*** * * Modified by *Carpinteria Unified School District* (2021) PERB Decision No. 2797, p. 14 and *Mt. San Jacinto Community College District* (2023) PERB Decision No. 2865, pp. 21-23, as recognized in *SunLine Transit Agency* (2024) PERB Decision No. 2928-M, pp. 18-19 * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SANTA ANA COLLEGE ORGANIZING COMMITTEE, CFT/AFT/AFL-CIO, and JOANNE MAYBURY-McKIM,	)	
Charging Parties,	)	Case No. LA-CE-1643
v.	)	PERB Decision No. 602
RANCHO SANTIAGO COMMUNITY COLLEGE DISTRICT,	)	December 30, 1986
Respondent.	)	

Appearances: Lawrence Rosenzweig, Attorney for Santa Ana College Organizing Committee, CFT/AFT/AFL-CIO, and Joanne Maybury-McKim; Parker and Covert by Spencer E. Covert, Jr., and Margaret A. Chidester for Rancho Santiago Community College District.

Before Morgenstern, Burt and Porter, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Rancho Santiago Community College District (District) to the proposed decision of an administrative law judge (ALJ) finding that the District violated section 3543.5(a) and (b) of the Educational Employment Relations Act (EERA or Act)[1] by

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

Section 3543.5 provides, in pertinent part, as follows:

> It shall be unlawful for a public school employer to:

disciplining Joanne Maybury-McKim for writing and/or publishing certain articles in the newsletter of an employee organization.[2] For the reasons set forth below, we affirm the ALJ's decision and order.

FACTS

Joanne McKim is a tenured instructor of history at Santa Ana College (SAC), having taught there for over 12 years. She was a founding member of the Organizing Committee of the Santa Ana College/California Federation of Teachers/American Federation of Teachers, AFL-CIO (Organizing Committee) in October 1981, and served as its first president.

In the 1981-82 school year, the Organizing Committee published a newsletter entitled AFTer/THOUGHTS. Approximately

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

[2]No exception is taken to that portion of the ALJ's decision dismissing an alleged violation of section 3543.5(d), "domination or interference with the administration of an employee organization," and a charge regarding the time, place and manner of service of process of the June 28, 1982 Notice of Unprofessional Conduct. Therefore, those matters are not before us.

[3]The Faculty Association of Rancho Santiago (FARSCCD) is the exclusive representative of faculty in the District. McKim is not a member of that organization.

500 to 700 copies of each issue were distributed to District faculty. Though the newsletter was not distributed to the public or students, students were able to get copies. McKim authored most of the articles in these newsletters and, as president of the Organizing Committee, she accepted responsibility for all of the articles.

On June 28, 1982, McKim was served with a notice of unprofessional conduct pursuant to Education Code section 87734.[4] The 15-page notice from Superintendent J. William Wenrich cited as "specific instances of unprofessional conduct" 19 separate passages in the May 11, May 20 and June 12 issues of AFTer/THOUGHTS, which the District characterized as "false public accusations" of dishonesty, criminal activities, intimidation, conspiracy, terrorization, nepotism, violations of constitutional and civil rights, violations of District procedures and policies, reprisal, coercion, libel, and mismanagement, all "made with knowledge of their falsity," which are "damaging to the reputations of staff and interfere with the effective operation of the District."

On November 11, 1982, McKim received a letter of reprimand which cited six additional phrases allegedly constituting unprofessional conduct, which appeared in an October 26, 1982 AFTer/THOUGHTS.

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[4]Education Code section 87734 requires notice 90 days prior to the initiation of formal proceedings to divest a community college faculty member of tenure.

McKim's fall 1982 evaluation, completed on November 10, 1982 by Dean Lee Layport, contained a satisfactory rating for classroom presentation and a "needs improvement" rating for both professional relations and other professional qualities, and referred to the contents of the previous notice of unprofessional conduct and letter of reprimand.

On December 8, 1982, McKim received a Special Evaluation performed by Dr. Roseann Cacciola. After briefly noting that McKim's classroom performance was satisfactory, the evaluation discussed at length the alleged impact of an article in the October 26, 1982 issue of AFTer/THOUGHTS. Referring again to the notice of unprofessional conduct, the letter of reprimand, and the previous evaluation, the special evaluation stated as follows:

> . . . Your unprofessional remarks and statements have had serious detrimental effect upon classroom, faculty, and the administration.
>
> We are pleased to see that this has apparently ceased in December. We note that the AFT-ER THOUGHTS, dated November 22, 1982, contained no unprofessional remarks. Pleased [sic] be advised that you must continue to not make any further remarks or statements that are unprofessional.

No further disciplinary action was taken against McKim prior to the hearing in this case.

At hearing, the District offered the testimony of Dr. Richard Sneed and Dr. Neal Rogers to show the disruptive effect of McKim's writings. Dr. Sneed testified that McKim was given the

notice of unprofessional conduct because she had made

> . . . defamatory, malicious, insulting remarks about her colleagues to the point that they were complainants and, as well as students who were disrupted and upset by her behavior.

He considered her conduct to be unprofessional because:

> I believe that if an instructor attacks colleagues in a defamatory way that the person is not adequately respecting the rights of the other persons to do his or her work. There is absolutely no question in my mind because the reactions that I received from faculty that they were, in fact, hindered in, some were hindered in their work, upset to the point of tears. I've seen students, or rather received testimony of students from Dean LaPorte [sic], who were equally upset. I think this is disruptive and unprofessional to that extent. That is to say if you attack other people in a way that casts doubt on their competency or on their professionalism, and they in turn are upset to the point that they do their work with difficulty, I consider that unprofessional.

In response to the question, "What operations of the District has Ms. McKim disrupted?," Dr. Rogers stated:

> She has cast a shadow upon other faculty, with administration, that there is a conspiracy, that there is a heavy-handedness, that there is a plot, if you will, to control and keep subservient certain components within this college.

When pressed for specifics, he responded:

> A. She has caused a great deal of turmoil with —
>
> Q. What does that mean?
>
> A. That means people that are very upset, very concerned that their name is being used and not only in an unfavorable, but in an untrue manner, that it has cast upon this institution, including the superintendent and

> top level administration, that we are a bunch of buffoons, that we obviously don't know what we're doing and we're using subtle trickery to control and manipulate the staff. We think that is detrimental to the reputation of this institution and, from that standpoint, it is disruptive.

The AFTer/THOUGHTS Articles

McKim testified that she wrote all of the May 11, 1982 issue of AFTer/THOUGHTS which is directed at:

> . . . a staff of teachers who have subtly, slowly, and inexorably been stifled and scared to do anything other than follow Wenrich's partyline as channeled through dependent and loyal faculty organizations such as the Faculty Senate, FARSCCD and administrator dominated department meetings and committee assignments.

