

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



SIMI VALLEY EDUCATORS ASSOCIATION,

Charging Party,

v.

SIMI VALLEY UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-4415-E

PERB Decision No. 1714

November 29, 2004

Appearances: California Teachers Association by Michael D. Hersh, Attorney, for Simi Valley Educators Association; Thurbon & McHaney by Robert E. Thurbon, Attorney, for Simi Valley Unified School District.

Before Duncan, Chairman; Whitehead and Neima, Members.

DECISION

WHITEHEAD, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Simi Valley Educators Association (Association) to an administrative law judge's (ALJ) proposed decision. The complaint alleged that the Simi Valley Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by taking disciplinary action against a teacher for his protected conduct. The complaint alleged that this conduct constituted a violation of EERA section 3543.5(a) and (b).

The Board has reviewed the entire record in this matter, including the unfair practice charge, the amended unfair practice charge, the complaint, the hearing transcripts and exhibits, the ALJ's proposed decision, the Association's exceptions and the District's response. As a

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

result of our review, the Board finds a violation of EERA section 3543.5(a) and (b)² and reverses the ALJ's proposed decision.

BACKGROUND

Mike Bishop (Bishop) has been a full-time social science teacher at the District's Apollo School (Apollo) for 21 years and was an Association site representative for at least three years before the events at issue. Before that, he worked as a Catholic missionary in Africa for nearly 20 years. In April 2001, Apollo Principal Nidia Grijalva-Imbler (Grijalva-Imbler) wrote a glowing recommendation for Bishop to become a "consulting teacher," a position in which he would share his expertise as an educator to assist other teachers who were deemed in need of assistance. In Bishop's June 2001 performance evaluation, Grijalva-Imbler rated him highly.

Apollo is a continuation school to which students are referred because of behavior, attendance or social problems. As a site representative, Bishop maintained an information flow between the Association and employees, and represented employees about to be disciplined by the District. Along those lines, at the request of Grijalva-Imbler, he attended a meeting on November 14, 2001, as site representative on behalf of a fellow teacher. On

²EERA section 3543.5 states, in pertinent part:

It is unlawful for a public school employer to do any of the following:

- (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
- (b) Deny to employee organizations rights guaranteed to them by this chapter.

February 8, 2002, he represented teacher and former site representative Nancy Lee (Lee) whose performance the principal had criticized. Bishop also attended Association representative council meetings.

The Program Dispute

On October 1, 2001, at a weekly staff meeting, Grijalva-Imbler asked that staff vote on a proposal for students to earn extra credit through an independent study program (program). The program had not been formally discussed until the October 1 staff meeting. After a heated discussion, most teachers voted in favor of the program except for Bishop, Lee, and one or two other teachers. Bishop's concerns involved mandatory participation in the program and the provision of undeserved extra credit to students. On October 2, 2001, Bishop sent a memo to Grijalva-Imbler and two school counselors outlining his objections to the program.

After the October 1 meeting, Association Staff Representative Hal Vick (Vick) asked Bishop about the program after learning about it from another teacher. Bishop expressed his concerns to Vick about the program believing that the program was not voluntary for teachers and that students might be granted undeserved credit. Vick stated that other teachers were concerned about the undeserved extra credit but believed that the Association's only legitimate concern was whether participation by teachers was voluntary. Vick contacted Dr. Cary Dritz (Dritz), the District's assistant superintendent of personnel services, and the two scheduled a meeting for October 30, 2001, a day off for the teachers. Dritz was to invite Grijalva-Imbler and he thought that Vick would invite Bishop. Dritz invited Grijalva-Imbler and told her to bring a couple of teachers. After the meeting, Vick asked Bishop about the program after learning about it from another teacher. Bishop expressed his concerns to Vick about the program believing that the program was not voluntary for teachers and that students might be granted undeserved credit. He told her some teachers were intimidated by the program dispute.

Grijalva-Imbler was shocked to hear this, thinking that a consensus had been reached and that she did not want the program "sabotaged." Vick was unaware that Grijalva-Imbler was bringing other teachers to the meeting. Because of some "misunderstanding," Vick did not invite Bishop to the meeting. Grijalva-Imbler brought nine teachers to the meeting.

