STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EMMA YVONNE ZINK, Charging Party, v. SAN DIEGO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6095-E PERB Decision No. 2538 September 7, 2017

Appearances: Mary Elizabeth Bain, representative for Emma Zink.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Emma Yvonne Zink (Zink) from the dismissal (attached) by the PERB Office of the General Counsel (OGC) of her amended unfair practice charge (UPC) against the San Diego Unified School District (District). The charge as amended alleged that the District violated the Educational Employment Relations Act (EERA)[1] by retaliating against Zink and interfering with her protected rights by convening an investigative meeting with Zink, continuing to keep her on administrative leave, preventing her from teaching summer school, and issuing her a notice of proposed reassignment.

The Board has reviewed the case file in its entirety and fully considered the relevant issues and contentions on appeal. Based on this review, the Board affirms the dismissal in part, and reverses in part, remanding the case to the OGC for further processing in accordance with the following discussion.

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

SUMMARY OF FACTUAL ALLEGATIONS[2]

Zink is a high school math teacher who has been employed in the District for 30 years, 26 of which have been at the same high school, La Jolla High. Her dispute with the District, which led to the allegations in the UPC, seems to have begun in September 2014, when she was summoned to a meeting with the school's vice principal regarding multiple student suspensions she wrote during one period the previous day. Zink was admonished for writing too many suspensions, and she asserted that the District failed to provide guidance and support to teachers regarding student suspensions.

On October 6, 2014, Zink attempted to confiscate from a student an electronic device he was using in violation of school and District policy. The attempted confiscation resulted in the student attempting to hit or shove Zink and her holding his arms to avoid being hit. This incident resulted in Zink being placed on paid administrative leave pending the District's investigation into the incident, a leave that was extended to last the rest of the 2014-2015 school year.

On October 13, 2014, Zink filed an administrative complaint with the District alleging harassment and discrimination, and requested as a remedy that the District provide support for

[2] On review of a dismissal without hearing, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*San Juan Unified School District* (1977) EERB Decision No. 12, p. 4 [Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board]; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6; *California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) We may also consider information provided by the respondent, provided it is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Regulation 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M, adopting dismissal letter at p. 1; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994, pp. 12-13; *Riverside Unified School District* (1986) PERB Decision No. 562a, p. 8.)

her and any other teacher when student disciplinary problems arise "that are beyond the scope of the classroom teacher."

On December 3, 2014, the District notified Zink that it had received student and parent complaints about her and was referring investigation of those complaints to an outside investigator, during which time she was to remain on paid administrative leave. The District combined its investigation of the student/parent complaints with its investigation of Zink's harassment complaint for investigation with this outside investigator.

Between early December 2014 and April 24, 2015, Zink and her representative, Donald Moore (Moore)[3] wrote several letters to the District complaining about the slow pace of the investigation. During this period, the District offered to settle the dispute by leaving Zink in paid non-duty status until the end of the school year, provided she retire then. She refused this offer.

On April 14, 2015, the District's investigator met with Zink, ostensibly to interview her about the October 6, 2014 incident with the student. Yet the investigator did not interview her, but came to the meeting with a predetermined conclusion that she was innocent of the allegations. Nevertheless, according to the investigator, Zink would receive a written warning, allegedly in violation of provisions in the collective bargaining agreement (CBA) regarding progressive discipline. The investigator further informed Zink that she would remain on administrative leave while investigation of the student and parent complaints continued and she would not be returning to La Jolla High. The investigator then spent the next 2-3 months

[3] Moore is not identified as being associated with the exclusive representative for certificated employees in the District, and his status as a recognized representative within the meaning of EERA is therefore doubtful, as only an agent of the exclusive representative may represent employees in investigative proceedings with the employer. (See *Hartnell Community College District* (2015) PERB Decision No. 2452, pp. 34-38.)

attempting to convince Zink to accept a voluntary transfer to another work site.[4] As with the similar offer made in December 2014, Zink rejected the investigator's proposals.

On April 27, 2015, Zink filed the first of two grievances. This one alleged that the District had violated various sections of the CBA related to evaluations, personnel files, and placement of derogatory information in personnel files when, in the April 14 meeting with the District's investigator and Interim Human Resources Officer, Jose Gonzales, the District produced derogatory material that she had not previously seen.

On May 7, 2015, Zink received the investigator's report regarding the October 6, 2014 incident. The report concluded that she had exercised "extremely poor judgment" in attempting to confiscate the device from the student by force. Zink disputed the conclusions and findings of this report by a letter sent the following day.

Meanwhile, the District and Zink's attorney were exchanging proposals concerning Zink's assignment for the 2015-2016 school year, as well as possible retirement. After Zink repeatedly declined to accept a voluntary transfer, on or about August 29, 2015, the District initiated the contractually-prescribed procedure for involuntary reassignment by giving Zink a written notice.[5] The notice proposed Zink's reassignment from La Jolla High for the remainder of the 2015-2016 school year, due to "repeated complaints about Zink's teaching methodology." Zink was to remain on paid administrative leave until told to report to work.

[4] As determined by the OGC, the investigator notified Zink's attorney by e-mail on April 17, 2015, that Zink would be receiving a letter of warning and a notice of proposed reassignment away from La Jolla High to a non-teaching position. This e-mail also suggested that her return to work could be hastened if she accepted a voluntary reassignment to a non-teaching position.

[5] The actual notice is dated September 2, 2015, a discrepancy which is not explained and is not of any consequence for purposes of this decision.

In response to Zink's first grievance, the District determined on September 21, 2015, that it had violated some provisions of the CBA by not timely informing her of parental complaints. As a remedy, it would not consider those complaints in any disciplinary or personnel action or in any evaluation of Zink.

Zink filed her second grievance on October 5, 2015, when Chuck Podhorsky (Podhorsky), principal of La Jolla High School, cancelled a meeting with her to discuss the proposed reassignment. This grievance also alleged that the District had violated the CBA's procedural requirements for involuntary reassignment. The meeting with Podhorsky was ultimately held on October 14. However, the reason for the proposed transfer changed from parental complaints to the "best interests of the District." Zink protested this meeting the following day by letter to Podhorsky and alleged that the involuntary transfer was in retaliation for engaging in protected activities.

On November 5, 2015, Moore wrote to the District's Human Resources director, protesting the District's failure to follow the CBA regarding involuntary reassignments and asserting that the notice of involuntary transfer was done in retaliation for Moore's letter to the District of April 10, 2015, on Zink's behalf.

On January 19, 2016, the District informed Zink that she would not be reassigned after all and that she should report to work at La Jolla High on February 1, 2016. However, as alleged in the third amended charge, on February 1, 2016, when Zink reported for duty, she was again placed on paid administrative leave to investigate parent/student complaints against her. On August 19, 2016, Zink received notice of an involuntary transfer to a District middle school, to an unspecified assignment.[6]

[6] These events—the February 1, 2016 administrative leave and the August 2016 involuntary transfer—were described in the third amended charge. However, the OGC did not

THE DISMISSAL

Timeliness

This charge was filed on December 24, 2015. Therefore, any events occurring before June 24, 2015 are untimely, unless the statute of limitations is tolled, either by statute or the doctrine of equitable tolling. Applying the doctrine of statutory tolling,[7] the OGC considered each of Zink's pre-June 24, 2015 allegations and concluded that the statute of limitations should not be tolled. The first grievance did not allege or otherwise put the District on notice that Zink claimed that the District retaliated against her because of her protected activity. Instead, that grievance alleged only that the CBA provisions concerning evaluations and personal files had been violated.

For reasons explained at pp. 2-3 of the dismissal letter, the OGC did permit the second grievance to toll the statute of limitations for 30 days, moving the statute of limitations to May 25, 2015. Even with tolling, however, the only timely charge was the August 29 notice of proposed reassignment, which is timely even if the statute of limitations had not been tolled.

As for other alleged violations, such as Zink's ineligibility to teach summer school and the continuation of her administrative leave beyond April 14, 2015, the OGC determined Zink

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consider these allegations in the dismissal letter, noting that they were the subject of a subsequent UPC filed by Zink, LA-CE-6141-E. (Dismissal letter, fn. 6.) Even though the acts were described in this charge, Zink does not list these actions in her description of the five adverse actions she alleges are timely. This is perhaps explained by the fact that a complaint issued in LA-CE-6141-E alleging that the District retaliated against Zink for filing this UPC, filing grievances and generally objecting to her reassignment by placing her on a second administrative leave on February 1, 2016, and then reassigning her to a middle school on August 17, 2016. These allegations have been heard by a PERB administrative law judge (ALJ) who issued a proposed decision on July 25, 2017.