"The McKim Chronicles" are an example that "there ARE penalties for faculty being independent in trying to improve the educational environment at SAC."

"The 'McKim Chronicles' - A Study in Professional Abuse and Lawbreaking," describe the events leading up to imposition of a "censorship order" on McKim as follows: Upon her return from a one-year sabbatical in spring 1981, she investigated, discussed and "orchestrated the protest movement" regarding an assault on teacher Leon Strahan, which occurred in late April 1981. In June 1981, she was issued a notice of unprofessional conduct based on a "sudden and unexpected" evaluation by Dean Layport which McKim characterized as "illegal" in violation of the collective bargaining agreement, "repressive," and "analagous to the gestapo's [role] in Nazi Germany."

According to McKim, the notice of unprofessional conduct was served on her under "incredible circumstances" at 8:30 p.m., and the real reason for the notice was to "cover up" and prevent her from discussing the "attempted murder" of Strahan and SAC's "responsibility" and "complicity" in the attack "in the six months or so it would take to deal with the District Attorney's office and get some plea bargaining accomplished."

The article quotes from her June 14, 1981 written response to the notice which, in part, accused the administration of "carrying out questionable, perhaps occasionally nefarious practices of mismanagement." She claimed that "student spies" provided the information for which she was charged, and characterized the process as "like being hauled away at midnight by the Nazis or being set up by the KGB in the Soviet Union." Until the 90-day notice period expired in mid-December, she "was scared to disclose anything about these censorship orders" because she thought she "would be sent right away off to the courts." She concluded:

> The bottom line in this story . . . is the existence of administrative policy to use fear and intimidation to run Santa Ana College. If you don't experience it, it is because you see eye-to-eye on the way things should be run. . . . If just one of us is pushed around, mistreated, abused, and attacked, no one is free to talk. . . .

The May 20, 1982 issue of AFTer/THOUGHTS continued the McKim Chronicle and began with the following explanatory remarks:

> In the previous AFT/er Thoughts, May 11, AFT-SAC dealt with the issue of calculated administrative frame-up to remove my tenure. That is to say, the subject of abuse of teacher rights at SAC was the focus of discussions. AFT, in its effort to explore issues of educational policy-making, continues to invite professional teachers to examine their professional responsibilities and obligations with respect to the way they are mistreated, intimidated, silenced, and if need be, crushed!

McKim described the subject of Chronicle #3 as:

> . . . the methods of authoritarian intervention that destroyed so-called faculty autonomy in the Women's Studies Department, leading to the destruction of the department, the resignation of one member, the betrayal of another, and the dispersal and non-communication of the others.

She referred to events which occurred in December 1979, accusing management of trying to destroy the Women's Studies program "chaired by anti-feminist Dean Donna Farmer," and "under the domination of a male supremacist administration."

McKim complained of a reprimand which she received on January 9, 1980:

> . . . they exact specific reprisals on a teacher above and beyond legal jurisdiction by outlawing communication that is private two-party correspondence with other faculty, when in fact it is within a teacher's Constitutional right of First Amendment speech to conduct private correspondence without jeopardy of losing tenure.

She quoted from her response to the reprimand as follows:

> To the contrary, Santa Ana College indoctrinates its students and coerces its faculty — usually through milder techniques than I experienced, but in my case is held up as an example to other would-be dissidents.

> Only conformity to the suitable mainline desired by the managers will be approved. No serious alternatives, under existing administrative fiat, will be permitted very long.

McKim testified that she did not write an article entitled "The Chief Negotiator and the Folly of the Packaged Deal" which criticized the FARSCCD negotiating team as "a collective begging team," its chief negotiator as having a "Sweetheart Arrangement" with the administration, and another negotiator as having a "vested interest" in the negotiations because of:

> . . . the favor Layport gave him in hiring his wife Georgia in the Women's Studies to take over teaching Joanne McKim's feminism classes while McKim was on her sabbatical?

The June 1982 issue of AFTer/THOUGHTS contained McKim Chronicle #4 - "Wenrich, the Lawbreaker," which began as follows:

> The McKim Chronicles have brought to light in the past month the protracted mismanagement of Wenrich's administration with respect to violating the First Amendment of the United States' Constitution, interfering with academic freedom under the FARSCCD contract, and conducting managerial take-over of faculty duties and responsibilities. Generally speaking, administrators have shown how they abuse educational policy, displaying contempt, open and covert, for teachers and arrogant indifference to the impact their intimidations of faculty have on student learning and student knowledge.
>
> Now it is time to add a chapter on how they broke the law by tearing up a sabbatical contract, approved by the Board, signed, sealed and delivered. Furthermore, they breached this contract without any legal basis, whatsoever! In litigation, they were even forced to admit it.

The article discusses management's revocation of McKim's sabbatical contract in Spring 1980 because she had emergency surgery, and her legal efforts to get the sabbatical restored. McKim wrote:

> These men are not human educators, but vindictive sadists . . . . They took advantage of me, and acted very unprofessionally in a mean and cruel manner. When they smelled the blood, they couldn't restrain their ruthless impulses.
>
> Taxpayers, students and faculty need to know of the low character of men who are paid to be "leaders" because of their so-called "enlightened" position as administrators. The reverse is true, as Wenrich, Sneed and Layport fulfill none of these descriptions. Opportunism and raw power motivate them. They took a cheap shot on a teacher and punished her because she had been a vocal critic of the faculty. They saw the vulnerability and attacked just after she was recovering from anesthesia and remained weakened by the devastating impact of the surgeon's knife. That behavior is thoroughly dishonorable!

In the October 26, 1982 issue of AFTer/THOUGHTS, McKim authored an article entitled "Academic Freedom and Civil Rights are the AFT Issues at SAC, not 'Personal Goals.'" The article describes AFT's goals as follows:

> . . . What I have done is organize an <u>independent faculty</u> voice, a union, that has the power <u>to speak the truth and resist coercion</u> by the administration. Consequently,- AFT-SAC can reveal what is usually covered up to serve the status quo: that it <u>is SAC administrative policy to harass faculty who don't tow the party line</u>.
>
> •
>
> Besides criticizing the FARSCCD two-year contract as the sell-out contract the weakest

> in California, AFT-SAC has focused on the ABSENCE OF ACADEMIC FREEDOM AT SANTA ANA COLLEGE and the implementation of other very serious ADMINISTRATIVE ABUSES OF ALL FACULTY at SAC, not just AFT organizers.

