STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFEREY L. NORMAN, Charging Party, v. JURUPA UNIFIED SCHOOL DISTRICT, Respondent.	Case Nos. LA-CE-5593-E; LA-CE-5744-E PERB Decision No. 2450 August 31, 2015

Appearances: Jefferey L. Norman, on his own behalf; Fagen, Friedman & Fulfrost by Christopher D. Keeler and Kerrie Taylor, Attorneys, for Jurupa Unified School District.

Before Huguenin, Winslow, and Banks, Members.

DECISION

WINSLOW, Member: These cases come before the Public Employment Relations Board (PERB or Board) on exceptions filed by Jefferey L. Norman (Norman) and the Jurupa Unified School District (District) to the proposed decision (attached) of a PERB administrative law judge (ALJ).[1] The complaints allege respectively that the District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[2] by discriminating and retaliating against Norman because of his protected activity when it denied him personal necessity leave (Case No. LA-CE-5593-E) and terminated his employment (Case No. LA-CE-5744-E).

[1] By agreement of the parties, the ALJ heard evidence and issued his proposed decision simultaneously on two cases: PERB Case Nos. LA-CE-5593-E and LA-CE-5744-E. The instant decision addresses both cases as well.

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

The ALJ dismissed both complaints. In Case No. LA-CE-5593-E, he concluded that Norman failed to establish that the District had knowledge of his protected activity. In Case No. LA-CE-5744-E, the ALJ determined that Norman had established a prima facie case for retaliation, but the District had proven its defense, i.e., that it both had and acted because of an alternative non-discriminatory reason in terminating Norman's employment. Both Norman and the District filed timely exceptions to the proposed decision.

The Board itself has reviewed the record in this matter, including the pleadings, the hearing record, the proposed decision, the parties' exceptions and their respective responses. We conclude that the ALJ's findings of fact are supported by the record, and we adopt them as the findings of the Board itself. With two exceptions, we also conclude that the ALJ's conclusions of law are well-reasoned and consistent with applicable law, and therefore we hereby adopt the ALJ's proposed decision as the decision of the Board itself, except as noted below and subject to the discussion of issues raised by the exceptions.

FACTUAL SUMMARY

Norman began his employment with the District as a physical education teacher in 2001, and the record includes no evidence of performance problems for the first several years of his career. In 2005, he was evaluated as "Exceeds District Standards" which was the highest possible rating. However, in 2007, the District received complaints from other staff members about Norman, including allegations that Norman had angrily confronted other employees. The District investigated these complaints, and in February 2007 presented him with a written summary of allegations, but without supporting documents and gave him an opportunity to respond. Norman did so, objecting to the lack of detail and the lack of documents supporting the allegations. He received a second disciplinary letter in March 2007, to which he registered the same objection.

Norman was reassigned to teach math for the 2007-2008 school year. In April 2009, Norman was again presented with a summary of allegations, this time concerning student complaints that he yelled at students and appeared angry with them. He was also accused of throwing a student's belongings out of his classroom while yelling at the student "get out!" Norman denied the allegations and again objected that the allegations were not specific enough to prepare a response to. He admitted at the time, however, to accessing student's cumulative files to obtain information about his accusers.

In May 2009, the District, through its Assistant Superintendent of Human Resources, Tamara Elzig (Elzig), issued Norman a notice of unsatisfactory service based on the 2007 conduct, student complaints during the 2008-2009 school year and his unauthorized access of student cumulative files. Norman was directed to correct his conduct by controlling his anger and treating students professionally, among other things.

During the following school year, 2009-2010, the District presented Norman with four disciplinary documents, three of which concerned student complaints that alleged a similar pattern of conduct as had allegedly occurred the previous year: Norman became angry in class, yelled at his students, and made them stand in the corner as a means of discipline, called one student "stupid ass" during class, refused to help a student seeking assistance, and refused to allow another student to use the restroom. Norman denied all of these allegations.

In May 2010, Luz Mendez (Mendez), the school principal, issued Norman a performance evaluation with an overall ranking of "Needs Improvement" based on the concerns articulated by students and parents concerning Norman's alleged disrespectful treatment of students.

The "Master Grievance" and Elzig's Response

In June 2010, an group of District employees, including Norman, anonymously filed a document with the District and several state and federal agencies, including the local district attorney, that described 21 complaints about working conditions in the District, including allegations about its discipline policies, its handling of employee personnel information and rest break policies, etc. This document, which came to be known as the "Master Grievance" also alleged that Elzig retaliated against male employees who did not submit to her allegedly sexually suggestive conduct or words. This "grievance" did not reference any alleged violation of the collective bargaining agreement (CBA) between the District and Norman's exclusive bargaining representative, National Education Association-Jurupa (NEA-J), but it did request a state investigation and a public hearing before the District's governing board.

Elzig responded to this "grievance" on June 25, 2010, by sending an e-mail to all District employees, categorically stating that "the issues outlined in the [Master Grievance] complaint are false" and specifically denying that she had ever participated in inappropriate "sexually suggestive conduct."

At the time of her response, Elzig did not know that Norman was part of the group of employees who had filed the Master Grievance, but she came to believe that he was a participant sometime during the Fall 2010, when Norman and 17 other employees filed a petition for a writ of mandate in Superior Court. She correctly assumed that his name on the court pleadings indicated that he was part of the Master Grievance group.

Norman's Request for Personal Necessity Leave

On May 17, 2011, Norman notified the District that he was taking personal necessity leave that day. The CBA between the District and NEA-J specifies that personal necessity leave should be requested at least two days in advance, except in emergencies or other

compelling personal reasons. The District does not normally require an explanation for the leave, unless it has reason to believe the leave is being abused.

Norman took personal necessity leave on this day in order to attend a dismissal hearing for a classified employee (Braden hearing), where Elzig saw him. Despite the fact that classified employees are not represented by NEA-J, Norman testified that he intended to gather information at the Braden hearing regarding how "our collective bargaining agreement in respect to how it was administered by Tammy Elzig." (Proposed Dec., p. 20.)

A few days later, Norman filled out a form requesting to use personal necessity leave for his May 17, 2011 absence. He did not state any reason for the leave request. Elzig denied Norman's request, because she believed the Braden hearing did not qualify for personal necessity leave under the CBA, and because Norman did not submit the required request form until after he took the leave. Norman's pay was docked for the day.

On August 3, 2011, Norman filed unfair practice charge No. LA-CE-5593-E, alleging that the District had denied him leave and docked his pay in retaliation for his involvement in the "Master Grievance" commencing in June 2010.

Discipline in 2011-2012

More student complaints against Norman came to the District's attention during Fall 2011.[3] These complaints alleged that he had refused to assist a student with his math, and that he had called another student "retarded" when that student incorrectly answered a math problem. The District investigated these complaints, as well as another one concerning Norman's computer usage. On November 2, 2011, Norman was placed on administrative leave while a computer forensics expert conducted an investigation. The expert concluded on

[3] There is no evidence in the record of complaints or disciplinary action against Norman during the 2010-2011 school year.

December 4, 2011, that Norman's District-issued computer contained downloaded images of nude women which originated from his cell phone.

Meanwhile, Elzig interviewed between 15 and 20 of Norman's students, asking them at first only general questions and following up with those who raised concerns about Norman's behavior. If a student indicated that he or she liked Norman, Elzig asked no further questions and produced no record of the interview. The students who had negative things to say about Norman were interviewed in greater detail. As a result of this investigation, Elzig produced a summary of allegations which she presented to Norman on November 10, 2011. The student complaints included in this summary alleged that he yelled at students during class and described some students as "lazy" "hot" and "sexy beast." According to the summary, he threw a student's belongings out of the classroom; left students unsupervised, refused to assist students, and inappropriately stared at female students' bodies. Some, but not all of these allegations were supported by documentary evidence such as written student statements and school administrators' notes of student interviews.

Dismissal Proceedings

By February 16, 2012, the District had prepared and presented to Norman a draft "Notice of Intent to Dismiss and Immediately Suspend" (Draft Notice).[4] The Draft Notice was over 300 pages and included all of Norman's prior discipline, evaluations from 2005 and 2010 and the various summaries of allegation he had received. Student statements and administrators' notes not previously shown to Norman were attached to the Draft Notice.

[4] This document is the statutorily required initial step in dismissing a permanent certificated employee. (Ed. Code, § 44934.)

Although the District gave Norman an opportunity to appear at a *Skelly* hearing,[5] he did not attend. Nor did he respond in writing to the Draft Notice. In April 2012, the District's governing board approved the Notice of Intent to Dismiss (Dismissal Notice). Norman requested a hearing before a Commission on Professional Competence (CPC) and that hearing was held in December 2012 to determine whether good cause existed for Norman's dismissal.

Based on the testimony of 13 students who were in Norman's class between 2009 and 2012, and the computer forensic expert, the CPC upheld Norman's dismissal by a written decision on January 18, 2013.

PROPOSED DECISION

Issues Common to Both Cases

The ALJ determined that Norman engaged in protected conduct when he participated in the Master Grievance, which PERB had previously determined to be protected conduct, because it was a collective attempt to address workplace concerns. (*Jurupa Unified School District* (2012) PERB Decision No. 2283.) Norman also engaged in protected conduct when he filed the unfair practice charges on August 3, 2011, and on October 1, 2012.

Elzig knew of Norman's involvement in the Master Grievance by the Fall 2010, and was aware of the unfair practice charges, since she was listed as a recipient of the District's response to those charges. Both the denial of leave and dismissal from employment were adverse actions.

Case No. LA-CE-5593-E: Denial of Leave

The ALJ determined that Norman's attendance at the Braden hearing was not protected conduct, because there was no evidence that the CBA governing Norman's working conditions

[5] The term "*Skelly* hearing" refers to a pre-disciplinary hearing required by *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 that provides a public employee an opportunity to rebut charges against him or her and present any mitigating circumstances to the employer before discipline is imposed that would deprive the employee of any vested property right.

was at issue in this hearing regarding dismissal of a classified employee, who was not covered by the NEA-J contract. Also, because there was no evidence that Norman told Elzig or anyone else in the District why he wanted to attend the Braden hearing, the ALJ concluded that District was not on notice that Norman intended to communicate with fellow employees about what he may have learned about Elzig's interpretation of any CBA provisions.

The ALJ also rejected Norman's implied assertion that the very act of requesting personal necessity leave, which is provided for in the CBA, was protected activity. Based on PERB precedent, the ALJ concluded that the request was not a logical extension of group activities or an attempt to enforce the CBA, and therefore, was not protected.

Despite concluding that Norman's request for personal necessity leave and his attendance at the Braden hearing were not protected activities, the ALJ considered whether there was a nexus between Norman's participation in the Master Grievance and the District's denying him leave approximately eight months after learning of his participation in the Master Grievance. He concluded that the passage of time does not support a finding of retaliation, nor was there any circumstantial evidence of animus, such as disparate treatment of Norman or a departure from existing policy or procedures in denying the leave and docking his pay.

For these reasons, the ALJ dismissed the complaint in Case No. LA-CE-5593-E.

Case No. LA-CE-5744-E: Termination From Employment

By the time the District initiated proceedings to terminate Norman's employment in February 2012, he had engaged in two acts of protected conduct—participating in the "Master Grievance" beginning in June 2010, and filing and pursuing the unfair practice charge No. LA-CE-5593-E in August 2011 over denial of personal necessity leave. Noting that approximately six months had passed between the most recent protected act in August 2011, and the commencement of termination proceedings in February 2012, the ALJ concluded that

the timing did not suggest a nexus between the protected conduct and the adverse action. He then considered other circumstantial evidence to ascertain nexus.