[7] Under EERA section 3541.5, subdivision (a)(2), the six-month statute of limitations shall be tolled during the time it takes to exhaust the grievance machinery, provided it exists, ends in binding arbitration and "covers the matter at issue" in the unfair practice charge. (*Los Angeles Unified School District* (2015) PERB Decision No. 2359, p. 11 (*Los Angeles*).)

had notice of these events more than six months before the charge was filed, as evidenced in documents attached to her unfair practice charges. There was therefore no basis for reviving the statute of limitations, according to the OGC.

Prima Facie Case

To state a prima facie case for retaliation, the charging party must allege facts that support the conclusion that she exercised rights guaranteed under the EERA; that the District knew that she exercised those rights; that the District took adverse action against her; and that the District took the adverse action because of the exercise of protected rights. (*Novato Unified School* District (1982) PERB Decision No. 210.) The OGC determined that Zink engaged in protected activity of which the District was aware, but concluded that the August 29 notice of proposed reassignment was not an adverse action. Because the notice of proposed reassignment did not identify what Zink's new position would be or where it would be, the OGC was unable to determine whether this potential involuntary transfer/reassignment would impose less favorable working conditions on Zink.

In addition, the OGC noted that the final decision regarding reassignment was up to the Chief Human Resources Director, not the principal who authored the notice of proposed reassignment.[8] *Trustees of the California State University* (2009) PERB Decision No. 2038-H, held a threat to take adverse action can itself be an adverse action if the threat gives the employee "unequivocal notice that the employer has made a firm decision to take the threatened action." (*Id*. at p. 12.) Because the transfer was only a notice of intent, subject to

[8] Procedures for involuntary transfers are governed by the CBA, which requires initially that the employee be notified in writing by the supervisor and by a personal interview that administrative transfer is being recommended and the reasons therefore. The next step involves a meeting with the appropriate division administrator and the employee to discuss the proposed transfer, and that administrator will determine whether the transfer should be made. Finally, administrative transfers may be appealed through the grievance process.

change in an appeal procedure, the OGC did not consider it unequivocal notice of a firm decision.

On this basis the charge was dismissed.

DISCUSSION

Zink avers two main errors in the dismissal: (1) that the OGC mistakenly applied the tolling doctrine to exclude the period of time from April 14, 2015, and otherwise erred in determining that the statute of limitations did not extend to before May 25, 2015; and (2) the OGC erred in concluding that the August 2015 notice of proposed reassignment was not an adverse action.

Statute of Limitations

Zink contends that she did not allege that the District's investigation of the October 6, 2014 incident with her student was an adverse action, as "it is not a topic covered in the SDEA CBA." (Appeal, p, 4.) She claims that she included allegations about this investigation as evidence of animus. Zink also argues that the statute of limitations should be tolled as to the events of April 2015 because the District fraudulently concealed that it was not in fact conducting any investigation, but merely using the alleged investigation as an excuse to keep her on administrative leave. Because Zink did not discover the fraudulent concealment until March 2016, when an investigator from the Department of Fair Employment & Housing (DFEH)[9] revealed the concealment, she argues the statute of limitations should be tolled.

Zink further asserts that tolling applies to her first grievance because both it and the unfair practice charge allege the District wrongfully used "hidden" parent complaints as a reason to involuntarily transfer her. According to Zink, the grievance and the unfair practice

[9] Zink had filed a discrimination charge with the DFEH on March 16, 2015.

charge arose from the same circumstances and the filing of the grievance therefore placed the District on notice of the dispute described in the unfair practice charge, citing *Victor Valley Joint Union High School District* (1982) PERB Decision No. 273. Simply because the grievance did not use the word "retaliation" should not prevent the timeline from being tolled, according to Zink.

Zink further contends that her second grievance, filed October 5, 2015, was simply an attempt to enforce the settlement of the first grievance. The first grievance was effectively "in abeyance" over the summer break (June 17, 2015 through September 1, 2015), so Zink argues that the abeyance period should toll the statute of limitations an additional 76 days.

Specifically with respect to Zink's allegation that she was prevented from teaching summer school,[10] Zink asserts on appeal that the OGC failed to consider that teachers could apply for summer school assignments up until June 22 and that she in fact attempted to apply in June.

We agree with the OGC's determination regarding tolling and other conclusions regarding the statute of limitations. PERB's statutory tolling rule is found at EERA section 3541.5, subdivision (a)(2). This subdivision prohibits issuance of a complaint:

> against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted. . . . The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

(*Ibid*.)

[10] The OGC dismissed this allegation as untimely because there was a letter attached to the UPC from Zink objecting to her determined ineligibility for summer school. The letter was dated March 9, 2015 and the OGC therefore determined that the statute of limitations for that allegation began on that date, making the charge untimely.

PERB has held that the statute of limitations will be tolled only if the grievance raises the same issues that have been raised in the unfair practice charge. Thus, tolling has been denied where the grievance over negative evaluations and termination failed to allege a violation of the non-discrimination clause of the CBA. (*Peralta Community College District* (2001) PERB Decision No. 1462: "PERB will not toll the statute of limitations in a discrimination case when the District is unaware of the [specific] discrimination allegation." (*Id*., at warning letter, p. 3.) More recently in *Los Angeles*, *supra*, PERB Decision No. 2359, the Board permitted statutory tolling even where the grievance itself failed to allege retaliation, but where the District was placed on notice of the employee's retaliation claim through correspondence. (*Id.*, p. 11.)

The OGC followed these cases, among others, and correctly applied the law to the facts as alleged by the charge, as amended. We therefore affirm the dismissal of the pre-August 29, 2015 allegations as untimely because the statute of limitations was not tolled by Zink's grievances.

We also reject Zink's assertion that the OGC erred by refusing to consider the fact that teachers could continue to apply for summer school through June 2015 and that she in fact did so. As the dismissal letter notes, Zink initially protested her ineligibility to apply for summer school in March 2015. That is when she was on notice of this alleged violation. She cannot revive the statute of limitations by applying a few months later. (*County of Riverside* (2011) PERB Decision No. 2176-M.)

We also reject Zink's assertion that the District fraudulently concealed the fact that it was not actually conducting an investigation but using it as an excuse to keep her on administrative leave. Zink alleged in her unfair practice charge, as amended, that the investigator informed her on April 14, 2015, that she would remain on administrative leave

even though he believed she was innocent of the charges regarding the October 2014 incident with the student. To the extent there was something allegedly illegitimate about the District's investigation, Zink was therefore on notice of the facts necessary to make this allegation on April 14, 2015, and the statute of limitations on such a claim began then.

Adverse Action

Zink asserts that the OGC erred by concluding that the notice of proposed reassignment was not an adverse action. If the OGC's conclusion is allowed to stand, according to Zink, it would be impossible for a threat of adverse action to ever be considered an unfair practice. Zink concedes that the District did not initially follow through with the proposed reassignment, but argues that the subsequent 2016 transfer (the subject of the complaint in PERB Case No. LA-CE-6141-E) demonstrates that the first attempt was in fact a "firm" decision that had simply been postponed.

We find merit in this argument. Our cases concerning adverse action, beginning with *Palo Verde Unified School District* (1988) PERB Decision No. 689, emphasize an objective test in determining whether a particular action was adverse to employment interests, i.e., whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the person's employment. (*Id*. at p. 12; *Newark Unified School District* (1991) PERB Decision No. 864, p. 14 (*Newark*); *Oakland Unified School District* (2004) PERB Decision No. 1645).[11] PERB has also held that a threatened adverse action is a separate potential unfair practice from the completed action. (*Regents of the University of California* (2004) PERB Decision No. 1585-H (*Regents*); *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 35.)

[11] *Newark, supra,* PERB Decision No. 864 found that an involuntary transfer from high school to junior high was an adverse action.

