REVERSED AND REMANDED in McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, and then SUPERCEDED by Carlsbad Unified School District (1989) PERB Decision No. 778

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CYNTHIA McPHERSON.	)	
	)	
Charging Party.	)	Case No. LA-CE-1590
	)	
v.	)	PERB Decision No. 529
	)	
CARLSBAD UNIFIED SCHOOL DISTRICT.	)	October 15, 1985
	)	
Respondent.	)	
	)	

Appearances: Mocine. Plotz & Eggleston by Mary H. Mocine for Cynthia McPherson; Biddle & Hamilton by Christian M. Keiner for Carlsbad Unified School District.

Before Hesse, Chairperson; Jaeger. Morgenstern and Porter. Members.

DECISION

JAEGER. Member: The Carlsbad Unified School District excepts to a proposed decision, attached hereto, which finds that it violated section 3543.5(a) of the Educational Employment Relations Act by taking certain actions against charging party, Cynthia McPherson, because of her participation in activities protected by the Act.[1]

Except as noted below,[2] we adopt the findings of fact

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

[2]The Administrative Law Judge stated that Superintendent Grignon cited McPherson's membership in a union and her work on its behalf as one reason for his action. In fact. Grignon made no reference to her membership and referred to her work on behalf of another employee organization.

made by the administrative law judge but otherwise reject the proposed decision and order that the complaint against the District be dismissed.

Because it is the employee's activity that is afforded protection, in cases alleging discrimination or reprisal, a charging party has the threshold obligation to establish that such protected activity was involved. An employer may harbor union animus without sanction as long as it does not act thereon in derogation of statutory rights.

Here, charging party claims that the District's actions were taken in reprisal against her work on behalf of a teachers' union, her appointment to the bargaining committee of an organization that represents the District's classified employees, and her appeal to the personnel commission, In light of the express language of section 3543,[3] the first of these allegations must fail. It is participation in organizational activities for the purpose of representation that is protected.[4] The teachers' union does not represent

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[3]Section 3543 reads in 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.

[4]The dissent cites a number of NLRB cases protecting activities performed on behalf of unions other than those that represent the employees against whom reprisals were taken. In each case cited, the protected activity was performed in

McPherson or the unit to which she, a classified employee, belongs. Nor may it do so.[5] If the typing McPherson did on its behalf somehow brought that activity within the four corners of the first paragraph of section 3543, it was her burden to establish that fact.[6] She did not do so.

The other allegations also fail. The District's alleged course of discriminatory conduct began several months before McPherson was appointed to the classified union's bargaining committee. It could not, therefore, have been the motive for that conduct. At any rate, the action complained of, Bates' remarks about McPherson's service on the committee, were made by the very individual who utilized her services and actively

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sympathy with and in support of another organization's representation duties, or was performed with the clear intent that the employee's own unit would benefit thereby, or was performed in concert with other employees. We have no quarrel with those holdings. However, McPherson's typing on behalf of the teachers' union, in and of itself without more, does not fall within any of the forms of protected activity described in the cases the dissent cites. No evidence was presented that the consequences of her typing had a chilling effect on labor/management relations in general, or that her activity was done "in sympathy" with the teachers' association.

[5]Once an employee organization is recognized or certified as the exclusive representative of an appropriate unit, only that employee organization may represent unit employees. Section 3543.l(a).

[6]We do not find it necessary to decide now whether work on behalf of another employee organization may be protected. See Morris, the Developing Labor Law, 2d Edition, Bureau of National Affairs, Inc., Washington, D.C., pp. 142-144; also, Gorman, Basic Text on Labor Law, West Publishing Co., St. Paul, Minn. 1976, pp. 301-302.

sought her reclassification as his confidential secretary. He obviously was not motivated to take reprisals if he was seeking her reclassification. His comment was ambiguous and, at the least, could well have been an appropriate comment on the incompatibility of her concurrent service as his confidential secretary and member of the union bargaining committee. Further, Grignon, who did not want McPherson to act as confidential secretary, promptly nullified and corrected Bates' statement. Thus, we do not find Bates' statement as rising to the level of a violation of law, nor as support for the proposition that it was the basis for the District's series of actions adverse to McPherson's interest in reclassification and back pay, or as the basis of her transfer to a different school.

Her appeal to the personnel commission was from the District's denial of an out-of-class pay claim, a pay claim alleged to have been denied because of her "protected activity." This argument is rejected because we find no protected activity. Nor do we see in the District's subsequent actions, particularly her transfer, an <u>independent</u> act of retaliation based on her exercise of her right of appeal. Rather, we see the entire sequence of events to be an integral series of actions designed solely to deny her the confidential appointment and to remove her from the personnel office once she was legitimately denied the confidential position.

We conclude that charging party has failed to demonstrate that she had participated in activity protected by EERA and that such participation was the motivation underlying a series of District actions that were adverse to her employment interests.

ORDER

Based on the record and the exceptions filed to the proposed decision of the administrative law judge, the Public Employment Relations Board ORDERS that the complaint filed against the Carlsbad Unified School District by Cynthia McPherson is DISMISSED.

Chairperson Hesse and Member porter joined in this Decision.

Member Morgenstern's concurrence and dissent begins on page 6.

Morgenstern, Member, concurring and dissenting: I vehemently disagree with my colleagues' radical departure from the established policy of this Board and federal precedent with respect to the nature of "protected" employee activity. Contrary to the majority, I find that McPherson engaged in protected activity when she typed documents for the teachers union, when she was appointed to her union's negotiating committee, and when she sought to exercise her rights under the negotiated contract and civil service rules.

It is well established that section 7 of the National Labor Relations Act (NLRA) protects activities of employees for the mutual aid and protection of other employees — even when they are members of a different union or are employed by a different employer. Morris, Developing Labor Law, 2nd Ed., Vol. I, p. 142. Thus, employees have a protected right to honor the picket line of another employer's employees (Redwing Carriers, Inc. (1962) 137 NLRB 1545 [50 LRRM 1440] enf. sub nom. Teamsters, Local 79 v. NLRB (D.C. Cir. 1963) 325 F.2d 1014 [54 LRRM 2707], cert, denied (1964) 377 U.S. 905 [55 LRRM 3023]); to express sympathy for another employer's striking employees (NLRB v. J. G. Boswell Co. (9th Cir. 1943) 136 F.2d 585 [12 LRRM 776]); to publish support for a strike by a cooperative association of dairy farmers (NLRB v. Peter Cailler Kohler Swiss Chocolates Co., Inc. (2nd Cir. 1942) 130 F.2d 503 [10 LRRM 852]); to assist in organizing another employer's employees (Fort Wayne Corrugated Paper Co. v. NLRB (7th Cir. 1940) 111

F.2d 860 [6 LRRM 888]; to distribute literature (Yellow Cab, Inc. (1974) 210 NLRB 568 [86 LRRM 1145]); to demonstrate in support of another employer's employees (Washington State Serv. Employees (1971) 188 NLRB 957 [76 LRRM 1467]); and to solicit funds for the benefit of agricultural laborers even though they are not considered employees covered by the NLRA (General Elec. Co. (1968) 169 NLRB 1101 [67 LRRM 1326]).

In Modesto City Schools (1983) PERB Decision No. 291, this Board found no substantive difference between employee rights under section 3543 of the Educational Employment Relations Act and under section 7 of the NLRA. As the Board stated:

> The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process. (Modesto, p. 62.)

The majority's claim that it has not decided to abandon NLRA precedent is simply not plausible. If McPherson is not protected in typing documents for the union which represents her fellow employees, how then may she be protected when she acts in solidarity with the employees of a different employer? How then would the majority protect a job applicant against discrimination based on her prior affiliation with "another" employee organization in her previous job? A thousand such questions arise.

By finding an otherwise legal and proper act of association with an employee organization of fellow workers to be a sufficient basis for adverse action against an employee, the Board gravely undermines the most basic right granted by EERA, the employees' right to engage in activities of an employee organization.

The majority's assertion that no such protection will be afforded, absent affirmative proof regarding the purpose of the employee's protected activity or the result thereof, directly contradicts federal precedent. It surely should suffice that the uncontested facts herein establish that McPherson donated her labor to aid the exclusive representative of the certificated employees of the Carlsbad School District. As the Second Circuit Court of Appeals recently said in Ewing v. NLRB (2nd Cir. 1985)_____F.2d_____[119 LRRM 3273]:

> We cannot agree that . . . a literal reading of the word "concerted" is required by the Act. The Board cannot claim that its literal compliance with the "letter of the law" excuses its avoidance of the policies addressed by that law.