The ALJ found circumstantial evidence of nexus, based on the apparent bias of Elzig, who assisted in the District's investigation of student complaints against Norman. He concluded that Elzig exhibited bias against Norman in two ways. During cross-examination at the administrative hearing Elzig stated: "at this point, I disbelieve most everything Norman says." She did not elaborate on what she meant. Without further explanation about the basis for her distrust, the ALJ found that her testimony cast doubt about whether her investigation of Norman's conduct was truly objective.

The ALJ found additional support for his conclusion regarding Elzig's animus in Elzig's June 25, 2010, e-mail about the Master Grievance also gave the appearance of bias. In the e-mail, sent just days after the Master Grievance was distributed, Elzig unequivocally said "that the issues outlined in the [Master Grievance] complaint are completely false." She also suggested that the submission of the Master Grievance was motivated by a personal dispute between her and Michael Rodriguez, a governing board member. According to the ALJ, Elzig's comments, made before any thorough investigation into the 21 enumerated complaints in the Master Grievance could have reasonably been completed, suggested bias.

The ALJ also found evidence of nexus in the way the District investigated the allegations against Norman and in its handling of evidence supporting his dismissal. According to the ALJ, the District failed to present Norman with all of the materials that supported the District's conclusion he had engaged in wrongdoing when it initially presented him with the November 10, 2011, summary of allegations which formed the basis for its decision to initiate dismissal proceedings against him. The complete evidence was not given to Norman until after the District's investigation ended and it had decided to proceed with

dismissal. None of Norman's prior discipline or summaries of allegations included student statements or notes taken by school administrators who interviewed the students.

Additionally, Elzig's student interviews were not sufficiently comprehensive, according to the ALJ. Because Elzig, who interviewed between 15 and 20 of Norman's students, only asked detailed questions if the students informed her of complaints or concerns with Norman, and did not ask students who spoke favorably of Norman to confirm or deny other students' complaints, the ALJ concluded that she was only interested in corroborating, not disproving students' complaints. In addition, Elzig admitted that she did not include any record of positive student comments about Norman, such as that he was "cool" or that they liked him. This selective reporting of student comments demonstrated to the ALJ bias in the investigation which artificially stopped pursuing lines of questioning that may have benefited Norman.

The ALJ found that Elzig's failure to thoroughly interview students in this case only exacerbated the other concerns regarding Elzig's animus toward Norman, i.e., her distrust of his veracity and her e-mail demonstrating bias against those who complain about District practices. Considering the record as a whole, the ALJ found that Norman established a causal connection, or nexus, between his protected activities and the Dismissal Notice sufficient to establish shift the burden to the District to show that it terminated Norman for non-discriminatory reasons.

District's Reasons For Dismissing Norman

Noting that in cases where an adverse action is apparently motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred "but for" the protected conduct, the ALJ considered the District's proffered non-discriminatory reasons for dismissing Norman. Finding in the District's favor, the ALJ based his conclusion on several facts.

The ALJ noted that there is no evidence that other District administrators Principal Mendez, Vice Principal Nanette Prince-Eggeter (Prince-Eggeter) who participated in the investigation of student complaints or the students themselves knew of Norman's protected activity or had any reason to retaliate against him. Elzig's involvement with the Dismissal Notice was limited. For example, Elzig's interview notes comprised only two of the more than 60 exhibits supporting the charges against Norman. Most of the actual content of the charges raised in the dismissal notice were based on the interviews conducted and statements collected by Prince-Eggeter, Mendez, or other staff. Only six of the 38 charges levied against Norman in the Dismissal Notice relied solely on Elzig's notes. Of those six charges, most were corroborated by student statements or testimony. The appearance of bias or retaliatory motive by Elzig notwithstanding, the ALJ found that the Dismissal Notice contained an accurate account of student complaints made against Norman. Therefore, the question, as viewed by the ALJ was whether those complaints provided a legitimate non-retaliatory reason for Norman's dismissal.

In answering that question, the ALJ noted that the District had a long record of complaints filed against Norman, many of which predated the protected activity alleged in the two PERB complaints. The District had warned Norman multiple times from 2007 through 2010 that it would not tolerate his confrontational nature with others, yelling, and inappropriate comments and contact with students. Those warnings included multiple conferences, memoranda, a letter of concern, a notice of unprofessional conduct, and a performance evaluation. All these documents issued before the District learned of Norman's participation in the Master Grievance.

Despite these warnings, student complaints about Norman's conduct during the 2011-2012 school year continued, including allegations that he yelled at students and called them

derogatory names in class, that he inappropriately stared at female students' bodies, and that he made students feel uncomfortable in class. All of these claims were supported by written statements.

The ALJ found that the complaints made against Norman were not overblown or supported only by managers. Rather, 13 students credibly testified with remarkable consistency about their complaints with Norman's teaching performance between the 2008-2009 and the 2011-2012 school years. Even though the student witnesses came from four different academic years taught by Norman, all 13 students testified that Norman appeared angry in class and frequently yelled at them. Ten students testified that Norman stared inappropriately at female students' bodies. Eight of those students testified about the inappropriate names Norman used for students. Two testified that Norman threw their belongings out of his classroom. Their testimony largely mirrored the allegations made in the Dismissal Notice and was further corroborated by other District employees, including non-management employees.

In addition to these complaints, the accusation that Norman downloaded nude female images to his District computer in violation of District policy was supported by a computer forensics report and a forensics examiner who testified in the CPC hearing.

In light of these facts, the ALJ concluded that the District had issued the Dismissal Notice because of numerous credible complaints about Norman's treatment of students and other misconduct, and not his protected activity. The District had therefore met its burden of rebutting the prima facie case, and the ALJ dismissed the complaint in Case No. LA-CE-5744-E.

NORMAN'S EXCEPTIONS

In his exceptions to the ALJ's proposed decision, Norman (among other exceptions) challenges the ALJ's finding that Elzig had limited involvement in the drafting of Norman's Dismissal Notice. Norman reiterates his allegation that no student complaints about his conduct during the 2011-2012 school years were provided to him, thereby making it impossible to correct any deficiencies noted in the student complaints. He accuses the District of targeting him by manufacturing derogatory information about him and placing it in a secret file (specifically, a "site file" and a "working file"), failing to institute set standards for a teacher to respond to derogatory information, and failing to solicit Norman's response contemporaneously with student complaints against him.

DISTRICT'S RESPONSE AND CROSS-EXCEPTIONS

In addition to refuting the substance of Norman's exceptions, the District urges that they be rejected in their entirety, because they fail to comply with PERB Regulation 32300.[6] Specifically, the District avers that Norman's exceptions attempt to raise new legal claims, and reassert claims that were dismissed by PERB's Office of the General Counsel prior to the complaints in this case being issued. The District also asserts that Norman's exceptions fail to identify any facts that support a reversal of the ALJ's determination and fail to identify the specific procedure, fact, law or rationale to which exception is taken.

The District cross-excepts to the ALJ's conclusion that Norman established a nexus between his protected activity and the District's termination of his employment. Specifically, the District requests that the Board reverse this finding and conclusion of the ALJ, because the evidence does not show that: (1) Elzig was improperly biased against Norman when she conducted her 2011 investigation; (2) the District improperly handled evidence against

[6] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Norman; or (3) Elzig's interview techniques were flawed. We consider these exceptions in greater detail *infra.*

DISCUSSION

Norman's Exceptions

We agree with the District's position that Norman's exceptions should be rejected in their entirety for failure to comply with PERB Regulation 32300, which requires the excepting party to include: (1) a statement of the specific issues of procedure, facts, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate the portions of the record relied upon for each exception; and (4) state the grounds for each exception. Exceptions are limited to matters contained in the record of the case. (PERB Reg. 32300(b).)

Compliance with the regulation is required to afford the respondent and the Board an adequate opportunity to address the issues raised. (*Temecula Valley Unified School District* (1990) PERB Decision No. 836, pp. 2-3.) Failure to comply with PERB Regulation 32300 can result in dismissal of the matter without review of the merits of the excepting party's claims. (See *California State Employees Association (O'Connell)* (1989) PERB Decision No. 726-H. We do so in this case because Norman's exceptions fail to comply with PERB Regulation 32300 in almost every respect. He filed 47 exceptions. Only eight of these exceptions refer to some part of the record, and these citations appear to be to the transcript in the dismissal case before the CPC.[7] None of the exceptions state the grounds for the exception.

Approximately 24 of Norman's exceptions purport to introduce alleged facts that were not contained in the record. He did not seek to re-open the record pursuant to PERB

[7] The parties agreed that the record in the CPC case could be used as evidence in the administrative hearing before PERB.

Regulation 32410. He also attempted to introduce new legal claims in his exceptions, two of which had been dismissed by the Office of the General Counsel before the complaints issued in these cases. Another exception implies that the District violated his *Weingarten* rights[8], a matter not litigated at the administrative hearing.

For all of these reasons, we reject Norman's exceptions and do not consider them.

District's Exceptions

Before considering the merits of the District's exceptions, we briefly review the elements of a prima facie case of retaliation most relevant to those exceptions.

To establish a prima facie case of retaliation in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights guaranteed by EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took action against or adverse to the interest of the employee; and (4) the employer acted because of the employee's exercise of the guaranteed rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*.) "Unlawful motive is the specific nexus required in the establishment of a prima facie case." (*Trustees of the California State University v. Public Employment Relations Board* (1992) 6 Cal.App.4th 1107, 1124.)

Once the charging party has established a prima facie case, the burden shifts to the respondent to demonstrate that it had and was motivated by alternative, non-discriminatory reasons in taking adverse action. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 23 (*Palo Verde*).)[9]

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[8] In *National Labor Relations Board v. J. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*), the U.S. Supreme Court affirmed the decision of the National Labor Relations Board (NLRB) to afford employees the right, upon request, to union representation during investigatory interviews. These rights have become known as the *Weingarten* rights.

[9] *Palo Verde, supra,* PERB Decision No. 2337 issued after the proposed decision in this case. Nevertheless, the record in this case demonstrates that the District had, and acted

As the ALJ found and as the District concedes, Norman engaged in protected activity when he participated in the Master Grievance and when he filed and pursued unfair practice charges.[10] (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, pp. 6-7; *Golden Gate Bridge Highway & Transportation District* (2011) PERB Decision No. 2209-M.) There is also no dispute that the District knew of Norman's protected activity or that he suffered adverse action.

The dispute lies, from the District's viewpoint, in whether Norman presented evidence sufficient to demonstrate the nexus between his protected activity and the adverse action. In other words, the District asserts that the burden should have never shifted to require its

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because of an alternative, non-discriminatory reason for dismissing Norman, namely, his treatment of students that occurred both before and after he engaged in protected conduct.

[10] However, relying on PERB precedent, the ALJ ruled that Norman's invocation of his contractual entitlement to personal necessity leave was not protected. Although this ruling was not specifically excepted to, we decline to adopt this conclusion. First, as the Board recently noted in *Jurupa Unified School District* (2015) PERB Decision No. 2420, pp. 20-21 (*Gillotte*), there is persuasive authority from the United States Supreme Court and from the National Labor Relations Board (NLRB) calling into question PERB precedent on which the ALJ relied, viz. *Marin County Law Library* (2004) PERB Decision No. 1655-M; *State of California (Department of Corrections & Rehabilitation)* (2008) PERB Decision No. 1961-S; *State of California (Department of Forestry & Fire Protection)* (2004) PERB Decision No. 1690-S. However, we save for another day consideration of whether our precedent should be overturned in light of various private sector cases such as *NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822; *Interboro Contractors, Inc.* (1966) 157 NLRB 1295, and *Rogers Corporation* (2005) 344 NLRB 504. As explained earlier, we do not consider Norman's exceptions and even if we were to do so, he did not except to the ALJ's conclusion that his seeking a collectively bargained benefit was not protected. He asserted that his *attendance* at the Braden hearing was protected.