At the meeting, the attendees agreed that teachers' participation in the program was voluntary. Vick was concerned by Grijalva-Imbler's reaction to the Association's challenge to the program and by the number of teachers she brought to the meeting that there may be retaliation against Bishop. After the meeting, Vick called Bishop and told him what occurred at the meeting, that he should "be careful" if confronted about his opposition by his coworkers, and that the Association would protect him. From this conversation, Bishop assumed that Grijalva-Imbler had intentionally picked teachers who supported the program and that he had been deliberately excluded.

While both were registering students, Bishop confronted Grijalva-Imbler about the "secret meeting." Grijalva-Imbler responded that the meeting was a result of Bishop filing a grievance over the program. Bishop assured her that there was no grievance; but, Grijalva-Imbler explained that perhaps she had used the wrong term and that she knew he had complained about the program to the Association. This encounter was hostile in that voices were raised. Bishop also testified that Grijalva-Imbler stated that, "You have your people, I have mine."

By memo dated October 30, 2001, Bishop wrote to Grijalva-Imbler expressing his dismay at being falsely accused of filing a grievance. Grijalva-Imbler did not respond but testified that she was upset by the substance of the memo. Not having received a response, Bishop wrote a memo to Apollo staff in which he explained that he had never filed a grievance against Grijalva-Imbler and that he considered the Monday meeting had been an "ambush and

an attempt to drive a huge wedge down the middle of our staff." He also stated that consensus building and the group decision process "are destroyed by such an underhanded approach to leadership."

To resolve the dispute, on November 6, Bishop, Grijalva-Imbler, Dritz and Vick met in Dritz' office. Dritz and Vick told Bishop that they had set up the October 30 meeting, not Grijalva-Imbler, and that Bishop was not invited because of a misunderstanding, for which Vick apologized. The participants then discussed their positions on the program. At the end, Grijalva-Imbler drafted a memo approved by Bishop to all Apollo teachers entitled, "Clear the Air," which was distributed at a staff meeting the next day. The memo stated that there were some misunderstandings, that the November 6 meeting was very productive, and that District policy regarding participation in the program was voluntary. The memo ended by inviting teachers with concerns to discuss them with Grijalva-Imbler, the Association, or both together. Although the conflict between Bishop and Grijalva-Imbler was resolved, both testified that they believed that the other was still angry.

Deterioration of Bishop's/Grijalva-Imbler's Relationship

Since the resolution of the dispute, Bishop believes that his relationship with Grijalva-Imbler has deteriorated. For example, there was an incident in which Bishop reported students to Grijalva-Imbler for using drugs. The next day Grijalva-Imbler wrote him a memo asking if he knew what he was talking about. Bishop contends that he was left out of staff discussions with the principal, in which he used to participate, and that she stopped talking to him. Bishop also contends that there was a division between those who attended the October 30 meeting and those who did not attend, but this was not explained. Grijalva-Imbler also began to visit his classroom unannounced and without apparent reason. Bishop and Sue Rosenfeld (Rosenfeld), his instructional aide, testified that Grijalva-Imbler's conduct caused his students

to comment and joke that he was in trouble. In the past, Grijalva-Imbler had visited for a specific purpose, normally to speak with Bishop, entered the front door and greeted Bishop. After the October/November events, she entered through an accordion door from an adjoining classroom and did not greet or speak to Bishop, Rosenfeld or the students. Bishop estimated that Grijalva-Imbler visited his classroom at least 40 times, often lasting 10 to 12 minutes, between October 2001 and April 2002. The length and frequency of these visits far exceeded his previous experience. Other teachers testified that when Grijalva-Imbler visited their classroom often, she followed up by offering suggestions. Grijalva-Imbler testified that she never discussed her alleged concerns with Bishop arising from her observations and never attempted to do so until the April 8, 2002 memo.

On April 8, 2002, Bishop received a note from Grijalva-Imbler requesting that he meet with her on April 10 "to discuss some student concerns." Bishop responded by note dated April 9, requesting the names of the students and asking whether the concerns were from the students or Grijalva-Imbler. Bishop also stated that he would not meet with Grijalva-Imbler without union representation. Bishop called the Association office for assistance.

