STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CYNTHIA McPHERSON, Charging Party, v. CARLSBAD UNIFIED SCHOOL DISTRICT, Respondent.	)	Case No. LA-CE-1590
	)	Remand from Court
	)	PERB Decision No. 778
	)	November 21, 1989

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

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

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on remand from the Court of Appeal, Fourth Appellate District, Division One. The Court of Appeal reversed Carlsbad Unified School District (1985) PERB Decision No. 529, which dismissed the unfair practice complaint. The court found that, contrary to the Board's decision, Cynthia McPherson (McPherson) had engaged in activity protected by the Educational Employment Relations Act (EERA or Act)[1] by undertaking activities for the certificated bargaining unit. On remand, the court requested the Board to decide the following issues: (1) whether the Carlsbad Unified School District (District) refused McPherson's reclassification to a confidential

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

position because of protected activity; (2) if so, whether the District had legitimate business reasons for refusing to reclassify McPherson. To make this determination, the court requested that PERB decide whether, in choosing a confidential employee, the District may lawfully decide against an applicant because the applicant has engaged in activity protected by EERA; (3) whether the District transferred McPherson from her former position with the Employment Relations Office to a high school because of protected activity; (4) if so, whether the District would have transferred McPherson anyway for a legitimate business reason; and (5) whether the District interfered with McPherson's EERA rights by refusing to permit her to be on her exclusive representative's negotiating committee.

FACTUAL BACKGROUND

McPherson has been employed by the District since 1953. Since 1977, McPherson has been a full-time employee of the District and held the position of Secretary III in the personnel department from July 1980 until June 1, 1982. From February 1981 through February 1982, McPherson handled all the work of the personnel office as the position of personnel director was vacant.

In February 1982,[2] the District hired David Bates (Bates) as director of employee relations. Upon his arrival, Bates assumed all of the labor relations functions, including being the District's negotiator on collective bargaining matters. These

[2]Hereafter all dates refer to 1982, except where noted.

duties had been previously performed through the assistant superintendent's office. Bates' secretary was McPherson. Bates, upon being hired, requested through Superintendent Philip Grignon (Grignon) that McPherson's position be reclassified from Secretary III to Secretary III (Confidential).[3] Bates requested reclassification because his secretary would be handling responsibilities that would include access to, and knowledge of, the District's labor relation positions and files.

On February 17, the board of trustees (board) rejected the reclassification request. Grignon testified to the board in opposition to Bates' recommendation. Grignon's concerns were that, although McPherson was a good secretary and had good secretarial skills, she should not be a confidential employee as she had been a long-time member of the community, her ex-husband

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[3]The job description of a Secretary III (Confidential) 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. (Charging party's Exh. No. 7.)

Section 3540.l(c) defines a confidential employee as:

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

was a teacher, and, in the past, she had undertaken work for the teachers' union.

After this denial, McPherson met with her union representative, Federated School Employees, Local 1200, LINUNA (Association) where it was agreed that McPherson would be appointed to the negotiating committee in an effort to obtain the reclassification.

In March, Bates was notified by letter that McPherson had been appointed to the negotiating committee. Bates informed McPherson that she "may serve on the committee but my secretary may not." McPherson immediately agreed to withdraw from the committee as she did not want to jeopardize her position as a secretary. Also, McPherson wanted to give the board additional time to clarify whether or not her position would be reclassified to a confidential position.

Grignon, in a May meeting with McPherson's union representative, learned for the first time of Bates' comments concerning McPherson's appointment to the negotiating committee. Immediately Grignon sent a letter to McPherson stating that she had the right to serve on the negotiating committee.

In April, McPherson sent a memorandum to the District's personnel commission requesting reclassification as well as out-of-class pay for the period during which she had performed

the work of a confidential secretary.[4] McPherson also made the same request to Grignon.

Grignon responded that only the District's board and not the personnel commission had the authority to determine whether or not an employee had confidential status. Also, Grignon noted that since McPherson had never been appointed as a confidential employee, she was owed no out-of-class back pay. Grignon scheduled interviews for the confidential position in April. In May, McPherson and nine other District employees interviewed for the position. The position was then offered to an applicant who subsequently declined the appointment. Thereafter, 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. However, ability to operate a court reporting machine was not included within the job specifications for the position.

In May, Grignon recommended to the board that it reduce the premium it paid for confidential employees from $296 per month to $50 per month over the salary for a nonconfidential position at the same level. The board approved the change in salary which became effective June 1st. At that time, no one in the District was employed as a Secretary III (Confidential).