However, though I find that McPherson engaged in protected activity and the District does not deny that it was motivated, at least in part, by that activity when it denied McPherson appointment to a confidential position,[1] I nonetheless find

[1]District Superintendent Philip Grignon testified that, because of her work for the teachers' union, he personally had

that the District did not thereby violate EERA. My reasons, however, are in no way consent with the majority's views as to what constitutes protected activity.

In finding a violation here, the administrative law judge (ALJ) erroneously relied on cases involving the selection of managerial and supervisory employees.[2] However, under EERA, confidential status differs from managerial and supervisory

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concerns regarding McPherson as a confidential secretary, which he communicated to the board:

> Well, I think I should differentiate between the skills that the person has and the advisability of her in that position. I think that Mrs. McPherson has good secretarial skills, that she takes shorthand well, she types well. But, however, as far as confidentiality there was my concern. She's been a long-term member of this community. Her ex-husband is a teacher, she has carried out work in the past for the teachers union, in fact, at that time she was typing documents for the teachers union. And, so, therefore, I felt that the position was too sensitive to appoint her given all that knowledge . . . . Again, we deal with very confidential materials that we want to stay there that we do not want broadcasted in the community or even slipped to the community and in my opinion I did not feel that Cynthia McPherson could carry out that function.

[2]See, e.g., Lemoore Union High School District (1982) PERB Decision No. 271; Town of Burlington (1982) 9 MLC 1139 (managerial); Ford Motor Co. (1980) 251 NLRB 413 [105 LRRM 1143] enf. vac, rem. in part (6th Cir. 1982) 683 F.2d 156 [110 LRRM 3202]; NLRB v. Bell Aircraft Corp. (2nd Cir. 1953) 206 F.2d 235 [32 LRRM 2550]; Little Lake Industries, Inc. (1977) 233 NLRB 1049 [97 LRRM 1101] (supervisory).

status in certain fundamental respects which render the cases cited by the ALJ inapplicable here.

As the Board stated in an early case regarding confidential employees,[3] there are very few confidential positions as compared to managerial/supervisory positions. It may reasonably be presumed that many, if not most, employees entertain ambitions to improve their status through upward movement on the job. At some point, this is accomplished only by promotion to supervisory or managerial status. If promotional opportunities were endangered by union activity, the predictable outcome would be a significant chilling effect on the exercise of the employees' right to union participation. This would not only violate individual rights but would deprive the union of the activists it needs to be effective. In contrast, confidential status is not a necessary step on the promotional ladder. Confidential status does not make one a supervisor or manager and is not a qualification for supervisory or managerial status. Indeed, an entry level clerk-typist position may be designated as a confidential employee. Moreover, as here, confidential status most often represents an immediate assignment (secretary to the labor relations director) rather than a permanent classification (Secretary I).

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[3]Sierra Sands Unified School District (1976) EERB Decision No. *2.* (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board.)

Because confidential status affects only a small number of positions and does not necessarily or even usually affect permanent promotional opportunities, employees and employee organizations have significantly less legitimate interest in the selection of confidential employees than in the selection of managerial/supervisory employees.

At the same time, because confidential status does not embark an employee on a (presumably permanent) supervisory or managerial career, there is less motivation for an employee to shift loyalties to the management side upon entering confidential ranks. Thus, management may well be warranted in utilizing criteria which in some ways exceed those applied to prospective managers and supervisors when choosing confidential employees.

To put it another way, because the rewards are fewer and the obligation to remain tight-lipped so basic and absolute, a management desire to exercise extreme and unusual caution in choosing confidential employees is not unreasonable.

Finally, I would note that the law limits confidential status to those involved in labor relations on behalf of the employer,[4] a limitation not statutorily attached to managers

[4]Section 3540.1(c) provides:

> "Confidential employee" means any employee who, in the regular course of his duties, has access to, or possesses information relating to, his employer's employer-employee relations.

or supervisors. Clearly, then, state law authorizes the Board to distinguish between these categories when circumstances warrant.

For these reasons, I would conclude that the employer may exercise very broad discretion in selecting individuals to fill confidential positions. With respect to supervisory or managerial employees, a district would likely exceed its discretionary authority if it were to decide that prior union association rendered a candidate unacceptable. In the case of a confidential employee, however, at the very least, a less stringent restriction on the employer is properly applied. Thus, in a situation such as this, where the employer seemed to want greater distance from union activists or a "laundering period" that was free from activities which involved close association with union functionaries, I cannot find the employer's decision illegal.

However, in my view, the District's legitimate interest in the selection of its confidential employees does not entirely justify its conduct with respect to Charging Party in this case. Specifically, this justification fails to excuse the District's refusal to pay McPherson a salary differential of $296.00 per month for the period February to June 1982 when she was engaged in doing work of a confidential nature. Similarly, McPherson's transfer to Carlsbad High School was not justified by any management interest in filling the position of Bates' secretary with a confidential employee. Indeed, the record

indicates that, for five months after McPherson was transferred, her position was filled by a series of temporary employees and all confidential work was done by Grignon's secretary. While the District certainly could properly have transferred McPherson once a confidential employee assumed her position in October, here her transfer on June 1, 1982 was premature and punitive.

Unlike the majority, I find ample evidence in the record to indicate that, quite apart from its legitimate refusal to appoint her to a confidential position, the District refused to pay McPherson the salary differential and decided to transfer her because of her active pursuit of her rights under the contract and personnel rules. There is some evidence that, in part, this retaliation was directed at McPherson because of the fact that she took recourse to the personnel commission. In any event, the District appeared quite content to permit McPherson to continue in her position, doing confidential work, until she sought to enforce her rights to receive a substantial pay differential for that work.

Apart from its general assertion of a right to refuse to appoint McPherson to a confidential position, the District has offered no explanation for its refusal to pay the salary differential. With respect to the transfer, the District now contends that the decision was made "for the good of the District" because "the high school needed a good, permanent Secretary III and Mrs. McPherson fit that need." However, at

hearing, the District's witnesses provided conflicting and inconsistent testimony regarding the reasons for and circumstances surrounding the transfer. I am not persuaded that McPherson would have been transferred if she had not vigorously pursued reclassification and back pay.

I would, therefore, find a violation with respect to both the denial of the confidential salary differential and the transfer and would order the District to compensate McPherson for the salary differential she would have received but for the District's unlawful discrimination.

Finally, I would affirm the ALJ's conclusion that Bates violated the Act by refusing to permit McPherson to serve on the Union negotiating committee. Because this violation consists of interference with the right to participate in the activities of an employee organization rather than discrimination because of such participation, Bates' motivation is irrelevant. However, since Grignon corrected Bates immediately upon becoming aware of this matter, the violation is de minimus.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CYNTHIA McPHERSON, Charging Party, v. CARLSBAD UNIFIED SCHOOL DISTRICT, Respondent.	)	Unfair Practice Case No. LA-CE-1590 PROPOSED DECISION (8/2/83)

Appearances; Thomas Rankin, attorney for Charging Party Cynthia McPherson; Christian Keiner (Biddle & Hamilton), attorney for Respondent Carlsbad Unified School District.

Before Marian Kennedy, Administrative Law Judge.

PROCEDURAL HISTORY

On June 7, 1982, Charging Party, Cynthia McPherson, (hereafter Charging Party or McPherson) filed an unfair practice charge against Respondent, Carlsbad Unified School District (hereafter Respondent or District) alleging that Respondent violated the Educational Employment Relations Act (hereafter EERA[1]) by denying her the right to act as a member of the negotiating team for the Federated School Employees, Local 1200, LIUNA (hereafter the Union), the exclusive bargaining representative for classified employees of Respondent.

[1]The Educational Employment Relations Act is codified at California Government Code section 3540, et seq. Unless otherwise indicated, all code references will be to the California Government Code.

On June 16, McPherson filed a first amended charge adding the allegation that Respondent violated the EERA by transferring her from her position as secretary to the director of employee relations to a lateral position in the Carlsbad High School in retaliation for her exercise of rights protected by the EERA. On August 3, 1982, McPherson filed a second amended charge which corrected the statutory references in the previous charge to section 3543.5(a), (b), and (d) of the EERA and added further factual and documentary support for the charge. Finally, on December 1, 1982, McPherson filed a third amended charge which added the allegation that McPherson was denied appointment to the newly created position of credentials-personnel technician because of her exercise of rights protected by the EERA.

A complaint was issued on September 15, 1982. Respondent filed its answer on October 4, 1982, admitting certain factual allegations but denying that its actions were taken in retaliation for McPherson's exercise of protected rights. Respondent also filed an amended answer in response to the third amended charge on December 20, 1982.

An informal conference was conducted by an administrative law judge of the Public Employment Relations Board (hereafter PERB or the Board) on November 19, 1982, in Carlsbad, California, but the dispute was not resolved.

A Notice of Hearing was issued on January 12, 1983, and a formal hearing was conducted by the undersigned administrative law judge on March 24, 1983 in Carlsbad. Each party having filed briefs, the matter was submitted for proposed decision on May 24, 1983.