Grijalva-Imbler contacted Dritz regarding Bishop's request for representation. Dritz testified that Grijalva-Imbler was frustrated that Bishop refused to meet with her without union representation. Dritz advised her that if the meeting was not an evaluative meeting or a disciplinary meeting, she could "give that in a memo or you can basically direct him to come talk to you. It doesn't require representation." He testified that he also told her, "you could, you know, take the time and wait for him to have a representative. That would be a fair thing to do because he's requesting that." Grijalva-Imbler told Dritz that the meeting involved a concern with Bishop's teaching methods and that she wanted Bishop to provide additional instruction in order to comply with new state standards. Grijalva-Imbler assured Dritz that the

meeting was not disciplinary. Though Grijalva-Imbler sent Dritz a draft of the April 9 memo for review, the draft that Dritz reviewed did not contain the dates of proposed classroom visits.

Grijalva-Imbler then wrote Bishop a memo dated April 9, 2002, in which she expressed disappointment that Bishop would not meet with her and had hoped that their differences were resolved. The memo discussed student uneasiness about his classes because of the way it was structured and would like to see him more frequently presenting information orally and visually. She wrote that she planned to visit his classes 26 times in the next two months beginning April 17, 2002. On April 16, 2002, Bishop took a medical leave of absence because "I cannot work with the needy kids that we work with at Apollo, in such a hostile working environment. Watching my back while I'm trying to meet the needs of these students." Bishop also suffers from a medical condition called esophageal spasm which causes him severe chest pain. As a result, school staff, including Grijalva-Imbler, assisted him by seeking emergency medical assistance. He did not feel he could rely on Grijalva-Imbler any longer. As a result, he also resigned his position as department chair, a position he had held for four years.

There was much testimony regarding how regularly Grijalva-Imbler visits other teachers; however, none was anywhere near the 26 proposed visits to Bishop's classes in two months. There was testimony from both the Association and the District regarding the coolness in the relationship between Bishop and Grijalva-Imbler.

Grijalva-Imbler testified that she has been concerned about Bishop's teaching methods for sometime. She states that he uses an independent study approach, having students complete assignments, rather than making oral and visual presentations to class.

However, Grijalva-Imbler's write-ups of Bishop's performance did not raise these performance issues. Instead, e.g., the April 27, 2001 written recommendation for the

consulting teacher position described Bishop as an "exemplary teacher" and further elaborated about his teaching skills in glowing terms. This recommendation also discussed his experience as a mentor to new teachers. In the June 2001 performance evaluation, Grijalva-Imbler stated that:

Mike uses formal and informal assessment to modify his teaching and meet the students' needs. Mike meets individually with students to evaluate their progress and give them feedback in regards to their achievement.

At the end of the evaluation, Grijalva-Imbler suggested that Bishop continue to collaborate with Mary Beth Bellotti (Bellotti), his performance evaluation partner. Grijalva-Imbler testified at the hearing that she was hoping that this last comment would help Bishop improve his performance; however, that is not clear from either the content of the evaluation itself or from Bishop's testimony.

ALJ'S PROPOSED DECISION

The Association alleged interference and retaliation against Bishop for exercise of his protected rights. With regard to protected rights, the ALJ found that Bishop refused to meet with Grijalva-Imbler "for any sort of meeting, without representation." The ALJ stated that the law is well-settled that there is no right to union representation unless the meeting involves an investigatory interview reasonably anticipated to result in discipline (Rio Hondo Community College District (1982) PERB Decision No. 260; Berkeley Unified School District (2002) PERB Decision No. 1481), or unusual and intimidating circumstances (Redwoods Community College District v. PERB (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523]). The ALJ did not believe Grijalva-Imbler's April 8 note or the proposed April 10 meeting to fit these descriptions.

However, the ALJ did find that Bishop engaged in protected activity when he represented fellow teachers in meetings with the principal in November 2001 and February 2002, when he discussed with other employees his opposition to the program in September and October 2001, as well as his October 2 memo to Grijalva-Imbler about the program. According to the ALJ, teachers' concerns about involuntary assignment to the program affects working conditions and hours.