In mid-May, McPherson was notified that she was to be laterally transferred to a Secretary III position to work for the

[4]Confidential Secretaries earned $296 per month more than nonconfidential Secretary IIIs.

principal of Carlsbad High School. McPherson was informed that the transfer was "for the good of the District."

Grignon testified that McPherson was transferred because the principal of Carlsbad High School had requested a permanent secretary. Also, Grignon testified that Bates had "requested a transfer" because of a lateral opening at the high school. Bates testified that he did not initiate McPherson's transfer.

The principal of Carlsbad High School testified that she had been requesting a permanent secretary since September or October 1981. Her last request had been just prior to April 12, 1982, which was the earliest date that her previous secretary could legally be replaced.[5]

Between June 1 and October, McPherson's former position was filled by a succession of eight temporary secretaries. McPherson testified that 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. McPherson testified that the calls continued until October when someone was hired to work full-time for Bates.

During July, Grignon proposed to the board that the position of Secretary III (Confidential) to the director of employee relations be replaced by a new position, Credentials-Personnel Technician (CPT).

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[5]The previous secretary retired. A temporary employee was hired but under the agreement with the union, a temporary employee could only work a maximum of 120 days.

In August, McPherson took a written test for the CPT position. McPherson received the highest score of the five applicants. McPherson and two others with the highest scores were interviewed in September. One of the other applicants was offered the position.

PROCEDURAL HISTORY

On June 7, 1982, McPherson filed an unfair practice charge with PERB alleging that the District violated EERA by denying her the right to act as a member of the negotiating team for her exclusive representative.

On June 16, 1982, McPherson filed a first amended charge, adding the allegation that the District violated 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 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)[6] of EERA and added further

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[6]Section 3543.5 states:

> It shall be unlawful for a public school employer to:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

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 CPT because of her exercise of rights protected by EERA.

On August 2, 1983, a PERB administrative law judge (ALJ) issued a proposed decision finding that the District had violated sections 3543.5(a) and (b) by taking certain actions against McPherson because of her activities protected by the Act. The Board reversed the ALJ on appeal and ordered that the complaint be dismissed.

On March 11, 1987, the Court of Appeal reversed Carlsbad Unified School District (1985) PERB Decision No. 529 which dismissed the unfair practice complaint and remanded the case back to the Board for disposition of several issues.

The following is a summary of the three decisions.

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

. . . . . .

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.

ALJ'S DECISION

Applying the test set forth in Novato Unified School District (1982) PERB Decision No. 210,[7] the ALJ concluded that uncontradicted evidence showed that Grignon's entire course of conduct was based upon McPherson's protected activity. Accordingly, all subsequent District conduct, including denial of promotion, transfer, denial of appointment to the CPT position, and refusal of opportunity to serve on the bargaining committee, were taken solely because of McPherson's protected union activity and therefore constituted violations of section 3543.5(a). Additionally, the ALJ found that Bates' comments regarding McPherson serving on the negotiation committee for the Association was a violation of section 3543.5(b).

The ALJ also determined that the District was not entitled to discriminate against union activists in choosing a confidential employee. The ALJ reviewed National Labor Relations Board (NLRB)[8] law and other decisions dealing with the choice of supervisorial or managerial employees and found that the District was not entitled to engage in such discrimination, amounting to a

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[7]In Novato, the Board held that, in cases of alleged reprisals against employees, the charging party must establish that the employee was engaged in protected activity, that the employer had actual or imputed knowledge of the employee's protected activity, and that the employer's conduct was motivated by the employee's participation in protected activity.

[8]In previous decisions, the Board has indicated that while it is not bound by NLRB decisions, it would take cognizance of them where appropriate. (Los Angeles Unified School District (1976) EERB Decision No. 5 (prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB)); Carlsbad Unified School District (1979) PERB Decision No. 89.)

presumption that a past loyal employee of many years service could not be trusted in a confidential position.

As a remedy,, the ALJ recommended that McPherson be offered the position of CPT, as well as being provided with back pay for all periods during which she should have held that position, or the position of a confidential secretary. The ALJ also recommended a posting of a cease-and-desist order and related relief.

PERB DECISION NO. 529 (Carlsbad I)

On appeal, PERB reversed the ALJ's decision. The Board stated that although the employee's activity is afforded protection, in cases alleging discrimination or reprisal, the charging party has the threshold obligation to establish that such protected activity was involved. In regards to the District's actions against McPherson for undertaking work for the certificated union, the Board found that working for a sister union is not a protected activity under EERA and that, even if the typing McPherson did on the Association's behalf brought McPherson's activity within the four corners of the first paragraph of section 3543,[9] McPherson failed in her burden to establish that fact.