The article then lists some 13 issues of concern, including: "[f]alsifying teacher evaluation for political retaliation"; "[b]reach of sabbatical contract as reprisal for criticism of administration"; "[i]nvasion of privacy"; "[u]sing nepotism arrangements to replace activists on the faculty with 'feather-your-own-nest' types"; "[a]dministrative meddling to break up 'autonomous' faculty departments and foment friction among faculty in a divide-and-conquer strategy"; and "[p]romoting smear campaigns by making phony charges of 'unprofessional conduct' to silence critics." The article concludes:

> It IS part of SAC's administrative policy, endorsed by the Board of Trustees, to harass teachers who dissent. This they do most effectively by operating silently, taking critics away one-at-a-time in secret meetings.
>
> After isolating the individual and scaring him/her, they issue phony charges of "unprofessionalism," thereby ruining their personnel files. Next they publicly conduct a personality smear to attempt to get obedience. What they really prefer is resignation, pure and simple. This is a process that has happened to many teachers on this campus. Perhaps you are next!

DISCUSSION

The District explicitly states that the sole reason for its disciplinary actions against McKim were certain objectionable statements published in AFTer/THOUGHTS. Thus, there is no

question as to the District's motivation.[5] Rather, the issue presented is whether these statements were protected by EERA.

In considering the limits of employee speech protected by EERA, PERB has adopted the standard applied by the National Labor Relations Board, consistent with that articulated by both the California and United States Supreme Courts in First Amendment cases.[6] Preliminarily, the speech must be related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations. (Section 3543.) (Mt. San Antonio Community College District, supra; cf. Pittsburg

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[5]We disagree with the ALJ's finding that the District's motivation is in dispute here, and that previous disciplinary actions against McKim are relevant to a determination of motivation. Inasmuch as the District does not claim that McKim's discipline was based on any alleged prior misconduct or, indeed, on any conduct other than her speech, we do not find her disciplinary history pertinent to the issues raised by the case.

[6]Pittsburg Unified School District (1978) EERB Decision No. 47 (prior to January 1, 1978, PERB was known as the Educational Employment Relations Board); Richmond Unified School District/Simi Valley Unified School District (1979) PERB Decision No. 99; Mt. San Antonio Community College District (1982) PERB Decision No. 224; Pickering v. Board of Education (1968) 391 U.S. 563; Mt. Healthy City School District v. Doyle (1977) 429 U.S. 274 [97 S.Ct. 568]; Givhan v. Western Line Consolidated School District (1979) 439 U.S. 410 [99 S.Ct. 693]; Linn v. United Plant Guard Workers of America (1966) 38 U.S. 53 [86 S.Ct. 657]; Los Angeles Teachers Union v. Los Angeles City Board of Education (1969) 71 Cal.2d 551 [78 Cal.Rptr.723]; Gregory v. McDonnell Douglas Corporation (1976) 17 Cal.3d 596 [131 Cal.Rptr. 641]; Postal Workers v. U. S. Postal Service (D.C. Cir., 1984) 118 LRRM 3119, 3126.

Unified School District, supra; State of California (Department of Transportation) (1982) PERB Decision No. 257-S.)

Here, McKim's writings are related to matters of legitimate concern to employees as employees, including such subjects as teacher safety, negotiations, leaves, the autonomy and effectiveness of the exclusive representative and other employee organizations, educational policy and academic freedom.

Speech which is related to employer-employee relations may nonetheless lose its statutory protection where it is found to be so "opprobrious, flagrant, insulting, defamatory, insurbordinate, or fraught with malice" (Mt. San Antonio Community College District, supra, p. 6; Rio Hondo Community College District (1982) PERB Decision No. 260) as to cause "substantial disruption of or material interference with school activities" (Richmond Unified School District/Simi Valley Unified School District, supra, citing Pickering, supra). In its exceptions, the District argues that McKim's writings are of this character. We disagree.

While McKim's choice of language is frequently exaggerated and overstated, we do not find it sufficiently flagrant, opprobrious or malicious as to lose its protected status. The District itself concedes that, in characterizing the writings as defamatory, it is not using the word as a term of art. Rather, it used the term to mean "a remark or comment or description that takes away, unlawfully takes away the reputation of a person and falsifies the person's activity." All of the incidents referred to have some basis in fact. The articles

unmistakably express McKim's opinions regarding these incidents. The underlying events were widely known at the college and are explained in graphic detail in the articles, enabling the reader to make his/her own judgment. Indeed, the sophisticated audience of college instructors and administrators is quite capable of drawing its own judgments about both the articles and events.

Though the District asserts that the articles had a disruptive effect on its operations, it relies exclusively on the conclusory testimony of its administration witnesses. It failed to introduce the testimony of a single student or teacher, nor did it submit any other evidence of actual disruption. Neither does the District contend that McKim's writings seriously interfered with the performance of her duties as an instructor.

For these reasons, we conclude that McKim's writings are protected under EERA.

Inasmuch as the District admits that McKim's statements formed the sole basis for its disciplinary action against her, and having found these statements to be protected, it is clear that the District disciplined McKim because of her exercise of protected rights. A violation of section 3543.5(a) of EERA is thereby established under Novato Unified School District (1982) PERB Decision No. 210.[7] By this same conduct, the District

[7]While the ALJ based his finding of violation on Carlsbad Unified School District (1979) PERB Decision No. 89, we find Novato, supra, provides the appropriate standard where an employer not only interferes with the exercise of employee

also denied the Organizing Committee its rights, in violation of section 3543.5(b).

REMEDY

In the proposed decision, the District was ordered to cease and desist from its unlawful conduct; to "remove from all District records and destroy" the notice of unprofessional conduct and the letter of reprimand; to delete all references to McKim's writings in her evaluations of November and December 1982; and to post a notice informing District employees of these actions.

The District excepts, claiming that PERB has no jurisdiction to order the rescission of a notice of unprofessional conduct. While it concedes that PERB would have jurisdiction to order reinstatement if McKim had actually been dismissed for retaliatory purposes, it argues that PERB's jurisdiction "does not supersede the District's exclusive right to determine when the mandatory Education Code section 87734 notice must be given."

The District's exception is lacking in merit. Having found that the notice of unprofessional conduct was issued to McKim because of her exercise of rights guaranteed by EERA, we find rescission of this notice appropriate and well within PERB's broad remedial authority

> . . . to issue a decision and order directing an offending party . . . to take such

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rights, but takes adverse personnel action against an employee because of the exercise of those rights.

> affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter. (Section 3541.5(c).)

Rescission of the notice is consistent with well-established Board precedent ordering letters of reprimand removed from personnel files in situations similar to the instant case. Mt. San Antonio Community College District, supra; Rio Hondo Community College District, supra.