FINDINGS OF FACT

Cynthia McPherson has been employed as a secretary by Carlsbad School District intermittently since 1953 and full-time since 1977. She held the position of secretary III in the personnel department from July 1980 until June 1, 1982, when she was involuntarily transferred to a secretary III position for the principal of Carlsbad High School. During the period of February 1981 through February 1982, the position of personnel director was vacant and McPherson handled all of the work of the personnel office.

In February 1982, David Bates was hired by the District as director of employee relations.[2] Prior to the arrival of Mr. Bates, labor relations functions, including collective bargaining, had been performed by the assistant superintendent's office. Bates assumed those labor relations functions in addition to the personnel functions previously performed by the personnel department.

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[2]Prior to assuming that position, Bates had represented teachers and had worked for teachers' unions as a labor relations specialist. He had never previously held an administrative position.

The job description for McPherson's secretary III (administrative offices) position provides in relevant part:

> Employees in this classification may be assigned to responsibilities that involve access to and knowledge of the district's employer-employee relations and attendance at collective bargaining sessions between the district's negotiator and employee organizations. Employees who are assigned this specific responsibility will be classified as confidential employees.[3]

The Request to Reclassify McPherson as Confidential

On February 8, 1982, his first day at work, Bates prepared a memo addressed to Superintendent Grignon recommending that his secretary, McPherson, be reclassified from a secretary III to a secretary III (confidential) position. The reason given for this reclassification was:

> Because the director of employee relations is now the negotiator for the District, and the personnel secretary's assigned responsibilities include "access to knowledge of the District's employer-employee relations," the position qualifies as a confidential position . . . .

Bates did not contemplate that McPherson's position would be opened for interviews at the time it was reclassified. McPherson testified that at the time the Rodda Act became effective, secretaries assuming new functions involving employee relations were reclassified as confidential; interviews were not held.

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[3]Classification to confidential status brought with it an increase in salary of $296.00 per month.

During the period that McPherson worked for Bates, particularly in April of 1982, part of her duties included typing the District's collective bargaining proposals and work relating to grievances filed by District employees.

No reclassification occurred as a result of Bates' recommendation. Superintendent Grignon testified that he received Bates' memo and submitted his recommendation to a closed session of the Board of Trustees on February 17, 1982. Both Bates and Grignon were present at that meeting. Bates testified that his recommendation was rejected by the board on budgetary grounds: there were already two confidential secretaries and the board did not want more. Bates testified that he discussed the matter with McPherson afterwards but asserted that he did not recall whether he told her that the board had rejected his recommendation.

Grignon testified that he took Bates' recommendation to the Board of Trustees but that the board had a vehement negative reaction. According to Grignon, the board did not want to fill the position and "they had qualms about the person who was recommended by the director of employee relations." During cross-examination on advice of the District's counsel, Grignon refused to answer any questions regarding the specific reservations expressed about McPherson on the ground that to do so would violate the confidentiality of the closed board session.

Grignon testified that he personally had the following concerns regarding McPherson as a confidential secretary which he communicated to the board:

> Well, I think I should differentiate between the skills that the person has and the advisability of her in that position. I think that Mrs. McPherson has good secretarial skills, that she takes shorthand well, she types well. But, however, as far as confidentiality there was my concern. She's been a long-term member of this community. Her ex-husband is a teacher, she has carried out work in the past for the teachers union, in fact, at that time she was typing documents for the teachers union.[4] And, so, therefore, I felt that the position was too sensitive to appoint her given all that knowledge . . . Again, we deal with very confidential materials that we want to stay there that we do not want broadcasted in the community or even slipped to the community and in my opinion I did not feel that Cynthia McPherson could carry out that function.

Grignon denied recommending that the reclassification be rejected; nonetheless, the board assertedly rejected the recommendation but told Grignon that he might be permitted to "screen applicants for the position sometime in the future."

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[4]McPherson testified on cross-examination that she had lived in Carlsbad since 1938, had gone to school there and was well-liked in the community. Her ex-husband is a teacher in the school district. She has typed work for the Union in the past. On redirect McPherson testified that she personally told Grignon that she was typing material for the Union and that he never asked her or told her not to do so or raised any question of a conflict of interest.

Grignon testified that he told McPherson after the board meeting that the board would not accept her as a confidential secretary because of the possibility that she would leak information and her possible conflict of interest. McPherson testified that she was not told about the meeting. Indeed, she asked Bates on several occasions when her reclassification to confidential secretary would occur and Bates assured her each time that the reclassification would be forthcoming.

McPherson's Appointment to the Union Negotiating Committee

In an effort to speed up the reclassification of McPherson to confidential status, McPherson and the Union jointly agreed that the Union would appoint McPherson to its negotiating committee.[5] On March 22, 1982, Nancy Davis, secretary-treasurer for the Union, sent a letter to Bates announcing McPherson's appointment to the negotiating committee.

McPherson testified that when Bates received the letter, he went to the superintendent's office and upon returning he informed her that she could not serve on the Union's negotiating committee because of her position as his secretary. Bates testified that he told McPherson she could serve on the negotiating committee but his secretary could not. McPherson immediately agreed to withdraw from the

[5]Robert Garner, representative of the international union of which the Union is a part, testified that he had had a conversation with Bates shortly after Bates began his job in which Bates had told him of the pending reclassification of McPherson to confidential employee.

committee until the Board of Trustees had been given a reasonable length of time to clarify whether or not her position would be reclassified to a confidential position and gave Bates a letter to that effect the same day. McPherson testified that she withdrew from the negotiating committee because she did not want to jeopardize her position as secretary and did not want to do what was wrong.

On April 1, 1982, Garner sent a letter to Bates stating that McPherson was working as a confidential employee and should be reclassified to that status and receive back pay for her out-of-classification work. He received no response.

McPherson's Protest to the Personnel Commission

Still having received no notice regarding reclassification of her position, McPherson sent a memorandum to the personnel commission of the District on April 22, 1982, requesting the reclassification as well as out-of-class pay for the period during which she had performed the work of a confidential secretary. McPherson testified that she made her request to the personnel commission because "it seemed to be the next legal step to follow." On April 23, McPherson sent a memo to Grignon making the same request. She also told him of her request to the personnel commission. McPherson testified, uncontradicted, that Grignon responded that confidential secretaries were overpaid and that his position was that she

should get only a stipend of $50 per month retroactive to February 8, 1982. He did not tell her that she personally was not acceptable as a confidential employee either to him or the board.

Three days later, on April 26, 1982, Grignon sent a memo to the director for classified personnel requesting that interviews be scheduled for the position of secretary III (confidential) to replace the secretary III position held by McPherson. Grignon testified that he requested interviews because the Board of Trustees had informed him that, although he could not fill the position for budget reasons, he could begin screening for the position.[6]

On April 27, McPherson, along with eight other District employees, was notified of the interviews. On April 28, she responded by letter that she would interview under protest. On the same date she sent a memo to Bates asking the reasons that interviews were being conducted for the position which

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6on the same day, the classified personnel commission considered McPherson's request and supported it in its entirety. The commission also directed Kathy Brown, the director of classified personnel, to question the superintendent's reasons for scheduling interviews for the position of secretary to the director of employee relations when that position was currently filled by McPherson. Grignon responded that only the Board of Trustees and not the personnel commission had the authority to determine whether or not an employee had confidential status; furthermore, since McPherson had never been appointed as a confidential employee, she was owed no out-of-class back pay.

she then held. Bates responded that he did not know what was happening. He suggested she speak to Grignon.

On May 3, 1982, Garner had a meeting with Grignon and Bates. Garner argued that the District should make McPherson's position confidential and pay her the confidential premium because she was already doing the work. Grignon neither refused nor agreed, nor did he indicate that the matter had already been decided by the Board of Trustees. Instead he told Garner that McPherson had taken the issue to the personnel commission, that she had ignored the Union, and that maybe the Union "didn't have any obligation to represent her interests."[7]

Garner also raised the issue of McPherson being told that she could not serve on the Union negotiating committee. Grignon testified that he had not known about that issue previously and immediately sent a letter to McPherson saying that the District acknowledged her right to serve on the Union

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[7]McPherson and Garner testified that Grignon had an on-going dispute with the personnel commission and that Grignon had tried to abolish the commission. Garner testified Grignon had asked him if the Union would support his efforts to abolish the commission and Garner had refused saying the Union would support the commission. Grignon threatened to take over the Union if they didn't support him. There is nothing in the record regarding when this conversation occurred. The District offered evidence that only a small percentage of school districts have a personnel commission and that at least three other school districts which had personnel commissions have recently abolished them.

negotiating committee. Grignon denied having been consulted by Bates at the time the question first arose.