[9]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.

PERB also rejected McPherson's interference claim based on Bates' comment to McPherson regarding the negotiating committee. The Board found insufficient anti-union animus in Bates' remark about McPherson's service on the committee, as Bates was the person who utilized McPherson's services and actively sought her reclassification as his confidential secretary.

Finally, the Board also denied McPherson's out-of-class pay claim, as the Board found no protected activity.

In a concurrence and dissent, former Member Morgenstern disagreed with the Board's decision that McPherson's activities on behalf of a fellow employee's union did not constitute protected conduct under EERA. Morgenstern would have found that McPherson engaged in protected activity when she typed documents for the teachers' union, when she was appointed to the negotiating committee, and when she sought to exercise her rights under the negotiated contract and civil service rules. In support of his position, Morgenstern cited National Labor Relations Act (NLRA) section 7[10] which protects activities of

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[10]Section 7 of the NLRA states:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

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. 1, p. 142.)

Morgenstern also cited Modesto City Schools (1983) PERB Decision No. 291, in which the Board found no substantial difference between employee rights under section 3543 of EERA and under section 7 of the NLRA. In Modesto, 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, supra, p. 62.)

Despite his disagreement, Morgenstern concurred in the Board's conclusion, as it was his opinion that the District was entitled to discriminate on the basis of protected unit activity in selecting a confidential employee. In part, Morgenstern said:

> . . . 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.
> (P. 11.)

However, Morgenstern concluded that although the District was justified in refusing McPherson's reclassification or appointment as a confidential secretary, this justification should not be relied upon in refusing to pay her a salary differential of $296 per month for the period February to June

1982, when she was, in fact, engaged in doing confidential work.

Finally, Morgenstern would have affirmed the ALJ's conclusion that Bates violated the Act by refusing to permit McPherson to serve on the negotiating committee. However, because the violation consisted of interference with the right to participate in the activities of an employee organization rather than discrimination because of such participation, Bates' motivation was irrelevant. Therefore, as Grignon corrected Bates' position immediately upon becoming aware of this matter, Morgenstern would conclude that the violation was "de minimis."

APPELLATE COURT DECISION

Whether McPherson was Engaged in Protected Conduct

The court first noted that although the EERA is similar in many ways to the NLRA, the language of the two statutes is not identical. Specifically, section 7 of the NLRA refers to the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection." This language directly protects activity on behalf of sister unions, whereas such language is not found in EERA sections 3540[11] or

[11]Section 3540 provides in part:

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

3543. Even though the statutory provisions are dissimilar, the court found no evidence in the record and no policy considerations stated in Carlsbad I which would justify exempting activity on behalf of a sister union from protection under EERA. The court then reviewed NLRB case law which found that protected activity under section 7 of the NLRA is not limited to association with employees of the same employer or to association with employees represented by the same union. (See Redwing Carriers, Inc. et al. (1962) 50 LRRM 1440 [137 NLRB No. 1545], enforcement sub, nom.; Teamsters, Chauffeurs & Helpers Local U. No. 79 v. NLRB (D.C. Cir. 1963) 325 F.2d 1011, cert. den. (1964) 377 U.S. 905; Alamo Express. Inc. (5th Cir. 1970) 430 F.2d 1032.) The court, therefore, concluded that McPherson's work on behalf of the teachers' union would fall squarely within the parameters of protected activity set forth in NLRB case law.

The court also reversed PERB's determination that McPherson failed to prove she engaged in protected activity as she did not offer specifics as to what she typed for the teachers' union and/or why she had done the typing. The court found that under NLRB precedent, no evidence is required as to the employee's intent in engaging in these activities or specifics about such activities. Therefore, the court concluded that despite differences in statutory language, PERB was not justified in

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> representative of the employees in an appropriate unit, and to afford certificated employees a voice in the formulation of educational policy.

departing from sound NLRB precedent which established the parameters protecting conduct in the labor relations context. The court then found that McPherson's activity on behalf of a fellow employees' union was protected activity under EERA.

