it discovered through an unlawfully motivated investigation.

Based on the record before us, we agree with CTA that the circumstances in which Andrew decided to investigate Preach were suspicious in themselves. As detailed above, Andrew offered conflicting and exaggerated explanations for undertaking the investigation. Moreover, Andrew's explanation at hearing that she investigated "the concern that the ILP had not been done," also failed to account for the tumultuous nature of the spring 2014 ILP process, including the modification to the process that ILPs could be marked complete as long as some kind of conversation—not necessarily the recorded video chat—had taken place. Considering this evidence along with CAVA's official opposition to CTA's organizing drive and the fact that Andrew initiated the investigation within mere days after she saw Preach engaging in visible union activity at CAVA's training sessions, we find that CAVA would not have undertaken the investigation absent Preach's protected activity. It necessarily follows that it would not have terminated her, either.

Even if we were to consider the results of CAVA's investigation, however, we would still find that CAVA failed to meet its burden of proof. In conducting this analysis, we weigh the evidence supporting the employer's justification for the adverse action against the evidence of unlawful motive. (*Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 14.)

The ALJ found that CAVA met its burden of proof because, he found: (1) CAVA "put forth undisputed evidence that their practice was to terminate all employees who intentionally falsified documents, even without prior discipline"; (2) Preach failed to follow the ILP instructions; and (3) CAVA "had a reasonable basis from which to conclude that Preach acted intentionally." We disagree that this evidence outweighs the strong evidence of unlawful motive.

Although Abston testified without contradiction that CAVA always terminates employees who intentionally falsify documents, this testimony lacked detail. Abston alluded to specific cases, and CAVA at one point represented that it would provide more information, but the record contains nothing more than Abston's conclusory testimony. It is impossible to determine from that testimony what conduct CAVA has considered to constitute intentional falsification, what procedures were followed in investigating that conduct, or what kind of evidence sufficed. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.) We find that CAVA was capable of providing stronger evidence, but failed to do so. We therefore view Abston's testimony with distrust.

The evidence is also unpersuasive as to the reasonableness of CAVA's belief that Preach acted intentionally. There were reasonable alternative explanations for Preach's conduct that did not include intentional falsification. She might have been confused about the ILP requirements. She might not have read or understood the directions. Or she might have inadvertently used the wrong template. The evidence shows, however, that CAVA went out of its way to avoid having to grapple with any alternative explanations, by involving more senior

managers not typically involved in discipline, leaving Preach's close supervisors out of the process, and declining to interview Preach. This evidence of a suspicious investigation, along with the other strong evidence of unlawful motive (close timing, animus toward CTA's organizing drive, and Abston's preemptive warning that Preach might think her termination was "retribution for something else"), outweighs the evidence in support of CAVA's affirmative defense.

Having found that CAVA failed to meet its burden of proving it would have taken the same action against Preach regardless of her protected activity, we conclude that CAVA retaliated against Preach in violation of EERA section 3543, subdivisions (a) and (b).

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that California Virtual Academies (CAVA) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a) and (b). Pursuant to EERA section 3541.5, subdivision (c), it is hereby ORDERED that CAVA, its governing boards, administrators, and representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activity;

2. Denying employee organizations the right to represent their members.

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

1. Offer Stacy Preach (Preach) reinstatement to her former position, or, if that position no longer exists, then to a substantially similar position;

2. Make Preach whole for lost benefits, monetary and otherwise, which she suffered as a result of CAVA's conduct, including back pay, plus interest at the rate of

7 percent per annum, from the date of her discharge, September 11, 2014, to the date she is reinstated or declines the offer of reinstatement;

3. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CAVA, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by CAVA to communicate with its employees. 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. 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 California Teachers Association.

Member Krantz joined in this Decision.

Member Shiners' concurrence begins on page 38.

SHINERS, Member, concurring: I agree with my colleagues that Respondent California Virtual Academies (CAVA) terminated Stacey Preach's (Preach) employment in retaliation for her exercise of rights under the Educational Employment Relations Act (EERA), specifically her role in the CAVA teachers' organizing campaign. I write separately to explain my disagreement with two portions of the majority opinion that I view as analytically problematic and unnecessary to reach our conclusion.

1. Andrew's Investigation into Whether Preach Conducted a Spring 2014 Live Conference with SK Was Not Unlawfully Motivated

Unlike my colleagues, I cannot find on the factual record before us that High School Director Cathy Andrew's (Andrew) initial investigation into whether Preach failed to conduct a Spring 2014 live conference with student SK was unlawfully motivated. In my view, the majority's finding of unlawful motive rests on a series of inferences that are not supported by the record or our decisional law.