Finally, finding the record fully adequate to decide the issues raised by this case, we deny the District's request for oral argument.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5(c), it is hereby ORDERED that the Rancho Santiago Community College District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Discriminating against, and interfering with, employees because of their exercise of rights guaranteed by the Educational Employment Relations Act.

2. Denying to the Santa Ana College Organizing Committee, CFT/AFT/AFL-CIO, rights guaranteed to it by the Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. Remove from all District records and destroy the June 28, 1982 notice of unprofessional conduct and the November 8, 1982

letter of reprimand issued to Instructor Joanne Maybury-McKim, and delete all references to Instructor McKim's writings in her evaluations dated November and December 1982.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all work locations where notices to employees customarily are 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 workdays. Reasonable steps shall be taken to insure that this Notice is not reduced in size, defaced, altered or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the regional director of the Public Employment Relations Board in accordance with his instructions.

Member Burt joined in this Decision. Member Porter's dissent begins on p. 18.

Porter, Member, dissenting: I unequivocally disagree with the majority's analysis and conclusion in this case and would reverse the ALJ and dismiss the charge. The majority concludes that, because McKim's conduct occurred in the context of a labor organization's publication, it achieves a degree of protection not otherwise available to similar conduct not so shielded. This simplistic approach ignores all of the surrounding context in which the District's discipline occurred and fails to grasp that the District's discipline had nothing whatsoever to do with the fact that McKim issued the organizational newsletter itself. The fallacy of the majority's conclusion can only be fully appreciated by a summary of events leading up to and surrounding the District's discipline.

Factual Background

The record in this case portrays a community college instructor who is an ardent and strident activist with regard to "feminist education"; an instructor who is personally committed to changing the women's studies and history programs and the respective chairpersons, courses and program instructors at Santa Ana Community College so as to conform with her views on "feminist education"; and an instructor who appears to be totally intolerant of anyone — including her faculty colleagues, the chairperson of the Women's Studies Program, students and college administrators — who she perceives is not acting, or has failed to act, in full and complete support of, and in conformity with, her views of the true feminist goals in education.

In 1979, McKim engaged in numerous vitriolic attacks, both verbally and in writing, on her faculty colleagues, the Women's Studies Program chair and college administrators castigating them for their alleged incompetence in women's studies and feminist activities and/or for alleged acts or omissions which she believed were damaging to what she perceived the Women's Studies Program and feminist education goals should be at Santa Ana Community College.

Following complaints from faculty and program administrators concerning McKim's unprofessional conduct, college administrators met with McKim on several occasions in late 1979 and attempted to counsel her concerning her professional responsibilities to her colleagues, the college programs and program administrators. McKim was admonished to refrain from unprofessional attacks on her colleagues or on the college programs and administrators. She indicated that she would stop such conduct but, shortly thereafter, again engaged in similar unprofessional conduct.

When the 1979 counseling proved unsuccessful, the District gave McKim a formal "Letter of Reprimand for Unprofessional Conduct" in January 1980, at the end of the fall semester for the 1979-80 academic year. After receiving this Letter of Reprimand, McKim went on sabbatical leave for one calendar year (1980), and returned to the college campus for the commencement of the Spring semester (1981) of the 1980-81 academic year.

Upon her return to the campus in the Spring of 1981, McKim commenced anew her unprofessional attacks on her faculty

colleagues, the Women's Studies Program and courses, and the college administrators for what she still perceived to be their shortcomings with respect to feminist education and feminist goals. But McKim did so in 1981 by way of her classroom — before her students — making verbal and written (chalkboard) attacks on other teachers, their courses and on college programs and administrators during the various classes McKim was teaching. This resulted in new complaints concerning her conduct from faculty, students and administrators.

The District responded to McKim's classroom attacks on her faculty colleagues, their courses, and the college programs and administrators by serving on McKim, in June 1981, a second written reprimand, entitled "Notice of Unprofessional Conduct." This is a statutory notice requirement mandated by Education Code section 87734 before the District can initiate dismissal proceedings for unprofessional conduct.[1] The purpose of the

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[1]Education Code section 87734 prescribes:

> The governing board of any community college district shall not act upon any charges of unprofessional conduct or incompetency unless during the preceding term or half school year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct or incompetency, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee an opportunity to correct his faults and overcome the grounds for such charge. . . .

87734 notice to McKim was to put her on official notice of her unprofessional conduct and afford her a period of time within which she could correct her conduct and thereby avoid dismissal proceedings.

Following the June 1981 Notice of Unprofessional Conduct and through the remainder of 1981 — including the Fall semester of the 1981 academic year — and into the first part of 1982, McKim did not engage in any further unprofessional attacks on her colleagues, the college programs and courses, or the college administrators. Accordingly, the District did not file formal Education Code section 87732 dismissal charges for her Spring 1981 unprofessional conduct.

In October 1981, during the period of time in which McKim would have been subject to formal Education Code section 87732 dismissal proceedings if she had persisted in her unprofessional conduct, McKim was instrumental in founding the "Organizing Committee of Santa Ana College/California Federation of Teachers/American Federation of Teachers/AFL-CIO" (Organizing Committee) and served as the Organizing Committee's first president.[2]

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[2]The exclusive representative for teachers in the District was and is the Faculty Association of the Rancho Santiago Community College District (FARSCCD). The record in this case shows FARSCCD as the exclusive representative, and we may take official notice of PERB records that it remains so to this date. We may also take official notice that PERB records show no decertification petition or other challenge to FARSCCD during the period of time involved in this case and up to the present date.

In 1982, the Organizing Committee, under McKim's presidency, began circulating a newsletter, "AFTer/THOUGHTS." The newsletter dealt with various subjects, including "feminist politics," an alleged absence of academic freedom at Santa Ana Community College, criticisms of the collective bargaining negotiations between the District and FARSCCD, and criticisms of FARSCCD. The newsletter was distributed to the faculty and became available to the students.

Commencing in May 1982, after a number of newsletters had been published and circulated and after the statutory time period of the June 1981 Notice of Unprofessional Conduct had expired, McKim began authoring a series of articles in the newsletter entitled "'The McKim Chronicles' - A Study in Professional Abuse and Lawbreaking." In the "McKim Chronicles," McKim reiterated and rehashed her 1979 and 1981 attacks on the competency and commitment of her faculty colleagues, on the inadequacies of the women's studies and history programs and courses, on "student spies" and college administrators. McKim also decried the District's attempts to counsel her and correct her unprofessional conduct in 1979, January 1980 and 1981, and wrote that there had been an ongoing conspiracy by other faculty members and college administrators to stifle her academic freedom.