The ALJ further found that Grijalva-Imbler was obviously aware of these activities. In addition, she mistakenly believed that Bishop had filed a grievance against her with Vick, an act which would also be protected.

The ALJ found that the excessive proposed number of visits to Bishop's classes by Grijalva-Imbler and the amount of time she would need to stay to evaluate his use of alternative teaching strategies evidenced disparate treatment of Bishop and a deviation from her standard visitation practices. Her claims about Bishop's teaching methods were contradicted by the favorable performance evaluation in April and June 2001 and the fact that she had not alleged any comments before the occurrence of the events at issue.

Despite these findings, the ALJ did not find nexus. The ALJ determined that the timing was off. Allegedly Bishop and Grijalva-Imbler had aired their differences on November 6, 2001 and jointly issued the "Clear the Air" memo to teachers the next day. Although there remained some distrust, there is no evidence that Grijalva-Imbler continued to believe that Bishop filed a grievance against her. Bishop's claims that Grijalva-Imbler visited his classroom more often between October 2001 and April 2002 lacks specificity as to frequency. There is no evidence of anti-union animus or of negative reaction to Bishop's representation of the two teachers in November 2001 and February 2002, the earlier of which was at Grijalva-Imbler's request. The six-month span between Bishop's opposition to the program and

Grijalva-Imbler's April 2002 memoranda are too remote to infer unlawful motive. The ALJ did not find sufficient nexus between Bishop's protected activity and Grijalva-Imbler's proposed 26 visits to his classroom or cancellation of the April 10 meeting. With regard to the latter, the ALJ found that a valid option of Bishop's refusal to meet with Grijalva-Imbler without representation was to follow Dritz' suggestion to put her concerns in writing.

The ALJ found that Grijalva-Imbler's cancellation of the April 10 meeting did not comprise "adverse action" under the objective test in Newark Unified School District (1991) PERB Decision No. 864.

The ALJ therefore found no violation and dismissed the underlying charge.

DISCUSSION

To demonstrate a violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (fNovato Unified School District (1982) PERB Decision No. 210 (fNovato*); Carlsbad Unified School District (1979) PERB Decision No. 89.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (North Sacramento School District (1982) PERB Decision No. 264 (No. Sacramento)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB

Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; No. Sacramento.)

Evidence of adverse action is also required to support a claim of discrimination or reprisal under the Novato standard. (Palo Verde Unified School District (1988) PERB Decision No. 689.) In determining whether such evidence is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (Ibid.) In a later decision, the Board further explained that:

The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment. [Newark Unified School District (1991) PERB Decision No. 864 (Newark); emphasis added; fn. omitted.]

Protected Conduct

We find that Bishop engaged in protected conduct. There is no dispute that Bishop had been the Association site representative for at least three years prior to the incidents at issue. He represented co-workers in meetings with Grijalva-Imbler in November 2001 and in February 2002, the former meeting at Grijalva-Imbler's request. Vick testified that the February 2002 meeting at which he and Bishop represented Lee was very contentious. There

is also no dispute that Bishop's efforts to challenge the program, i.e., his protests at the October staff meeting; his October 2, 2001 memo to Grijalva-Imbler explaining the historic problems with independent study programs; his discussions of the program with Vick; and his participation in the November 6 meeting are protected activity. (Regents of the University of California (Einheber) (1992) PERB Decision No. 949-H; Madera County Office of Education (1999) PERB Decision No. 1334.)

What is in dispute is whether his request for representation in response to the April 8 note from Grijalva-Imbler is protected. The Association argues that the request itself is protected conduct notwithstanding whether he was entitled to representation under the circumstances in this case. The District agrees with the proposed decision that the April request was not protected because Bishop was not entitled to representation under the circumstances. The District appears to confuse Weingarten³ rights with the protected nature of the request for representation itself. The Board has long held that requests for union representation to discuss working conditions, such as job assignments, are protected conduct. (See e.g., Los Angeles Unified School District (1991) PERB Decision No. 874; California State University. Long Beach (1987) PERB Decision No. 641-H; California State University. Sacramento (1982) PERB Decision No. 211-H.) We find that Bishop's request for representation for the proposed April 10 meeting to be protected conduct.