McPherson was interviewed for the position of secretary III (confidential) on May 4, 1982. As a result of those interviews, the District offered the position to a person employed outside the District who subsequently declined the appointment. No other offers were made. Grignon testified that the candidate who was offered the job was chosen because she was a court reporter and could operate a shorthand machine, a skill would might be useful in taking notes during negotiations. Ability to operate a court reporter machine was not included within the job specifications for the position.

Salary Change

On May 5, 1982, Grignon sent a memorandum to the Board of Trustees recommending that the pay premium for confidential employees be reduced from $296.00 per month to $50.00 per month over the salary for a non-confidential position at the same level. Grignon testified that he recommended that reduction in salary because of budgetary concerns and because confidential secretaries were overpaid by comparison with other districts.

The change in salary for confidential secretaries became effective June 1, 1982. At that time, there was only one person in the school District employed as a secretary III (confidential), Grignon's secretary. Just prior to

June 1, 1982, she was reclassified to an administrative assistant at no loss of pay.

McPherson's Transfer

On May 17, 1982, McPherson was notified that she would be involuntarily transferred from her position as secretary III for the director of employee relations to the position of secretary III for the principal at Carlsbad High School, a lateral transfer, effective June 1, 1982. The reason given for the transfer was "for the good of the District." McPherson testified that she asked Bates why she was being transferred and he stated that he did not know.[8]

Grignon testified that McPherson was transferred at the beginning of June because the principal of the high school had requested a permanent secretary during the first week in May. Grignon testified that he consulted with Bates before transferring McPherson and that Bates had "requested the transfer" because of the need for a secretary at the high school. Bates testified that he did not request McPherson's

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8on June 8, 1982, McPherson filed a grievance under the parties' collective bargaining agreement protesting her involuntary transfer. The grievance has reached the arbitration stage and is currently in abeyance pending resolution of this unfair practice charge. The arbitration provision in the contract provides for advisory arbitration only and provides that the final decision on any grievance shall be made by the Board of Trustees.

transfer and that Grignon did not tell him the reasons for the transfer.

Patricia Burden, principal of Carlsbad High School, testified that she had been requesting a permanent secretary since her secretary became ill in September or October. Her last request had been just prior to April 12, 1982, which was the earliest date that her previous secretary could legally be replaced.

From the date of McPherson's transfer on June 1 until sometime in October 1982, her position was filled by a succession of eight temporary secretaries. McPherson testified that in the period between June 1 and July 12 she received 67 calls from both Bates and the temporary secretaries asking her questions about how to do things in her previous position. Bates acknowledged that he made several such calls to McPherson. The calls continued until and even after someone was hired to work for Bates in October.

Grignon acknowledged that the District was in negotiations with the Union at the time McPherson was transferred and that Bates was representing the District in those negotiations. He testified that after McPherson was transferred, all confidential work from Bates' office was done by Grignon's secretary. Grignon testified that he did not know whether McPherson typed District contract proposals before she was transferred but said that he did not necessarily consider contract proposals "confidential".

Creation of the Credentials-Personnel Technician (Confidential) Position

On July 7, 1982, Grignon presented a proposal to the Board of Trustees that the position of secretary III (confidential) to the director of employee relations be abolished and replaced by the position of credentials-personnel technician (confidential) (hereinafter CPT). Grignon testified that the idea for the CPT was his, along with Bates. He thought the new position should be created because the position of secretary to the director of employee relations had become highly technical and required someone who was highly trained in credentials law. Grignon testified that the idea for the new position first came up in June, after McPherson's transfer. He could not recall whether or not the idea arose after McPherson filed her unfair practice charge on June 7. In his written justification to the Board of Trustees regarding the proposed new position, Grignon stated:

> Over the last few years, the complexity of teaching credentials has increased dramatically . . . A lack of knowledge and experience concerning the intricacies of credentialing and contracting has led into [sic] the post-in-house difficulties which came to light during the current teacher layoffs. It is imperative that the District have a qualified credential technician with a full range of knowledge of the laws and the experience to implement these legal mandates.

Grignon testified that part of the rationale for the new position was that there had been difficulties with scope of

various type of credentials in the past. Grignon could not remember whether these difficulties had occurred during the year in which there had been no director of personnel and he did not know or investigate whether the difficulties were McPherson's fault. Grignon felt, however, that McPherson "did not know all the intricacies of the laws which deal with the commissioning or licensing of teachers" and that the position "had evolved to such a point where the technicalities needed someone who was highly trained and who had experience and knowledge of teaching credentials." Grignon testified that he was aware of this need in February 1982, prior to the time interviews were held for the secretary III (confidential) position, although there was no evidence that candidates with special credentialing skills were sought at that time.

Bates testified that he had no complaints regarding McPherson's performance and specifically had no problems with her work dealing with credentials. McPherson testified that she had never received any complaints regarding her credentialing work.

The salary for the CPT was set at several steps higher than the secretary III position which it replaced because, according to Grignon, it demanded greater knowledge and skills. The job description for the position included a long list of duties to

be performed. McPherson testified without contradiction that she had performed all of those duties in her previous position.

On August 26, 1982, McPherson took a written test for the CPT position which tested matters of office procedure, office management, spelling and typing. She received the highest score of the five applicants. The candidates who received the three highest scores were interviewed in September and one of those three, other than McPherson, was chosen for the position. The personnel commission rules permit the District to appoint any one of the top three candidates to the position for which they tested. No evidence was introduced regarding the qualifications of the person ultimately hired or whether that person's knowledge of credentialing exceeded that of McPherson.

Issues Presented

1. Did the District violate section 3543.5(a), (b) and (d) by (1) denying McPherson promotion to the position of secretary III (confidential); (2) transferring McPherson from her position as secretary to the director of employee relations to the position as secretary to the principal of Carlsbad High School; and (3) denying McPherson appointment to the position of credentials-personnel technician (confidential)?

2. Did the District violate section 3543.5(a), (b) and (d) by denying Cynthia McPherson the right to serve on the Union negotiating committee?

DISCUSSION AND CONCLUSIONS OF LAW

I. Involuntary Transfer and Denial of Promotion

A. The Legal Standard

By its terms, section 3543.5(a) of the Act prohibits discriminatory action against an employee for engaging in conduct protected by the EERA, including,

> . . . 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. (Sec. 3543.)

In Carlsbad Unified School District (1/30/79) PERB Decision No. 89, and in Novato Unified School District (4/30/82) PERB Decision No. 210, the Board set forth the standard by which charges alleging discriminatory conduct under section 3543.5(a) are to be decided. The Board summarized its test in a decision issued the same day as Novato;

> . . . a party alleging a violation . . . has the burden of making a showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision to engage in the conduct of which the employee complains. Once this is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of protected conduct. As noted in Novato, this shift in the burden of producing evidence must operate consistently with the charging party's obligation to establish an unfair practice by a preponderance of the evidence. (California State University, Sacramento (4/30/82) PERB Decision No. 211-H at pp. 13-14.)

The test adopted by the Board is consistent with precedent in California and under the National Labor Relations Act (NLRA) requiring the trier of fact to weigh both direct and circumstantial evidence in order to determine whether an action would not have been taken against an employee but for the exercise of protected rights. See, e.g., Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 729-730; Wright Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169] enf., in part, (1st Cir. 1981) 662 F.2d 899 [108 LRRM 2513]; NLRB v. Transportation Management Corp. (1983)_____U.S._____, 113 LRRM 2857.9

B. Protected Activity by McPherson

There is no factual dispute that McPherson had engaged in protected activity within the knowledge of the District, particularly of Superintendent Grignon.

Grignon himself testified that McPherson's membership in the Union and her activity in typing some documents on behalf of the Union constituted, at least in part, the ground for his opposition to promoting McPherson to a confidential secretary

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9The construction of similar or identical provisions of the NLRA, as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the EERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 12 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616. Compare section 3543.5(a) of the Act with section 8(a)(3) of the NLRA, also prohibiting discrimination for the exercise of protected rights.

when Bates first recommended that reclassification on February 8, 1982. The Union's March 22, 1982, appointment of McPherson to its negotiating committee at a minimum raised McPherson's apparent involvement in the Union to a more prominent level. On June 7 and 8, 1982, respectively, McPherson filed an unfair practice charge and a grievance regarding her transfer and the denial of reclassification; both constitute protected activities under EERA. Baldwin Park Unified School District (6/30/82) PERB Decision No. 221; North Sacramento School District (12/20/82) PERB Decision No. 264.

The Union argues, in addition, that McPherson's act of filing a request for reclassification and back pay with the District personnel commission was an act protected by EERA and that Grignon immediately retaliated by ordering interviews for the position of confidential secretary to replace McPherson. This issue need not be reached since I find that Grignon's whole course of conduct with respect to McPherson was based upon the reasons Grignon himself enumerated included her protected activity.