Second, NEA-J joined in Norman's attempt to get paid for the personal necessity day, which would theoretically bring Norman's request into the sphere of protected conduct. (*The Regents of the University of California* (1995) PERB Decision No. 1087-H, Proposed Dec., p. 10; *Los Angeles Unified School District* (1992) PERB Decision No. 957, Proposed Dec., p. 19.) NEA-J's involvement on Norman's behalf occurred after Elzig denied his leave request on May 20, 2011, so we leave undisturbed the ALJ's findings and conclusions regarding the timing between protected conduct and adverse actions.

presentation of its affirmative defense. Because evidence of unlawful motive rarely comes in the form of direct evidence, PERB considers any of several factors to establish by circumstantial evidence an inference of unlawful motive.

In addition to the timing of the employer's adverse action in relation to the employee's protected activity[11] one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists and employees engaged in protected conduct (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa*); *Jurupa Unified School District* (2012) PERB Decision No. 2283, pp. 9-10; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's

[11] The proximity in time between the protected activity and the adverse action goes to the strength of the inference of unlawful motive, but is not determinative by itself. (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096.)

unlawful motive (*North Sacramento School District* (1982) PERB Decision No. 264; *Novato, supra,* PERB Decision No. 210).

In this case, the ALJ concluded that there was a nexus between Norman's protected activities and his dismissal based on three of the above factors: (1) employer animosity toward union activists and employees engaged in protected conduct; (2) a cursory investigation of the employee's misconduct; and (3) the employer's inconsistent or contradictory justification for its conduct.

Elzig's Bias

According to the ALJ, Elzig's bias or animosity was demonstrated by her comment on cross-examination by Norman's attorney in the administrative hearing: "At this point, I disbelieve most everything Norman says." (Reporter's Transcript Vol. II, p. 170.) This called into question whether her investigation of Norman, conducted two years earlier, was truly objective, according to the ALJ.

The District excepts generally to the conclusion that Elzig was biased, specifically asserting that her testimony referred to that point in time, i.e., well after she was involved in investigating Norman's work conduct, and there was no evidence that she disbelieved Norman when she was conducting the investigations. We agree with the District's contention.[12] Elzig's comment at the PERB administrative hearing does not tend to show that she harbored an improper motive when she investigated student complaints about Norman or when she participated in the District's dismissal process.

Moreover, Elzig's statement that she disbelieved Norman does not, by itself, indicate that her skepticism arose because of his protected conduct. As we found in *Gillotte, supra,*

[12] Member Huguenin would affirm the ALJ's reliance on the witness' comment as evidencing her continued animosity grounded in Norman's ongoing protected conduct.

PERB Decision No. 2420, p. 24, fn. 18, hostile comments that do not bear on protected activities or a protected group are insufficient to demonstrate animus. (See also *Garden Grove Unified School District* (2009) PERB Decision No. 2086; *Escondido Union Elementary School District* (2009) PERB Decision No. 2019 [hostile relationship between employee and supervisor, by itself, does not create inference of unlawful motivation].) In sum, it is apparent that Elzig had a bias against Norman because she believed he was untruthful, but there is no evidence that that particular bias arose or was acted upon because he engaged in protected activity.

Elzig's bias was also shown, according to the ALJ, by her June 25, 2010, e-mail distributed to all staff in response the Master Grievance.[13] Because she suggested the Master Grievance was actually motivated by a personal dispute she had with a member of the District's governing board, and because she categorically declared that "the issues outlined in the [Master Grievance] complaint are completely false" before she had a chance to thoroughly investigate the complaints encompassed in the Master Grievance, the ALJ concluded that Elzig's response suggested bias.

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[13] After recounting an incident four years earlier in which a member of the District's governing board allegedly threatened to "break [her] down publicly" and noting that Richard Ackerman (Ackerman), an attorney who represented the school board member, has been retained by employees who have "employment issues," Elzig continues in her June 25, 2010 e-mail:

> On Monday, June 21, 2010, Mr. Ackerman issued an anonymous public complaint centered on personnel practices. Many of you have contacted me personally after reading this widely-distributed, anonymous complaint and hearing the vicious rumors about me. . . . I first want to assure you that the issues outlined in the complaint are false. Second, while none of us should have to address our personal lives at work, I willingly put mine before you to dispel any rumors you may have heard. Bill and I have been married for eleven years. I have enjoyed every minute of the years we have shared . . . . I have never committed adultery. I have never participated in inappropriate "sexually suggestive conduct" at work or in my personal life. . . . It saddens me that these individuals have chosen to attack me on such a personal level.

The District excepts to this conclusion, and urges that Elzig's e-mail must be read solely as an indignant response to accusations that she was unfaithful to her husband and sexually harassed male employees. It is certainly that, and there is nothing unlawful in a manager denying accusations that he or she believes to be untrue, provided the communication does not also convey a threat or promise of benefit. (*Rio Hondo Community College District* (1980) PERB Decision No. 128.) But that does not resolve the question of whether Elzig's communication in this context could reasonably support an inference that she harbored animus against those who participated in the Master Grievance.

We reject the District's attempt to parse Elzig's response as only a benign and understandable defense of her honor. The ALJ correctly determined that her categorical denial ("I first want to assure you that the issues outlined in the complaint are false.") was not limited to the personal accusation concerning her marital fidelity, but encompassed the Master Grievance in general. It is in the sentence that follows the above-quoted denial that Elzig addressed "rumors" about her marriage and alleged "sexually suggestive conduct." The Master Grievance contained 21 different complaints about working conditions and District personnel practices. One of these complaints alleged that Elzig retaliated against male employees who did not submit to Elzig's purported "sexually suggestive conduct." There was no accusation in the Master Grievance that Elzig had committed adultery.

The ALJ reasonably concluded that Elzig's June 25, 2010, e-mail suggested her bias against those who were behind the Master Grievance based on the fact that her categorical denial came before she could have investigated the various complaints and because she linked the attorney who filed the Master Grievance with her nemesis on the District's governing board, thereby suggesting that the grievance was motivated by a personal dispute between her and the board member, rather than by legitimate workplace complaints. It is reasonable to

infer that Elzig was personally angered by the Master Grievance and that she would therefore harbor hostility towards individuals who she perceived to be responsible for it when she learned their identity. (*Jurupa, supra,* PERB Decision No. 1920-M, Proposed Dec., pp. 15-16 [expressions of personal anger in response to protected activity evidence of animus].)[14] The fact that Elzig did not learn that Norman was involved in the Master Grievance group until approximately three months after she wrote the June 25, 2010, e-mail does not diminish the fact that the e-mail itself demonstrates her hostility to anyone who was part of the group, regardless of when she learned of their involvement.

We note that this finding simply shifts the burden of proof to the District to show that it would have taken the action even in the absence of Norman's protected activity. The District has amply met its defensive burden in this case in showing that it had a non-discriminatory reason for dismissing Norman and acted because of that reason, i.e., Norman's repeated misconduct.

The District's Investigation of Norman

The District also excepts to the ALJ's conclusion that its investigation techniques with respect to student complaints about Norman's conduct and the way it handled evidence against him suggested animus. The ALJ based this conclusion on two findings: (1) Elzig failed to provide all of the written complaints and interview notes in the District's possession when it presented Norman with the November 10, 2011, summary of allegations; and (2) Elzig's interview of students were not sufficiently comprehensive, which suggested that she was only interested in corroborating, not disproving, students' complaints.

[14] By affirming the ALJ's finding that Elzig's June 25, 2010, e-mail demonstrates circumstantial evidence of nexus, we do not imply that a manager's expression of frustration or anger will always demonstrate nexus. Cf. *City of Oakland* (2014) PERB Decision No. 2387-M, p. 32. In this case, Elzig's response to the Master Grievance, coupled with the District's investigation practices with respect to Norman are sufficient to shift the burden to the District to demonstrate that it had and acted based on a non-discriminatory reason.

The District asserts in its exceptions that Elzig's interview techniques were not suspect because she asked non-leading questions, gave the students who offered positive assessments of Norman a second opportunity to offer information, and refrained from putting the students on notice that Norman had been accused of wrongdoing.

The District also claims that the ALJ erred by finding that the District's failure to attach all written complaints and interview notes to the November 10, 2011, summary of allegations indicated a suspect motive on the District's part. The District asserts that it did not attach all of the supporting documentation because of Norman's alleged propensity to retaliate against those who complained about him, although this explanation was not presented to Norman at the time it withheld the documents. The District also argues that providing derogatory materials to Norman was not "required by law," and therefore its practice does not demonstrate nexus.

We agree with the ALJ's reasoning and conclusion that the District's investigation of Norman's conduct after the Fall 2010, provides a reasonable basis to infer animus. The District's failure to attach all of the written complaints and interview notes to the November 2011 summary of allegations when Norman had specifically requested that he be given all evidence against him departs from a common sense, standard procedure. The District had a practice of not attaching all written evidence to disciplinary documents and that did not waiver from this practice with respect to Norman from before he engaged in protected activity to when he was served with the Notice of Intent to Dismiss. However, the District's explanation for this practice—that it did not want to overwhelm employees with too much information—makes little sense after Norman asked as early as 2007 to be provided with all documentation.

The District's asserted reasons for not attaching all the backup documentation to the November 2011 summary of allegations also shifted. In post-hearing briefs, the District

claimed that it chose not to attach all the documentation because it believed Norman would retaliate against those who complained about him. Yet this reason was not offered to Norman at the time the summary of allegations was presented to him. Moreover, the District did not explain why it attached some documents but not others. For these reasons, the ALJ was correct in relying on *Chula Vista Elementary School District* (2011) PERB Decision No. 2221, pp. 16-19 among other cases to conclude there was a nexus between Norman's protected conduct and his termination.

We also agree with the ALJ that Elzig's cursory interview of the students who liked Norman and her failure to include any record of these positive comments in the investigation materials provided to Norman suggests an investigation focused on corroborating complaints rather than disproving them.

The investigation of Norman, combined with evidence of Elzig's hostility towards participants in the Master Grievance support the burden being shifted to the District to prove its affirmative defense. Ultimately, the District amply and convincingly demonstrated that it terminated Norman's employment because of legitimate, non-discriminatory reasons, specifically Norman's repeated misconduct.

ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaints and underlying unfair practice charges in Case Nos. LA-CE-5593-E and LA-CE-5744-E, Jefferey L. Norman v. Jurupa Unified School District, are hereby DISMISSED.

Members Huguenin and Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFEREY L. NORMAN, Charging Party, v. JURUPA UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NOS. LA-CE-5593-E LA-CE-5744-E PROPOSED DECISION (August 27, 2013)

Appearances: Richard D. Ackerman, Attorney, for Jefferey L. Norman; Fagen, Friedman & Fullfrost, LLP, by Kerrie Taylor, Attorney, for Jurupa Unified School District.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In these two cases, a former public school employee accuses his former employer of retaliating against him for engaging in activity protected under the Educational Employment Relations Act (EERA).[1] The employer denies any violation occurred.

On August 3, 2011, Jefferey L. Norman filed an unfair practice charge against the Jurupa Unified School District (District) alleging retaliatory denial of personal necessity leave. The Public Employment Relations Board (PERB or Board) assigned this charge case number LA-CE-5593-E. On October 1, 2012, Norman filed a second unfair practice charge. PERB assigned this charge case number LA-CE-5744-E. On November 1, 2012, the PERB Office of the General Counsel issued a complaint in case number LA-CE-5593-E. On January 3, 2013, the General Counsel's office issued a complaint in case number LA-CE-5744-E. The District filed separate answers to each complaint,

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

denying the substantive allegations and asserting multiple affirmative defenses. No informal settlement conference was held and the two cases were consolidated for formal hearing.

The formal hearing for both cases was held on April 22-23, 2013. During the hearing, the parties stipulated to the admission of portions of the transcript from a District Commission on Professional Competence (CPC) hearing regarding Norman's dismissal. Part of that stipulation was that the admitted testimony would be treated as though it were produced during the course of the PERB hearing.[2] At the end of the PERB hearing, the parties agreed to submit simultaneous closing briefs on or before July 26, 2013.