Employer Knowledge of Protected Conduct

It is undisputed that the District was aware of Bishop's protected conduct.

Adverse Action

³ In National Labor Relations Board v. Weingarten (1975) 420 U.S. 251 [88 LRRM 2689] (Weingarten), the Court granted employees the right to representation during disciplinary interviews.

The Association asserts that Grijalva-Imbler imposed adverse action beginning soon after the October and November meetings through her silent, frequent and unannounced visits to his classroom, which culminated in the April 9 memo to Bishop imposing 26 hours of observation in a 2 month period. The ALJ determined Grijalva-Imbler's cancellation of the April 10 meeting not to comprise adverse action.

As noted, the Board uses an objective test to establish adverse action. There was much testimony over the number, frequency and tenor of Grijalva-Imbler's visits to teachers' classrooms by teacher/witnesses during the hearing. The experience of these teachers was significantly different in number and tone than Bishop's experience with Grijalva-Imbler's visits. Compared with Bishop, Teacher Vince Deblahovich (Deblahovich) testified that Grijalva-Imbler visited him "a lot," which he described as once every two weeks. Deblahovich also expressed surprise at the number of visits proposed in the April 9 memo. Teacher Renee Griser, a District witness, testified that Grijalva-Imbler visited her classroom an average of twice a week for a couple of minutes each and that occasionally they would discuss classroom issues. She had only received a written notice of observation when it was time for her formal evaluation, which occurred every other year. Teacher Cristina Sullivan (Sullivan), a District witness and teacher for parenting teenagers, testified that Grijalva-Imbler visited her classroom 12 to 14 times in a quarter (approximately 10 weeks) or slightly more often than once per week. Sullivan stated that Grijalva-Imbler's demeanor was always very friendly, that she always says hi to staff aides, and talks to the students, and their babies. She stays from 5 to 10 minutes each time. Special Education Teacher, Bellotti, another District witness, testified that in a quarter, Grijalva-Imbler observes her class probably 12 to 15 times and stays 2 to 5 minutes. Bellotti described these informal observations as "friendly and easy-going."

Bishop's experience with Grijalva-Imbler's visits after October 2001 was significantly different than his experience before then. Bishop testified, and Grijalva-Imbler confirmed in her testimony, that between October and the beginning of April, Grijalva-Imbler visited approximately 40 times.⁴ Before that, other than his formal observation, which occurs every other year, Grijalva-Imbler only visited Bishop sporadically, specifically to ask him a question or inform him of something he needed to know, greeted him, came through the door and was always friendly. After October 2001, the visits were frequent, Grijalva-Imbler would enter Bishop's classroom through the accordion wall separating an adjoining classroom and would not speak. Both Bishop and his instructional aide, Rosenfeld, testified that the change in frequency and tone of Grijalva-Imbler's visits after October 1 prompted students to comment why she visited so often and to ask whether Bishop was "in trouble." These months of silent visits culminated in the April 9 memo critical of his teaching methods and scheduling 26 hours of observation over a two-month period beginning April 17. At the hearing, Grijalva-Imbler was asked about her normal observation procedures. She stated that when she visited and observed an issue that needed correction or a different approach, she would soon speak to the teacher privately. She acknowledged that during all these months of visits she never shared her "concerns" with Bishop even privately and when asked why, responded with a series of non-answers. Vick testified that, in his years as an Association representative, he had not seen a memo requiring the number of visits as proposed in the April 9 memo unless the teacher was in trouble. Bishop testified likewise. Assistant Superintendent of Personnel Services Dritz testified that he had only seen that number of visitations over the

⁴The proposed decision stated that the Association did not provide testimony as to the number of these visits. However, Bishop testified to an estimate of 40 visits. The District did not dispute this number; rather, in her testimony, Grijalva-Imbler strongly agreed to visiting Bishop at least that many times during this period.

short period of time when working with consulting teachers.⁵ Utilizing the objective test under Newark, comparing the atmosphere and the frequency of Grijalva-Imbler's observations of Bishop and the frequency and length of those classroom visits proposed in the April 9 memo with her treatment of other teachers during informal observations, we conclude that a reasonable person "under the same circumstances would consider the actions (taken against Bishop) to have an adverse impact on (Bishop's) employment."⁶