The personal thrust of the "McKim Chronicles" may be illustrated by the following excerpts from the "McKim Chronicles" article in the May 11 issue in which McKim was attacking the first Notice of Unprofessional Conduct served on her in 1981:

In this issue, the focus will be on another case study of this problem of REPRESSION AT SAC. This issue will deal with Part 2 of the "McKim Chronicles." The "McKim Chronicles" are a four-part series aimed at exploring the issues in the repression of her rights and interests as an educator on the SAC staff in the History Department under the supervision of Dean Layport and V.P. of Academic Affairs, Dr. Richard S. Sneed.

THE "McKIM CHRONICLES" - A STUDY IN PROFESSIONAL ABUSE AND LAWBREAKING!

The discussion in this issue continues the expose of crimes and abuses I experienced as a result of my critical opposition to administrative policies. . . . Charge #5 accused me of making a statement that some instructors in the Women's Studies Program should not be teaching women's studies because they are neither knowledgeable nor qualified with enough experience.

Since no bona fide feminist program functions without faculty working also in grassroots campaigns, it is a deserving observation that so many Women's Studies faculty at SAC have never been involved in this movement. Readers with memories about my disclosure and criticism of the Women's Week several weeks ago recall I said the same thing in the AFT/er Thoughts. A year ago it was grounds for dismissal to say that. Now it's okay, because I am saying these things under protection of a different statute. Now I am protected by the Labor Code of California and this information I disseminate comes under the jurisdiction of that law, not the Education Code. If they try that fascist stuff with me this year, they're going to run into an Unfair Labor Practices suit. That's the difference a union can make on your campus. Until the AFT got started here, all of us were victims of the silence, and some of us, such as Leon and me, were the objects of "search and destroy" missions.

> Another point that is exceedingly important to make is the fact that information obtained to make the charges, such as the examples I gave in Charge #2 and Charge #5, were taken from student spies. Names of the spies I can, and will, provide privately upon request to interested faculty who might have some grounds to suspect they're presently being secretly observed and turned in.
>
> Although the "McKim Chronicles" are lengthy, they are written to provide factual counter-weight to the malicious gossip, misrepresentations, lies and concealed truths that prevail at SAC. The reader is asked to evaluate this carefully and add this data to the critical information regarding the status of education and the role of the professionalist at this college. The next episode will discuss events surrounding the first Letter of Reprimand which I received January 1980.
>
> Joanne Maybury-McKim
> Department of History
>
> (Emphasis added.)

These renewed attacks by McKim on her faculty colleagues, program chairs, college programs, students and college administrators were distributed to the college faculty via their college mailboxes and also became available to the student body. Further complaints and concerns regarding McKim's attacks then came to the District from faculty, program administrators and students.

On June 28, 1982, the District gave McKim a second Notice of Unprofessional Conduct. (Ed. Code sec. 87734.) The second notice referred to and included the previous 1981 Notice of Unprofessional Conduct and the 1980 Letter of Reprimand for

Unprofessional Conduct. At the beginning of the second notice, the District set forth:

> This Notice is given because certain statements you have made in the AFTer/THOUGHTS newsletter directed at your fellow faculty members and administrators were apparently made by you under the mistaken impression that such statements enjoy blanket immunity as a protected activity merely because they are printed on the AFT letterhead. Please be advised that such is not the law.

Pursuant to the requirements of Education Code section 87734,[3] the District, as it had previously done when it gave McKim the first Notice of Unprofessional Conduct in 1981, set forth specific statements in the May 11 and 20 and June 12, 1982 issues of AFTer/THOUGHTS, which the District asserted constituted unprofessional conduct. The District also included, as it had in the first notice, a copy of the District's "Statement of Ethics - Professional Standards for Community College Instructors," which McKim had agreed to abide by when she signed her employment contracts with the District.[4]

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[3]See footnote 1.

[4]These professional standards prescribed in pertinent parts that a Santa Ana Community College instructor has the responsibility:

> (1) with respect to students, to respect each student, to protect the student from unnecessary embarrassment or disparagement and to maintain a relationship which preserves confidentiality, to refrain from discrimination against any student and to

The statements from the newsletter that the District specified in the second notice included McKim's rehashed 1979 and 1981 unprofessional attacks as well as new attacks concerning her faculty colleagues, program chairs, "student spies," administrators, the 1980 feminist classes, the "failure" of Women's Programs and Services chaired by "anti-feminist Dean Donna Farmer," nepotism in Women's Studies appointments, an attempt to deny her a sabbatical because "she had been a vocal critic of the faculty," and the statement that the Notice of Unprofessional Conduct served on her was a "frame-up" to force her into silence concerning the cover-up by the college administration of "the attempted murder" of another teacher.

On July 1, 1982, McKim sent a letter to the District expressing her position that the "Labor Code" had superseded or

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> deal objectively with topics that could be offensive to some,
>
> (2) with respect to the district, to participate in the development of a climate of trust and mutual respect through support of district programs and policies, to abide by the policies and procedures governing instructor employment, and to promote a feeling of cooperation by encouraging and/or participating in college programs, and
>
> (3) with respect to colleagues, to be open minded, to respect his or her own intellectual freedom and that of colleagues, to encourage a climate of trust and mutual support through willing interchange of ideas and inter-disciplinary cooperation, and to evidence respect for colleagues by discouraging criticism of them.

repealed Education Code section 87734. The District responded to McKim to the effect that Education Code section 87734 had not been repealed or superseded by the Labor Code, EERA, or any other provision of law.

On September 23, 1982, McKim filed this unfair practice charge, alleging that the June 1982 Notice of Unprofessional Conduct to her was an act of reprisal for her "McKim Chronicles" in AFTer/THOUGHTS "in which she outlined factual events and her interpretation of the intent and motivation behind the events as carried out by the College administration."

McKim then persisted in her unprofessional attacks both in her AFTer/THOUGHTS articles and in her on-campus dealings with faculty and students during October and November 1982. These new attacks included attacks before her students on her fellow faculty members, the "worthlessness" of courses in the Women's Studies Program except for her own courses, and charges that certain college instructors were just "ploys" of the administration to teach "non-feminist type courses" under the guise of Women's Studies.

McKim's fresh attacks on her faculty colleagues, the Women's Studies Program and the college administration interrupted the regular proceedings of some classes and brought new complaints about McKim's unprofessional conduct from other faculty and students. The District responded to these new and continuing attacks from McKim by serving her in November 1982 with a new "Letter of Reprimand Regarding Your Unprofessional Conduct." In

December 1982, McKim received an Evaluation Report which spoke to her October and November unprofessional conduct but which noted that, as of December 1982, she had ceased making such attacks.