Discrimination with Reference to Identical Employee Position

The court found that there was little doubt that the District had discriminated against McPherson in choosing a confidential secretary. However, the question that remained was whether an employer could discriminate against an employee on the basis of union activity when the employee seeks to become a confidential employee. The court determined that as this was a sensitive labor relations issue affecting all public sector employees under PERB's jurisdiction, and since the statutory scheme of EERA reposes exclusive initial jurisdiction in PERB over such matters, the court would not resolve this matter, absent PERB analysis and application of policy.

Negotiating Committee

The court found that section 3543 grants the right to engage in labor relations activities to "public school employees." Section 3543.4 prevents a "confidential employee" from being represented by a union, but it does not otherwise deny "confidential employees" the rights guaranteed by section 3543.5. The court concluded that because a confidential employee is part of the nucleus of the management negotiating team, a

"confidential employee" cannot also be represented by the union which represented other employees. Therefore, the court asked that on remand, PERB decide whether McPherson was a "confidential employee" in the spring of 1982.

Issues on Remand

On remand, the court asked PERB to decide: (1) whether the District refused McPherson's reclassification to a confidential position because of activity this court has found protected under EERA; and (2) if so, whether the District had legitimate business reasons for refusing to reclassify McPherson. To make this determination, PERB was asked to decide whether in choosing a confidential employee, the District may lawfully decide against an applicant because the applicant has engaged in activity protected by EERA. (3) Whether the District transferred McPherson from her former position with the employment relations office to a high school because of activity this court has found to be protected; and (4) if so, (4) whether the District would have transferred McPherson anyway for a legitimate business reason; and (5) whether the District interfered with McPherson's EERA rights by refusing to permit her to be on the negotiating committee.

On July 23, 1987, both parties filed briefs on the issues raised by the Court of Appeal.

On September 20, 1988, oral arguments were held at the PERB Headquarters in Sacramento.

DISCUSSION

1. Whether the District refused McPherson's reclassification to a confidential position because of activity the Court of Appeal found protected under EERA.

The District argues that the board rejected McPherson for the confidential position on several grounds, including concern that Bates' recommendation came too quickly, problems with costs, and concern over placing McPherson in a confidential position. Further, the District argues that the factual record in no way establishes that the activity on behalf of the teachers' union, deemed "protected activity" by the Court of Appeal, was the sole cause of the decision not to reclassify or appoint McPherson to the position.

McPherson argues that the Board, in its initial decision, found that Grignon's decision was based upon McPherson's typing for the teachers' union and that no one ever contended that the decision was based on anything other than the work for the teachers' union.

Grignon testified that as superintendent, he was responsible for selecting and recommending management, classified and confidential personnel to the District's board. When questioned as to his concerns about McPherson being selected as a confidential employee, he replied:

> I think that Mrs. McPherson has good secretarial skills, that she takes shorthand well, she types well. But, however, as far as the 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 teacher 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 . . . and in my opinion I did not feel that Cynthia McPherson could carry out that function.
> (Hearing transcript, p. 90.)

Grignon denied recommending that McPherson's reclassification be rejected and testified that the board did not want to fill the position as "they had qualms about the person who was recommended by the director of employee relations." On the other hand, Bates testified that McPherson was denied the position based upon budgetary grounds, as the District already had two confidential secretaries and the board did not believe another one was warranted.

When questioned as to the board members' actual reason for denying the reclassification, Grignon, under the advice of his counsel, refused to answer with any specificity, as to do so would violate the confidentiality of the board's closed session.

Although the Board recognizes the importance of confidentiality of closed board meetings to permit evidence to be introduced regarding board personnel decisions, reliance on such a basis does not absolve the District from its obligation to prove that the denial of the position to McPherson was based upon nondiscriminatory grounds. As Bates' and Grignon's testimony were contradictory, we find that the District has not proven that

the board properly denied reclassification of McPherson for nondiscriminatory reasons.

2. Whether in selecting a confidential employee a school district may lawfully decide against an applicant because the applicant has engaged in activity protected by EERA.

The District argues that a school district has the highest interest in selecting a person whom the governing board and administration believes would be the most appropriate employee or outside candidate to fill a confidential slot. The uniqueness of such a position is demonstrated by Government Code section 3540.1(j)[12] and section 3543.4[13] that establishes that a person in a confidential position is not included in any bargaining unit and is not an EERA "employee" within the meaning of the Act. The District cites Sierra Sands Unified School District (1976) EERB Decision No. 2, and Fremont Unified School District (1976) EERB Decision No. 6, in support of the right of an employer to be

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[12]Section 3540.1(j) states:

> "Public school employee" or "employee" means 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.)