Nexus

We further conclude that the Association has demonstrated a nexus between the protected conduct and the adverse action. The Board has held that an employer acts unlawfully if it retaliates against an employee in the mistaken belief that the employee has engaged in protected activity. (California Union of Safety Employees (John) (1994) PERB Decision No. 1064-S, citing Pleasant View Rest Home (1971) 194 NLRB 426 [78 LRRM 1683]; NLRB v. Link-Belt Co. (1941) 311 U.S. 584 [7 LRRM 297].) On several occasions, Grijalva-Imbler expressed, and other teachers parroted, their mistaken belief that Bishop had filed a grievance about the program. Before October 2001 when the Association challenged the program, Grijalva-Imbler and Bishop had a professional relationship; her classroom visits were sporadic but communicative and friendly. During and after the October/November 2001 events, Grijalva-Imbler visited Bishop's classroom at least 40 times for at least 10 to 12 minutes each time from the adjoining classroom without explanation or greeting.⁷ These

Consulting teachers assist, observe and report on "teachers in trouble."

⁶We will not speculate whether the cancellation of the April 10 meeting comprises adverse action. The tangible actions taken by Grijalva-Imbler involve the observations since October 2001 and the content of the April 9 memo.

⁷Bishop testified that he would occasionally say "hi" but gave up after repeatedly getting no response.

classroom visits culminated in the April 9 memo. Grijalva-Imbler wrote the April 9 memo critical of Bishop's teaching style and scheduling 26 classroom observations in a two-month period. This memo was written immediately after Bishop had requested union representation for the proposed April 10 meeting. Since the silent observations began in October, the memo was the first time that Grijalva-Imbler expressed her concerns to Bishop about his teaching methods. Instead of assuring Bishop that the April 10 meeting would not be disciplinary, Grijalva-Imbler wrote the April 9 memo. Although Grijalva-Imbler claims that Associate Superintendent Dritz approved the April 9 memo, he had only approved a draft that was missing the 26 proposed classroom observations. The advice Dritz gave to Grijalva-Imbler was premised on Grijalva-Imbler's assurances that the meeting was not investigatory or disciplinary in nature. Dritz advised Grijalva-Imbler that she might wait to meet with Bishop while he obtained union representation because "that would be a fair thing to do because he's requesting that." Grijalva-Imbler testified that when observing teachers, if it is inconvenient to comment during the observation, she would have a private conversation with the teacher. In this case, she waited six months to express her "long-term" concerns to Bishop. The commencement of the initial silent observations and the April 9 memo occurred shortly after perceived and actual protected conduct by Bishop.

Bishop had an exemplary record as a teacher; in fact, Grijalva-Imbler wrote a glowing recommendation in April 2001 for Bishop's application as a "consulting teacher," in which Bishop would evaluate and report on "teachers in trouble." In his June 2001 performance evaluation, Grijalva-Imbler praised his ability to assess students and to modify his teaching style to meet students' needs. On the other hand, Grijalva-Imbler testified that she had had concerns about Bishop's teaching style for months and perhaps years. She stated that she had

received complaints from students and counselors. However, she never attempted to discuss these concerns with Bishop until April 2002.

As stated above, the frequency and tenor of Grijalva-Imbler's visits, as compared to her treatment of other teachers evidences disparate treatment. The 40 visits to Bishop were silent. Rosenfeld, the instructional aide, and the students noted the unspoken tension from visits to the extent that students asked if Bishop was "in trouble" with Grijalva-Imbler. Unlike her conduct toward other teachers, Grijalva-Imbler did not talk to Bishop during or after these visits.

The above facts evidence timing, disparate treatment, and departure from established procedures and standards, sufficient to show nexus. We thereby find that Grijalva-Imbler retaliated against Bishop because of his protected conduct and that the concerns about Bishop's performance were a pretext for adverse action. Otherwise, why did Grijalva-Imbler wait more than six months to express her concerns?