The District filed its closing brief on Friday, July 26, 2013. Shortly after PERB's offices closed that day, Norman e-mailed a request to extend the briefing deadline until the following Monday, July 29, 2013. The District opposed the request. The Administrative Law Judge (ALJ) informed Norman that he could submit his brief on July 29, but his extension request, along with the issue of whether the brief would be accepted as timely, would be taken under submission. Norman submitted his closing brief on July 29, 2013. That day, Norman's attorney, Richard D. Ackerman, said that he would explain why the extension was warranted by declaration, on July 30, 2013. He did not file the declaration until July 31, 2013. At that point, the record was closed and the matter was submitted for decision.

[2] Both parties and their respective counsel participated in the CPC hearing. The parties agreed to admit testimony from District students, staff, and a forensic investigator at pages 26-157, 167-301, and 308-344. Those pages were admitted as Joint Exhibit I on April 22, 2013. The parties later agreed to admit the testimony of District Assistant Superintendent of Human Resources Tamara Elzig at pages 344-517 and 520-583 with the same understanding about its evidentiary value. Those pages were admitted as Joint Exhibit II on April 23, 2013. No agreement was reached regarding either Norman's testimony or the exhibits from that hearing.

RULING ON REQUEST TO EXTEND THE BRIEFING SCHEDULE

Although PERB Regulations[3] do not specifically set forth timelines for filing closing briefs, PERB Regulations 32170(j) and 32212 authorize the assigned ALJ to regulate the submission of briefs, including the time for filing. In general, requests to extend a filing deadline must be made in writing at least three days beforehand. (PERB Reg. 32132(c).) Late filings may be excused "for good cause only." (PERB Reg. 32136.)

In *Los Angeles Unified School District* (2003) PERB Decision No. 1552, PERB rejected a charging party's amended charge after she failed to: (1) file the document by the due date; (2) timely request an extension; or (3) request or demonstrate "good cause" to excuse the late filing. (*Id.* at p. 8.) In *City of Redding* (2011) PERB Decision No. 2190-M, the respondent filed its closing brief on the deadline provided, but the charging party did not. After still not receiving the charging party's brief 15 days later, PERB granted the respondent's motion to reject any submission as untimely. (*Id.* at proposed decision, p. 2, fn. 5.) In contrast, in *Santa Barbara Community College District* (2011) PERB Decision No. 2212 (*Santa Barbara*), PERB expressed a general policy preference for resolving disputes based on their merits. There, the Board accepted a party's closing brief that was timely sent to PERB, but not served upon the opposing party until nine days later. (*Ibid.*) The Board found that the latent-filing party made a conscientious effort to file the brief in compliance with PERB Regulations and the other party failed to demonstrate any resulting prejudice. (*Ibid.*) In *Stanislaus Consolidated Fire Protection District* (2012) PERB Order No. Ad-392-M (*Stanislaus*), the Board held that "good cause" exists for a filing delay when based upon a "reasonable and credible" explanation or "honest mistakes," such as a mailing or clerical error

[3] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

or some other short delay resulting from either excusable misinformation or circumstances beyond the filing party's control. (*Id.* at pp. 3-4.)

In this matter, the parties agreed to submit closing briefs on or before Friday, July 26, 2013. The District filed its brief that day, but Norman submitted his brief three days later, on Monday, July 29, 2013.[4] He submitted a request to extend the filing deadline, but that submission was itself untimely. Ackerman's declaration supporting his extension request was also submitted one day past the deadline he set for himself. According to the declaration, the extension was warranted "because of a blizzard of filings and hearings that were set by the Court or which were due [on July 26, 2013]." He also mentioned other filings before PERB. These facts do not establish "good cause" to excuse the late filing of either the extension request or the closing brief. The briefing schedule was set with Norman's agreement more than three months before the filing deadline. Neither Norman nor his counsel offered any credible reason for being unable to anticipate and prepare for any conflict between this schedule and Ackerman's other responsibilities. Even if those other responsibilities arose suddenly and unexpectedly, no reason was offered for filing the extension request until after the briefing deadline already expired. Based on these facts, Norman has not established that his late filings were due to excusable misinformation or circumstances beyond his control. (See *Stanislaus*, *supra*, PERB Order No. Ad-392-M.) And, unlike in *Santa Barbara*, *supra*, PERB Decision No. 2212, Norman has not made a conscientious effort to comply with his filing responsibilities. Rather, Norman's conduct suggests a consistent disregard for deadlines

[4] This matter is notably distinguishable from *Scotts Valley Union Elementary School District* (1994) PERB Decision No. 1052, where the parties agreed to submit briefs 30 days from when transcripts were mailed to the parties. Because the filing deadline in that case was technically set by mail, i.e., the mailing date of the transcript, the Board found that PERB Regulation 32130(c) provided the parties with a five-day extension to file briefs. (*Id.* at proposed decision, p. 2, fn. 4.) In the present case, the parties agreed to submit briefs on a date certain, i.e., July 26, 2013, irrespective of when transcripts were mailed. PERB Regulation 32130(c), therefore, does not apply.

set either with his agreement, by PERB Regulations, and even by his own counsel. This is not sufficient to demonstrate "good cause."

In addition, the District is prejudiced by Norman's late filing because it had already filed its own closing brief. Ackerman's declaration states that he did not review the District's brief until after July 29, 2013, but that does not fully negate the harm to the District. The ALJ made it clear that closing briefs were to be filed *simultaneously*, meaning on the same day. By submitting his brief on July 29, 2013, Norman has allotted to himself three additional days to prepare his arguments that the District did not have. Now, that harm cannot be undone. Because of this prejudice and because Norman has not demonstrated "good cause" to excuse the filing of either his closing brief or his extension request, the extension request is denied and the closing brief is rejected. It will not be considered as part of the record.

FINDINGS OF FACT

The Parties

The District is a public school employer within the meaning of EERA section 3543.1(k). Prior to his dismissal from the District, Norman was a public school employee within the meaning of EERA section 3543.1(j) as a teacher. Norman possesses teaching credentials in both physical education (PE) and math. Teachers at the District are in a bargaining unit that is represented by the National Education Association-Jurupa (NEA-J). The District and NEA-J are parties to a Collective Bargaining Agreement (CBA) that was in effect at all relevant times.

The District's Teacher Investigation and Discipline Processes

The District employs a progressive discipline process that it maintains is designed to work with teachers to improve performance. At the first level, the employee and his or her supervisor hold an informal conference to discuss performance issues. Nothing is reduced to writing. The next step is a similar meeting followed by a written Summary of Meeting. The

third step is a Letter of Concern outlining the misconduct and providing directives for corrective action. The next step is a Notice of Unprofessional Conduct which, in substance is similar to the Letter of Concern, but in practice, is the most serious form of discipline prior to suspension or dismissal. Elzig testified that a Notice of Unprofessional Conduct is followed by "an improvement period that allows the employee to improve in order to respond to the District's concerns." Thus, if a teacher is accused of further wrongdoing, lower level discipline, such as a Summary of Meeting would issue.

The District may investigate claims against a teacher prior to issuing discipline. Site administrators typically investigate minor incidents and Elzig, as the head of the Human Resources Office, leads or assists with investigations involving more serious issues. Investigations typically involve interviewing those involved, including the subject employee. The subject employee may be placed on paid administrative leave during the investigation. He or she is not informed of the nature of the investigation at the time.

If the District uncovers what it believes are substantiated complaints during an investigation it produces a Summary of Allegations which, as its name implies, sums up the District's findings and accusations into a single document. Elzig said that the District does not include all of the underlying information uncovered during the investigation because it she believes it would be overwhelming for the subject employee. Instead, she said the Summary of Allegations is a brief synopsis that allows the employee to focus on the claims made. The subject employee may respond to the Summary of Allegations either verbally, in writing, or both. The District then reviews all of the information gathered, including the employee's response and decides whether to pursue discipline.

Prior to dismissing a teacher, the District presents a Notice of Intent to Dismiss and a Statement of Charges (Dismissal Notice) to its Governing Board for approval. Before that happens, the District provides the teacher with a draft version of those documents and gives the

teacher the option to hold a *Skelly* hearing.[5] The employee may respond to the charges during the hearing or in writing. If the District believes cause still exists for dismissal after the *Skelly* hearing, or if no *Skelly* hearing is held, the draft charges are provided to the District's Governing Board during a meeting for consideration. The employee is notified of the meeting beforehand and may address the Governing Board prior to the vote.

If approved by the Governing Board, the District serves the Dismissal Notice on the teacher, along with a verification from Elzig about the accuracy of the charges. At that point, the teacher has the opportunity to request a hearing before the CPC to decide whether there is good cause for the dismissal.

Norman's Tenure as a PE Teacher

Norman was hired by the District as a PE teacher at Mission Middle School in 2001. In 2005, Norman received a performance evaluation where he was rated as "Exceeds District Standards," the highest possible score.

However, in early 2007, the District began investigating claims by other staff concerning Norman's misconduct. On February 28, 2007, Elzig presented Norman with a Summary of Allegations about those claims. There were no supporting documents accompanying the summary. Norman responded in writing, stating that there was insufficient detail and no documentary proof of the claims. On March 13, 2007, the District issued him a Letter of Concern due to claims that Norman had "angry" confrontations with other employees. Norman responded voicing similar objections about the lack of documentary evidence.

[5] The term *Skelly* hearing refers to a pre-disciplinary hearing that complies with the due process requirements set forth in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. This hearing allows public employees to challenge the sufficiency of the evidence in certain proposed discipline. (*City of Modesto* (2008) PERB Decision No. 1994-M, p. 2, fn. 3.)

The District reassigned Norman to teach math in the 2007-2008 school year. At an unspecified time, Norman filed a grievance over the matter but the record is mixed as to how and when the grievance was resolved. However, Norman agreed to remain a math teacher.

The Notice of Unprofessional Conduct

On April 14, 2009, Elzig issued Norman a Summary of Allegations concerning student complaints and Norman's failure to bring his class to a school assembly. Among the complaints were that Norman appeared angry and yelled at students, that he hit a student with a stack of paper, and that he threw a student's belongings out of his classroom while yelling "get out!" Norman responded to the Summary of Allegations, denying the students' claims and asserting that the assembly was voluntary. He complained that the Summary of Allegations was not specific enough to prepare a sufficient response and claimed that the District was disciplining him in response to prior grievance activity. In his response, Norman admitted to accessing students' cumulative files to gather information about his accusers.

On May 13, 2009, Elzig issued Norman a Notice of Unsatisfactory Service referencing the 2007 Letter of Concern, the student complaints, the assembly issue, and Norman's unauthorized access of student cumulative files. The document also gave Norman a series of directives aimed at controlling his anger, treating students professionally and respectfully, not accessing student records for other than educational purposes, not leaving students unsupervised, and using instructional time effectively.

Discipline in the 2009-2010 School Year

The District issued Norman four disciplinary documents in the 2009-2010 school year. On October 20, 2009, Elzig held a meeting with Norman about student complaints submitted in September and October 2009. Mission Principal Mendez, and Vice Principal Nanette Prince-Eggeter, and a union representative also attended. Specifically, students complained that Norman became visibly angry in class, yelled at them during class, made students stand in the

corner as a means of discipline, and misused instructional time to watch a video clip. Elzig issued Norman a Summary of Meeting on October 26, 2009.

On November 18, 2009, Prince-Eggeter issued Norman a memorandum about unplugging his classroom telephone and misrepresenting that it was broken. Norman admitted to unplugging his telephone.

On January 29, 2010, Prince-Eggeter met with Norman to discuss a parent complaint that Norman called a student a "stupid ass" during class. Prince-Eggeter issued Norman a Summary of Meeting on February 11, 2010.