[13]Section 3543.4 provides in pertinent part:

> No person serving in a management position, senior management position, or a confidential position shall be represented by an exclusive representative.
> (Emphasis added.)

allowed a small group of employees who could be entrusted with confidential information concerning employer-employee relations.

The Association argues that the District seeks to sanction discrimination on the basis of prior union activity or other protected acts and the permission to interfere with employees' exercise of protected rights. If this were to occur, the Association argues, employees would be fearful of participating in union activities if such participation could lead to a loss of promotion.

The Association further asserts that because confidential positions usually pay more money and are generally the top of the line for secretarial employees, the position should be considered a promotion. NLRB and federal courts have ordered promotions to supervisor and management positions when the employer denied them based on protected activity. (See NLRB v. Bell Aircraft Corporation (2nd Cir. 1953) 206 F.2d 235, 237 ; Little Lake Industries, Inc. (1977) 233 NLRB 1049 [97 LRRM 1101]; Osteopathic Hospital Founders Assn, v. NLRB (10th Cir. 1980) 618 F.2d 633, 636.) Moreover, PERB has held that promotional opportunity cannot be denied because of protected activity. (Lemoore Union High School District (1982) PERB Decision No. 271.)

The Association also asserts that the District did not establish legitimate business justification for its denial of the position to McPherson. A business justification is an affirmative defense which must be demonstrated by the employer after the employee has established discrimination. (Novato

Unified School District, supra, PERB Decision No. 210.) In this case, no such justification was given.

Under section 3540.1(c), "Confidential Employee" is defined as:

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

PERB has recognized the right of an employer to have confidential positions in employer-employee relations. In Sierra Sands Unified School District, supra, EERB Decision No. 2, PERB stated:

> The assumption is that the 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. It is further assumed that this 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. (P. 2.)

In another significant case concerning confidential employees, Fremont Unified School District, supra, EERB Decision No. 6, PERB found that:

> . . . the employer's right to the undivided loyalty of a nucleus of staff designated as "confidential" outweighs the inherent denial of representation rights of those employees designated as "confidential." (P. 10.)

In determining whether a position should be deemed confidential, PERB has looked to the degree of contact of the position with the negotiations process or the processing of

grievances. (Unit Determination for Professional Librarians of the University of California Unit (1983) PERB Decision No. 247b-H.) An employee must have involvement substantial enough so that the employer's ability to negotiate on an equal posture with the Union would be jeopardized if the information was made prematurely public. (See Campbell Union High School District (1978) PERB Decision No. 66, where the Board held a principal's secretary who maintained files and processed correspondence relating to negotiations and employee grievances was a confidential employee.) In Imperial Unified School District (1987) PERB Decision No. 647, "in the regular course of his duties" was held to mean that more than a fraction of the employee's time was spent on confidential matters, although the frequency of access was not important.

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. In the initial determination, the ALJ found under NLRB law that reprisals and discrimination related to the opportunity of promotion is prohibited. (Ford Motor Co. (1980) 251 NLRB 413, 422 [105 LRRM 1143], enf. vac, re. 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].) The ALJ then concluded because the confidential secretary was paid more than a Secretary III, this should be regarded as a promotion and that denying an

employee the opportunity to compete for a promotion based upon the protected organizational activities of the employee is prohibited by EERA. (Lemoore Union High School District, supra, PERB Decision No. 271.)

The Board cannot agree with the Association's and ALJ's analogy that the appointment of a person to a confidential position is equated with receiving a promotion. Confidential status is not a necessary step on the promotional ladder. As former Member Morgenstern stated in his concurrence and dissent in Carlsbad I:

> . . . 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). (Carlsbad I, supra, p. 10.)

Although the Confidential Secretary III position provides an increase in pay, salary alone is not a gauge of whether a promotion has occurred. A promotion may also include being provided with new responsibilities and a wider scope of duties. In this case, the Secretary III (Confidential) has the same responsibilities as a Secretary III, except that they may be assigned responsibilities that involve access to, and knowledge of, the District's employer/employee relations, and attendance at collective bargaining sessions. As a result, we conclude that appointment of a secretary to the confidential position on the

facts of this case would not be a promotion. Therefore, it is unwarranted to review additional NLRB and PERB case law that finds denial of a promotion based upon protected activity prohibited.

