STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOREENA LYNN COLLINS, Charging Party, v. OXNARD UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5421-E PERB Decision No. 2265 May 25, 2012

Appearances: Law Office of Harry F. Berman by Harry F. Berman, Attorney, for Loreena Lynn Collins; Lozano Smith by Darren C. Kameya, Attorney, for Oxnard Union High School District.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Loreena Lynn Collins (Collins) from a dismissal (attached) of an unfair practice charge by PERB's Office of the General Counsel. The charge alleged that the Oxnard Union High School District (District) violated the Educational Employment Relations Act (EERA)[1] by reducing the hours of Collins' teaching assignment and by implying that a student complaint had been made against her. The charge alleged that this conduct violated EERA section 3543.5. The Office of the General Counsel dismissed the charge for failure to state a prima facie case.

We have reviewed the entire record in this case and given full consideration to the appeal and the response thereto. Based on that review, the Board finds the warning and dismissal letters to be well-reasoned, adequately supported by the record and in accordance with the applicable law. Accordingly, the Board affirms the dismissal of the charge and hereby

[1] EERA is codified at Government Code section 3540 et seq.

adopts the warning and dismissal letters as the decision of the Board itself as supplemented below.

DISCUSSION

Pursuant to PERB Regulation 32635, subdivision (a),[2] an appeal from dismissal shall:

> (1) State the specific issues of procedure, fact, law or rationale to which the appeal is taken;
>
> (2) Identify the page or part of the dismissal to which each appeal is taken;
>
> (3) State the grounds for each issue stated.

To satisfy the requirements of this regulation, the appeal must sufficiently place the Board and the respondent "on notice of the issues raised on appeal." (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H; *City & County of San Francisco* (2009) PERB decision No. 2075-M.) An appeal that does not reference the substance of the Board agent's dismissal fails to comply with PERB Regulation 32635, subdivision (a). (*United Teachers of Los Angeles (Pratt)* (2009) PERB Order No. Ad-381; *Lodi Education Association (Huddock)* (1995) PERB Decision No. 1124; *United Teachers – Glickberg* (1990) PERB Decision No. 846.) Likewise, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635, subdivision (a). (*Contra Costa County Health Services Department* (2005) PERB Decision No. 1752-M; *County of Solano (Human Resources Department* (2004) PERB Decision No. 1598-M.)

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

Here, the appeal[3] consists of a one-page letter (appeal letter) plus a repaginated effective duplicate of the seven-page supplement (supplement) to the amended charge. There appear to be only two discernible differences between the version of the supplement filed with the amended charge and the version of the supplement filed with the appeal letter. In the version filed with the amended charge, the first sentence states: "This is the first amendment to the above referenced case." In the version filed with the appeal letter, the first sentence states: "This is our appeal of dismissal to the above referenced case." Also in the version filed with the appeal letter, the request for back pay and fringe benefits, which was included in the supplement filed with the amended charge, was omitted. Collins asserts in the appeal letter that she submitted "our entire amended complaint as the basis of our appeal." As stated above, an appeal that merely reiterates facts alleged in the unfair practice charge does not comply with PERB Regulation 32635, subdivision (a).

Collins also asserts in the appeal letter that the dismissal misstates the basic issues of the case by focusing on the personal behavior of the District administrators and Federation officials. We disagree with Collins' characterization of the dismissal. The dismissal properly addresses whether the factual allegations of the charge state any possible prima facie case. The appeal does not reference any particular portion of the dismissal or otherwise state the specific issues of procedure, fact, law or rationale to which the appeal is taken. Nor does it identify the page or part of the dismissal to which the appeal is taken or state the grounds. Thus, the appeal is subject to dismissal on this ground alone. (*City of Brea* (2009) PERB Decision No. 2083-M.)

[3] Collins filed a companion charge against the Oxnard Federation of Teachers (Federation). Collins also appealed from the dismissal of that charge. Except for the width of the margins, the appeal document filed in that case appears identical to the appeal document filed in this case. The Board affirmed the dismissal in PERB Case No. LA-CO-1417-E.

Finally, Collins asserts that the Office of General Counsel "capriciously" dismissed her case, speculating that it was because of workload, time lag or "at the behest of the union, or district counsel." There is no merit to this claim.