While "a threat may constitute an adverse action even if the employer never follows through with the threatened action," for a threat to be actionable it must give the employee unequivocal notice that the employer has made a firm decision to take the threatened action. (*Trustees of the California State University, supra*, PERB Decision No. 2038-H, p.12.) However, in *County of Merced* (2008) PERB Decision No. 1975-M, at page 3, "unequivocal notice" was described as initiation of formal disciplinary procedures, such as a notice of intent to suspend or a notice of intent to dismiss a certificated employee pursuant to Education Code requirements. In contrast, a supervisor's isolated comment that she would be "seeking adverse action against" the employee, without specifics either orally or in writing, did not constitute unequivocal notice of an adverse action. (*Ibid*.)

While the notice of August 29, 2015 was not a final decision, it was the first step in a process the District was required to initiate under the CBA before reassigning Zink. (See dismissal letter, p. 5, fn. 5 for the outline of the process.) This is analogous to the dismissal process for certificated employees, which requires an initial notice of intent to dismiss, followed by due process steps ultimately leading to a decision by a tripartite panel. While a school district could always change its mind as this process unfolds, it cannot be seriously argued that the initiation of the dismissal process is not an action that a reasonable person would find adverse. (See *Monterey Peninsula Unified School District, supra,* PERB Decision No. 2381 [statute of limitations begins to run when the certificated employee has notice of intent to dismiss]; *Regents, supra*, PERB Decision No. 1585-H [threat to terminate and actual termination are separate violations of the Higher Education Employment Relations Act].)

One likely reason there is a process embedded in the CBA in the first place is because certificated employees undoubtedly consider the disruption of being involuntarily transferred or reassigned to be onerous, often carrying the stigma of unsatisfactory performance, as in this

case. The absence of the factors described in *Fresno County Office of Education* (2004) PERB Decision No. 1674 (longer commute, more difficult students, etc.) does not preclude concluding especially at the pleading stage, a reasonable person under the same circumstances as Zink would consider the action adverse. Several factors here support a conclusion that the notice of proposed reassignment given to Zink was objectively adverse to her employment conditions.

First, as prescribed in the CBA, the notice of proposed reassignment is the required initial step in a formal procedure initiated by the District to transfer or reassign Zink. While the District could always alter its proposed course, the same can be said for a notice of intent to dismiss a certificated employee under the Education Code. Yet we have held that the notice and the actual dismissal are separate unfair practices. (*Regents, supra*, PERB Decision No. 1585-H.)

Second, the context of Article 12.7, Involuntary Transfers, indicates that such transfers are initiated to address performance problems. For example, Article 12.7.1 states: "Administrative transfers [used interchangeably with "involuntary transfers"] provide a process to address behavior/actions and their impacts that cannot be addressed through [evaluation or discipline articles.]" Article 12.7.1.2.1 provides: "The behavior/actions that lead to the consideration of an administrative transfer must be based on the negative impact of the behavior/action and in the best interests of the District, school, pupils, and the unit member." The administrator must meet with the teacher "to discuss the behavior/actions, its negative impact and the possible consequences of continuing the behavior," including the possibility of a transfer. (Article 12.7.1.2.3.) The teacher must be notified of expectations for future behavior and be informed of "supports that will be provided to mitigate the behavior/action." (*Id*. at section (b).) These provisions demonstrate that the District

considered involuntary reassignment or transfer a quasi-disciplinary action, one that carries the stigma of unsatisfactory performance. (*Jurupa Unified School District* (2012) PERB Decision No. 2283, pp. 18-19 [annual evaluation for permanent employee considered adverse action because of the stigma of unsatisfactory performance associated with the more frequent evaluation].)

The actual notice Zink received, dated September 2, 2015, bears this out. It reads:

> "I [school principal] will be recommending that you be reassigned to a different work site for the balance of school year 2015-2016. ¶ The reason for your reassignment is as follows: The school received repeated complaints about your teaching methodology from the parents of students in your classes."

Zink was therefore called upon to defend herself against the claim of unsatisfactory teaching methodology, requiring her to meet with various administrators to make her defense. Even though this notice did not threaten Zink with a loss of her job or a reduction in pay, it would be readily seen by a similarly-situated certificated employee as an accusation of professional incompetence requiring a formal defense or, at minimum, likely affecting future employment decisions. (*Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 22; *City of Long Beach* (2008) PERB Decision No. 1977-M, p. 13.)

Complaints about Zink's teaching methods in the notice echo what the investigator told her the previous April—that she would remain on administrative leave while investigation of parent complaints continued and she would not be returning to La Jolla High. Add to this the District's numerous attempts to obtain Zink's retirement, and that she received the notice after she steadfastly refused to accept a voluntary transfer, it seems clear that this notice was an adverse action within our established case law.

For these reasons, we reverse the OGC's dismissal of the allegation regarding the notice of proposed reassignment and remand this charge to the OGC for a determination of

whether there are sufficient allegations to support a nexus between Zink's protected activities and this adverse action.

ORDER

The unfair practice charge in Case No. LA-CE-6095-E is hereby partially dismissed as to those allegations of illegal conduct occurring before May 25, 2015. The charge is remanded to the Office of the General Counsel for further investigation of whether the unfair practice charge as amended alleges a prima facie case that the August 29, 2015 notice of proposed reassignment was issued in retaliation for Zink's protected activities.

Chair Gregersen and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

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October 31, 2016

Mary Elizabeth Bain

Re: *Emma Yvonne Zink v. San Diego Unified School District*
Unfair Practice Charge No. LA-CE-6095-E
DISMISSAL LETTER

Dear Ms. Bain:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 24, 2015. Emma Yvonne Zink (Zink or Charging Party) alleges that the San Diego Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by retaliating against her for exercising rights under EERA.

Charging Party was informed in the attached Warning Letter dated March 15, 2016, that the charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, she should amend the charge. Charging Party was further advised that, unless she amended the charge to state a prima facie case or withdrew it on or before March 29, 2016, the charge would be dismissed.

An extension of time was granted, and a timely First Amended Charge was filed on April 25, 2016. A Second Amended Charge was filed on July 5, 2016, and a Third Amended Charge was filed on August 25, 2016.

The original charge alleged that the District took 17 actions against Zink, which were either in retaliation for or interference with her protected activity. The Warning Letter concluded that many of these actions were untimely because they took place more than six months before the charge was filed, and that the remaining timely actions were not adverse to Zink's employment.

The amended charges withdraw some of the original 17 allegations and provide additional information, clarification, and legal argument regarding the remaining allegations. The remaining allegations concern: (1) an April 14, 2015 investigative meeting; (2) the

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

continuation of Zink's administrative leave, following the April 14, 2015 meeting; (3) a letter summarizing the April 14, 2015 meeting, which Zink received on May 7, 2015; (4) Zink's ineligibility to teach summer school for 2015; and (5) an August 29, 2015 notice of proposed reassignment

I. Statute of Limitations

As explained in the Warning Letter, the charging party's burden includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) Because the charge was filed on December 24, 2015, events that took place before June 24, 2015 are untimely unless an exception to the statute of limitations applies.

A. Statutory Tolling

EERA provides for the tolling of the statute of limitations "during the time it took the charging party to exhaust the grievance machinery." (Gov. Code, § 3541.5, subd. (a)(2).) "[T]he statutory tolling doctrine only applies where the grievance and the later-filed charge raise the same issue." (*Los Angeles Unified School District* (2014) PERB Decision No. 2359 (*Los Angeles*).) In general, a grievance that does not specifically allege retaliation for protected activity does not toll the statute of limitations for filing a PERB charge regarding that allegation. (*Peralta Community College District* (2001) PERB Decision No. 1462 (*Peralta*).)

The Board has indicated that tolling may still apply if the employer is "otherwise informed" that the grievance includes a retaliation claim. (*Los Angeles*, *supra*, PERB Decision No. 2359.) In *Los Angeles*, *supra*, an employee received a letter of reprimand, which he claimed was in retaliation for his protected activity. The employee's supervisor later acknowledged this assertion in a memorandum, which was in turn attached to the employee's subsequent performance evaluation. The employee then filed a grievance challenging the performance evaluation, but did not allege retaliation for protected activity. Nevertheless, the Board concluded that the employer was otherwise informed of the retaliation allegation, such that the grievance tolled the statute of limitations.

Zink argues that the statute of limitations was tolled while her grievances against the District, filed April 27, 2015 and October 5, 2015, were pending. Although neither grievance alleged that Zink was subjected to adverse actions in retaliation for protected activity, or that the District interfered with her rights under EERA, Zink points out that she placed the District on notice of her retaliation allegations in letters dated October 15, 2015 and November 5, 2015, both of which referred to her then-pending October 5, 2015 grievance.