The NLRB has supported the transferring or discharge of confidential personnel based upon protected activities which lead to a "more than conjectural" concern that confidential secrets may be leaked. (Raytheon Missile System Division, Raytheon Company and Electrical Workers (IUE), AFL-CIO (1986) 279 NLRB 35 [122 LRRM 1036]; Illinois Bell Telephone Co. (1977) 228 NLRB 942 [94 LRRM 167]; Lucky Food Stores, Inc. (1984) 269 NLRB 942 [115 LRRM 3089]; Emanuel Hospital (1984) 268 NLRB 1344 [116 LRRM 1008].) In Raytheon, the NLRB held that an employer did not violate the NLRA when it transferred a secretary who had access to confidential information, as the employer had more than a "conjectural" basis for fearing she might disclose information to the union. The employer found that the secretary had initially attempted to conceal her attendance at a union meeting. Therefore, the management decision to transfer in Raytheon was based upon "protected activity," the secretary's support for the union and concealment of union activity.

Based upon PERB and NLRB precedent stressing the importance of confidential employees in labor relations, the Board finds that an employer should be given "broad discretion" in filling a confidential position.

The law limits confidential positions to those employees directly involved in labor relations on behalf of the employer. The Board believes that the "broad discretion" standard will have a minimal impact on employee-union relations due to the small number of confidential positions that exist. In addition, we also find that the important role a confidential person may play in negotiations between an employer and its employees' representative outweighs the potential result of a few individuals being denied a confidential position based upon their protected activity. Therefore, an employer, under EERA, may consider past protected activity when selecting an employee for a "confidential" position.

The facts of each and every case will dictate whether the employer exercised appropriate "broad discretion." As McPherson had previously undertaken work for the certificated union that may be adverse to the District's interests, the Board concludes that the board's refusal to appoint her to the confidential position was a proper exercise of the District's "broad discretion."

3. Whether the District transferred McPherson from a former position with the employment relations office because of activity the Appellate Court found protected.

The District asserts that no evidence in the factual record establishes that the District transferred McPherson "because of" the exercise of the inter-union protected rights set forth by the Court of Appeal. The District argues that even pursuant to

Novato Unified School District, supra, California State University, Sacramento (1982) PERB Decision No. 211-H, and California State University (San Francisco) (1986) PERB Decision No. 559-H, the mere exercise of protected rights itself is not sufficient to meet the "but for" test. The District then goes on to assert that McPherson was transferred to Carlsbad High School for proper business reasons after she was lawfully denied reclassification or appointment to a confidential position.

McPherson argues that her transfer to the high school was based upon her typing for the teacher's union and seeking wage differential redress from the personnel commission. McPherson also alleges that there was no legitimate business reason for the transfer as she was needed by Bates for the current negotiations, and she had served him well in that capacity for a number of months. Additionally, McPherson argues that she was needed in the position as she was the only person qualified, as demonstrated by the fact that she received 67 phone calls asking for advice subsequent to her transfer. Finally, McPherson argues the high school had been seeking a secretary for a very long time and had been eligible for one since early April. Not until late May did Grignon approve the transfer.

When Bates assumed the labor functions for the District, it necessitated that his secretary's position be filled by a confidential employee. Interviews were initially conducted in early May for the confidential secretary position. As a result of those interviews, the District offered the position to a

person employed outside the District who subsequently declined the position.

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 of May. Grignon further testified that Bates had requested the transfer because a secretary was needed at the high school. However, in his own testimony, Bates made no mention that he requested the transfer. Moreover, evidence showed that the secretary position at the high school had become available on April 12, 1982, and it was not until May 17, 1982, that McPherson was notified that she would be involuntarily transferred from her position. The reason given for the transfer was for the "good of the District." These facts indicate inconsistent and questionable justifications. We conclude that McPherson was transferred based, in part, upon her protected activities.

4. Whether the District would have transferred McPherson anyway for a legitimate business reason.

McPherson was transferred laterally to fill a permanent replacement at the high school due to an event outside the control of the District, e.g., the expiration of the 120-day limit for leave for a temporary employee who no longer was eligible to fill the position. Although six weeks elapsed between the time of the opening and McPherson's notification, we find that beginning on February 17, 1982, when the board decided not to designate McPherson as a "confidential employee," the

District had a legitimate business reason for the lateral transfer. McPherson's new position as secretary to the principal of Carlsbad High School resulted in no loss of pay, benefits, or status. Even though McPherson's former position was to remain unfilled or run by temporary secretaries, the Board finds that the transfer of McPherson was lawful.

5. Whether the District interfered with McPherson's EERA rights by refusing to permit her to be on the negotiating committee.