The test for whether a respondent has interfered with the rights of employees under the EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. The Board described the standard as follows:

[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA. (State of California (Department of Developmental Services) (1983) PERB Decision No. 344-S.)

Under the above-described test, a violation may only be found if EERA provides the claimed rights. In Clovis Unified School District (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. Under Carlsbad Unified School District (1979) PERB Decision No. 89, the employer then has

the burden to prove operational necessity and the Board will then balance the competing interests.

Bishop's perceived and actual protected conduct is described above. It is clear from the frequency, nature and tenor of Grijalva-Imbler's observations and that she had not discussed alleged concerns with Bishop over his teaching methods for six months until the April 9 memo. Testimony at the hearing showed that the frequency, length and tenor of these observations occurred only for "teachers in trouble." There was testimony that Grijalva-Imbler's conduct was intimidating to Bishop, Rosenfeld, and his students and thus prompted Bishop's request for representation in April. Grijalva-Imbler's conduct harms Bishop's protected rights to act as a site representative, to challenge policies as violative of protected rights (unilateral changes in hours and terms and conditions of employment), and to request union representation. We therefore find that Grijalva-Imbler interfered with Bishop's protected rights. As stated above, we conclude that Grijalva-Imbler's concerns about Bishop's performance were a pretext for imposition of the adverse action.

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that Simi Valley Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b).

Pursuant to EERA section 3541.5(c), it is hereby ORDERED that the District, its administrators and representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining or coercing Michael Bishop (Bishop) because of his exercise of rights guaranteed by EERA.

2. Denying the Simi Valley Educators Association (Association) rights guaranteed to it by EERA.

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

1. Rescind, remove and destroy the April 9, 2002 memorandum from Apollo School Principal Nidia Grijalva-Imbler to Bishop that has been determined to be unlawfully motivated. This memorandum shall be removed from all of Bishop's personal employment records including official personnel files, any "supervisory" or "working files," or any other source of information that could be used in the future to support either (1) a comment or a rating in an evaluation of, or (2) discipline against Bishop.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices to employees are customarily placed, 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 thirty (30) consecutive work days. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Association.

It is further Ordered that the proposed decision in Case No. LA-CE-4415-E is hereby
REVERSED.

Member Neima joined in this Decision.

Chairman Duncan's dissent begins on page 21.

DUNCAN, Chairman, dissenting: I respectfully dissent. I would adopt the administrative law judge's (ALJ) opinion. The essence of my position is found in the ALJ opinion at pages 14-18.

At page 14, the ALJ said:

In the instant case, I do not find that Bishop exercised a right under the EERA when he refused to meet with Grijalva-Imbler 'for any sort of meeting, without representation.' It is well-settled that there is no right to union representation in a meeting with management unless the meeting is to be an investigatory interview reasonably anticipated to lead to discipline. (Rio Hondo Community College District (1982) PERB Decision No. 260; accord, Berkley Unified School District (2002) PERB Decision No. 1481.) Grijalva-Imbler's April 8 note seeking to 'discuss some student concerns' does not reasonably invoke any threat of discipline, nor does it suggest an investigatory interview, notwithstanding Bishop's fear that he might be 'ambushed.' . . .

I agree further with the ALJ that a right to representation

also attaches where the meeting with the employer involves unusual circumstances, e.g., the presence of a high-level administrator, a formal and intimidating atmosphere, a negative impact on the employee's personnel file. (Redwoods Community College District v. Public Employment Relations Board (1984) 159 Cal.App.3d 617 [205 Cal.Rptr. 523].) None of those facts are present here, nor is there any other evidence to indicate that the April 10 meeting might be unusual.

In the Simi Valley Unified School District (District) response to the exceptions, at pages 3-5, the District cites to the transcript of the hearing regarding testimony on alleged adverse actions. The District notes that the meeting with the principal on April 10, 2002, was to discuss teaching style, not to address discipline. The District notes these interviews were scheduled with other teachers as well. I agree with the ALJ (and the District) that no evidence exists to indicate that Mike Bishop's (Bishop) request for representation at the April meeting was protected.