Zink's October 15, 2015 letter does not support the application of tolling. In that letter, Zink's only claim of "retaliation" concerned her involuntary transfer; no other adverse actions were mentioned. Thus, the letter "otherwise informed" the District only of Zink's allegation that the

involuntary transfer was retaliatory. But, as concluded in the Warning Letter, that allegation is timely without tolling.

The analysis is different for Zink's November 5, 2015 letter. That letter included a lengthy summary of Zink's allegations against the District, including those surrounding the District's investigation and its efforts to induce her to agree to a voluntary transfer. Therefore, this letter "otherwise informed" the District of Zink's view that her grievance included allegations that she had been retaliated against for protected activity.

Zink argues that as a result of her November 5, 2015 letter, the statute of limitations should be tolled not only for the entire time her October 5, 2015 grievance was pending, but also for the time her April 27, 2015 grievance was pending. This argument is rejected, because Zink did not place the District on notice of her allegations of retaliation and interference with protected activity prior to her November 5, 2015 letter. Thus, prior to that letter, Zink was not pursuing those allegations through the grievance process. (See *Santa Monica-Malibu Unified School District* (2000) PERB Decision No. 1389 [tolling applies only while a claim is being pursued].)[2]

Therefore, statutory tolling applies for the 30-day period between Zink's November 5, 2015 letter and the conclusion of the grievance process, on December 4, 2015. Actions of which Zink knew or should have known within 6 months and 30 days before the original charge was filed, i.e., no later than May 25, 2015, will be considered timely, while actions of which she knew or should have known prior to that date will be dismissed. Accordingly, the only timely allegation in the Third Amended Charge is the August 29, 2015 notice of proposed reassignment.

Zink claims that her ineligibility for summer school occurred in "May/June 2015." This assertion is contradicted by the facts alleged in the original charge, which show that Zink

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[2] Zink also argues, based on *Fillmore Unified School District* (2013) PERB Decision No. HO-U-1093-E, a final decision by a PERB administrative law judge (ALJ), that specifically alleging retaliation in a grievance is not a requirement for equitable tolling. In that case, the ALJ concluded that, although the charging parties did not allege retaliation for protected activity in any of their eight grievances, their employer was nevertheless informed of the "fundamental basis" of the charge: that they were improperly transferred because of their attempts to establish a charter school.

Reliance on this ALJ decision is misplaced for two reasons. First, it was not adopted by the Board, and is therefore not precedential. (PERB Regulation 32215.) Second, it is factually distinguishable. It is undisputed that neither of Zink's grievances informed the District of a dispute regarding the adverse actions for which Zink seeks equitable tolling. The grievances were concerned with the District's failure to provide Zink copies of student and parent complaints and with Podhorsky's notice of proposed reassignment, respectively. Thus, they did not inform the District of the "fundamental basis" of any other allegations.

objected to her ineligibility in a March 9, 2015 letter.[3] Therefore, the statute of limitations for this event began to run not in May or June of 2015, but on March 9, 2015. Accordingly, this allegation is properly dismissed as untimely.

Zink also claims that her allegations regarding the continuation of her administrative leave beyond April 14, 2015 are timely because of information she received in 2016 after the charge was filed. According to Zink, this information demonstrated that the District did not conduct an investigation of the student and parent complaints mentioned in the District's December 3, 2014 letter. However, Zink alleges in the Third Amended Charge that at an April 14, 2015 investigatory meeting, she "became aware the District was not investigating the complaints as the District claimed in its December 2014 letter to Zink, and instead was now attempting to circumvent contractual CBA requirements regarding administrative investigations, the handling of complaints against certificated employees, and the maintenance and use of derogatory material as related to certificated employees." Therefore, the statute of limitations for this allegation began to run on April 14, 2015. Zink's later discovery of additional evidence regarding the District's lack of investigation does not revive the statute of limitations. (Cf. *State of California* (2001) PERB Decision No. 1459-S [belated discovery of the legal significance of the conduct underlying the charge does not revive the statute of limitations].) Therefore, this allegation is dismissed as untimely.

II. Prima Facie Case

As noted above, the Warning Letter concluded that Zink adequately alleged that she engaged in protected activity and that the District had knowledge of that activity, but not that the timely events alleged in the charge qualified as adverse actions under an objective standard.[4] As explained in the Warning Letter, the test for whether an action is adverse is "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.) The harm alleged must be "actual and not merely speculative." (*County of Tehama* (2010) PERB Decision No. 2122-M.)

As noted, the only remaining timely allegation is that on August 29, 2015, La Jolla High School (LJHS) Principal Chuck Podhorsky issued Zink a notice of proposed reassignment. The Warning Letter concluded that this was not an adverse action, for two reasons. First, an involuntary transfer is an adverse action when the new position has less favorable working

[3] This fact, obtained from a copy of the letter attached to the original charge, was summarized in the Warning Letter. (See *Los Angeles Community College District* (2000) PERB Decision No. 1377 [the Board agent may rely on documents provided by the charging party that contradict factual allegations in the charge].)

[4] Footnote 5 of the Warning Letter noted that some of Zink's activities were not protected, for instance, a letter in which Zink disputed whether she should receive a verbal warning or a written one. The conclusion that this was not protected activity was incorrect. (*Walnut Valley Unified School District* (2016) PERB Decision No. 2495.)

conditions (see, e.g., *County of Santa Barbara* (2012) PERB Decision No. 2279-M (*Santa Barbara*); *Fresno County Office of Education* (2004) PERB Decision No. 1674), but the notice in this case did not identify Zink's new position. Second, a threat to take an adverse action is itself an adverse action when it "give[s] the employee unequivocal notice that the employer has made a firm decision to take the threatened action" (*Trustees of the California State University* (2009) PERB Decision No. 2038-H), but the notice from Podhorsky made clear that the final decision whether to transfer Zink was not Podhorsky's. Rather, under the CBA, the final decision would be made by District Chief Human Resources Officer Tim Asfazadour (Asfazadour).[5] Indeed, as the Warning Letter noted, Asfazadour ultimately determined not to transfer Zink.[6]

In the amended charges, Zink includes the following evidence intended to demonstrate that the District had reached a firm decision to transfer her: (1) a statement in the District's August 5, 2015 response to the charge Zink filed with the Department of Fair Employment and Housing (DFEH), that "Zink will be notified of her reassignment once the 2015-2016 academic school year begins in September, 2015"; (2) a statement in the District's March 8, 2016 response to a request from DFEH for additional information, that "[a]ction on the reassignment recommendation was put on hold pending efforts to identify a mutually agreeable new work location. When these efforts proved unsuccessful, the involuntary transfer process was started"; (3) evidence that Zink's position at LJHS was filled by another employee while she

---

[5] The process for administrative transfers is described as follows in section 12.7.1.1 of the CBA:

> 12.7.1.1.1. Before the request for administrative transfer is acted upon, the supervisor shall advise the unit member through a personal interview and in writing that an administrative transfer is being recommended and the reasons therefor.
>
> 12.7.1.1.2. The appropriate division administrator(s) shall, upon request, meet with the unit member to discuss the proposed administrative transfer.
>
> 12.7.1.1.3. The appropriate division administrator(s) will determine whether the administrative transfer should be made.
>
> 12.7.1.1.4. Administrative transfers may be appealed through the grievance procedure.

[6] Zink's subsequent UPC, Case No. LA-CE-6141-E, alleges that, after Asfazadour decided not to transfer Zink, the District took adverse action against her by: (1) placing her in a non-teaching position at LJHS; (2) placing her on administrative leave again; (3) issuing a new notice of proposed reassignment away from LJHS; and (4) reassigning her to Marshall Middle School. Because those allegations are not included in the present charge, they are not considered here.

was on administrative leave, although Zink alleges that this employee "has since been fired"; (4) the fact that Asfazadour had notice of Podhorsky's proposal to reassign Zink, but did not intervene until January 14, 2016; and (5) the fact that the only academically comparable high school to which Zink could be transferred is 13 miles farther from her residence than LJHS.