The record establishes that the District did interfere with McPherson's right by refusing to allow her to serve on the negotiating committee. However, once Grignon was notified of Bates' statement to McPherson, "you can serve on the committee but my secretary cannot," he corrected the District's position stating that McPherson could serve on the committee. No testimony was given showing that Grignon knew of the statement at an earlier date. Also, during her testimony, McPherson herself indicated that the negotiating team appointment was sought, not for the purposes of representation, but for the purpose of achieving a raise by appointment to a "confidential" position. Therefore, we find that any resultant harm to McPherson was "de minimis" and thus not a violation.

6. Out-of-class work.

As we find there is no violation of EERA, it is inappropriate for the Board to comment on whether McPherson is entitled to back pay based upon out-of-class work. The collective bargaining agreement between the Association and the

District provided a five-step grievance process. According to the record before the Board, McPherson has appealed for out-of-class pay through step four of the procedure. The fifth and final step, advisory arbitration, has been held in abeyance pending the outcome of this matter. Therefore, any remedy that McPherson may be entitled to should proceed through the contractual grievance process.

ORDER

The unfair practice charge in Case No. LA-CE-1590 is hereby DISMISSED.

Chairperson Hesse and Member Shank joined in this Decision.

Member Porter's concurrence begins on page 30.

Member Craib's concurrence and dissent begins on page 33.

Porter, Member, concurring: I agree with the majority insofar as it concludes that the charge and complaint in this case must be dismissed. However, I respectfully disagree with the majority's analysis for the reasons set forth below.

Regarding the initial issue, whether the Carlsbad Unified School District (District) refused McPherson's reclassification because of the typing she had performed for the teachers' union, my reading of the entire record leads me to the conclusion that the District did not unlawfully discriminate against McPherson. As pointed out by the majority, the record shows that Superintendent Grignon was concerned about moving McPherson into a confidential position because she is a long-term member of the community who has extensive personal and professional acquaintances, an outgoing personality, and is well-liked by, and popular among, her peers. McPherson's ex-husband being a District teacher and her past typing for the teachers' union were further examples evidencing her broad ties within the community and among District classified and certificated employees. However, the past typing was merely a piece of the McPherson personality mosaic which Grignon observed in evaluating McPherson. While Grignon perceived McPherson as a person qualified to perform the work in a technical sense, he was obviously concerned about placing such an outgoing person into a confidential slot. His belief was that she might, albeit unintentionally, leak or slip confidential information to her co-workers, other District employees, or community members in

the course of her various interactions with these people. Put simply, Grignon did not believe that McPherson's extroversive personality lent itself well to the performance of confidential duties and obligations.

Accordingly, I would find that Grignon's concern with McPherson was based on his lawful consideration of various legitimate factors, all relating to what he perceived to be a possible risk with respect to her performing in a confidential capacity. I cannot agree with the majority's finding that the District, through Superintendent Grignon, retaliated or discriminated against McPherson because of her typing activity.[1]

Secondly, even assuming that there was a prima facie showing that the District did refuse the reclassification because of McPherson's typing for the teachers' union, and the burden shifted to the District to show that, notwithstanding McPherson's past typing, it would have refused the reclassification anyway (Novato Unified School District (1982) PERB Decision No. 210, p. 14), I would find that the District's evidence satisfies such a burden. In other words, I believe the District has met the "but for" test. I reach this conclusion for the reasons set forth above. The typing in and of itself was not Grignon's

[1]Further evidence of Grignon's lack of animus toward McPherson and/or the union appears in the record in connection with a previous incident whereby Grignon granted McPherson's request not to be transferred out of the headquarters office, to a school site, as a result of layoffs in the District. Grignon clearly did not act adversely toward McPherson in the earlier instance which, when taken with the other record evidence discussed above, bolsters a finding of no unlawful discrimination in the present case.

concern; his concern was with McPherson's overall popularity and contacts within the community and among District employees. His concern, therefore, would remain even in the absence of the past typing activity.

Finally, assuming arguendo that the District did refuse to place McPherson into the confidential slot because of her exercise of a protected right, I must respectfully disagree with the majority's conclusion that, under a "broad discretion" standard, such District conduct is lawful.[2] The relevant EERA provision, section 3543.5(a), prescribes that a public school employer shall not impose reprisals or discriminate against employees "because of their exercise of rights guaranteed by this chapter." The statute does not except confidential positions from its proscription, nor does it provide for the exercise of any employer discretion which would allow such discrimination against candidates for confidential positions. Under the statutory provisions, if an employer, in the course of taking a personnel-related action, discriminates or retaliates against an employee solely because of his/her protected activity, that conduct is unlawful. I therefore submit that this Board may not read a "broad discretion" exception, for confidential positions, into the mandatory proscription of section 3543.5(a).