On April 7, 2010, Mendez met with Norman to discuss additional student complaints, including claims that he told a student to "go somewhere else" if she did not want to be in his class, that when the same student asked for his assistance, he said "help yourself, it wouldn't kill you." He was also accused of denying a student's restroom request, stating "I don't care, you can pee yourself." Norman denied making those statements. Mendez sent Norman a Summary of Meeting on April 13, 2010.

The 2010 Performance Evaluation

On May 14, 2010, Mendez issued Norman a performance evaluation with an overall rating of "Needs Improvement," the second lowest possible score. The evaluation referenced concerns expressed by parents and students and the need to treat others respectfully and professionally. Norman responded, maintaining that the inclusion of parent complaints in his evaluation violated the CBA complaint procedure and that other comments were too vague. The CBA complaint procedure requires parent complaints to be made directly to the teacher "whenever possible," but does not specify who decides whether such an approach is possible.

The "Master Grievance" and Elzig's Response

In June 2010, an anonymous group of certificated and classified employees filed a document entitled "Master Grievance" with the District as well as the California Department of

Education, U.S. Department of Education, Equal Employment Opportunity Commission, Riverside County Office of Education, Riverside District Attorney's Office, and unnamed union representatives. Ackerman attended the District Governing Board's June 2010 meeting and distributed copies of the Master Grievance to the attendees.

The Master Grievance included 21 enumerated complaints about a variety of working conditions at the District including multiple complaints about the District's discipline procedures, rest break policies, the handling of employee personnel information, and union misconduct. Two of the complaints mentioned Elzig directly. Relevant to this case is the claim of "[r]etaliation against male employees who did not submit to sexually suggestive conduct or words on the part of one T. Elzig within the last three years." The document also alleged violations of the State Constitution, the Education Code, and the Labor Code. Nothing in the Master Grievance expressly referenced either the NEA-J CBA or the CBA for classified employees. In the document, the complainants requested a State investigation and a public hearing before the District's Governing Board.

On June 25, 2010, Elzig sent an e-mail message to all District employees about both the Master Grievance as well as other rumors about her personal life that were circulating throughout the District. In the e-mail, Elzig mentioned that District Governing Board Member Michael Rodriguez forcibly grabbed her by the arm and threatened to "break [her] down publicly" due to something she said during a Governing Board meeting. She noted that Ackerman was Rodriguez's attorney and said "I can say with absolute confidence that this is not a coincidence that [the Master Grievance complainants] have retained Mr. Rodriguez's attorney to attack personnel practices." Elzig confronted what she called "vicious rumors" about her and said she "never participated in inappropriate 'sexually suggestive conduct' at work or in [her] personal life." She also said that "the issues outlined in the [Master

Grievance] complaint are false," without elaborating on whether she was referring to all 21 listed complaints or only those involving her personally.

Elzig said she first believed that Norman was one of the complainants from the Master Grievance sometime during Fall 2010, when 18 employees, including Norman, filed a writ petition against the District about its personnel practices. Although not entirely clear from the record, Elzig apparently assumed that the 18 petitioners also initiated the Master Grievance. At least with respect to Norman, Elzig's assumption was correct.

Norman's Personal Necessity Leave Request

In April 2011, the District scheduled a dismissal hearing scheduled for one of its classified employees, Leslie Braden on May 17, 2011 (the Braden hearing). The hearing had previously been rescheduled twice. District classified employees are not represented by NEA-J and neither the NEA-J CBA nor the teacher discipline process applies to classified employees.

On the morning of May 17, 2011, Norman telephoned the District's automated network to arrange for a substitute teacher and indicated that he was taking personal necessity leave under the CBA that day. Norman and Elzig both attended the hearing but did not speak to each other. Elzig was scheduled to testify but the hearing was canceled by the hearing officer due to illness. A few days later, Norman filled out a form requesting the use of personal necessity leave. He did not include the reason for needing personal necessity leave that day. Norman initially testified that NEA-J president John Vigrass spoke with Elzig about Norman's leave request prior to May 17, but Norman later admitted that he was mistaken and that Vigrass only spoke to Elzig at some point afterwards.

According to the CBA, "under no circumstances" should personal necessity leave be used for matters of personal convenience, to extend other time off, or for "matters which reasonably can be taken care of outside work hours." In two different places, the CBA

specifies that personal necessity leave should be requested at least two days in advance when possible. The CBA notes "[f]ailure to secure advanced permission may result in the absence being taken without compensation."

The CBA also provides exceptions to the advance notice requirement, including emergency situations, other events that could not be scheduled outside regular working hours, and "[o]ther compelling personal reasons of the unit member." An explanation of the leave is typically not required unless the District has reason to believe that the leave is being abused.

According to Norman, teachers are not required under the CBA to give either advance notice or a reason prior to taking personal necessity leave. He said he took personal necessity leave on 21 other occasions and never provided advance notice or a reason for the leave. Elzig flatly disputed Norman's testimony, stating that she regularly reviews personal necessity leave requests for abuse and has denied multiple leave requests. She also said that personal necessity leave was only allowed during an emergency or other unavoidable circumstance. Elzig's testimony is credited over Norman's on this issue because it is more consistent with the language of the CBA. In addition, Norman's account was contradicted elsewhere in the record. He had to recant earlier testimony about Vigrass's involvement in the personal necessity leave request. Furthermore, when Norman listed the content of his personnel file, there was no record of any prior personal necessity leave usage, even though Elzig credibly testified during the CPC hearing that personal necessity leave records were kept there. She also found no records of another employee that Norman said regularly takes personal necessity leave for recreational hunting trips. For these reasons it is concluded that personal necessity leave is only appropriate for either emergencies or situations where the teacher's presence is required during regular business hours. It is further concluded that personal necessity leave requests must be submitted at least two days in advance, whenever possible.

On May 20, 2011, Elzig sent Norman a letter stating that she intended to deny his request because the Braden hearing did not qualify for personal necessity leave and because he did not submit the required form until after he already took the leave. She invited Norman to provide additional information about the nature of his request before she made her determination. Norman never responded.

Without being requested to do so, Vigrass contacted Elzig after she denied Norman's personal necessity leave request. The substance of what Vigrass said to Elzig was entirely uncorroborated hearsay. At some point, Elzig received a request from NEA-J that Norman's May 17, 2011 absence be compensated as Association leave, which entitled NEA-J designees to attend conferences or participate in other union business. Norman was not involved in that request. Association leave requests must be submitted at least two days in advance. Elzig denied that request.

The District docked Norman's pay by one day for the May 17, 2011 absence, roughly $450.00. NEA-J issued Norman a check for his lost salary that day.

The 2011 Investigation

During Fall 2011, the District began investigating additional student complaints filed against Norman. Among the complaints were that Norman refused to assist a student with his math and sent him to the back of the class and that he called another student "retarded" for getting a math problem incorrect. Both students were forced to write essays as a form of punishment. Around that time, the District also began investigating Norman's District computer. It hired a computer forensics expert for that purpose. Norman was placed on paid-administrative leave on November 2, 2011. He was not informed of the subject of the District's investigation at that time.

Elzig interviewed between 15 and 20 of Norman's students. She said she initially asked the students only general questions and would follow up if students raised concerns or

complaints about Norman. If the students had nothing negative to say, she would end the interview without further questions. During her interviews, some students said that they liked Norman or that he was "cool." No record of those interview notes was produced.

On November 10, 2011, Elzig presented Norman with a Summary of Allegations. The complaints in the Summary of Allegations included claims that Norman yelled at students during class and used inappropriate language to describe students, such as "lazy," "hot," and "sexy beast." The document also alleged that Norman threw a student's belongings out of his classroom, left students unsupervised, refused to assist students, and inappropriately stared at female students' bodies. The Summary of Allegations also referred to past incidents where the District previously warned Norman about calling students names, refusing to assist students, and throwing a student's belongings. Some, but not all, of the allegations were supported by documentary evidence, attached as exhibits, such as written student statements and interview notes from Mendez or Prince-Eggeter.

Through counsel, Norman responded to the November 30, 2011 Summary of Allegations. The response addressed the substance of the claims against him in just one sentence: "Our client categorically denies every one of your allegations." NEA-J also filed a response.

On December 4, 2011, the computer forensics examiner produced a report about Norman's computer. Among the examiner's findings was that the computer contained downloaded images of nude women originating from Norman's mobile telephone. Those claims were summarized in another Summary of Allegations issued on December 15, 2011. Norman declined the opportunity to respond, but NEA-J filed something on his behalf.

The Dismissal Notice

On February 16, 2012, Elzig presented Norman with a document entitled "[Draft] Notice of Intent to Dismiss and Immediately Suspend; Statement of Charges" (Draft Notice).

The Draft Notice was more than 300 pages long and included all of Norman's prior written discipline, his 2005 and his 2010 evaluations, and the various Summaries of Allegations he received. Although many of the allegations in the Draft Notice were the same as those in the November 10 and December 15, 2011 Summaries of Allegations, the Draft Notice also attached student statements and administrators' notes not previously shown to Norman.

Elzig also sent Norman a letter informing him of the right to request a *Skelly* hearing. Norman requested a hearing and one was scheduled, then rescheduled at Norman's request. The hearing was eventually set for March 14, 2012, but Norman did not appear and did not request further rescheduling. Elzig gave Norman the opportunity to respond to the Draft Notice in writing. Norman did not respond.

On March 28, 2012, Elzig informed Norman by letter that the District's Governing Board would consider the Draft Notice during its April 2012 meeting and that he would have the opportunity to attend and address the board members during open session. Norman did not appear at the meeting. That day, the District's Governing Board approved the Draft Notice without changes.

On or around April 3, 2012, the District sent Norman the final Dismissal Notice. This document was identical to the draft Dismissal Notice except it omitted the word "draft." The District initially neglected to include Elzig's signed verification along with the notice, but it corrected that error on August 22, 2012. No further changes were made to the Dismissal Notice. Norman requested that the Dismissal Notice be reviewed for cause at a CPC hearing.

The CPC Hearing

The CPC hearing was held on five non-consecutive days between December 10 and 20, 2012. The issue was whether good cause existed for the Dismissal Notice. During the hearing, 13 former students testified about their complaints with Norman's conduct. All were identified for the record only by their initials for privacy reasons. Most of the students (eight) were in

one of Norman's classes during the 2011-2012 school year, but there were also students from Norman's classes in the 2010-2011, 2009-2010, and 2008-2009 school years. All 13 students testified that they saw Norman yelling loudly at students during class. Many testified that he yelled at them personally, some stating that he was only a few feet away or was "really close to me, where you could feel him breathing." The students rated his voice as somewhere between 7 and 9 on a scale of 1 to 10. They also said he appeared angry and was not merely raising his voice to match the students' own loud voices.

In addition, 10 of the 13 students, including some from 2009-2010, 2010-2011, and 2011-2012, observed Norman staring inappropriately at female students' body parts. Some female students observed him looking at them. Eight students also testified that Norman used words like "stupid ass," "big mouth," "lazy," "sexy beast," "hot," "weirdo," 'retarded," and "cheesy biscuits," to describe them during class time. Two students said that Norman became angry with them and threw their belongings out of his classroom. The first incident occurred in 2009, the second in 2011. Four students said they were scared of Norman or uncomfortable around him because of his conduct. Other District personnel also testified consistently with the students. The forensic computer examiner also testified about the nude images he recovered from Norman's District computer. The CPC upheld the dismissal by a written decision issued on January 18, 2013.

ISSUES

1. LA-CE-5593-E: Did the District deny Norman's May 17, 2011 personal necessity leave request and reduce his compensation in retaliation for his protected activity?

2. LA-CE-5744-E: Did the District issue Norman the April 6, 2012 Dismissal Notice in retaliation for his protected activity?

CONCLUSIONS OF LAW

Both of Norman's unfair practice charges allege retaliation for EERA-protected activity. To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*).)