The relative distances of the District's high schools from Zink's residence establish that the reassignment might be an adverse action. (*Fresno County Office of Education*, *supra*, PERB Decision No. 1674.) However, the other newly alleged facts do not demonstrate that the District provided unequivocal notice of a firm decision to transfer Zink. The statements in the District's responses to Zink's DFEH charge were not made to Zink herself, and, according to Zink, she did not discover them until the District responded to her public records request on April 29, 2016. Moreover, those statements do nothing more than state that the District intended to initiate the involuntary transfer process. They do not indicate that Asfazadour had already reached a final decision through that process.

The fact that the District filled Zink's position while she was on administrative leave does not appear to indicate that she could not have returned to that position or another one at LJHS. Indeed, Zink alleges that the individual who filled her position has since been fired.

Finally, as for Asfazadour's failure to intervene, the CBA did not require Asfazadour's involvement until after Zink objected to the transfer, Podhorsky met with Zink to discuss the transfer, and Podhorsky nevertheless determined to proceed. It cannot be concluded that merely by failing to act sooner, Asfazadour somehow ratified Podhorsky's decision. (See *West Contra Costa County Healthcare District* (2011) PERB Decision No. 2164-M.)[7] Therefore, Zink has not established that the August 29, 2015 notice from Podhorsky gave her unequivocal notice of a firm decision to transfer her, and this allegation is dismissed.

Conclusion

Because the present charge does not adequately allege that Zink suffered an adverse action within the statute of limitations period, the charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the

[7] In the Second Amended Charge, Zink suggests that Asfazadour ultimately decided not to transfer her only because she had filed the original charge in this matter three weeks earlier, on December 24, 2015. This speculation regarding Asfazadour's motive is not sufficient to state a prima facie case. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S.) But even if this speculation were accepted, it would be an allegation that the District decided *not* to take an adverse action because Zink engaged in protected activity. This is not an unfair practice.

Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

J. FELIX DE LA TORRE
General Counsel

By _____
Joseph Eckhart
Regional Attorney

Attachment

cc: Sandra T.M. Chong, Assistant General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027

March 15, 2016

Mary Elizabeth Bain

Re: *Emma Yvonne Zink v. San Diego Unified School District*
Unfair Practice Charge No. LA-CE-6095-E
WARNING LETTER

Dear Ms. Bain:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on December 24, 2015. Emma Yvonne Zink (Zink or Charging Party) alleges that the San Diego Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by retaliating against her for exercising rights under EERA.

FACTS AS ALLEGED

Zink is a high school math teacher assigned to the District's La Jolla High School (LJHS). Her exclusive representative is the San Diego Education Association (SDEA). SDEA and the District are parties to a collective bargaining agreement (CBA) that establishes Zink's terms and conditions of employment.

On September 30, 2014, Zink received an e-mail message from LJHS Vice Principal Anne McCarty (McCarty) asking to meet with Zink regarding "the multiple (5) 2 day suspension referrals you wrote during your 3rd period class yesterday for varying student offenses."

On October 2, 2014, Zink met with McCarty. Afterwards, Zink sent McCarty a letter responding to the issues discussed during the meeting, specifically, McCarty's claim that Zink was issuing too many suspension referrals. Among other things, Zink protested the lack of written guidance provided to teachers regarding suspension referrals.

On October 6, 2014, a student in one of Zink's classes was using an electronic device in violation of LJHS and District policy. According to a written statement Zink submitted that day, Zink asked the student to stop, but he did not. Zink then attempted to confiscate the device. The student reacted by attempting to hit or push Zink. Zink attempted to hold the

[1] EERA is codified at Government Code section 3540 et seq. PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

student's arms to avoid being hit. The student reported that Zink scratched him during this exchange. According to her written statement, Zink was concerned about protecting herself from aggravating a serious pre-existing injury.

On October 8, 2014, Zink sent a letter to various District officials claiming that she was "being targeted and not supported" by the LJHS administration with regard to the disciplinary issues in her classes.

On October 9, 2014, LJHS Principal Chuck Podhorsky (Podhorsky) hand-delivered Zink a letter from Erin Houston (Houston), a District human resources staff member, dated October 8, 2014. The letter informed Zink of her placement on paid administrative leave, pending an investigation into the October 6, 2014 incident. The letter further informed Zink that she was "expected to be available if needed throughout this investigation" and that she was prohibited from engaging in outside employment during her "work hours as a secondary teacher." In addition, the letter stated:

> You are not to have any contact with any staff member, students or parents at La Jolla High School during the course of this investigation or while you are on leave. Should you make contact with any of the above, we will consider this as misconduct, hindering a fair and thorough investigation.

On October 13, 2014, Zink submitted to the District an Employee Complaint Alleging Harassment or Discrimination.[2] The complaint stated:

> I allege a trend or pattern of apparent harassment, discrimination, retaliation, intimidation, hostility, and offensive work environment perpetrated by the La Jolla High School administration.

As a remedy, the complaint requested that the District:

> Cease and desist the harassment and discrimination and provide support for extensive discipline issues in my Period 3 class, specifically, and provide support for any other classroom disciplinary problems that may arise that are beyond the scope of the classroom teacher.

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[2] Zink refers to this as a "7110 Complaint" because it is provided for in the District's Administrative Procedure 7110. Although not provided in the charge, this procedure appears to be available on the District's website at https://www.sandiegounified.org/node/490. Administrative Procedure 7110's stated purpose is "[t]o outline administrative procedures governing the ensuring of fair, equitable, and timely resolution of employee complaints alleging harassment or discrimination on the basis of race, religion, creed, color, marital status, veteran status, sex, sexual orientation, gender, gender identity, gender expression, ancestry, national origin or ethnic group identification, age, mental or physical disability."

The complaint designated Donald Moore (Moore), identified elsewhere in the charge as "Zink's Labor Relations Specialist," as her representative for the complaint.

Also on October 13, 2014, Moore sent a letter to Houston, stating:

> I have been retained by La Jolla faculty member, Emma Zink, to represent her interests relative to investigative meetings/investigation(s) and any subsequent disciplinary action that may result.

The letter does not identify Moore by job title or organizational affiliation. The letter goes on to invoke the California Public Records Act (CPRA) to request records regarding the District's investigation of Zink. The letter indicates that copies were sent to various District officials, as well as to "Jonathan Mello, SDEA Union Representative."

On October 27, 2014, Moore, this time identifying himself as a "Labor Relations Specialist," sent a letter to Houston requesting an update on the status of Zink's October 13 harassment complaint and his October 13, 2014 CPRA request.

On November 17, 2014, Houston contacted Moore by telephone with a settlement offer, that Zink remain on paid administrative leave through June 30, 2015, and then retire from the District. Zink rejected the offer.

On November 21, 2014, Zink submitted a Citizen Complaint Form to the County of San Diego's Civil Grand Jury, alleging "[a]cademic fraud" by Podhorsky, McCarty, and other District employees.

On December 3, 2014, Zink received a letter from Houston stating that both her harassment complaint and various "student and parent complaints" had been referred to an outside investigator for investigation, and that she would remain on administrative leave during the investigation. The letter again informed Zink that she was prohibited from engaging in outside employment during her working hours during the leave. In addition, the letter directed Zink "not to have any contact with any staff member, students or parents at La Jolla High School during the course of this investigation or while you are on leave regarding the investigation or the allegations."

On December 4, 2014, Zink sent a letter to Podhorsky threatening to "commence civil proceedings and take other actions" unless the District stopped the "fraudulent and improper use" of her name in its online grading and attendance systems.

On December 5, 2014, Moore sent a letter to Houston expressing various concerns regarding the District's actions.

On January 22, 2015, a meeting was held with Moore, Zink, Houston, and an attorney for the District. At the meeting, Moore asked Houston about the results of a police investigation into allegations of child abuse from the October 6, 2014 incident. Houston denied knowledge of those results, even though the San Diego Police Department had notified the District a week

earlier regarding the result of its investigation. Houston made a second settlement offer to Zink, proposing that she remain on paid administrative leave through June 30, 2016 and then retire from the District. Zink rejected the offer.

On January 27, 2015, Zink and Moore reviewed Zink's District personnel file.

On January 28, 2015, Moore sent a letter to Houston to "raise some lingering concerns about this whole process." Among other things, Moore noted that the District's directives that Zink refrain from discussing the pending investigations were inconsistent with "recent Public Employment Relations Board (PERB) and National Labor Relations Board (NLRB) decisions." Moore asserted that if the District's outside investigator "is allowed to depose witnesses and collect evidence, Ms. Zink and her defense team has the right to collect evidence and depose said witnesses." Moore also asserted that the District's directives had a "chilling effect" on staff members, students, or parents who might want to assist Zink's defense.