ORDER

The unfair practice charge in Case No. LA-CE-5421-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dowdin Calvillo and Huguenin joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2805
Fax: (818) 551-2820

June 23, 2011

Harry F. Berman, Esquire
National Association of Government Employees
1819 Knoll Drive, # 17
Ventura, CA 93003

Re: *Loreena Lynn Collins v. Oxnard Union High School District*
Unfair Practice Charge No. LA-CE-5421-E
DISMISSAL LETTER

Dear Mr. Berman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 29, 2010 and amended on June 8, 2011. Loreena Lynn Collins (Ms. Collins or Charging Party) alleges that the Oxnard Union High School District (District or Respondent) violated section 3543.5 of the Educational Employment Relations Act (EERA or Act)[1] by reducing the hours of her teaching assignment and alleging that a student complaint had been made against her.

Charging Party was informed in the attached Warning Letter dated May 13, 2011 that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to May 27, 2011, the charge would be dismissed. Charging Party requested and received an extension of time to file an amended charge through June 10, 2011 and timely did so on June 8, 2011.

The facts in the charge as originally filed were fully set forth in the attached Warning Letter. Briefly, the crux of the unfair practice charge is that Ms. Collins' working hours were reduced by the District allegedly in violation of the collective bargaining agreement between the Oxnard Federation of Teachers (Union) and the District. The Union grieved the issue on Ms. Collins' behalf, but in a December 2009 letter to Ms. Collins, the Union declined to pursue the grievance to arbitration. In sum, the amended charge provides the following additional relevant information.[2]

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] The amended charge also includes information on layoff practices at another school district. This information is not germane to determining whether the instant charge states a prima facie case of retaliation or interference by the Respondent.

E-mail messages from Union representative Ko Tamura to Ms. Collins in August 2009 acknowledge that the Union's position regarding the number of hours that should have been guaranteed to Ms. Collins by the District in Fall 2009 are the hours that she worked for the previous two years.

On September 18, 2009, Union President Jim Rose sent an e-mail message to employees explaining the magnitude of the District's budget shortfall and stating that the Union and the District were negotiating over furlough days to avoid layoffs.

In November 2009, Mr. Tamura warned in a Union newsletter that:

> The cuts the Adult School has endured are unarguably severe and there is still the possibility of further cuts in the future. Hard decisions, not necessarily popular ones, may have to be made and [the Union] will continue to work in the best interest of the Adult Ed unit.

Ms. Collins alleges that the Union and the District had reached a pre-determined conclusion regarding her case before the grievance mediation in December 2009 because: (1) Mr. Tamura spent the entire mediation typing on his computer and did not participate or provide input; (2) the District's counsel was "derisive and insulting to Ms. Collins,"[3] misquoted the Education Code, and did not attempt any meaningful settlement; and (3) at the conclusion of the meeting District representatives,[4] Mr. Tamura, and Mr. Rose "all left the building together for lunch."

Regarding the statement made by Mr. Rose that Ms. Collins could expect repercussions from the District should she choose to pursue the grievance on her own, and the subsequent conversation between Ms. Collins and Assistant Principal Grisafe wherein Mr. Grisafe implied that students had complained about Ms. Collins, the amended charge states:

> Given the conduct of Mr. Parham [District counsel], Mr. Grisafe, Mr. Rose, and Mr. Tamura during the mediation, coupled with the threat by Mr. Rose and the classroom visit by Mr. Grisafe, it is clear that the district and the union were colluding to ensure the intimidation of an employee with an active and legitimate grievance/unfair labor practice against the district.

---

[3] The amended charge also states that the District's counsel "spent a good deal of time pounding the table and shouting loud enough for people in other rooms to hear him...."

[4] Including Oxnard Adult School Assistant Principal John Grisafe, who is the administrator that later alluded to student complaints being made about Ms. Collins' teaching techniques.

In July 2010, the Union and the District executed a side-letter agreement regarding "clarifying the staffing process" due to reductions in adult school staffing. This letter defined "longevity" and "seniority" and also defined priorities for assignment based on tenure and seniority. It is not clear what Ms. Collins alleges is an EERA violation regarding this side-letter. The amended charge states that the side-letter continues to misapply relevant Education Code provisions, it was created after the filing of Ms. Collins' grievance and unfair practice charges, and the District and the Union "are attempting to disregard her rights under the effective collective bargaining agreement in place at the time of her grievance."