The ALJ did find that Bishop did engage in protected activity when he represented other teachers in meetings with the principal in November 2001 and February 2002. The District agrees. She also found that at least part of his opposition to the program was protected in contrast to the District position.

The ALJ found that on three prongs of the Novato¹ test Bishop's allegations were sustained but his charge failed because she did not find the necessary nexus. At page 17 of her proposed decision she states:

Bishop and Grijalva-Imbler had aired their differences and resolved them at the November 6, 2001, meeting and had circulated their 'Clear the Air' memo to the teaching staff the following day. They both acknowledge that some mistrust remained between them and that their former spirit of friendly cooperation was diminished. However, there is no evidence that Grijalva-Imbler continued to believe Bishop had filed a grievance, notwithstanding Bishop's assumptions to the contrary, which I find unfounded. Bishop claims that she visited his classroom more often between October 2001 and April 2002 than before; however, he did not provide details as to how often, thus I cannot conclude that she treated him disparately from other teachers during this period. There is no evidence of anti-union animus, or of any negative reaction specific to Bishop's union representation of the two employees at the November 2001 and February 2002 meetings, the earlier of which was at the Principal's request. Further, the six-month time span between Bishop's opposition to the Program in October 2001 and Grijalva-Imbler's memos of April 2002 is too protracted to infer an unlawful motivation. Thus, I do not find sufficient nexus between Bishop's protected activity and Grijalva-Imbler's scheduling 26 visits to his classroom.

¹Novato Unified School District (1982) PERB Decision No. 210 (Novato).

The bottom line for the ALJ is that she found Bishop's assumption that Nidia Grijalva-Imbler (Grijalva-Imbler) continued to believe that Bishop had filed a grievance against her wrong. Grijalva-Imbler testified she did not, in fact, believe that and the ALJ found her more credible than Bishop.

The ALJ stated that "Bishop claims that she [Grijalva-Imbler] visited his classroom more often between October 2001 and April 2002 than before; however, he did not provide details as to how often, thus I cannot conclude that she treated him disparately from other teachers during this period." The majority seizes on Bishop's testimony that she visited him 40 times in that time frame to indicate the ALJ erred. The ALJ did not err, she saw that testimony as the guesswork it was and she found Grijalva-Imbler more credible.

The ALJ is in a better position to judge credibility of witness testimony than the Board because of the opportunity to view body language, nuance and tone in addition to the actual words.

Where the ALJ's findings of fact are based on the ALJ's determination with respect to credibility of witnesses, PERB should defer to those findings. In United Teachers of Los Angeles (Keskey) (1991) PERB Decision No. 914, the Board held that in the situation where an ALJ's findings of fact are based on credibility of witnesses, PERB will defer to those findings. That is what the majority should have done here.

The ALJ is correct that canceling a meeting is not an adverse impact on Bishop. Bishop's feeling that it was adverse is subjective and does not meet the objective test used by the Board. That test is set out in Palo Verde Unified School District (1988) PERB Decision No. 689. There, the Board held that an objective test is used and the Board will not rely on the subjective reaction of the employee.

Because there was no adverse action, the District did not interfere with or retaliate against Bishop because of his work as site representative or any other protected activity. Accordingly, I would dismiss this case.

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**



After a hearing in Unfair Practice Case No. LA-CE-4415-E, Simi Valley Educators Association v. Simi Valley Unified School District, in which all parties had the right to participate, it has been found that the Simi Valley Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) and (b).

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

A. CEASE AND DESIST FROM:

1. Imposing or threatening to impose reprisals, discriminating or threatening to discriminate against, or otherwise interfering with, restraining or coercing Michael Bishop (Bishop) because of his exercise of rights guaranteed by EERA.
2. Denying the Simi Valley Educators Association rights guaranteed to it by EERA.

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

1. Rescind, remove and destroy the April 9, 2002 memorandum from Apollo School Principal Nidia Grijalva-Imbler to Bishop that has been determined to be unlawfully motivated. This memorandum shall be removed from all of Bishop's personal employment records including official personnel files, any "supervisory" or "working files," or any other source of information that could be used in the future to support either (1) a comment or a rating in an evaluation of, or (2) discipline against Bishop.

Dated: _____

SIMI VALLEY UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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