On February 17, 2015, Zink sent a letter to Houston inquiring about the status of the District's investigations, and stating her right to ask for assistance with her discrimination complaint from the California Department of Fair Employment and Housing (DFEH).

On February 23, 2015, Zink sent another letter to Houston. Among other things, the letter objected that the District's investigator had not yet met with her in the nearly five months she had been on administrative leave. Zink also objected that the District's directives not to contact parents prevented her from communicating with a parent who had asked Zink to provide a letter of recommendation for a student.

On March 2, 2015, Houston sent a letter to Zink to "amend" the directive contained in Houston's October 8, 2014 letter to state:

> You cannot have contact with any staff, students or parents at La Jolla High School about the allegations that are being investigated. Those allegations include that you grabbed a student's arm and scratched him and that you created an unsafe learning environment in one of your classes. Should you do so, we will consider this misconduct, hindering a fair and thorough investigation. This in no way limits your rights to discuss those allegations with your respective representatives.

On March 9, 2015, Zink sent a letter to Houston objecting that the District had, among other things, "defamed" her by accusing her of child abuse, prevented her from applying to be District Teacher of the Year, failed to investigate her discrimination complaint, prevented her from writing letters of recommendation, continued to use her name in its online grading system, and prevented her from applying to earn additional income by teaching summer school.

On March 16, 2015, Zink filed a discrimination complaint with DFEH.

On March 27, 2015, Houston informed Moore that due to problems with the outside investigator, an Interim Human Resources Officer, Jose Gonzales (Gonzales), would be conducting the investigations regarding Zink.

On March 30, 2015, Gonzales sent an e-mail message to Zink and Moore to schedule an interview with Zink. A meeting was originally scheduled for April 7, 2015, but then rescheduled for April 14, 2015.

On April 10, 2015, Moore sent a 24-page letter to Houston asserting in detail violations of a number of statutes, regulations, and policies by the District and LJHS, some directly related to Zink and others not. Among these violations, Moore claimed that the District was required to address any issues relating to classroom safety through the teacher evaluation process, based on "California law, [District] policies and procedures, Article 14 of the San Diego Education Association (SDEA) Collective Bargaining Agreement (CBA), and case law." Moore also noted that the "illegal directive" in the District's October 8, 2014 letter prevented Zink from submitting her "Teacher Assignment Preferences" for the 2015-2016 school year.

On April 14, 2015, Gonzales met with Zink and Moore. The charge states that Gonzales "came to the meeting with his 'findings' already determined," and did not allow Zink to provide witnesses or witness statements. Gonzales stated that Zink would be involuntarily transferred from LJHS.

On April 17, 2015, Gonzales sent an e-mail message to Jennifer Lynch (Lynch), an attorney representing Zink at the time. Gonzales stated that Zink would be receiving a letter of warning regarding the October 6, 2014 incident, and confirmed that she would receive a notice of proposed reassignment away from LJHS to a non-teaching position. Gonzales suggested that Zink's return to work could be hastened if Zink was willing to accept a reassignment to a non-classroom position.

On April 20, 2015, Gonzales sent another e-mail message to Lynch responding to some of Zink's concerns regarding letters of recommendation and the District Teacher of the Year award. Gonzales also stated that if Lynch would confirm Zink's willingness to accept a non-classroom position, it would be "unnecessary to comply with the teacher collective bargaining agreement process, a more time consuming process, for notifying a teacher that she is being reassigned to another location."

On April 22, 2015, Lynch responded to Gonzales by e-mail message, stating that Zink would prefer a teaching assignment, and proposing a verbal warning rather than a letter of warning.

On April 27, 2015, Zink filed a grievance claiming that the District had violated sections 14.9, 14.10, and 14.11 of the CBA, which respectively concern evaluations, personnel files, and placement of derogatory material in personnel files. As the "specific grounds for the grievance," the grievance alleged:

> The District, by and through its representatives, violated the above mentioned articles when it produced derogatory material in a meeting with Jose Gonzales

> on April 14, 2015. Twice during the District's investigation we requested information from Ms. Zink's District and Site Personnel files. There was no derogatory material given to us. With the investigation almost over the District is trying to introduce derogatory material from some secret file. Further the District has [proposed] possible discipline based on this illegal material.

On April 28, 2015, Gonzales informed Lynch that the District was exploring assignments that would allow Zink to interact with students. Gonzales stated that this would need to be resolved promptly to avoid having to comply with the CBA's procedures on reassignment. Gonzales also asked whether a favorable resolution of the assignment issue would resolve Zink's recently filed grievance.

On May 7, 2015, Gonzales provided Lynch with a copy of his report regarding the October 6, 2014 incident, which was dated April 14, 2015. The report concluded that the student was not seriously injured, but that Zink exercised "extremely poor judgment" in attempting to confiscate the device by force. The report determined that the LJHS policy directing teachers to "confiscate" unauthorized electronic devices did not mean teachers should do so by force.

On May 8, 2015, Zink sent a letter to Gonzales questioning the veracity of one of the witnesses to the October 6, 2014 incident, as well as disputing Gonzales's interpretation of the LJHS policy. Zink asserted that these were grounds for concluding that a verbal warning was the appropriate level of discipline.

On May 26, 2015, Gonzales sent an e-mail message to Lynch proposing an assignment for Zink in the District's Information Technology (IT) Department, where she would develop an online math instructional program. Gonzales informed Lynch of a meeting between Zink and Dan Stoneman (Stoneman), the District's IT Director to discuss the assignment. Gonzales concluded the message by suggesting that Zink might be interested in a retirement incentive being offered to employees represented by SDEA.

On May 27, 2015, Zink appealed her grievance to the third level of the grievance procedure.

On May 28, 2015, Gonzales told Lynch that Zink was required to attend the meeting with the IT Director, and that this was not part of the involuntary reassignment process.

On June 1, 2015, Zink hand-delivered a letter to Stoneman asserting that she was being "bullied" into interviewing for the IT Department position. Zink also asserted that she should have been reinstated at LJHS, and questioned the District's motives for reassigning her.

On June 3, 2015, Podhorsky responded to Zink's grievance, acknowledging a partial violation of one CBA provision, but concluding that Zink's requested remedy—destruction of the derogatory information—was not appropriate.

On June 4, 2015, Stoneman cancelled the meeting with Zink regarding the IT Department position.

The same day, Zink sent a letter to Stoneman, stating that if she were to participate in the meeting, it could be construed as her approval of "blatant" violations of the CBA and of District procedures. Zink again questioned why she was not being permitted to return to LJHS. She also referred to the findings by the Civil Grand Jury that there was "testimonial and documentary evidence to suggest the possibility of improper conduct" by the District toward Zink.

On June 9, 2015, DFEH accepted Zink's complaint.

On June 15, 2015, Moore sent a letter to Podhorsky attempting to further explain the contract violations claimed in Zink's grievance.

On June 16, 2015, Zink sent a letter to Gonzales raising further questions about the veracity of a witness to the October 6, 2014 incident.

On June 23, 2015, Moore sent a letter to Gonzales raising various concerns regarding the District's investigations and its efforts to reassign Zink. The letter claimed that the District was engaging in racial discrimination by reassigning Zink. The letter also asserted that "the District has engaged in acts or has acted in a manner which tends to harm or interfere with Ms. Zink's employee rights."

On August 29, 2015, Zink received a letter from Podhorsky dated September 2, 2015, providing notice of a proposed reassignment from LJHS for the remainder of the 2015-2016 school year. The letter asserted that due to "repeated complaints" about Zink's "teaching methodology," reassigning her was in the best interests of Zink and the District. The letter also informed Zink of her contractual rights to meet with Podhorsky regarding the proposed reassignment, and to appeal Podhorsky's decision to the District's Chief Human Resources Officer, Tim Asfazadour (Asfazadour).

The same day, Zink sent a letter to Podhorsky requesting clarification of whether she was still on administrative leave.

On September 1, 2015, Gonzales responded to Zink by e-mail, confirming that she remained on paid administrative leave until told to report to work.