For ease of discussion, the elements of Norman's alleged protected activities and the District's knowledge of those activities will be addressed together, followed by a separate discussion of the alleged adverse actions and the District's motivation.[6]

A. Protected Activity With the District's Knowledge

To establish a prima facie case for unlawful retaliation, Norman must first prove that he engaged in activities protected under EERA and that the District was aware of those activities. (*Palo Verde Unified School District* (1988) PERB Decision No. 689, proposed decision, p. 25.) EERA section 3543(a) protects employees' right to form, join, and participate in the activities of employee organizations. That section also protects employees' right to represent themselves individually before their employer. (*Ibid.*)

To establish the knowledge element of a prima facie case, at least one of the individuals responsible for taking the adverse action must be aware of the protected conduct. (*Oakland*

[6] It is acknowledged that each PERB complaint alleges different protected activities. Case number LA-CE-5593-E alleges that Norman's protected conduct was requesting personal necessity leave to attend the Braden hearing. LA-CE-5744-E alleges that Norman's protected conduct was his PERB unfair practice charge activity and his filing of the Master Grievance. Because there was ample notice of Norman's claims, all the alleged protected activities were fully addressed in a single PERB hearing, and both parties had a full opportunity to explore these issues with evidence, it is appropriate to consider the protected activity alleged in case number LA-CE-5593-E as part of case number LA-CE-5744-E, and *vice versa*. (See *Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8.)

Unified School District (2009) PERB Decision No. 2061.) In other words, the issue is whether "the individual(s) who made the ultimate decision to take adverse action against the employee had such knowledge." (*Sacramento City Unified School District* (2010) PERB Decision No. 2129 (*Sacramento City*), p. 7, citing *City of Modesto* (2008) PERB Decision No. 1994-M.) Each of Norman's alleged protected activities will be discussed below.

1. The Master Grievance

Norman alleges that his participation and distribution of the group Master Grievance in June 2010 is protected under EERA. PERB has found that employees' collective complaints about their employer's extra shift and premium pay policies constituted protected activity. (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H.) Likewise, in *Jurupa Unified School District (Lukkarila)* (2012) PERB Decision No. 2283 (*Jurupa (Lukkarila)*), concerning substantially similar allegations, the Board held that a "group complaint" submitted to an employer through counsel was protected under EERA because it was an attempt to enforce workplace rights. (*Id.* at p. 15, citing *Eastex Inc. v. NLRB* (1978) 437 U.S. 556; *Franklin Iron & Metal Corp.* (1994) 315 NLRB 819, enf'd (6th Cir. 1996) 83 F.3d 156.) In addition, PERB has found that public distribution of materials critical of an employer's management may be protected if they provide "comments on matters which were of legitimate concern to the teachers as employees." (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224, p. 7; see also *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1091.)

Here, the Master Grievance was a clear attempt to address workplace concerns applicable to all District employees, including discipline, break times, and other personnel matters. That document was distributed publicly during a well-attended District Governing Board meeting. Based on these facts, Norman's involvement in the Master Grievance is protected under EERA.

Norman has also established that Elzig, who both denied Norman's personal leave request and drafted the Dismissal Notice, was aware of his involvement with the Master Grievance as of Fall 2010. She testified that she assumed he was one of the Master Grievance complainants after seeing court litigation documents listing him as a petitioner. Although the relationship between the Master Grievance and the writ petition were not made entirely clear for the record, further clarification is unnecessary because even Elzig's mistaken belief that Norman engaged in protected activity is sufficient to establish these elements. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 15.)

2. PERB Unfair Practice Charges

EERA guarantees that "[a]ny employee, employee organization, or employer shall have the right to file an unfair practice charge." (EERA, § 3541.5(a).) Accordingly, PERB has found that filing and pursuing unfair practice charges is protected activity. (*Healdsburg Union High School District* (1997) PERB Decision No. 1185 (*Healdsburg*), proposed decision, p. 47, citing *North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*).) Here, Norman filed case number LA-CE-5593-E on August 3, 2011, and case number LA-CE-5744-E on October 1, 2012. Needless to say, Norman has pursued both cases throughout the instant formal hearing. This activity is protected under EERA.

The record also shows that the District was aware of Norman's unfair practice charge activity. Elzig was listed as a recipient to the District's position statements in both case number LA-CE-5593-E, on August 22, 2011, and case number LA-CE-5744-E, submitted on November 5, 2012. Those documents acknowledged Norman's unfair practice charges and responded to his allegations. This demonstrates her knowledge of his charge activity.

3. The Personal Necessity Leave Request

Norman also alleges that he engaged in protected activity by requesting a personal necessity day to attend the Braden hearing. During the hearing, Norman provided two

purposes for attending the hearing that he asserts were protected. The first purpose was "gathering information on the practices of our collective bargaining agreement in respect to how it was administered by Tammy Elzig." In general, the investigation into possible contract violations for the purpose of pursuing grievances may constitute protected activity. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 9-10.) However, in this matter, Norman has not shown that his agreement, the NEA-J CBA, was at issue in the Braden hearing. It is undisputed that the hearing involved the dismissal of a classified employee and that the classified employees' CBA does not apply to teachers. There was no evidence that Elzig would testify about the NEA-J CBA. Nor did Norman establish that the District/NEA-J CBA contains terms that overlaps with the classified employees' CBA in any meaningful way. Under these circumstances, Norman has not met his burden of proving that his attendance at the Braden hearing was protected pursuant to his right to gather information, or otherwise investigate Elzig's application of the NEA-J CBA.

Norman also said he hoped to share what he learned from Elzig's testimony during the Braden hearing with other District employees. Employees' discussions about terms and conditions of employment is protected. (*The Roomstores of Phoenix, LLC* (2011) 357 NLRB No. 143, p. 3, fn. 3.) Even communications that are critical of management may be protected if its purpose is to advance employees' interests or working conditions. (*Id.* at p. 78; *State of California, Department of Transportation* (1982) PERB Decision No. 257-S, pp. 6-7 (*Department of Transportation*).) On the other hand, communications bearing no discernible relationship to employee working conditions is not considered protected. (*Department of Transportation*, *supra*, at pp. 7-8.)

In this matter, Norman stated during the hearing that his goal was to assist other District employees with what he learned about Elzig's interpretations of either the NEA-J CBA or the classified employees' CBA. However, it is undisputed that Norman never communicated that

goal to Elzig or anyone else at the District even after Elzig requested further details from him. Thus, Elzig was unaware of why Norman wanted to take the leave. This is not sufficient to establish that Norman engaged in protected activity with the District's knowledge.

Although not fully clear, Norman also appears to assert that merely requesting personal necessity leave is protected under EERA because the right to such leave is covered by the NEA-J CBA. As explained above, EERA section 3543(a) includes the individual right of self-representation. To qualify as protected self-representation, the individual activity must be "a logical continuation of group activity." (*San Joaquin Delta Community College District* (2010) PERB Decision No. 2091, p. 3.) However, an individual's activity made solely for his or her own benefit is not protected. (*Ibid.*)

In *Jurupa (Lukkarila), supra,* PERB Decision No. 2283, the Board held that a teacher engaged in protected self-representation by using a negotiated dispute resolution procedure to enforce provisions of a CBA. (*Id.* at p. 16.) In reaching that conclusion, the Board cited to, among other cases, *Meyers Industries, Inc.* (1986) 281 NLRB 882. There, the National Labor Relations Board (NLRB) found that a truck driver's individual effort to enforce negotiated contractual rights was protected because his actions benefitted all employees. (*Id.* at p. 888, enf'd sub nom *Prill v. NLRB* (D.C. Cir. 1987) 835 F.2d 1481.)[7] In *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246 (*Oakdale*), the Board found that an individual's use of the CBA safety complaint process to report unsafe working conditions qualified as protected activity. (*Id.* at pp. 16-17.) Likewise, in *Los Angeles Unified School District* (2005) PERB Decision No. 1787 (*LAUSD*), the Board found that an employee's

[7] In *Jurupa (Lukkarila)*, the Board also cited with approval *California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096 (*CTA (Tsai)*), p. 10, suggesting that the teacher's conduct was also protected under the protected right to present grievances to her employer under EERA section 3543(b).

submission of a contract-based workplace injury report form to her supervisor at the behest of her union was protected under EERA. (*Id.* at proposed decision, p. 11.)

In contrast, in *Marin County Law Library* (2004) PERB Decision No. 1655-M, the Board found that an individual's request for her job description and a schedule change were made solely for her own benefit and did not constitute protected self-representation. (*Id.* at dismissal letter, p. 4.) Similarly, in *State of California (Department of Corrections & Rehabilitation)* (2008) PERB Decision No. 1961-S, the Board held that an individual employee's bid for a job assignment pursuant to an agreement negotiated between his union and his employer was not protected. (*Id.* at warning letter, p. 4.) The Board echoed that sentiment in *State of California (Department of Forestry & Fire Protection)* (2004) PERB Decision No. 1690-S, holding that "case law does not support a finding that a request for a transfer constitutes protected conduct any more than, for example, would a request by an employee for a vacation day, or an employee's application for a promotion, or a request to work overtime." (*Id.* at dismissal letter, p. 3; see also *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S, pp.6-7 [individual's overtime request was not protected].)

Here, Norman has not shown that his personal necessity leave request qualifies as either a logical extension of group activity or the presentation of a grievance to the District. Unlike in *Jurupa (Lukkarila)*, *supra*, PERB Decision No. 2283, Norman was not attempting to *enforce* a CBA provision; he merely sought to utilize one of those provisions to his individual benefit. The CBA also entitles unit members to a one hour duty free lunch period, but it cannot be said that Norman engaged in EERA-protected activity simply by taking his lunch break. In sharp contrast, and as already explained above, Norman's efforts to *enforce* existing break procedures through the Master Grievance is protected. Nor was Norman reporting on safety conditions or other matters of employee concern as in *LAUSD*, *supra*, PERB Decision

No. 1787 or *Oakdale, supra*, PERB Decision No. 1264. Rather, Norman's leave request was for his own sole benefit and was accordingly more akin to an individual's request for a schedule change, job assignment, or overtime.[8] Under these circumstances, Norman's personal necessity leave request was not protected under EERA. Accordingly, this proposed decision will not address further whether the District retaliated against Norman because of his May 17, 2011 personal necessity leave request.

B. Adverse Actions

The next issue is whether the District took adverse actions against Norman. PERB considers objective criteria when deciding whether an employer has committed an adverse employment action. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an *adverse impact on the employee's employment.*

(*Newark Unified School District* (1991) PERB Decision No. 864, p. 11, emphasis supplied, fn. omitted.) In this matter, each case alleges a separate adverse action.

1. Denial of Personal Necessity Leave (Case No. LA-CE-5593-E)

PERB has found that an employer's action that results in the loss of pay to be adverse in a variety of circumstances. (See e.g., *Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista*), p. 15, fn. 9 [loss of extra-duty assignment]; *City of Modesto* (2008) PERB Decision No. 1994-M, p. 12 [suspension without pay].) In addition, PERB has

[8] Norman disagreed with Elzig's interpretation of the personal necessity leave provision of the CBA but he never vocalized that disagreement to the District or otherwise explained to anyone why he felt his interpretation was more correct. In the same way that merely harboring safety concerns without reporting them is unprotected (see *Menlo Park Fire Protection District* (2008) PERB Decision No. 1983-M, pp. 7-8), Norman's privately held beliefs about Elzig's misinterpretation of the CBA does not qualify for protected status.

held that an employer's denial of even an unpaid leave request may be an adverse action. (*Rio Hondo Community College District* (1982) PERB Decision No. 226, p. 5.)

In this matter, the District denied Norman's personal necessity leave request and, because he had already taken the day off, it also docked his pay by one day. A reasonable person in Norman's situation would find both the denial of the leave request and the reduction in compensation to be adverse to employment. The District does not dispute this issue in its closing brief.