C. Discriminatory Action by the District

The District takes the position that no violation can be found in this case because the District engaged in no discriminatory action within the meaning of EERA. Specifically, the District argues that the decision not to designate McPherson a confidential employee is not reviewable

by PERB; the question of which employees are put in confidential positions is purely a matter of management discretion since confidential employees are not employees within the meaning of EERA. Moreover, the District argues, interviews were conducted according to personnel commission rules for both the secretary III (confidential) position and the CPT position, candidates were ranked, and in each case one of the top three candidates was chosen. Since it is within management's discretion to choose any one of the top three candidates, that choice cannot be challenged under EERA. Finally, the District argues that McPherson's transfer did not constitute discrimination because it was purely lateral and did not involve any reduction in pay or benefits.

Considering these contentions in reverse order, I conclude that the District's last point is without merit. A transfer from one work location to another or from one set of duties to another, even though the transfer is without loss of pay or benefits, constitutes discrimination which is prohibited by EERA if the action is taken in retaliation for protected activity. Carlsbad Unified School District (1/30/79) PERB Decision No. 89.

The District's second argument must also be dismissed. Normally, absent restrictions embodied in a collective bargaining contract, an employer has the authority and discretion to determine which employees should be appointed or

promoted. That management right is limited by EERA only to the extent that management's choice not to promote or appoint a particular person may not be based upon the employee's protected activities. Similarly, under a merit system like that in Carlsbad, the District has the authority and discretion to appoint any one of the top three candidates tested for a position — limited, however, by the EERA proscription against basing that choice upon the protected activity of one of more of the candidates. It certainly does not interfere with the operation of the merit system to require that management's choice for appointment among the top three candidates for a position may not be based upon grounds prohibited by other laws.

The District's first argument, however, raises a novel question of labor law not addressed by any PERB or NLRB cases. Does an employer have absolute discretion in choosing employees for confidential positions such that a refusal to appoint an employee to a confidential position cannot be the basis for an unfair practice charge, even if the refusal is based upon the employee's protected activity? Resolution of this issue requires consideration of the conflicting statutory interests involved.

On the one hand, EERA section 3543.5(a) protects public school employees against reprisals or discrimination by their employer for the exercise of rights protected by EERA, including the right to form, join and participate in the

activities of an employee organization. The reprisals and discrimination prohibited relate to any term and condition of employment and the opportunity for promotion is one such condition of employment. Ford Motor Co. (1980) 251 NLRB 413, 422 [105 LRRM 1143], enf. vac, rem. in part (6th Cir. 1982) 683 F.2d 156 [110 LRRM 3202]; NLRB v. Bell Aircraft Corp. (2d Cir. 1953) 206 F.2d 235, 237, [32 LRRM 2550]. The PERB has held that denying an employee the opportunity to compete for a promotion — specifically, a promotion to a management position outside the bargaining unit — is prohibited by EERA when the denial was based upon the protected organizational activities of the employee. Lemoore Union High School District (12/28/82) PERB Decision No. 271. The designation as a confidential secretary would, on the facts of this case, have been a promotion since it would have carried with it an increase in salary of approximately $296.00 per month.[10]

The protection against reprisals or discrimination for protected activity extends to all persons who are employees within the definition of the Act. The definition of employee in section 3540.l(j) excludes management and confidential

[10]The confidential premium was reduced to $50.00 per month on June 1, 1982. In August the confidential secretary III position was replaced by CPT at a salary not specifically disclosed in the record but which was greater than secretary III salary.

employees but nothing in the Act can be read to exclude from protection bargaining unit employees who simply aspire to promotions to managerial or confidential positions. Thus, there is nothing in the law which would permit an employer to condition future promotions to managerial or confidential positions on an employee not engaging in protected activities while the employee is a member of the bargaining unit and thus falls within the definition of employee under the Act.

On the other hand, the District correctly argues that an employer has strong interests in having a reliable management team and those interests are also recognized by the Act in the exclusion of managerial and confidential employees from coverage under the Act and the exclusion of supervisors from bargaining units with other public school employees. In a very early decision, PERB recognized the policy behind the exclusion of confidential employees from the protection of the Act:

> Presumably, the Legislature denied certain rights to "confidential" employees for the sole purpose of guaranteeing orderly and equitable progress in the development of employer-employee relations.
>
> [T]he employer should be allowed a small nucleus of individuals who would assist the employer in the development of the employer's positions for the purposes of employer-employee relations. . . [T]his nucleus of individuals would be required to keep confidential those matters that if made public prematurely might jeopardize the employer's ability to negotiate with employees from an equal posture.

> The underlying assumption then, is that the employer, in order to fulfill its statutory role in its employer-employee relations, must be assured of the undivided loyalty of a nucleus of staff designated as "confidential employees". (Sierra Sands Unified School District (10/14/76) EERB Decision No. 2.)

Persons who fall within the definition of confidential employee are therefore excluded from representation by an employee organization on the theory that an employee could not give the employer his or her undivided loyalty on matters involving labor relations if the employee were also represented by the employee organization with which the employer is bargaining. A potential conflict of interest or conflict of loyalties of the confidential employee is thereby avoided.

Although no NLRB or PERB cases deal directly with the question presented here, the NLRB and to a limited extent the courts, have confronted the question of whether a bargaining unit member may be denied promotion to a supervisorial position solely on the ground of union or concerted activities while a member of the bargaining unit. The answer has been clearly "no", In Ford Motor Co., supra, the employer denied promotions to supervisory positions to two rank-and-file employees because they filed grievances challenging the employer's promotional policies, contemplated filing a lawsuit, and brought unfair labor practice charges against their employer. The NLRB found that the employees' activities were protected and the denial of

promotions to them therefore constituted unfair labor practices. The Board quoted the Second Circuit in NLRB v. Bell Aircraft Corp. (2nd Cir. 1953) 206 F.2d 235, 237 [32 LRRM 2550].

> [T]he employee's "prospects for promotion were among the conditions of his employment," the Act "protected him so long as he held a nonsupervisory position," and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected.

Similarly, in Little Lake Industries, Inc. (1977) 233 NLRB 1049 [97 LRRM 1101], the employer argued that he was justified in refusing to promote an employee to a supervisory position because of the employee's union activity on the ground that an employee who supports a union would be disloyal to the employer as a supervisor. The Board rejected that argument finding that an employee can engage in union activity so long as he remains a rank-and-file employee and he may not be held to a code of conduct for supervisors until he becomes a supervisor.[11]

The lesson of these decisions is that union activity as a rank-and-file employee alone does not justify a presumption that an employee will not give the employer his full loyalty when promoted to a supervisory position.

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[11]See also, Republic Corp., Advanced Mining Group, Lucerne Facility (1982) 260 NLRB No. 73 [109 LRRM 1281] ; Keeler Corp. dba Keeler Brass Co. (1982) 262 NLRB No. 23 [110 LRRM 1257].

The Massachusetts Labor Relations Commission has reached the same conclusion in a case involving denial of a promotion to a managerial position to a public sector employee. In Town of Burlington (1982) 9 MLC 1139, a union activist was denied a promotion to the position of acting fire chief, a managerial position, because he was an active and vocal union supporter as a rank-and-file employee. The employee had served as acting fire chief on two earlier occasions without any problems and there was no evidence other than his active union role from which to draw an inference that he would be disloyal to management in the future. The Commission concluded:

> We can envision circumstances in which a public employer may legally decline to promote an employee to a managerial position because of the employee's union activity. We note, as only one example, the situation in which a union applicant for a managerial position indicates by conduct or comment that she or he will continue to feel aligned with the union following the promotion. Here, however, the record discloses absolutely nothing about Pollicelli's prior association with the Union other than that it was active and vocal. We can find on this record no legitimate interest of the town which is served by upholding the denial of Pollicelli's promotion. We agree with Commissioner Altman that an employer has a major stake in who its managers will be. There is no suggestion, however, that Pollicelli was in any way unqualified; the evidence, in fact, is quite the reverse. Further, the record demonstrates that Pollicelli served in the temporary managerial position of Acting Chief on two occasions in the past without any problems

> or complaints from management. In addition, there is no direct or circumstantial evidence warranting an inference that Pollicelli would have been disloyal to management if he assumed the Acting Chief's position on this occasion. Instead, the record indicates that the employer acted on pure speculation in denying Pollicelli the promotion, based upon nothing but the mere fact that Pollicelli had previously been an active union leader. All we hold in this case is that a public employer under Chapter 1508 cannot deny an employee a promotion to a managerial position solely because of the employee's affiliation with a union.

Thus, while an employer's legitimate concerns for loyalty in managerial and supervisorial employees must and should be accommodated, an employer is not justified in presuming future disloyalty based solely upon past union activity.