McKim thereafter amended her unfair practice charge to include the November Letter of Reprimand and the December Evaluation as alleged acts of retaliation by the District for her exercise of a protected right under EERA to author articles in an employee organization newsletter. McKim additionally alleged that such actions by the District interfered with her involvement with an employee organization.

The ALJ's Proposed Decision

Following a hearing on McKim's charges, this Board's ALJ rendered a proposed decision in which he found that the District had consistently acted to stop McKim's unprofessional conduct whether it occurred in the classrooms, in memoranda addressed to her faculty colleagues or to college administrators, or in the newsletter articles and that, in connection therewith, McKim had already received a number of negative personnel actions prior to her first newsletter article. After viewing the witnesses and hearing the evidence, the ALJ further found that there was insufficient evidence to establish any retaliatory or discriminatory motivation on the District's part or that the motivating purpose behind the District's actions was the cessation of McKim's "labor organizing." (Novato Unified School District (1982) PERB Decision No. 210.) However, the ALJ concluded that the District's attempts to stop McKim's

unprofessional conduct[5] interfered with McKim's protected right to author and publish articles in an employee organization's newsletter and that, on "balancing" any disruption or interference in the school's operation with McKim's right to write in the newsletter, the "equities" were with McKim and, thus, there was an "interference" violation. (Carlsbad Unified School District (1979) PERB Decision No. 89.)

Discussion

The majority opinion rejects the ALJ's finding that the evidence in this case does not establish any unlawful motivation on the District's part as to any EERA section 3543.5(a) violation.[6] Premising as the sole reason for the District's

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[5]While the ALJ correctly observed in his proposed decision that whether McKim's writings constituted unprofessional conduct under the Education Code was not before this Board, he also concluded that:

> All of this behavior (McKim's), although offensive and "unprofessional" to many polite, civilized and educated persons, is well within the scope of acceptable and time-proven behavior of a labor organizer. The fact that the employees that are the subject of such attempted organization are well educated, but unaccustomed to such tactics, is irrelevant to whether such activity is protected under the Act.

In essence, the ALJ held, as would the majority, that, even if McKim's behavior constituted unprofessional conduct for a teacher, it nevertheless was "acceptable behavior" for a labor organizer and, thus, protected by EERA without regard to the professional standards of the Education Code.

[6]EERA section 3543.5 provides that it is unlawful for a public school employer to:

disciplinary actions against McKim her "objectionable statements" in the newsletters,[7] the majority disagrees with the ALJ that the District's previous and consistent disciplinary actions against McKim, in response to similar unprofessional conduct by her, are relevant or pertinent and flatly asserts that "there is no question as to the District's motivation." The majority concludes that "it is clear that the District disciplined McKim because of her exercise of protected rights" and "a violation of section 3543.5(a) of EERA is thereby established under Nova to Unified School District (1982) PERB Decision No. 210." (Majority Opn., pp. 11-12, 14.) Having so simplistically disposed of the critical motivation element, the majority states that the only issue presented in this case is whether McKim's statements are protected by EERA. Observing that "speech which is related to a

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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. (Emphasis added.)

See Novato Unified School District, supra, as to the motivation element.

[7]The evidence in this case clearly establishes that the reason, as opposed to the basis, for the District's Education Code section 87734 Notice of Unprofessional Conduct to McKim was McKim's unprofessional conduct (Ed. Code sec. 37732(a)) and not that she was authoring statements in an employee organization newsletter.

labor dispute"[8] is protected by EERA unless it is so "opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice" as to cause "substantial disruption or material interference with school activities," the majority then finds that "McKim's choice of language" was not "sufficiently flagrant, opprobrious or malicious as to lose its protected status." (Majority Opn., pp. 12-13.) Additionally, the majority notes that the District's evidence of disruption consisted only of the "conclusory testimony" of its administration witnesses, and that the District "failed" to offer any additional testimony from students or teachers.[9]

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[8]McKim's "Organizing Committee" was not engaged in a "labor dispute" with the District, nor with the Women's Studies Program, the faculty or the students. The exclusive employee organization representing the teachers in their employment relations and/or negotiations with the District was FARSCCD. (See footnote 2, supra.)

[9]It would be reasonable to infer that the District not only saw no need to put in such additional testimony but also that it would not want to embroil any students or teachers in this nonacademic proceeding with McKim, considering McKim's past attacks on teachers who opposed her or did not agree with her, and considering also her statements that she was keeping a list of "student spies" who helped the college administration and that she would turn over the list of students to other teachers. Furthermore, the District's responsibility to put on evidence as to McKim's unprofessional conduct and the resultant effects, if any, on the faculty, students, programs, courses and administrators was a matter for the hearing under the Education Code that was required if McKim failed to correct her unprofessional conduct and the District proceeded with her dismissal. (Ed. Code secs. 87732, 87734 et seq.; Saraceno v. Foothill-De Anza Community College District (1982) 127 Cal.App.3d 850, 857, hg. den.)

While facially it might appear that the District had taken disciplinary action against McKim for her union activities, in that her unprofessional conduct involved certain statements she made in her "McKim Chronicles" which she had placed in an employee organization newsletter, the determinative issue in this case is the lawfulness of the underlying reason or motive of the District in taking the disciplinary actions. A public school employer may take disciplinary action against a public school employee for misconduct and the fact that the employee, at the time of the misconduct, was also participating or engaging in union activities does not insulate the employee from such disciplinary action, provided the motivating reason for the employer's action is the misconduct and not the employee's union activity. (Novato Unified School District, supra; Moreland Elementary School District (1982) PERB Decision No. 227, pp. 11, 15; The Regents of the University of California (U.C. San Diego) (1983) PERB Decision No. 299-H, pp. 12-13, 17; Regents of the University of California (Berkeley) (1985) PERB Decision No. 534-H; California State University (San Francisco) (1986) PERB Decision No. 559-H, pp. 4, 7; California State University (Sacramento) (1982) PERB Decision No. 211-H, pp. 16-17; State of California (Department of Developmental Services) (1982) PERB Decision No. 228-S, pp. 22-25; and see Sunnyside Nurseries, Inc. v. ALRB (1979) 93 Cal.App.3d 922, 934-935, hg. den.; George Arakelian Farms, Inc. v. ALRB (1980) 111 Cal.App.3d 258, 273-274, hg. den.) As succinctly set forth in Sunnyside Nurseries, Inc.

v. ALRB, supra, in quoting with approval from NLRB v. Ace Comb Company (8th Cir. 1965) 342 F.2d 841, 847:

> It has long been established that for the purpose of determining whether or not a discharge is discriminatory in an action such as this, it is necessary that the true, underlying reason for the discharge be established. That is, the fact that a lawful cause for discharge is available is no defense where the employee is actually discharged because of his Union activities. A fortiori, if the discharge is actually motivated by a lawful reason, the fact that the employee is engaged in Union activities at the time will not tie the employer's hands and prevent him from the exercise of his business judgment to discharge an employee for cause. [Citations.] It must be remembered that it is not the purpose of the Act to give the Board any control whatsoever over an employer's policies, including his policies concerning tenure of employment and that an employer may hire and fire at will for any reason whatsoever, or for no reason, so long as the motivation is not violative of the Act." (Emphasis in original.)