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[2]Nor do I agree with my dissenting colleague that a broad discretionary standard would be valid and could be exercised by. the public school employer in such cases. A public school employer has no discretion under the Educational Employment Relations Act to discriminate against an employee because of the employee's exercise of a protected right.

Member Craib, concurring and dissenting: I agree with the majority that, under the circumstances, any interference with McPherson's right to be on the negotiating committee was de minimis. I also agree with the conclusion that the Carlsbad Unified School District (District) refused to appoint McPherson to a confidential position and transferred her because of her protected activity. While I also agree with the analytical framework adopted by the majority for evaluating whether the District's actions were nonetheless lawful, I do not agree with the result reached. Specifically, I agree that a public school employer must be given broad discretion in selecting a confidential employee, and that protected activity may be lawfully considered in exercising that discretion. However, I believe the majority has failed to properly apply this broad discretion test.

By definition, "broad" discretion is something less than total discretion. While a broad discretion standard would be easy to meet, the exercise of such discretion logically requires some element of reasonableness. Furthermore, the choice of a broad discretion over a total discretion standard necessarily implies that not all protected activity would suffice to justify the employer's actions. The standard used by the National Labor Relations Board (NLRB), which the majority cites approvingly, employs the analogous concept that the decision must be based on more than "mere conjecture" that the employee may leak confidential information. (See, e.g., Raytheon Missile System Division. Raytheon Company (1986) 279 NLRB 35 [122 LRRM 1036].)

Thus, while an employer may lawfully reject an employee for a confidential position where prior or contemporaneous protected activity would give the employer a reasonable doubt that the employee could maintain the requisite undivided loyalty, arbitrary rejection or irrational fears would not constitute sufficient justification. As described below, I submit that the District's actions in this case fall into the latter category.

The protected activity for which McPherson was denied the confidential position was "typing for the teachers' union." There was no evidence presented which provided any details about this activity. It is important to note that, since McPherson has successfully shown that the District's actions were motivated by her protected activity, the District bears the burden of establishing that its actions were nevertheless consistent with the broad discretion standard adopted by the Board. (Novato Unified School District (1982) PERB Decision No. 210.)

It is difficult to conceive of more innocuous protected activity than that relied on by the District in this case. While it is perhaps conceivable that the circumstances surrounding typing for another union could raise some doubt about an employee's loyalty, the District has failed to provide evidence of such circumstances. What is left, therefore, is the very general assertion that McPherson was typing for the teachers' union. Such activity would give no rational person reason to fear that an otherwise well-respected and upstanding member of the community would leak confidential information. The other reasons given for the District's action toward McPherson, that

she was a long-term resident of the community and was formerly married to a teacher in the District, are patently frivolous and, therefore, do not add to, but detract from, the reasonableness of the District's actions. The fact that McPherson performed admirably as a de facto confidential employee for at least four months further undermines the District's proffered justification.

In contrast to the present case, the NLRB cases relied on by the parties and cited by the majority involved protected activity that, due to its character or quantity, raised a reasonable fear that confidentiality would be breached. In Raytheon Missile System Division. Raytheon Company, supra. 279 NLRB 35 [122 LRRM 1036], the employer suspected divided loyalties because the employee tried to cover up her attendance at a union organizational meeting. In Emanuel Hospital (1984) 268 NLRB 1344 [116 LRRM 1008], the employee was an outspoken union supporter. In Lucky Stores. Inc. (1984) 269 NLRB 942 [116 LRRM 1463] and Illinois Bell Telephone Company (1977) 228 NLRB 942 [94 LRRM 1671], the employees had close relationships with union officials or activists. The protected activity relied on by the District in the present case pales by comparison in its potential for generating a reasonable fear of a breach of confidentiality.

In sum, I cannot agree that the District's stated reason for refusing a confidential position to McPherson, that she had done some typing for the teachers' union, meets a broad discretion test. If such protected activity is enough to justify the District's actions, then it is difficult to imagine what kind of protected activity would not. As discussed above, a broad

discretion test logically implies that not all protected activity would justify discrimination against present or prospective confidential employees. Thus, the inescapable conclusion that must be drawn from the majority's acceptance of the District's proffered justification is that, while the majority purports to adopt a broad discretion standard, it has instead applied a total discretion standard.