First, the majority relies on a purported testimonial discrepancy as demonstrating "exaggerated and shifting justifications" for why Andrew investigated Preach. (Maj. Opn. pp. 23-24.) In her declaration in support of CAVA's position statement, Andrew said that SK's mother, KK, was "upset" when she told Andrew that her son had not received a live conference in Spring 2014. At the hearing, however, Andrew admitted that KK was not upset when she made this comment. The majority concludes from this evidence that Andrew exaggerated the seriousness of KK's complaint after the fact to justify her investigation. (Maj. Opn. p. 24.)

Whether KK was upset or not when she complained to Andrew misses the point. It is undisputed that Andrew initiated the investigation of Preach in response to KK's comment that her son had not received a live conference in Spring 2014. There is no evidence that Andrew

at any time claimed that she initiated the investigation for any reason other than KK's comment. Accordingly, I do not find the supposed discrepancy between Andrew's declaration and her hearing testimony to constitute exaggerated or shifting justifications for the investigation.[15]

Second, the majority finds "suspicious" Andrew's decision to investigate Preach while not investigating any of the other teachers she knew had not completed individualized learning plans (ILP) that semester. (Maj. Opn. p. 24.) Andrew testified she did not look into problems with Spring 2014 ILPs unless a parent raised an issue.[16] The record does not show that any parent other than KK raised an issue with their child's Spring 2014 ILP. Consequently, it was not "suspicious" for Andrew to look into KK's comment that her son had not received a live conference in Spring 2014 while not looking into why other teachers may not have done live conferences. On this record, I do not find Andrew's decision to investigate Preach "suspicious."

Third, the majority concludes Andrew had anti-union motivation based solely on her receipt of the May 6, 2014 e-mail from Katrina Abston (Abston), CAVA's Head of Schools, expressing displeasure with the teachers' organizing campaign. (Maj. Opn. pp. 30-31.) PERB has adopted the subordinate bias liability theory, whereby a subordinate's union *animus* will be imputed to the decision maker when the subordinate's unlawfully motivated conduct effectively taints the entire decision-making process. (*Santa Clara Valley Water District*

[15] It is possible Andrew exaggerated the seriousness of KK's complaint after the fact to justify the decision to terminate Preach. But that would not necessarily show that the initial investigation was unlawfully motivated.

[16] The administrative law judge (ALJ) explicitly found Andrew's testimony on this point to be credible. I find no basis in the record to overturn the ALJ's credibility determination, and therefore defer to it. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.)

(2013) PERB Decision No. 2349-M, p. 33.) But the Board has explicitly "decline[d] to recognize a doctrine of reverse subordinate bias liability." (*Walnut Valley Unified School District* (2016) PERB Decision No. 2495, p. 21.) Thus, to show that a superior's *animus* tainted a subordinate's decision-making process, the charging party must show that the superior "provided inaccurate, biased or incomplete information" to the decision maker. (*Ibid*.) Here, Abston's May 6, 2014
e-mail had no bearing on the subject of Andrew's investigation of Preach or the facts underlying her termination, and indeed predated the investigation by three months. Because the e-mail did not "provide[] inaccurate, biased or incomplete information" about Preach, there is no basis under our decisional law to impute Abston's *animus* to Andrew with regard to the investigation.

Moreover, because Abston's e-mail was sent to all CAVA staff, under the majority's theory her *animus* would be imputed to *every* manager or supervisor within the organization, thereby tainting any personnel decision regarding a teacher involved in the organizing campaign. Our decisional law provides no authority for such a blanket imputation of *animus*. (Cf. *San Bernardino City Unified School District* (2004) PERB Decision No. 1602, p. 25, fn. 22 [finding that personnel director's knowledge of employee's protected activities could not be broadly imputed to all district employees].)

The majority nonetheless claims blanket imputation of *animus* is appropriate here because CAVA had an anti-union "culture," and in support cites court decisions holding that a manager's discriminatory statement unrelated to a particular employment decision may be

relevant to show the atmosphere in which the decision was made.[17] (Maj. Opn. p. 31.) Notably, both decisions addressed whether such "stray remarks" may be considered in ruling on a summary judgment motion, and both cases included significant evidence of discrimination in addition to the "stray remarks." (*Reid*, *supra*, 50 Cal.4th at p. 545; *Brewer*, *supra*, 72 F.3d at pp. 331-333.) Here, there is no evidence in the record of anti-union sentiment held by anyone at CAVA other than Abston, and no evidence that any manager or supervisor acted in accord with Abston's animus as to any matter with which Abston was not involved personally. The record accordingly does not establish an anti-union "culture" at CAVA, and the cases relied upon by the majority therefore are distinguishable.