I agree with the ALJ, who viewed the witnesses, that the evidence and record in this case does not show or establish any unlawful motive on the District's part. The District made no attempt to stop McKim's participation in or publishing of the newsletter. Nor did the District attempt to stop or censure the newsletter. The District did not remove the newsletter copies from the faculty mailboxes. The newsletters' general contents and their various articles and columns on such matters as collective bargaining negotiations, critical commentary and cartoons on the autonomy and effectiveness of the exclusive employee organization representative (FARSCCD), etc., were never

the subject of any District action. It was only when McKim renewed her previous unprofessional conduct by launching, within the pages of the newsletter, her rehashed and renewed unprofessional attacks on the Women's Studies Program, her faculty colleagues, students and program administrators that the District acted.

The District's motive or reason for issuing McKim her second Education Code section 87734 Notice of Unprofessional Conduct in June 1982, as well as the second Letter of Reprimand for Unprofessional Conduct in November 1982, and the adverse comments in the December Evaluation, is overwhelmingly evident from the record in this case. It was not to discipline McKim for her exercise of a protected right under EERA to participate in and publish an employee organization newsletter. Rather, the District's motive and reason was to stop McKim's renewed unprofessional conduct in her unprofessional attacks on the Women's Studies Program, faculty colleagues, students, college courses, program chairs and deans, and college administrators.

Teaching is a profession and teachers are professionals whose employment eligibility and conduct are subject to various statutory requirements and restrictions to which employees in other professions, occupations and vocations are not subject.[10] 10

10For example, teaching credentials are required for employment in the public schools, including community colleges. (Ed. Code sec. 87200 et seq.) Credentials may not be issued to persons who have been convicted of certain offenses (Ed. Code sec. 87290) and are summarily revoked on the holder's conviction

Because of the importance of the public school system, the Legislature has enacted an extensive statutory scheme which includes specific qualifications and standards of conduct for public school teachers, including community college instructors. (Cal. Const., Art. IX; Ed. Code secs. 87210 to 87864; Serrano v. Priest (1971) 5 Cal.3d 584, 604-610; and see Turner v. Board of Trustees, Calexico Unified School District (1976) 16 Cal.3d 818, 825; McGrath v. Burkhard (1955) 131 Cal.App.2d 367, 377.)

Teachers, including community college instructors, must act and conduct themselves in a professional manner in their dealings with students, fellow teachers, instructional programs and school administrators. A teacher who acts unprofessionally in such matters is statutorily subject to dismissal from his or her employment status with the employing school district, as well as to credential revocation. (Ed. Code secs. 87331, 87732(a), 87734; Board of Education v. Swan (1953) 41 Cal.2d 546, 551-554; Belvi v. Brisco & Board of Trustees of Rio Hondo Community College District (1985) 165 Cal.App.3d 812, 816-817, hg. den.; Board of Trustees, Compton Jr. College District v. Stubblefield (1971) 16 Cal.App.3d 820, 824, hg. den.; Palo Verde Unified

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of any of a wide range of offenses (Ed. Code sec. 87334). A credential to teach in the community colleges may also be revoked for various noncriminal acts and/or conduct, including unprofessional conduct. (Ed. Code sec. 87331.)

Independent of any credential action, community college instructors may be disciplined and/or dismissed from their employment with a community college district for unprofessional conduct. (Ed. Code secs. 87732(a), 87734.)

School District v. Hensey (1970) 9 Cal.App.3d 967, 970-971, hg. den.; Board of Trustees of Mt. San Antonio Jr. College District v. Hartman (1966) 246 Cal.App.2d 756, 763, hg. den.)

The enactment of EERA (Gov. Code secs. 3540-3549.3) did not repeal or invalidate the Education Code. EERA section 3540, in which the Legislature sets forth the purpose of EERA, specifically prescribes that, "Nothing contained" in EERA " . . . shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure . . . ." The provisions of EERA cannot and do not invalidate or supersede Education Code sections dealing with the discipline and/or dismissal of teachers for unprofessional conduct, such as sections 87732(a) and 87734 which prescribe the cause and procedures for such dismissals of community college instructors from their employment status with community college districts.[11]

This case involves a teacher — a community college instructor (McKim). Community college instructors, including McKim, have the responsibility and duty to act professionally in

[11]EERA section 3543.2, dealing with the scope of representation in collective bargaining, provides that notwithstanding Education Code section 44944 (dealing with disciplinary actions against teachers in the primary and secondary schools), the parties may meet and negotiate over the causes and procedures for disciplinary action other than dismissal. No such exception or supersession provision exists in EERA regarding nondismissal actions against community college instructors, nor as to their dismissals which are governed by Education Code sections 87732 and 87734.

dealing with their students, their faculty colleagues, the chairpersons of the college departments, the college administrators, and the college's instructional programs and courses of study. Community college instructors, including McKim, are statutorily subject to dismissal from the employing community college district if they act unprofessionally.[12] 12 (Ed. Code secs. 87732(a), 87734.) While the general "unprofessional conduct" cause for dismissal, specified in Education Code section 87732(a), is sufficient to apprise community college instructors of the professionalism required of them (Board of Education v. Swan, supra, 41 Cal.2d 546, 552-554; Palo Verde Unified School District v. Hensey, supra, 9 Cal.App.3d 967, 971, hg. den.; Johnson v. Taft School District (1937) 19 Cal.App.2d 405, 407-408, hg. den.), it is significant that, in the case before us, McKim repeatedly signed contracts of employment agreeing to abide by the District's "Statement of Ethics - Professional Standards for Community College Instructors." (See footnote 4 above.)