On September 21, 2015, a decision was issued regarding Zink's grievance, determining that some CBA provisions were violated when Zink was not timely informed of parental complaints against her. The remedy for the violation was to preclude the parental complaints from being used as part of a disciplinary or personnel action or to evaluate Zink.

A meeting was scheduled for September 24, 2015 between Zink, Moore, and Podhorksy regarding the involuntary reassignment. However, when Zink and Moore arrived for the meeting, they were informed that the meeting would need to be rescheduled.

Later that day, Zink sent a letter to Podhorsky insisting on her right to the meeting regarding the involuntary reassignment, pursuant to section 12.7 of the CBA.

On October 5, 2015, Zink filed a new grievance, this time alleging violations of various provisions of section 12.7 of the CBA. As the "specific grounds for the grievance," the grievance alleged:

> On Thursday, September 24, 2015 at 12:30 p.m. a personal interview with Emma Zink was to occur with La Jolla High School Principal Chuck Podhorsky but twenty minutes before the scheduled meeting Principal Podhorsky cancelled the meeting. (Ms. Zink arrived at the La Jolla High Main Office and signed in at 12:10 p.m.) In an email sent to Ms. Zink by Principal Podhorsky at 12:29 p.m. September 24, 2015, Ms. Zink became aware that Principal Podhorsky improperly combined two steps in the contract (Sections 12.7.1.1.1 and 12.7.1.1.2) in his recommendation for administrative transfer. Principal Podhorsky not only violated the aforementioned two sections but also, in a notification dated September 2, 2015, violated Section 12.7.1.2 administrative transfer process by not following the specific steps outlined in the contract.

On October 7, 2015, Podhorsky sent an e-mail message to Zink and Moore, proposing to reschedule the cancelled meeting for October 14, 2015 at the "Ed Center."

Moore responded the following day, October 8, 2015, informing Podhorsky of the grievance and requesting that the meeting be held at LJHS. Moore mentioned "still unresolved ADA issues concerning Mrs. Zink."

Podhorsky insisted that the meeting be at the Ed Center, and the meeting was ultimately held on October 14, 2015.

On October 15, 2015, Zink sent a letter to Podhorsky protesting the previous day's meeting. Zink objected that the reason for the proposed transfer had changed from parental complaints to the "best interest of the District." Among other things, Zink alleged that the involuntary transfer was "in retaliation for engaging in protected activities."

On October 21, 2015, Zink appealed her second grievance to Step 3 of the grievance procedure.

On October 22, 2015, Zink received a letter from Podhorsky dated October 15, 2015, stating that he was still recommending a reassignment, and informing Zink of her right to meet with Asfazadour.

On October 26, 2015, Zink sent a letter to Podhorsky, reiterating her objection to the proposed reassignment.

On November 2, 2015, a Step 3 appeal meeting was held regarding Zink's grievance, with Zink, Moore, and District Labor Relations Specialist Kristine Morshead (Morshead) in attendance.

On November 5, 2015, Moore sent a 25-page letter to Asfazadour. In addition to protesting Podhorsky's failure to follow section 12.7 of the CBA, Moore claimed that Zink was placed on administrative leave as a result of her October 2, 2014 complaint regarding the lack of written guidance regarding suspension referrals, and that the involuntary transfer, first raised on April 14, 2015, was in retaliation for the April 10, 2015 letter from Moore on Zink's behalf.

On November 16, 2015, Zink and Moore met with Asfazadour regarding the proposed reassignment.

Also on November 16, 2015, the District denied Zink's grievance at Step 3. The decision was issued by Morshead.

On November 17, 2015, Zink requested that SDEA arbitrate her grievance.

On December 4, 2015, Zink received a letter informing her that the SDEA Grievance Committee voted to recommend that the SDEA Board of Directors not proceed to arbitration of Zink's grievance. Zink was informed of her right to appear before the Board of Directors to appeal that decision.

On January 14, 2016, Zink and Moore met with Asfazadour.

On January 19, 2016, Asfazadour sent Zink a letter informing her that she would not be transferred, and that she should report to work at LJHS on February 1, 2016.

DISCUSSION

I. The Charging Party's Burden

An unfair practice charge must include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB Regulation 32615(a)(5).) A charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this by alleging sufficient facts describing the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture*) (1994) PERB Decision No. 1071-S (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Such allegations should focus on the elements of the prima facie case.

In evaluating whether a charge states a prima facie case, the Board agent must assume that the facts alleged by the charging party are true. (*Temple City Unified School District* (1990) PERB Decision No. 843.) Speculation and legal conclusions, however, are not factual allegations, and they are not sufficient to state a prima facie case. (*Dept. of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) In addition, while the Board agent may not resolve factual disputes in favor of the respondent, the Board agent may rely on undisputed facts provided by the

respondent under penalty of perjury. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

II. Statute of Limitations

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

The charge in this case was filed on December 24, 2015. As a result, events that took place before June 24, 2015 are untimely unless an exception to the statute of limitations applies. In the charge, Zink acknowledges that many of the events alleged occurred more than six months before the charge was filed, but argues that the statute of limitations was tolled while her two grievances were pending.

With respect to tolling of the statute of limitations, EERA specifically provides that:

> The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

(Gov. Code, § 3541.5, subd. (a)(2).) In order to effectively toll the statute of limitations under this provision, a grievance must place the employer on notice of the specific violation. (*North Orange County Community College District* (1998) PERB Decision No. 1268.) A grievance that does not specifically allege retaliation for protected activity does not toll the statute of limitations for filing a PERB charge regarding that allegation. (*Peralta Community College District* (2001) PERB Decision No. 1462 (*Peralta*).)

In this case, neither of Zink's grievances placed the District on notice of the EERA violations alleged in the charge. The charge enumerates 17 adverse actions taken by the District against Zink, which are alleged to be in retaliation for her EERA-protected activity. The charge also alleges that the District issued directives that interfered with Zink's rights under EERA to communicate with her co-workers. None of these specific allegations are not included on the forms Zink submitted with her grievances. Those forms included only assertions that the District violated Zink's contractual rights governing disclosure of derogatory information and involuntary reassignment. Nor is there any other evidence that Zink presented these

allegations as part of the grievance process.[3] Thus, Zink's grievances did not place the District on notice of the EERA violations alleged in the charge. As a result, the grievances did not toll the statute of limitations. (*Peralta*, *supra*, PERB Decision No. 1462.)

Because the statute of limitations was not tolled by Zink's grievances, events that took place more than six months before the charge was filed, i.e., before June 24, 2015, are untimely. The timeliness of the 17 claimed adverse actions is discussed as follows.

Several of the claimed adverse actions are clearly untimely. Numbers 1-6 and 9-10 concern the conduct of the District's investigator, Gonzales, all of which is alleged to have occurred between March 27, 2015, when the District informed Zink of Gonzales's appointment as investigator, and June 23, 2015, when Moore sent a letter to Gonzales. Number 8 concerns the District's directive not to contact other staff members, students, or parents, which was issued on December 3, 2014.[4] Numbers 14 and 15 concern Zink's ineligibility to apply for District Teacher of the Year and summer school, respectively. She was informed of those actions no later than March 9, 2015, the date she objected to them in a letter to Houston. Number 16 concerns Zink's decision to turn down the District's two settlement proposals that Zink remain on administrative leave for a period of time and then retire. Zink turned down the second of these proposals on January 22, 2015. Because each of these claimed adverse actions occurred before June 24, 2015, they are untimely.

Number 17 is less clear. This action concerns the "continuing" of Zink's paid administrative leave as a result of parental complaints. No date is specifically alleged for this action. Zink was initially placed on paid administrative leave on October 8, 2014 pending an investigation into other allegations. On December 3, 2014, while the first investigation was pending, she was informed that she would remain on paid administrative leave pending investigation of her own discrimination complaint and of complaints from students and parents. Thus, Zink appears to have been informed no later than December 3, 2014 that her administrative leave

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[3] There are instances in which Zink's representatives asserted violations of Zink's rights under EERA, such as Moore's January 28, 2015, June 23, 2015, and November 5, 2015 letters. However, it is not alleged that these letters were part of the grievance process. Nor, despite references to Zink's grievances in the latter two letters, did these letters assert that the grievances involved either interference with Zink's rights under EERA or retaliation for EERA-protected activity.