I conclude that there is no reasonable basis for applying a different rule in the case of confidential employees. The employer's interest in selecting a managerial employee is, in part, in choosing someone who can effectively represent the employer and its interests in formulating, determining and carrying out the managerial policies of the employer, including labor relations policies. Bell Aerospace, Division of Textron Corp. v. NLRB (1974) 416 U.S. 267 [85 LRRM 2945]. In choosing a supervisory employee, the employer's concern is, in relevant part, in finding someone who can effectively enforce management policies in the employer's relations with its employees.

A confidential employee is, by definition, one who "in the regular course of his duties, has access to, or possesses

information relating to, his employer's employer-employee relations." Unlike a managerial employee, a confidential employee is not in a policy-making position. Nor is the confidential employee, unlike the supervisor, in a position to enforce management policies in day-to-day labor relations. Thus, the concern for loyalty of a confidential employee is a limited concern that the employee refrain from disclosing to others the employer's confidential positions or information on employer-employee relations.

Certainly, the employer's interest is having loyal confidential employees is not greater than having loyal managerial and supervisorial employees. While not every supervisor or managerial employee may have the regular access to employer labor relations information available to a confidential employee, the basis for exclusion of all three categories of employees is concern for potential conflicts of interest in labor relations matters. There is simply no basis for a blanket presumption that that conflict is more acute in the case of confidential employees than managerial or supervisory employees.

The court of appeal has noted a concern for allowing substantial scope for an employer's discretion in making employment decisions affecting managerial and confidential employees. In Pugh v. See's Candies, Inc. (1981) 116 Cal.App.3d 311, 171 Cal.Rptr. 917, the court found that the

plaintiff, a high level managerial employee, had stated a cause of action for arbitrary and unjust dismissal but cautioned:

> Where, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope for the exercise of subjective judgment. Id. at 330.12

Although that case arose in a different legal context, the quote indicates that, in cases involving managerial and confidential employees, the courts and the PERB should not put themselves in the position of second-guessing the merits of decisions arrived at through the conscientious exercise of managerial discretion. That concern for reserving for management sufficient room for the exercise of discretion in

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12The Court accompanied this cryptic comment with a cite to a Harvard Law Review article, "Note Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith" (1980) 93 Harv. L. Rev. 1816, which proposed that different standards should be developed for what constitutes bad faith termination which are less restrictive and more subjective for high level managers. The article argued:

> Efficient running of an enterprise demands a high degree of trust and cooperation among top personnel; thus, upper echelon employees should perhaps have to overcome a higher hurdle to show that their discharge was abusive or retaliatory. Foremen, salesmen, supervisors, and middle managers [and arguably confidential secretaries], on the other hand, often fall between the two stools [sic] of union safeguards and top management privileges, and so may require more protections." Id. at 1840-41.

choosing managerial and confidential employees should not, however, cause the PERB to abdicate responsibility for enforcing laws which protect public school employees in the exercise of their statutory rights. When, as in the instant case, the only exercise of managerial discretion shown is to deny an employee a position — even a confidential position — solely because of her exercise of rights protected by EERA, the PERB does not exceed the appropriate exercise of its authority or interfere with the rightful exercise of managerial discretion when it condemns such actions as unfair practices.

Considering the standards set forth above and the facts in this case, I conclude that McPherson was improperly denied the promotion to a confidential position, was consequently transferred to another secretary III position, and was denied the CPT position solely because of her union activity. Superintendent Grignon testified to three reasons for his concern about McPherson maintaining the confidentiality of the District's labor relations information:

> She's been a long-term member of this community. Her ex-husband is a teacher, she has carried out work in the past for the teacher union, in fact, at that timel3 she was typing documents for the teacher union.

13other testimony by McPherson and Grignon indicates that McPherson had typed documents for the Union at some time in the past, not at the time of the instant dispute.

Clearly, given the above discussion, Grignon's reliance on the fact that McPherson had engaged in activities on behalf of the teacher's Union while a rank-and-file employee was improper,

The District's Rebuttal

1. Concern Regarding Confidentiality

Under Novato, supra, once the Charging Party has made out a prima facie case to support the inference that the exercise of employee rights protected by EERA was the ground for a decision affecting terms and conditions of employment, the burden shifts to the employer to show that its actions would have been the same even absent the protected activity. The other reasons asserted by Grignon for refusing McPherson the confidential position should be analyzed to determine whether the District has met that burden.

Based upon the evidence presented herein, I conclude that the District has not met its burden. The fact that an employee is a long-time member of the community by no means, on its face, raises the inference that the employee would be disloyal to a major community institution, the school District which employs her, upon being put in a confidential position. The District offered no evidence to demonstrate why such an inference would be appropriate here. Grignon subsequently modified his expression of this concern to say that McPherson was "popular" in the community. Again, one's popularity does

not, on its face, reflect, either positively or negatively, on loyalty to one's employer and the District offered no evidence upon which to draw a different conclusion.

In fact, McPherson had been not only a long-term member of the community but also a long-term employee of the school district. She had held over the years significant and responsible secretarial positions for the District.[14] Grignon conceded that McPherson had never engaged in any conduct which was contrary to the interests of the District or which could reasonably cause one to question her integrity or loyalty to the District. To the contrary, McPherson gave the impression in her testimony of being proud of her work for the District and concerned, even in asserting her rights under EERA, that she not do anything improper or wrong.

When the Union appointed McPherson to its negotiating committee in order to press for a resolution of the continuing question of her confidential status, McPherson immediately declined the appointment as soon as her immediate supervisor, Bates, told her (improperly) that he would not permit his secretary to serve on the negotiating committee. McPherson testified that she withdrew because she did not want to jeopardize her position as secretary and because she did not want to do "what was wrong." Similarly, McPherson filed her

[14]McPherson served as secretary to a prior superintendent and as secretary to the personnel commission.

request with the personnel commission for reclassification to confidential status and for out-of-class back pay after the District had stalled on the question of her reclassification more than two months and McPherson felt that the request to the personnel commission "seemed to be the next legal step to follow."

Moreover, the evidence indicates that McPherson was very forthright with her employer. Grignon acknowledged that he knew that McPherson had typed some documents for the Union in the past because McPherson told Grignon at the time that she performed the work. Grignon did not request or direct McPherson to stop doing that work. Similarly, when McPherson decided to take her problem of reclassification to the personnel commission, she immediately informed Grignon that she was doing so, even though her appeal to the personnel commission was a challenge to Grignon's authority. Thus, McPherson's conduct, even in handling her dispute with the District, indicates loyalty and forthrightness rather than the opposite.

Grignon's second justification for refusing McPherson confidential status — that her ex-husband is a teacher in the District — similarly does not assist the District's case. The District offered no evidence or analysis to demonstrate why McPherson's prior marriage to a teacher in the District — who is presumably a member of the bargaining unit, although

not necessarily a member of the Union — could be a ground for current concern about her confidentiality. In the absence of such evidence, there is no basis to infer that McPherson would breach the confidentiality of District information to her ex-husband or to the Union which presumably represents him.

An even more telling consideration with respect to both of these arguments is the fact that McPherson did, in fact, do work as a confidential secretary on at least one significant occasion between the time of her request for designation to confidential status and her involuntary transfer to the high school. McPherson testified without contradiction that she typed the District's bargaining proposals for negotiations with the Union which occurred in the spring of 1982. There was absolutely no evidence introduced that any confidential labor relations information regarding those negotiations was leaked to the Union. Thus, Grignon's fears about McPherson maintaining the confidentiality of District labor relations information seem not only unfounded but contradicted by direct experience.

Thus, of the reasons which Grignon himself gave for his opposing McPherson's designation as a confidential employee, only one reason — her Union activity — has any substance, and reliance on that ground is improper under EERA.

2. McPherson Lacks Necessary Skills

Despite Grignon's explicit testimony that his opposition to permitting McPherson to serve in a confidential position was

based upon the reasons just discussed and not upon McPherson's abilities, the District made an effort to show that the rejections of McPherson for the secretary III and CPT positions were based upon her lacking certain necessary skills. The evidence, however, is inconsistent and incomplete on this point and creates the impression that this argument was conceived as a post-hoc justification for a decision actually made on the grounds which Grignon indicated. In fact, the reasons about to be discussed were advanced only as justifications for choosing another candidate over McPherson in the two sets of interviews held, first for the secretary III (confidential) position and later for the CPT position. No reason, other than concern for confidentiality already discussed, was advanced for the initial decision to refuse to designate McPherson's position as confidential while she continued to fill that position.