McKim, herself, is well aware of the unprofessionalism of her attacks in her "McKim Chronicles," but she harbors the belief — now validated by the majority opinion — that she may freely engage in unprofessional conduct without any fear of

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[12]Independent of dismissal, unprofessional conduct by a community college instructor also constitutes grounds for, and may result in, revocation of the instructor's credential. (Ed. Code sec. 87731.)

discipline from the District so long as she does it within the pages of an employee organization newsletter. Knowing full well that she would be disciplined by the District if she again engaged in unprofessional conduct, McKim clearly sought to insulate herself from such discipline by making her unprofessional attacks within the pages of the newsletter. This is akin to the type of tactic firmly rejected by this Board in Charter Oak Unified School District (1984) PERB Decision No. 404, p. 5, where an employee engages in some type of protected activity in order to assure herself of a hearing before this Board on the theory that the employer is disciplining her because of her protected activity.

After concluding that coincidence in timing, by itself, between the exercise of a protected right and the dismissal of the employee, is insufficient to prove unlawful motivation, the Board stated:

> . . . were this not so, any employee who perceived that he or she might be in danger of dismissal could, by the mere act of filing a grievance, be assured of a hearing before . . . this agency and, further, place the legal burden of producing evidence on the employer to prove . . . that the discharge resulted from a legitimate operational justification. Such a state of affairs would be unwise and unnecessary.

Here, the majority has taken this one step further and given teachers the right to engage in blatant unprofessionalism so long as they do so in the context of what would otherwise be a protected activity. Further, the majority has even deprived the

employer of the opportunity to demonstrate "legitimate operational justification" by its requirement that the employer needed to show actual disruption and the inference that the District failed to do so in this case.

As dogmatically asserted by McKim, herself, in her "McKim Chronicles:"

> . . . Charge #5 accused me of making a statement that some instructors in the Women's Studies Program should not be teaching women's studies because they are neither knowledgeable nor qualified with enough experience.
>
> Since no bona fide feminist program functions without faculty working also in grassroots campaigns, it is a deserving observation that so many Women's Studies faculty at SAC have never been involved in this movement. Readers with memories about my disclosure and criticism of the Women's Week several weeks ago recall I said the same thing in the AFT/er Thoughts. A year ago it was grounds for dismissal to say that. Now its okay, because I am saying these things under protection of a different statute. Now I am protected by the Labor Code of California and this information I disseminate comes under the jurisdiction of that law, not the Education Code. If they try that fascist stuff with me this year, they're going to run into an Unfair Labor Practices suit. (Emphasis added.)

Likewise, after the District had served the second Education Code section 87734 Notice of Unprofessional Conduct on McKim in June 1982, McKim wrote to the District and expressed her position that the "Labor Code" had superseded or repealed Education Code section 87734. When the District responded that Education Code section 87734 had not been repealed or superseded by the Labor

Code, EERA, or any other provision of law, McKim then filed this unfair practice charge.

If the evidence in this case demonstrated that the District had been unlawfully motivated in issuing the second Education Code section 87734 Notice of Unprofessional Conduct to McKim and would not have issued it if McKim had renewed such unprofessional attacks in anything other than the union newsletter, then, and only then, could this Board have found an EERA violation and have the authority to order the District not to proceed with the disciplinary action. But there is simply no such evidence in this case.

Finally, the ALJ, while rejecting a reprisal violation, did find the District's discipline constituted interference. Since the majority would find reprisal and, derivatively, interference, it did not separately address the ALJ's discussion of interference. However, I would reject the interference claim for the following reason. The ALJ found a violation by "balancing the equities" between McKim's right to publish a union newspaper and the District's right to discipline a teacher for unprofessional conduct.[13] He found an interference violation

[13]AS to the majority's opinion that McKim's "speech" or "choice of language" was not "sufficiently flagrant, opprobrious or malicious," such a conclusion by the majority does not and cannot constitute a finding or determination that McKim's renewed unprofessional attacks in her "McKim Chronicles" against the Women's Studies Program and courses, against her faculty colleagues, against her students, and against the program chairs and deans did not constitute unprofessional conduct by McKim in violation of Education Code section 87732(a). This Board may

under Carlsbad on the basis that he believed the "equities" were in McKim's favor. Such an approach and result is simply wrong. Under Carlsbad, where a District's action, although not unlawfully motivated, interferes with, or tends to interfere in some way with, employee rights under EERA, the issue is one of whether the public school employer has a business or operational justification for its action. Here, the District had consistently taken disciplinary action against McKim when she engaged in unprofessional conduct and took the new disciplinary action against her when she again engaged in similar unprofessional conduct in violation of Education Code section 87732(a). Where the District, with just cause, has taken disciplinary action under the Education Code against a public school employee, we may not "balance the equities" to override and nullify the District's action. In Moreland Elementary School District, supra, the Board admonished, at page 16:

> To find that the harm inherent in the discharge of a dishonest employee who happens to be a union organizer outweighs the employer's legitimate needs and interests would make a mockery of Carlsbad's

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not administer, enforce, override or adjudicate matters within Education Code sections 87732(a) and 87734. As correctly recognized by the ALJ in his proposed decision:

> This decision contains no determination as to whether Professor McKim's writings are "unprofessional" as the term is used in Education Code section 87734. That question is not before the Public Employment Relations Board.

> balancing principle and preclude employers from ever disciplining union activists irrespective of just cause.

So, too, in the present case, the employer's legitimate need and interest in disciplining an employee who engages in unprofessional conduct cannot be found to be outweighed merely because the employee happens to be a union organizer. While "balancing the equities" might be proper where the employer, for operational or business reasons, has taken some type of nondisciplinary action which nevertheless impacts on employee or employee organization rights, I submit that this Board may not engage in such balancing where the employer is taking lawful disciplinary action.

As succinctly stated by the Supreme Court in Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721, 728-729:

> The mere fact an employee is or was participating in union activities does not insulate him from discharge for misconduct or give him immunity from routine employment decisions.

I would reverse the ALJ's finding of an interference violation and dismiss the complaint.

APPENDIX

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

After a hearing in Unfair Practice Case No. LA-CE-1643, Santa Ana College Organizing Committee, CFT/AFT/AFL-C10, and Joanne Maybury-McKim v. Rancho Santiago Community College District, in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5(a) and (b). As a result of this conduct, we have been ordered to post this Notice and will abide by the following. We will:

A. CEASE AND DESIST FROM:

1. Discriminating against, and interfering with, employees because of their exercise of rights guaranteed by the Educational Employment Relations Act.

2. Denying to the Santa Ana College Organizing Committee, CFT/AFT/AFL-CIO, rights guaranteed to it by the Act.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

Remove from all District records and destroy the June 28, 1982 notice of unprofessional conduct and the November 8, 1982 letter of reprimand issued to Instructor Joanne Maybury-McKim, and delete all references to Instructor McKim's writings in her evaluations dated November and December 1982.

Dated: RANCHO SANTIAGO COMMUNITY COLLEGE 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 BY ANY MATERIAL.