[4] As noted, the charge also alleges that this directive interfered with Zink's rights under EERA. The allegation is untimely under either theory. (*State of California (Department of Transportation)* (1996) PERB Decision No. 1172-S [statute of limitations for an interference allegation begins to run when "charging party knew or should have known of the conduct giving rise to the alleged unfair practice"].)

The charge does not specifically allege that the similar directive contained in the October 8, 2014 letter, or the amended directive contained in the March 2, 2015 letter, are unfair practices. Nevertheless, any allegations based on those letters would also be untimely, having occurred before June 24, 2015.

would continue pending a second investigation, notwithstanding the resolution of the first investigation.

The charge does not allege that the investigation initiated on December 3, 2014 was ever completed. In other words, because the investigation was still pending at all times relevant to the charge, Zink could not have expected that her administrative leave would be terminated. Zink acknowledges the Board's decision in *Claremont Unified School District* (2015) PERB Decision No. 2459 (*Claremont*), which held that it was not an adverse action to continue a previously announced administrative leave, when the investigation prompting the leave is still pending. Nevertheless, Zink attempts to distinguish *Claremont* by claiming that the terms of her administrative leave changed, resulting in a new adverse action, when the District informed her that it would be seeking to involuntarily transfer her on the basis of the parental complaints. Even assuming that this resulted in a new adverse action, Zink's attorney was informed of it on April 17, 2015. Because that date was prior to June 24, 2015, this allegation is untimely.

The remaining allegations in the charge are timely. These are: (1) the cancellation of the September 24, 2015 meeting between Zink, Moore, and Podhorsky (listed as Number 7 in the charge); (2) Podhorsky's August 29, 2015 initiation of the involuntary reassignment procedure (listed as Numbers 11 and 12 in the charge); and (3) the November 16, 2015 denial of Zink's second grievance (listed as number 13 in the charge). Only these three timely actions will be analyzed to determine if they state a prima facie case.

III. Prima Facie Case

The charge alleges that the District took adverse action against Zink for engaging in protected activity. To state a prima facie case of retaliation in violation of EERA section 3543.5(a), Zink must allege: (1) she exercised rights under EERA; (2) the District had knowledge of the exercise of those rights; (3) the District took adverse action against Zink; and (4) the District took the action <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

A. Protected Activity and Employer Knowledge

EERA protects employee rights to "form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations," as well as to "represent themselves individually in their employment relations with the public school employer." (Gov. Code, § 3543, subd. (a).)

In order to be protected, an employee's activity must be the "logical continuation of group activity" (*Los Angeles Unified School District* (2003) PERB Decision No. 1552), and it must be directed toward issues of legitimate concern to employees as employees (*Berkeley Unified School District* (2015) PERB Decision No. 2411 (*Berkeley*)). Protected activity includes asserting rights grounded in a collective bargaining agreement (*Jurupa Unified School District* (2015) PERB Decision No. 2420), and filing grievances pursuant to a contractual grievance process (*Trustees of the California State University* (2008) PERB Decision No. 1970-H).

However, internal complaints, "undertaken alone and for [the employee's] sole benefit" are not protected. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) "[W]hen an employee's communication with the employer is for his/her own benefit, the conduct is not protected." (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S (*CDCR*).)

Under these standards, the charge in this case adequately alleges that Zink engaged in protected activity by way of the April 10, 2015 letter from Moore on Zink's behalf, the April 27, 2015 grievance, the October 5, 2015 grievance, and the various other communications in which Zink asserted her rights under the CBA.[5]

The charge also adequately alleges that the District had knowledge of Zink's protected activity. (See *Palo Verde Unified School District* (2013) PERB Decision No. 2337.)

B. Adverse Action

The test for whether an action is adverse is "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.) This is an objective test; the Board does not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) The harm alleged must be "actual and not merely speculative." (*County of Tehama* (2010) PERB Decision No. 2122-M.) As discussed above, the charge alleges 17 claimed adverse actions, most of which are untimely. The remaining actions, discussed below, are not adverse actions under an objective standard.

The charge alleges that Podhorsky's cancellation of the September 24, 2015 meeting was an adverse action because it caused Zink and Moore to "waste" their time, and Zink to "waste" the money she paid her representative, Moore. However, wasting Zink's time does not appear to be adverse to her employment, where she was already on administrative leave and required to report to work as directed by the District. Moreover, the wasting of Zink's money did not have an adverse impact on Zink's employment with the District. And, in any event, it is not alleged that the District required Zink to pay a representative to attend the meeting.[6]

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[5] Not all of the activities cited in the charge are protected. For instance, Zink's May 8, 2015 letter to Gonzales argued that based on concerns with witness veracity and the District and LJHS policies at issue, a verbal warning was more appropriate than a written one. This letter did not assert any rights under the CBA, nor did it raise issues of concern to any employees other than Zink.

[6] It is noted that Zink may have had a right to be represented in this meeting by an SDEA representative. (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C.) However, she did not have an EERA-protected right to representation by Moore, who is not alleged to be an SDEA representative. (*Hartnell Community College District* (2015) PERB Decision No. 2452.)

The charge also alleges that Podhorsky took adverse action against Zink by initiating the involuntary reassignment process and by doing so without following the steps defined by the CBA. PERB has determined that involuntarily transferring or reassigning an employee is an adverse action when the new position has less favorable working conditions. (See, e.g., *County of Santa Barbara* (2012) PERB Decision No. 2279-M (*Santa Barbara*); *Fresno County Office of Education* (2004) PERB Decision No. 1674.) In addition, a threat to take an adverse action is itself an adverse action when it "give[s] the employee unequivocal notice that the employer has made a firm decision to take the threatened action." (*Trustees of the California State University* (2009) PERB Decision No. 2038-H.)

Podhorsky's actions fall short of establishing an adverse action, for two reasons. First, Podhorsky's initiation of the transfer process was unequivocal notice of a firm decision to initiate the transfer process, but not of a firm decision to transfer Zink. Under the CBA, the final decision to transfer Zink was Asfazadour's.[7] Second, even if it had been unequivocal notice, the transfer's effect on Zink's working conditions is entirely speculative. This is because the transfer did not provide notice of what position Zink would be transferred to. Therefore, it cannot be concluded that the transfer would result in less favorable working conditions for Zink.[8]

Finally, the charge alleges that the District took adverse action against Zink when it issued the Step 3 grievance response, which "omits factual and supporting evidence as to Zink's claims and provides factual inaccuracies, while blatantly acknowledging the District is violating the contract, yet attempting to provide excuses for their violations." The Board has suggested that the denial of a grievance may be an adverse action if the denial of the grievance has an adverse effect on the grievant's employment. (*Golden Gate Bridge Highway & Transportation District* (2011) PERB Decision No. 2209-M.)

In this case, it is not alleged that the denial of Zink's grievance had an adverse effect on Zink's employment. Prior to the denial, she was on paid administrative leave, and Podhorsky was attempting to reassign her. Both of those conditions continued after the denial of her grievance; she remained on paid administrative leave, and Podhorksy was attempting to reassign her.[9]

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[7] As the District notes in its position statement, Asfazadour ultimately decided not to approve the transfer.

[8] Alternatively, if Gonzales's statements that Zink would be transferred to a non-teaching position are viewed as unequivocal notice of a firm decision to transfer Zink to a position with less favorable working conditions, such an allegation is untimely. Gonzales made those statements on April 17, 2015.

[9] To the extent Zink contends that the denial of the grievance was adverse to her employment because the grievance should have been granted, this contention appears aimed at improperly seeking to have PERB enforce the CBA. EERA prohibits PERB from enforcing contractual agreements, absent an independent violation of the statute. (Gov. Code, § 3541.5, subd. (b); cf. *Trustees of the California State University (San Marcos)* (2015) PERB Decision

Because the charge does not allege sufficient facts that the District took a timely adverse action against Zink, it fails to state a prima facie case of retaliation.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.[10] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before **March 29, 2016**,[11] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Regional Attorney

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No. 2407-H ["The final step in a grievance procedure is not the filing of an unfair practice charge"]; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M [knowledge of protected activity resulting from a supervisor's denial of a grievance "is only relevant to the extent there are circumstances, other than the denial of the grievance, to suggest unlawful motive," because, "[o]therwise, every denied grievance would be bootstrapped into a retaliation claim"].)

[10] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[11] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile or electronic mail. (PERB Regulation 32135.)