The amended charge also states that hours reductions in the District Adult Education department in 2003 were accomplished using tenure as the first criteria and seniority as the second criteria and that temporary employees were not afforded any form of seniority to protect their assignment. The amended charge further states that the hours guarantee at that time was the hours worked for the employee's previous two years. Lastly, the amended charge provides that layoffs of cafeteria workers and high school teachers in the District in 2011 followed tenure and seniority criteria.

For the reasons to follow, the charge, as amended, does not correct the deficiencies outlined in the Warning Letter and the charge must be dismissed.

Discussion

1. PERB's Jurisdiction and Standing of the Charging Party

The amended charge continues to allege violations of the Education Code and sections of EERA that govern the bargaining process between employers and employee organizations. As stated in the Warning Letter, these allegations must be dismissed from the charge for PERB's lack of jurisdiction and the Charging Party's lack of standing. (*San Francisco Unified School District* (2009) PERB Decision No. 2040; *Orange Unified School District* (2004) PERB Decision No. 1670.)

Furthermore, the charge alleges violations of the collective bargaining agreement between the District and the Union. EERA section 3541.5(b) prevents PERB from enforcing agreements between an employer and employee organization and may only issue an unfair practice complaint on an alleged violation of an agreement if such would also constitute a deprivation of statutory rights under EERA. (*Los Angeles Unified School District* (1993) PERB Decision No. 1013.) Individual employees lack standing to assert that a breach of a collective bargaining agreement amounts to an unlawful unilateral change, as such EERA bargaining rights rest in employee organizations. (*Oakland Unified School District* (2007) PERB Decision No. 1902.) Thus, these allegations must be dismissed from the charge.[5]

[5] This rationale also extends to any alleged violation by the District regarding the negotiation of the July 2010 side letter.

2. Retaliation and Interference

The Warning Letter advised that in order to demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), a 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.)

Regarding the allegation over Ms. Collins' hours reduction, the Warning Letter specifically advised that the only instance of protected conduct alleged in the charge—i.e., the grievance—occurred after Ms. Collins' assignment was reduced, and that such occurrences do not demonstrate the necessary nexus between adverse action and protected conduct to sustain an EERA violation. (*San Joaquin Delta Community College District* (2010) PERB Decision No. 2091.) The amended charge has not corrected this deficiency, as it does not allege any new instances of protected conduct occurring prior to the hours reduction. Thus, this allegation must be dismissed.

Regarding Mr. Grisafe's report of student complaints against Ms. Collins, as concluded in the Warning Letter, this conduct cannot constitute unlawful retaliation because his report and suggestions for improvement cannot be found objectively adverse to Ms. Collins' employment under applicable case law. (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2140-H; *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S; *Woodland Joint Unified School District* (1987) PERB Decision No. 628.)

As to the interference allegation regarding Mr. Grisafe's conduct, the Warning Letter concluded that his discussion with Ms. Collins could not reasonably be found to discourage her from exercising protected rights. (*Clovis Unified School District* (1984) PERB Decision No. 389.) The Warning Letter further stated that there was no credible evidence in the charge to connect Mr. Rose's statement regarding potential repercussions by the District to Mr. Grisafe's actions, and that unions and employers are not liable for each other's conduct. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.) Nothing submitted in the amended charge has disturbed these conclusions. The amended charge argues that the Union's and the District's behavior at the mediation in combination with Mr. Rose's statement and Mr. Grisafe's actions demonstrate collusion between the District and the Union and an attempt to intimidate her. The facts regarding District and Union representatives having lunch together after the mediation and failing to reach a grievance settlement satisfactory to Ms. Collins do not approach evidence of collusion. Bare allegations, without sufficient factual support, do not meet a charging party's burden of pleading a prima facie case. (*California School Employees Association (Lohmann)* (1991) PERB Decision No. 898.)

Conclusion

For all of the above reasons and for the facts and reasons supplied in the May 13, 2011 Warning Letter, this charge does not state a prima facie case and must be dismissed.