Finally, the majority concludes Andrew's initial investigation was unlawfully motivated by Preach's protected activity and therefore any evidence obtained in that investigation cannot be used to establish CAVA's affirmative defense that it would have terminated Preach even if she had not engaged in protected activity. (Maj. Opn. p. 34.) While I agree with this principle as a general matter, I do not find it applicable in this case because, unlike the employers in the National Labor Relations Board decisions cited by the majority, there is no evidence CAVA initiated the investigation for the purpose of discovering misconduct it could use to fire Preach. As noted above, there is no evidence that Andrew shared Abston's union *animus* or had such *animus* of her own. Nothing in the record shows that Abston directed Andrew to conduct the investigation, or that Abston was even aware of the investigation until Andrew presented her findings to Abston. Moreover, there was an intervening event after Preach's protected activity that triggered the investigation—KK's comment to Andrew that her son had not received a live

[17] *Reid v. Google, Inc.* (2010) 50 Cal.4th 512 (*Reid*); *Brewer v. Quaker State Oil Refining Corp.* (3d Cir. 1995) 72 F.3d 326 (*Brewer*).

conference in Spring 2014. On this record, I do not find that Andrew's investigation was unlawfully motivated.

In conclusion, Andrew's investigation was not a model of thoroughness but, at best, it supports an inference that Preach's termination was unlawfully motivated. I cannot find on the facts before us that the investigation itself was unlawfully motivated. Instead, I find that unlawful motivation tainted the termination process beginning the moment Abston became involved in the process. The evidence in support of this conclusion is sufficient to resolve the issue before us, thereby rendering superfluous the majority's discussion of the motivation for Andrew's investigation.

2. Abston's Statement Regarding Preach's Possible Perception of the Termination as Retribution Does Not Show Unlawful Motive

The record contains an e-mail from Abston to human resources consultant Casey Johnen indicating CAVA's desire to terminate Preach. In describing the content of the termination notice, Abston wrote: "She needs to know this is serious and not retribution for something else." I agree with the majority that "something else" refers to Preach's organizing activity. But I cannot infer retaliatory motive from this sentence, as the majority does. As PERB's decisional law demonstrates, employees often file unfair practice charges claiming to have been disciplined or terminated for engaging in protected activity. As a result, it is common for a public employer to be concerned about a retaliation claim when disciplining or terminating a known union supporter.[18] Expressing such concern does not necessarily indicate the discipline or termination was in fact retaliatory. This is so even when the concerns are

[18] Unlike my colleagues, I find no significance in the fact that Preach was not known to be "unusually litigious or disputatious." (Maj. Opn. p. 28.) I am aware of no authority, nor does the majority cite any, for the proposition that whether to infer retaliatory motive from a manager's expression of concern about a potential retaliation claim depends upon the likelihood the particular employee will challenge the disciplinary action.

expressed among high level managers and human resources staff, who, after all, are the individuals most likely to be aware of the potential for a retaliation claim and thus the most likely to have and discuss such concerns. Unlike the majority, I am unwilling to open the door to liability any time management expresses concern that a retaliation claim might arise from a disciplinary action.

I also am concerned that the majority decision may discourage employers from engaging in these critical conversations before they make important personnel decisions. Such conversations give management the opportunity to assess whether discipline or termination is, in fact, justified by the employee's misconduct or is instead motivated by an improper consideration. As a matter of policy, we should be encouraging employers to consider these issues before deciding to take disciplinary action that adversely impacts an employee, not chilling such conversations by creating apprehension that an expression of concern will later be used against the employer in litigation. Accordingly, I cannot find that Abston's statement demonstrates unlawful motive. Nonetheless, because there is sufficient evidence of CAVA's unlawful motive notwithstanding this statement, I concur in the conclusion that CAVA terminated Preach's employment because of her protected activity of participating in the teachers' organizing campaign.

APPENDIX

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-5974-E, *California Teachers Association v. California Virtual Academies*, in which all parties had the right to participate, it has been found that California Virtual Academies violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activity;

2. Denying employee organizations the right to represent their members.

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

1. Offer Stacy Preach (Preach) reinstatement to her former position, or, if that position no longer exists, then to a substantially similar position;

2. Make Preach whole for lost benefits, monetary and otherwise, which she suffered as a result of CAVA's conduct, including back pay, plus interest at the rate of 7 percent per annum, from the date of her discharge, September 11, 2014, to the date she is reinstated or declines the offer of reinstatement;

Dated: _____ California Virtual Academies

By: _____
Authorized Agent

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