2. Dismissal Notice (Case No. LA-CE-5744-E)

PERB has held that an employer's unequivocal notice to impose discipline is an adverse employment action. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C; *County of Merced* (2008) PERB Decision No. 1975-M.) In *Monterey County Office of Education* (1991) PERB Decision No. 913, the Board held that an employer committed an adverse action by issuing a notice of intent to terminate the charging party followed by actual termination. (*Id.* at proposed decision, p. 3.) Here, on or around April 6, 2012, the District issued Norman the Dismissal Notice. It eventually followed through with dismissal. This is an adverse action. This was not disputed in the District's closing brief.

C. Nexus

The next element of a prima facie case is whether there is a causal connection, or nexus, between the adverse actions and the protected activity. The existence or absence of nexus is usually established circumstantially after considering the record as a whole. (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278, warning letter, p. 3, fn. 2, citing *Moreland Elementary School District* (1982) PERB Decision No. 227.)

1. Timing as Circumstantial Evidence of Nexus

The timing between the employer's adverse actions and the protected activity is typically an important circumstantial factor to consider in establishing or disproving nexus.

(*North Sacramento*, *supra*, PERB Decision No. 264, proposed decision, p. 23) PERB has held that "[t]iming is important in an unlawful motivation inquiry to the extent that it shows that [the respondent] responded to protected activity by initiating [a] negative personnel action against the [charging party]." (*State of California (Department of Social Services)* (2000) PERB Decision No. 1413-S, proposed decision, p. 11.) Although the Board has occasionally described timing as an "element" of the prima facie case for retaliation, it more accurately held that "'the closeness in time (or lack thereof) between the protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself.'" (*CTA (Tsai)*, *supra*, PERB Decision No. 2096, p. 11, quoting *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M.)

a. Timing and the Personal Necessity Leave Allegation (LA-CE-5593-E)

In the present matter, the June 2010 Master Grievance was Norman's only protected activity before the District denied the personal necessity leave request.[9] However this document was filed nearly a year before Elzig denied Norman's leave request. Elzig said she discovered Norman's involvement in the Master Grievance in the Fall of 2010, around eight months before she denied his personal necessity leave request. The length of time between these events does not support Norma's retaliation claim. (See *Los Angeles Unified School District* (1998) PERB Decision No. 1300, dismissal letter, p. 1 [five or six months between protected activity and adverse action did not suggest nexus].)

[9] Norman engaged in additional protected activities shortly after the personal necessity leave incident, namely filing unfair practice charge case number LA-CE-559-E on August 3, 2011. However, typically, PERB finds no evidence of a retaliatory motive where the charging party's protected activity follows after the adverse action in question. (See *Oxnard Union High School District* (2010) PERB Decision No. 2265, warning letter, p. 4.)

b. Timing and the Dismissal Notice Allegation (LA-CE-5744-E)

Similarly, the Dismissal Notice issued on April 6, 2012, occurred long after the Master Grievance. Likewise, the Dismissal Notice issued approximately eight months after Norman filed unfair practice charge case number LA-CE-5593-E. Under the circumstances of this case, this timing does not suggest nexus.[10]

It is true that Norman's unfair practice charge was still active at the time the District issued the Dismissal Notice. In *State of California (Department of Social Services)* (2000) PERB Decision No. 1413-S, the Board recognized that an employee's protected involvement with his union was ongoing but declined to find any suspicious timing because there was no "escalation" in that involvement around the time the employer took the adverse action. (*Id.* at proposed decision, p. 11.) The Board reached a different conclusion in *County of Riverside* (2009) PERB Decision No. 2090-M, where an employee's protected complaint activity began long before the adverse action, but continued and "came to a head" during a meeting with the management shortly before the adverse actions occurred. (*Id.* at p. 35.) In this matter, although unfair practice charge case number LA-CE-5593-E remained pending through 2012, there was no escalation or culminating event in the PERB case such as the filing of an amended charge or the issuance of the PERB complaint at the time the District issued the Dismissal Notice. This, at most, provides weak evidence of nexus.

2. Other Circumstantial Evidence

As explained above, closeness in time is not determinative about the existence of absence of nexus. Norman may demonstrate the required nexus through other evidence.

[10] It is also noteworthy that Norman's charge filing occurred around six months before February 16, 2012, the date the District issued the Draft Notice. The timing between these two events is also generally too remote to suggest a strong causal connection. (See *Los Angeles Unified School District, supra*, PERB Decision No. 1300, warning letter, p. 1.) The Draft Notice was later adopted, in its entirety, by the District's Governing Board on April 6, 2012.

a. The Personal Necessity Leave Allegation (LA-CE-5593-E)

Norman asserted during the hearing that the District did not follow its existing practices and engaged in disparate treatment when it denied his personal necessity leave request. If true, such conduct may provide evidence of nexus. (See *Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 8; *Oakland Unified School District* (2009) PERB Decision No. 2061, pp. 9-10.) Here, however, Norman's description of the personal necessity leave policy was not credited because it was inconsistent with the CBA and otherwise conflicted with the record. Using Elzig's more credible explanation as a starting point, Norman has not established any departure from existing policy or disparate treatment. Elzig denied Norman's request because it was not submitted in advance and was not for either an emergency or some other purpose that required his presence during his regular working time.

Norman maintains that he could not have given advance notice because he was unsure whether the Braden hearing would be canceled as it had been in the past. This position is unpersuasive because it is undisputed that the Braden hearing was calendared more than a month before May 17, 2011. Any uncertainty about whether the hearing would proceed that day did not prevent Norman from making the request in advance and then modifying the date of the request if the hearing date changed. The terms of the CBA put Norman on notice that the failure to receive advance approval could result in the denial of his leave request. Norman did not put forth credible evidence that advance notice had not been required in the past. Based on these facts, Norman has not shown that the District deviated from existing policy or treated him differently when it concluded that he failed to provide advance notice.

Furthermore, Norman has not proven that his attendance at the Braden hearing qualified for personal necessity leave. Norman maintains that the Braden hearing could only have taken place during working hours, but this position is unpersuasive given Norman's stated reason for attending the hearing. He said he wanted to use Elzig's testimony to assist himself and other

District employees. Norman does not establish, however, that he needed to attend the Braden hearing to achieve that goal. Put another way, Norman has not shown that he could not have gathered the same information from reading a transcript of that proceeding.[11] Even if that was an adequate justification for personal necessity leave, Norman never explained that reason to anyone at the District. In absence of any provided reason from Norman, it was not a departure from existing practices for the District to deny his request. And with no other direct or circumstantial evidence of nexus present, Norman has failed to establish a prima facie case in case number LA-CE-5593-E. Accordingly, the charge and complaint in that case is dismissed.

b. The Dismissal Notice Allegation (LA-CE-5744-E)

Norman has shown circumstantial evidence of nexus due to concerns about the District's investigation process. Chief among those concerns is the apparent bias of the District's chief investigator, Elzig. During cross-examination at the PERB hearing Elzig admitted that "at this point, I disbelieve most everything Norman says." She never elaborated on what she meant. Without further explanation about the basis for her distrust, her testimony casts doubt about whether Norman's investigation was truly objective. Elzig's June 25, 2010 e-mail about the Master Grievance complainants also gave the appearance of bias. In the e-mail, sent just days after the Master Grievance was distributed, Elzig unequivocally said "that the issues outlined in the [Master Grievance] complaint are completely false." She also suggested that the submission of the Master Grievance was motivated by a personal dispute between her and Governing Board member Rodriguez. Elzig's comments, made before any thorough investigation into the 21 enumerated complaints in the Master Grievance could have

[11] The record shows that Norman's counsel used a portion of the transcript from the Braden hearing in an attempt to discredit Elzig's testimony during the PERB hearing. This strongly suggests that Norman was in possession of the transcript from the Braden hearing.

reasonably been completed, also suggests bias.[12] In *Jurupa (Lukkarila)*, *supra*, PERB Decision No. 2283, the Board held that a substantially similar e-mail, in conjunction with other factors (such as timing and departure for existing practices), suggested nexus. (*Id.* at p. 26.)[13]

In addition, there is reason to be suspicious of the way that the District handled its evidence supporting Norman's dismissal. In *Novato*, *supra*, PERB Decision No. 210, the Board held that a principal's "secret file" about an employee's union activity and job performance was evidence of an unlawful motive where the documents in the file were never discussed with the employee and appeared to be inconsistent with the employer's personnel file practices. (*Id.* at pp. 20-21.) In *Baldwin Park Unified School District* (1982) PERB Decision No. 221 (*Baldwin Park*), an employer refused to show two employees any documentation about accusations made against them and also declined to interview either one during investigation of those accusations. The Board found those actions suggested "the District was not concerned with determining the truth of the matter and resolving the problem in the most expeditious way, but instead was determined to exact punishment on [the employees]." (*Id.* at pp. 16-17.) In *Woodland Joint Unified School District* (1987) PERB Decision No. 628 (*Woodland*), the Board held that an employer's maintenance of a "working file," separate from the traditional personnel file may not be evidence of nexus where it was

[12] It is recognized that Elzig testified that the purpose of the e-mail was merely to address the accusations in the Master Grievance made against her personally. However, the cited portions of her June 25, 2010 remarks make no such distinction.

[13] It is not found, however, that Elzig's June 25, 2010 e-mail demonstrates nexus for Norman's denial of personal necessity leave allegation in case number LA-CE-5593-E. At least two reasons support this conclusion. First, unlike in *Jurupa (Lukkarila)*, no other factors suggest nexus in case number LA-CE-5593-E. Second, the issues surrounding the June 25, e-mail were similar in kind to Norman's claims in case number LA-CE-5744-E in that both involved Elzig's handling of personnel matters and response to complaints. In case number LA-CE-5593-E, on the other hand, Elzig had no clear understanding about the relationship between Norman's leave request and the District's personnel or CBA practices until after she denied the request. The Master Grievance notably did not involve the CBA, which was the primary basis Elzig used to deny Norman's leave request.

consistent with existing practice. (*Id.* at p. 44, fn. 21.) However, the employer's failure to provide the content of that file to an employee so she could timely and intelligently respond to discipline was evidence of nexus, absent a reasonable explanation. (*Id.* at p. 43.) In that case, the employee was permitted to respond to a disciplinary letter, but was not given the parent complaints that formed the substance of that letter. (*Ibid.*)

In the present case, the District maintains that its Summary of Allegations documents were part of its fair and balanced investigation process. However, the November 10, 2011 Summary of Allegations, which formed the basis for the District's decision to dismiss Norman, attached as exhibits some, but not all, written complaints and interview notes that the District possessed at the time. For example, the Summary of Allegations referred to a February 24, 2009 incident where Norman allegedly threw a student's belongings out of the classroom. The District had student statements about this incident, but it did not include them in the Summary of Allegations. Likewise, the Summary of Allegations included claims that female students were uncomfortable with the way Norman looked at them. Those claims were supported, in part, by Principal Mendez's November 2, 2011 interview notes, but not shared with Norman at the time. These documents and other evidence were not given to Norman until after the District's investigation ended and it decided to proceed with dismissal. None of Norman's prior discipline or Summaries of Allegations included student statements or interview notes.