Right to Appeal

Pursuant to PERB Regulations,[6] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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

The Board's address is:

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

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or

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

deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

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

Final Date

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

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Valerie Pike Racho
Regional Attorney

Attachment

cc: Darren C. Kameya, Attorney
Loreena Lynn Collins

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2805
Fax: (818) 551-2820

May 13, 2011

Harry F. Berman, Esquire
National Association of Government Employees
1819 Knoll Drive, # 17
Ventura, CA 93003

Re: *Loreena Lynn Collins v. Oxnard Union High School District*
Unfair Practice Charge No. LA-CE-5421-E
WARNING LETTER

Dear Mr. Berman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on January 29, 2010. Loreena Lynn Collins (Ms. Collins or Charging Party) alleges that the Oxnard Union High School District (District or Respondent) violated section 3543.5 of the Educational Employment Relations Act (EERA or Act)[1] by reducing the hours of her teaching assignment and alleging that a student complaint had been made against her.[2] Investigation of the charge revealed the following relevant information.

Facts as Alleged by the Charging Party

Ms. Collins is employed by the District as a teacher at Oxnard Adult School. Ms. Collins is included in a bargaining unit exclusively represented by the Oxnard Federation of Teachers and School Employees (Union). On June 15, 2009, the staff at Oxnard Adult School, including Ms. Collins, were notified by letter from the school's principal that due to budgetary shortfalls, adjustments in hours and class assignments would be made for the upcoming Fall semester. Employees were assured that any such adjustments would be made according to seniority. Ms. Collins' Fall teaching assignment ultimately resulted in a seven-hour reduction from her previous assignment, prompting her to contact Union representative Ko Tamura. After Mr. Tamura consulted with Union President James Rose and the Union's attorney, he informed Ms. Collins that the District did not appear to be following the contract, and that he would "get back" to her regarding resolution of the matter.

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] The charge also alleges violations of the Education Code, as well as sections of EERA related to the time that school employers and employee organizations must begin negotiations prior to adoption of a final budget, the duty to bargain in good faith, and the duty to participate in impasse procedures in good faith.

The charge states that Ms. Collins later discovered that other less-senior adult education teachers had not had their hours reduced at all, and at least one less-senior teacher had been guaranteed more hours than Ms. Collins. Employees senior to Ms. Collins had their hours increased. The Union, at some point in time not specified in the charge, filed a grievance over this issue. It appears from information included in exhibits to the charge that a mediation between the District, the Union, and Ms. Collins was conducted as part of the grievance process. Sometime subsequent to the mediation, Ms. Collins requested that the Union pursue the matter to arbitration. By letter dated December 18, 2009, the Union informed Ms. Collins that the Union declined to arbitrate the grievance. The District thereafter "refused further arbitration attempts by Ms. Collins."[3]

On a date not specified in the charge, Union President Rose advised Ms. Collins that should she choose to pursue the matter on her own with the assistance of a private attorney, she could expect "repercussions" from the District. Ms. Collins interpreted this statement as a threat. Shortly after Mr. Rose's statement, the assistant principal of Oxnard Adult School, John Grisafe, approached Ms. Collins in her classroom and implied that he had received student complaints about her teaching techniques. Mr. Grisafe "offered her suggestions as to how to implement curriculum...." Ms. Collins reports that in her previous eight years of employment with the District she had never received a student complaint. The charge also notes that Mr. Rose is a temporary employee of the Adult School and works directly with management, including Mr. Grisafe.

For the reasons explained below, the charge fails to state a prima facie violation of EERA.

Discussion

1. PERB's Jurisdiction and Standing of the Charging Party

PERB is a quasi-judicial administrative agency charged with administering collective bargaining statutes covering public employers, public employees, and employee organizations representing public employees. EERA is one of the collective bargaining statutes under PERB's exclusive jurisdiction. PERB's jurisdiction does not extend, however, to other independent statutory schemes, such as the Education Code. (*San Francisco Unified School District* (2009) PERB Decision No. 2040; *Service Employees International Union, Local 535 (Mickle)* (1996) PERB Decision No. 1168.) Accordingly, PERB lacks jurisdiction over allegations of violations of the Education Code and these allegations must be dismissed from the charge.