After reviewing candidates for the secretary III (confidential) position, Grignon offered the position to a candidate other than McPherson because, he testified, that candidate was a court reporter and could operate a shorthand machine, a skill which Grignon thought might be useful in negotiations. The ability to operate a shorthand machine was not part of the job description for the secretary III (confidential) position. The court reporter turned the job down and no offer was made to any other candidate.

Shortly thereafter, McPherson was notified of her transfer to the high school effective June 1. McPherson was transferred despite the fact that n6 successor to her position had been appointed. Her previous position was then filled by a succession of eight unqualified temporary employees until October. During that period, both the temporary employees and Bates called upon McPherson frequently for help in performing various aspects of her previous job.

In August McPherson was tested and interviewed for the CPT position. This new position was created, according to Grignon, because of the growing need to have someone skilled in credentialing. Grignon acknowledged that McPherson had performed credentialing tasks in the past and, although he asserted that there had been some problems with teacher credentials with respect to layoffs, he could not say that those problems were the result of errors by McPherson. The written test for the CPT position did not have anything to do with credentialing skills. No evidence was offered to show that the person finally appointed to this position possessed credentialing skills not possessed by McPherson.

Moreover, Grignon testified that he was aware of the credentialing "problem" at the time that interviews were held for the secretary III (confidential) position, but no special credentialing skills were sought in candidates at that time. The timing of Grignon's proposal to create this new position

focusing on credentialing skills creates the inference that the proposal was in response to McPherson's unfair practice charge and grievance for denial of the secretary III (confidential) position, both filed in early June. (Grignon testified only that he "couldn't remember" whether the idea for the CPT position came to him after the filing of McPherson's unfair practice charge or not.)

I conclude that the District has not born the burden of proving that, absent illegal considerations, McPherson would have been denied either the CPT or the secretary III (confidential) jobs because she lacked necessary skills for them.

Finally, the District argues, based upon the testimony of Grignon, that it was the Board of Trustees which decided not to designate McPherson a confidential employee and that decision, made on February 17, 1982, is not attributable to any unlawful motivation. Grignon testified that the board turned down Bates' recommendation to designate McPherson confidential because the members "had qualms about" McPherson in that position. Grignon asserted that he did not oppose Bates' recommendation, although he did tell the board his own concerns about McPherson maintaining confidentiality based upon the reasons quoted above. Grignon refused to answer questions on cross-examination, on advice of counsel, regarding the basis for the "qualms" which the board had about McPherson. Bates, who was also present at the board meeting, testified that the

board rejected his recommendation because he had acted too quickly and because of budgetary concerns. Although both men assert that the recommendation regarding McPherson was emphatically rejected, the record demonstrates that neither one informed McPherson of the decision. In fact, Bates subsequently made statements to her indicating that designation as confidential would be forthcoming and Grignon made no claim that the question had already been decided when it was raised directly with him by Union representative Garner.

Based upon the contradictory testimony of Grignon and Bates regarding the board meeting and the subsequent conduct of both men which belies their claim that final decision about McPherson's status was made at that meeting, I conclude that the District has not proven that a decision to deny McPherson confidential status was made by the board for non-discriminatory reasons.[15] While the District has the right to decline to

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15An additional ground for not crediting the District on this point is the general lack of credibility of Grignon, and to a lesser extent, Bates. Grignon's testimony was contradicted at several points noted in the discussion above not only by McPherson but also by Bates and Burden. His credibility was also undermined by his long delays in answering questions on cross-examination, the evasiveness of his answers, and his apparent discomfort or nervousness.

Bates was called as an adverse witness by McPherson after the District indicated off the record that it did not intend to call him. Bates gave the impression of being very cautious in answering questions and phrased his answers carefully, apparently in an effort to avoid putting his superior in a bad light to the extent possible.

waive its privilege of confidentiality of closed board meetings to permit evidence to be introduced regarding the alleged board decision and reasons therefor, reliance upon that privilege does not release the District from its obligation to prove that the denial of the promotion was on non-discriminatory grounds after a prima facie case of discriminatory denial of the promotion has been made. Therefore, this argument is also rejected.

For all the above reasons, I find that the District violated section 3543.5(a) by denying McPherson promotion to secretary III (confidential) and CPT positions and by transferring her to the position of secretary III in Carlsbad High School.

II. Denial of Right to Serve on Negotiating Committee

Section 3543 of the EERA provides that public school employees shall have certain rights including:

> . . . 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. (Emphasis added.)

The parties stipulated that the Union is an employee organization within the meaning of EERA. A public school employee is defined in section 3540.1(j) as:

> . . . any person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees and confidential employees. (Emphasis added.)

Confidential employee is further defined in section 3540.1 (c) to mean:

> . . . any employee who, in the regular course of his duties, has access to, or possesses information relating to his employer's employer-employee relations.

Serving as a member of the negotiating team for one's exclusive representative is an act of participation in the activities of the employee organization, which is a right explicitly granted to employees in section 3540.l(j) quoted above. An employer is not free to prohibit certain employees who are within the bargaining unit from taking part in negotiations as a representative of an employee organization. To attempt to dictate who the representatives of the opposing side shall be in collective negotiations constitutes a refusal to bargain in good faith. San Ramon Valley Unified School District (8/9/82) PERB Decision No. 230; Booth Broadcasting Co. (1976) 223 NLRB 867 [92 LRRM 1335].

The only ground upon which McPherson could properly have been denied the right to serve on the Union negotiating committee would have been, as asserted by the Union below, that she was a confidential employee excluded from the definition of employee under EERA and therefore excluded from the right to participate in activities of the exclusive representative. The District, however, did not assert that argument as a defense to its prohibiting McPherson from serving on the committee. Quite

the opposite, the District asserts that McPherson never was a confidential employee. Indeed, the request by both McPherson and her supervisor Bates that she be reclassified to confidential employee status in light of the labor relations work in which Bates was engaged was not granted during the same period of March 22, 1982 through May 3, 1982, during which McPherson was denied the right to serve on the negotiating committee.

The only defenses asserted by the District are wholly inadequate. Bates testified that he did not tell McPherson that she could not serve on the negotiating committee - he only told her that his secretary could not serve on the negotiating committee. Since McPherson was Bates' secretary, a rank-and-file position within the bargaining unit, Bates' unmistakable message was that McPherson faced a choice between losing her job and exercising her protected right to serve on the negotiating team. Bates' careful phrasing of his denial of McPherson's protected right does not make the denial any less an unfair practice.

Grignon testified that he was not consulted about whether McPherson should be told that she could not serve on the negotiating committee and that he first learned of the prohibition against her serving at his meeting with Union representative Garner on May 3, 1982. Grignon immediately sent McPherson a letter telling her that the District recognized her

right to serve on the negotiating committee. Grignon asserted that Bates was simply wrong in his previous directions to McPherson.

The District does not and could not successfully assert that Bates did not have the authority to give instructions to his secretary which are binding in their effects upon the District. Bates is not only a supervisor but also the District's chief negotiator. Acts of a supervisor constituting unfair practices are attributable to the employer.

Nor does the fact that the District belatedly reversed its position and told McPherson that she could serve on the negotiating committee render the unfair practice moot. Negotiations between the parties were already well in progress when McPherson was told that she could join the committee. The earlier denial of her right to serve on the committee prevented her from taking part in negotiations or planning for the period that the denial was effective. Thus, the effect on McPherson's protected rights was not insubstantial.

Finally, the District asserts that there was no injury to McPherson's protected rights because she did not really want to serve on the negotiating committee. McPherson and the Union admitted that appointing her to the negotiating committee was a pressure tactic to force the District to finally come through on its promise, through Bates, that McPherson would be reclassified to confidential status. That McPherson's

appointment to the negotiating committee was a pressure tactic, however, does not make it any less an unfair practice for the District to prohibit McPherson from serving on the committee.

The evidence is uncontradicted that McPherson did serve as secretary to the District's chief negotiator, Bates, for a period of several months and did at least on some occasions have access to the District's labor relations information. Clearly, the position McPherson filled appropriately could have been designated confidential by the District, as was eventually done. Nonetheless, the District violated McPherson's rights by not permitting her to serve on the negotiating team while denying her confidential status. Orderly labor relations are not served by permitting an employer to ignore at will careful statutory distinctions between rights of rank-and-file versus confidential employees.

I conclude, therefore, that the District violated section 3543.5(a) by interfering with and restraining McPherson in the exercise of her statutory right to participate in the activities of her employee organization.

The District's refusal to permit McPherson to serve on the negotiating committee while she was a rank-and-file member of the bargaining unit also constitutes a violation of section

3543.5(b) in that it denied the Union its right to designate its own representatives for bargaining purposes.[16]

REMEDY

Section 3541.5(c) of the EERA states:

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

Having found that the District refused to place McPherson in the position of secretary III (confidential) and credentials-personnel technician (confidential) and transferred her to the high school solely because of the exercise of her rights protected by the EERA, the customary remedy would be a cease and desist order along with an order to place McPherson in a comparable position and to pay her back pay at the rate which she would have earned in the positions discriminatorily denied from the date of the denial until the date on which she is offered a comparable position, along with 7 percent interest.