The District explained that it gives only a synopsis of its investigation to employees in the Summary of Allegations because it would be too difficult for the employee to absorb all the information. This explanation is unconvincing under the facts of this case for at least three reasons. First, upon receiving his first Summary of Allegations document in 2007, Norman notified Elzig that he could not cogently respond because the District did not provide enough information and documentary evidence. Thus, Elzig was aware that her desire to shield him from the quantity of its investigatory information was unwelcome. Second, the District did not

act consistently with this reasoning. The November 10, 2011 Summary of Allegations, included some, but not all, documents supporting the accusations. This inconsistency casts doubt on her explanation. (See *Chula Vista*, *supra*, PERB Decision No. 2221, pp. 16, 19 [employer's inconsistent explanations for its conduct evidenced nexus].) Third, the District had no explanation for withholding documentary evidence from Norman for prior discipline even after the investigations were completed. Nor did it explain why it waited until the Dismissal Notice to provide Norman with that material. As in *Woodland*, *supra*, PERB Decision No. 628, the District failed to provide a reasonable explanation for its practice of withholding documentary evidence from Norman until after its investigations ended. And as in *Baldwin Park*, *supra*, PERB Decision No. 221, the District's failure to provide Norman those documents, when he clearly sought that information, raises questions about whether the District's investigation process was designed to elicit the truth.

It also appears as though Elzig's student interviews were not sufficiently comprehensive. An employer's cursory or inadequate investigation may be evidence of nexus. (*North Sacramento*, *supra*, PERB Decision No. 264, p. 26.) Here, Elzig interviewed between 15 and 20 of Norman's students but she said she only asked detailed questions if the students informed her of complaints or concerns with Norman. She did not ask students who said they liked Norman to confirm or deny other students' complaints. Her failure to do so suggests that she was only interested in corroborating, not disproving students' complaints. In addition, Elzig admitted that some students said during their interviews that they "liked" Norman or that he was "cool," but she did not include any record of those comments in the investigation materials provided to Norman. This further suggests an incomplete investigation.

The District maintains its interview practices was not improper because Elzig's interviews in Norman's case were consistent with both her training and with the District's investigation practices. In *City of Santa Monica* (2011) PERB Decision No. 2211-M

(*Santa Monica*), the Board found no evidence of nexus in an employer's failure to interview the charging party prior to releasing him from probation. (*Id.* at p. 15.) The Board reasoned that the city's decision was consistent with existing investigation practices. (*Ibid.*, citing *County of Riverside* (2011) PERB Decision No. 2184-M, *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.) In that case, no other evidence of nexus was present. (*Id.* at p. 15.) The District's argument is unpersuasive under the facts of this case because the District in this matter purported to conduct a full investigation into the claims against Norman, only to artificially stop pursuing lines of questioning that may have benefited Norman.

In addition, unlike in *Santa Monica, supra*, PERB Decision No. 2211-M, here, there was other evidence of unlawful motive. This includes, Elzig's admitted propensity to distrust Norman, her e-mail demonstrating bias against those who complain about District practices, and the District's failure to disclose derogatory information about Norman during its investigation. Elzig's failure to thoroughly interview students in this case only exacerbates these other concerns, none of which were present in *Santa Monica.* Considering the record as a whole, Norman has established a causal connection, or nexus, between his protected activities and the Dismissal Notice. This is sufficient to establish a prima facie case for retaliation.[14]

[14] Norman also alleges two instances where the District departed from existing practices. First, he claims that the District failed to refer parent complaints directly to him for a meeting as required by the CBA. However, the CBA complaint policy only requires such a meeting "whenever possible" and Norman never elaborated on how that term was applied. Elzig credibly testified that a meeting would be inappropriate in this case due to the serious allegations involved. This is not sufficient to demonstrate a departure from existing practices. Second, Norman contends that the District's failure to include a signed verification of the Dismissal Notice after the Governing Board approved it was a departure from the District's discipline practices. In *Regents of the University of California* (2012) PERB Decision No. 2302-H, the Board held that an employer's failure to properly retain an employee's self-evaluation form was merely a record-keeping error and had no bearing on the discipline he received. (*Id.* at proposed decision, p. 25, fn. 7.) Similarly in this matter, the District's initial failure to provide the verification form appears from the evidence to be merely an oversight

D. The District's Burden

If the charging party establishes all the elements of a prima facie case, the burden then shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in any protected activity. (*Santa Ana Unified School District* (2012) PERB Decision No. 2235, citing *Novato, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Bros.*).) In cases where an adverse action appears to have been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred "but for" the protected acts. (*Los Angeles County Superior Court, supra*, PERB Decision No. 1979-C.) The focus of the "but for" analysis "is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, citing *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169.)

Based on the record in this matter, it appears as though Elzig may not have conducted a complete or objective investigation. However, "the mere presence of animus is not determinative" in discrimination cases. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561 (*Bellvue*), proposed decision, p. 37.) In *Bellvue*, the Board found evidence of retaliation, including the principal's bias against union activity and the district's failure to disclose or adequately investigate parent complaints. (*Id.* at proposed decision, pp. 35-37.) In spite of that evidence, the Board concluded that retaliation was not the true motive behind the non-reelection decisions given that there was no apparent discrimination against other teachers who had engaged in similar union activity and where the employer had

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that did not affect either the content of the Dismissal Notice or on Norman's ability to respond. Under these circumstances, these arguments do not support Norman's retaliation claim.

legitimate concerns about work performance that predated the protected activity. (*Id.* at proposed decision, p. 48.)

Virtually all of the evidence of nexus in this matter is localized to either the conduct or the opinions of Elzig. There is no evidence, for instance, that Principal Mendez, Vice Principal Prince-Eggeter, or any of Norman's students were aware of Norman's protected activity or had any motive to retaliate against him. And although it is true that Elzig drafted the Dismissal Notice, a close examination of this document reveals that her involvement was limited. For example, even though Elzig's interview practices were questionable, Elzig's interview notes comprised only 2 of the more than 60 exhibits supporting the charges against Norman. Most of the actual content of the charges raised in the Dismissal Notice were based on the interviews conducted and statements collected by Prince-Eggeter, Mendez, or other staff. Only 6 of the 38 charges levied against Norman in the Dismissal Notice relied solely on Elzig's notes. Of those six charges, most were corroborated by student statements or testimony. In short, the appearance of bias or retaliatory motive by Elzig notwithstanding, the Dismissal Notice appears to contain an accurate account of student complaints made against Norman. The proper inquiry, therefore, is whether those complaints provided a legitimate non-retaliatory reason for Norman's dismissal. (See *Healdsburg*, *supra*, PERB Decision No. 1185, proposed decision, p. 67 [despite evidence of nexus, dismissal was justified because the charges against the employee were "for the most part, true"].)

In *Fall River Joint Unified School District* (1998) PERB Decision No. 1259 (*Fall River*), the Board held that an employer was justified in removing an employee from a school site where it had legitimate concerns over how that employee's conduct affected the integrity of its education program. In *Santa Monica*, *supra*, PERB Decision No. 2211-M, the Board found that, had the charging party established a prima facie case for retaliation, the employer would have nevertheless been justified in terminating his employment because of the

long history of complaints made by the employer's customers coupled with the employer's concerns for customer and public safety. (*Id.* at p. 9.) The Board also noted that the charging party had been warned repeatedly of his performance deficiencies. (*Id.* at p. 17.) In *County of San Joaquin (Health Care Services)* (2004) PERB Decision No. 1649-M (*County of San Joaquin*), the Board held that an employer was justified in terminating a doctor due to performance problems and "a pattern of complaints about offensive comments made by [the doctor] during patient examinations, where sensitivity is paramount." (*Id.* at p. 3; see also *Martori Bros.*, *supra*, 39 Cal.3d at pp. 724, 730 [holding termination justified in spite of union organizing activity because employee screamed obscenities and threatened his supervisor].)

In contrast, the Board found no adequate justification for termination where the issues raised in the notice of termination were untrue, exaggerated, and/or based entirely on hearsay. (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, proposed decision, p. 20.) The Board also noted that the employer's only supporting witnesses were managers and supervisors. (*Ibid.*) In *Chula Vista*, *supra*, PERB Decision No. 2221, a school district asserted that its adverse action was justified because of a teacher's lack of "interpersonal skills." The Board found that explanation was unsupported by the record given that no one had observed any problems with her conduct in the classroom, and she had never been warned of any performance deficiencies in the past. (*Id.* at pp. 21-22.)

Here, as in *Santa Monica*, *supra*, PERB Decision No. 2211-M, the District had a long record of complaints filed against Norman, many of which predated the protected activity alleged in the two PERB complaints. As in that case, and unlike in *Chula Vista*, *supra*, PERB Decision No. 2221, the District here warned Norman multiple times from 2007 through 2010 that it would not tolerate his confrontational nature with others, yelling, and inappropriate comments and contact with students. Those warnings included multiple conferences,

memoranda, a letter of concern, a notice of unprofessional conduct, and a performance evaluation. All these documents issued before Norman submitted the Master Grievance.

Despite these warnings, the District continued to receive student complaints about Norman's conduct during the 2011-2012 school year. Multiple students complained that he was, once again, yelling at students and name-calling in class. Students also complained that he inappropriately stared at female students' bodies. Students expressed feeling scared or uncomfortable in Norman's presence. All of these claims were supported by written statements. Similar to *County of San Joaquin*, *supra*, PERB Decision No. 1649-M, these more recent complaints were particularly troubling because of the sensitive nature of the issues involved. And, like in *Fall River*, *supra*, PERB Decision No. 1259, District administrators and staff had concerns about how Norman's classroom conduct affected the integrity of the District's education programs.

Unlike in *Jurupa Community Services District*, *supra*, PERB Decision No. 1920-M, the complaints made against Norman were not overblown or supported only by managers. Rather, 13 students testified about their complaints with Norman's teaching performance between the 2008-2009 and the 2011-2012 school years. For the most part, their testimony was credible and honest. Even though, some students admitted to receiving failing grades from Norman, which might in some circumstances give rise to bias or a motive to lie, the students were surprisingly forthright. For example, one student, L.R., admitted to cheating on Norman's exams. She also acknowledged that Norman could be a good teacher and that she sometimes talked too much in class. Other students made similar admissions including stating that Norman's students were unruly and difficult to corral. These statements, sometimes made against the students' own interests, support their credibility.

Another factor lending to the students' credibility was their remarkable consistency. Even though the students ranged from four different school years, all 13 students testified that

Norman appeared angry in class and frequently yelled at them in a high volume. In addition, 10 of the 13 students testified that Norman stared inappropriately at female students' bodies, including their private parts. Eight of those students testified about the inappropriate names Norman used for students, including "stupid ass," "big mouth," "lazy," "sexy beast," "hot," "weirdo," "retarded," and "cheesy biscuits." Four students testified about being scared or uncomfortable around Norman. Two testified that Norman threw their belongings out of his classroom. Their testimony largely mirrored the allegations made in the Dismissal Notice and was further corroborated by other District employees, including other non-administrators.

In addition to these complaints, Norman was also accused of downloading pornographic images to his District computer in violation of District policy. That accusation was supported by a computer forensics report and a forensics examiner who testified against Norman in the CPC hearing.

Norman disputes almost all of the complaints, but there are multiple reasons to doubt his testimony. Norman clearly has a far greater motive to lie and deny wrongdoing. In addition, his testimony about those denials was brief, conclusory, and only elicited during cross-examination. He made no effort to elaborate further either in re-direct examination or in his case in rebuttal and his limited testimony gave no factual basis for disbelieving the students' complaints. For example, Norman never explained how he reacted when he caught students cheating or talking out of place. Nor did he present any evidence about his demeanor or classroom management that was inconsistent with the students' complaints. His response to the November 2011 Summary of Allegations was also conclusory, devoting only one sentence to the substance of all the charges against him. He never responded to the December 15, 2011 Summary of Allegations and never failed to attend either his own scheduled *Skelly* hearing or the District Governing Board meeting concerning the Draft Notice. In light of these facts, it is concluded that the District issued the Dismissal Notice because of the numerous credible

complaints about Norman's treatment of students and other misconduct, and not his protected activity. The District has therefore met its burden of rebutting the prima facie case.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaints and underlying unfair practice charges in Case Nos. LA-CE-5593-E and LA-CE-5744-E, *Jefferey L. Norman v. Jurupa Unified School District*, are hereby DISMISSED.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. 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
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

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 or received by electronic mail before the close of business, 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, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)