The charge also alleges violations of EERA sections related to an employer's duty to bargain in good faith (EERA, § 3543.5(c)) and participate in impasse procedures in good faith (EERA, § 3543.5(e)) with employee organizations, as well as violations of the collective bargaining

[3] The grievance procedure contained in the collective bargaining agreement between the District and the Union was not provided in the charge.

agreement between the District and the Union. Individual employees lack standing to allege bargaining violations, including unilateral change violations and violations of EERA sections that protect the collective bargaining rights of employee organizations. (*Orange Unified School District* (2004) PERB Decision No. 1670.) Accordingly, these allegations must be dismissed from the charge.

2. Retaliation and Interference

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), a 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 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*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; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*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 (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986)

PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

A. Hours Reduction

Ms. Collins exercised protected rights by seeking assistance from the Union regarding her reduced assignment and asking the Union to pursue a grievance on her behalf. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.) It is clear that the District was aware of this activity because it participated in mediation over the grievance. Additionally, a reduction in work hours, which necessarily reduces wages, is an adverse employment action. (*San Mateo County Community College District* (2008) PERB Decision No. 1980.) However, the only instance of protected conduct demonstrated in the instant charge occurred after the alleged adverse action. PERB has specifically held that where adverse action precedes the exercise of protected rights, the necessary nexus between adverse action and protected activity is not shown. (*San Joaquin Delta Community College District* (2010) PERB Decision No. 2091; *County of San Bernardino (County Library)* (2009) PERB Decision No. 2071-M.) Thus, the reduction in hours does not demonstrate retaliation against Ms. Collins for her protected activity.

B. Report of Student Complaints

Mr. Grisafe reported the alleged student complaints and offered suggestions regarding curriculum implementation to Ms. Collins after she exercised her protected right to pursue her grievance with the District. However, Mr. Grisafe's actions cannot be found adverse to Ms. Collins' employment under an objective standard. PERB has found that "not all verbal expression of concern about an employee's conduct rise to the level of a verbal reprimand and thus establish that adverse action was taken." (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2140-H (*San Marcos*), quoting *Woodland Joint Unified School District* (1987) PERB Decision No. 628.) In *San Marcos*, the Board found no adverse action when an employee's supervisor questioned whether the employee was capable of performing an assignment. (*Ibid.*) Similarly, the Board has held that a performance evaluation that "contained written comments and constructive criticism that suggested some minor performance issues" was "insufficient to transform an otherwise positive performance evaluation into an adverse action." (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S.)

The facts in the charge state only that Mr. Grisafe "offered...suggestions" regarding curriculum issues after "implying" that there were student complaints regarding teaching techniques. The charge does not explicitly state that Mr. Grisafe informed Ms. Collins of any actual student complaints, and, even if he had, merely offering suggestions and guidance regarding performance cannot be considered an adverse action under the authorities discussed above. Accordingly, this conduct cannot be found retaliatory.

The charge also characterizes this allegation as involving "threat of reprisal." The test for whether a respondent has interfered with the rights of employees under EERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, the Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if EERA provides the claimed rights. In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. An interference allegation is analyzed under an objective analysis and does not rely on the subjective reaction of the employee. (*Los Rios College Federation of Teachers, CFT/AFT Local 2279 (Deglow)* (1996) PERB Decision No. 1137.)

The charge implies, without expressly stating, that the incident involving Mr. Grisafe is connected to Mr. Rose's comment about "repercussions" from the District. There is no factual support for this contention. There is no evidence that Mr. Grisafe was present when Mr. Rose made that comment, or any other facts that show any connection between the Union's statement and Mr. Grisafe's discussion with Ms. Collins. Bare allegations, without factual support, do not meet a charging party's burden of pleading a prima facie case. (*California School Employees Association (Lohmann)* (1991) PERB Decision No. 898.) Furthermore, unions and employers are not liable for each other's conduct. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.) Mr. Grisafe's discussion with Ms. Collins regarding the curriculum cannot objectively be found to tend to discourage her from exercising protected rights. (*Clovis Unified School District, supra*, PERB Decision No. 389.)

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended

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

Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before May 27, 2011,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Valerie Pike Racho
Regional Attorney

VR

cc: Loreena Lynn Collins

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