The question arises in this case, however, unlike the customary case, whether the PERB and this administrative law judge have the authority to order an employer to appoint a particular employee to a confidential position. In the Town of Burlington case, supra, as well as in several NLRB cases

[16]NO evidence was introduced to support the alleged 3543.5(d) violation. It is therefore dismissed.

regarding promotion to supervisorial positions, a reinstatement order was not necessary because the position involved was a temporary one, the term of which had expired. The NLRB has held, however, in the few cases which raise the issue, that reinstatement is the appropriate remedy when an employee is denied a promotion to a supervisorial position for discriminatory reasons. Ford Motor Co., supra; Little Lake Industries, Inc., supra.

The sixth circuit disagrees. In Ford Motor Co., supra, the sixth circuit affirmed the NLRB's conclusion that the employees were denied promotions to supervisorial positions solely because of their union activity but reversed the board's order that the employees be given those promotions. The court held that the NLRB may not invade management's prerogative by ordering an employee promoted to a supervisorial position. All the NLRB may do, according to the sixth circuit, is order that the employees be given fair reconsideration for the positions. That remedy effectively requires the employer to reconsider candidates and either appoint the discriminatee to the promotional position or come forward with specific reasons, supported by demonstrable facts for declining anew to do so. The NLRB has not adopted the sixth circuit view.

Given the findings made above, I find no basis to conclude that EERB is without authority to order McPherson promoted. Where the only "managerial discretion" exercised in denying a

promotion to an employee is based on grounds prohibited by the EERA, PERB does not invade the District's managerial prerogatives by ordering the decision reversed and the employee promoted. Since this case presents a novel unfair practice question, however, it may be useful to consider alternative remedies which are not subject to the type of objections raised by the sixth circuit and determine whether the normal or an alternative remedy would be more appropriately applied in this case.

One alternative to a direct order of promotion would be to order the District to reopen the selection process for the CPT position and to give McPherson and other former candidates a full and fair opportunity to be appointed. In order to avoid the illegal taint which invalidated the previous selection process, the District could be ordered: (1) to refrain from considering McPherson's or any candidate's protected organizational activities; (2) to structure the testing and/or interview to eliminate any advantage to the incumbent by virtue of his or her period of incumbency; and (3) to compose a selection panel of persons not involved in the decision to reject McPherson in the past. The District could be directed to report back to the Regional Director in writing the following: (1) the names and positions of the persons making the selection; (2) the criteria by which the selection was made; (3) whether or not McPherson was chosen to fill the

position; and (4) if McPherson was not chosen, the specific facts and reasons for denying her the position. This alternative essentially gives the District another opportunity to make a nondiscriminatory decision. It creates the risk that no new decision will be made, but only a better justification created after the fact, for the previous discriminatory decision.

Another alternative would be to order no change of position for McPherson at all and limit the remedy to a cease and desist order and back pay. In ordinary discharge cases, the NLRB has occasionally denied reinstatement where actions of the employee so poisoned the working atmosphere that reinstatement was not a viable remedy. See e.g., NLRB v. Apico Inns of California (9th Cir. 1975) 88 LRRM 3283; Renfro Hosiery Mills (1959) 43 LRRM 1221.

Neither alternative appears appropriate in this case. Ordering promotion of McPherson to the confidential CPT position would not pose problems in the working relationship with her supervisor, Bates. Bates testified that he considers McPherson fully qualified to do the work required in his office, including credentialing. Moreover, Bates expressed no reservations regarding McPherson maintaining the confidentiality of information in the office, and indeed, originally recommended that she be designated confidential. In the normal course of her work, McPherson would be reporting to Bates.

Grignon clearly does harbor personal objections to McPherson in any confidential position. However, McPherson would not work directly for him and he would not be responsible for supervising her work. For these reasons, I conclude that ordering promotion of McPherson to the CPT position would be a workable as well as appropriate remedy herein.

The remedy of ordering reconsideration for candidates for the CPT position is also not a satisfactory alternative remedy in this case. The record discloses that the District went to some lengths already to try to camouflage Grignon's discriminatory decisions regarding McPherson as grounded upon her lack of necessary skills rather than on her protected activity. Moreover, although the alternative remedy would attempt to exclude Grignon from the reevaluation process to avoid the discriminatory taint which affected the prior selection, the small size of the school district and the all-pervasive role of Grignon in the past indicate a substantial risk that no real nondiscriminatory selection with respect to McPherson is possible.

For all of these reasons, I conclude that the traditional remedy of ordering the discriminatory decision reversed and McPherson promoted to the current position of credential-personnel technician is the only alternative sufficient under the circumstances to remedy the prior discriminatory action.

Secondly, because McPherson was denied the promotion to the confidential position solely because of her exercise of protected organizational activities, it is appropriate to award her back pay at the rate which she would have earned in the positions discriminatorily denied from the date of denial until the date of her appointment to the CPT position. Interest at 7 percent shall be added. The precise measure of back pay due is not clear from the record. At a minimum, McPherson is due the amount of premium for confidential status which was authorized for the secretary III (confidential) position until that position was replaced by the CPT position, and thereafter she is due the salary and confidential premium, if any, attached to that position. If, under the District's merit system rules or other applicable restrictions outside the EERA,[17] the District would not have been permitted to reduce the confidential premium applicable to the secretary III (confidential) position had there been an incumbent in that position on June 1, 1982, when the reduction from $296 per month to $50 per month premium became effective, that reduction shall not be applicable to the calculation of back pay for McPherson. Similarly, the salary for the personnel-credentials technician (confidential) position is not revealed in the

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[17]Reducing the salary or changing the position are not mandatory subjects of bargaining under the EERA since the position is outside the bargaining unit.

record. If that salary is less than the salary for a secretary III (confidential) plus $296 and if under the District's merit system rules or other applicable restrictions outside the EERA, the District would not have been permitted to change the title of the position and reduce the salary had there been an incumbent in the secretary III (confidential) position, the reduction in salary, if any, shall not be applicable to the calculation of back pay for McPherson.[18]

Finally, it is appropriate that the District be ordered to post at all schools, District offices and other work locations where notices to employees customarily are placed, within five (5) days of the date upon which this proposed decision becomes final, copies of the Notice attached as an appendix hereto signed by an authorized agent of the employer. Such posting shall be maintained for a period of at least 30 days. The Notice must not be reduced in size and reasonable steps shall be taken to ensure that these notices are not altered, defaced or covered by any other material. Posting of such a notice will provide employees with notice that the District has acted in an unlawful manner, and it is being required to cease and

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18McPherson may, of course, decline an offer of transfer to the CPT position or any comparable position and avoid being thereby excluded from the bargaining unit and from the protection of EERA. If an offer of the position is made and declined, back pay liability would, of course, cease at that point.

desist from this activity and to restore the status quo. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision No. 69. In Pandol and Sons v. Agricultural Labor Relations Board and UFW (1979) 98 Cal.App.3d 580, 587, the California District of Appeal approved a posting requirement. See also U.S. Supreme Court decision NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, and pursuant to section 3541.5(c), it is hereby ordered that the Carlsbad Unified School District and its representatives shall:

1. CEASE AND DESIST FROM:

Restraining, discriminating against, or otherwise interfering with the rights of employees, and Cynthia McPherson in particular, because of the exercise of their right to participate in activities protected by the Educational Employment Relations Act;

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

(a) Promptly offer McPherson the position of credentials-personnel technician in the office of the director of employee relations.

(b) Make Cynthia McPherson whole for the loss of pay and any loss of other benefits she may have suffered, including

(1) the applicable premium for confidential status for the secretary III (confidential) position and

(2) the difference between her salary as a secretary III and the salary plus confidential premium (if any) applicable to the position of credential-personnel technician (confidential) from the date that the position was created. The amount paid shall include interest at the rate of 7 percent per annum.

(c) Within five (5) workdays after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, for at least thirty (30) consecutive workdays at all schools, District offices and other work location where notices to employees are customarily posted. The Notice must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered or covered by any material.

(d) Within twenty (20) workdays from service of the final decision herein, give written notification to the Los Angeles Regional Director of the Public Employment Relations Board of the actions taken to comply with this order. Continue to report in writing to the regional director thereafter as directed. All reports to the regional director shall be concurrently served on the Charging Party herein.

IT IS FURTHER ORDERED that all other aspects of the charge and complaint are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on August- 22, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board at its headquarters office in Sacramento before the close of business (5:00 p.m.) on August 22, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305.

Dated: August 2, 1983

Marian Kennedy
Administrative Law Judge