

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ASAD ABRAHAMIAN,

Charging Party,

v.

COACHELLA VALLEY UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-5635-E

PERB Decision No. 2342

December 9, 2013

Appearances: Asad Abrahamian, on his own behalf; Fagen Friedman & Fulfrost by Milton E. Foster, Attorney, for Coachella Valley Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Asad Abrahamian (Abrahamian) to the proposed decision (attached) of an administrative law judge (ALJ). Abrahamian's charge, as amended, alleges that Coachella Valley Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ when it placed him on paid administrative leave and, subsequently, involuntarily transferred him to another school site because he engaged in protected conduct. The ALJ concluded that although Abrahamian established a prima facie case of retaliation, the District had met its burden of establishing that it would have placed him on administrative leave and involuntarily transferred him, notwithstanding his protected conduct.

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

The Board has reviewed the entire record in the case, including the hearing record, the ALJ's proposed decision, Abrahamian's exceptions and the District's response. The ALJ's factual findings are supported by the record, and we adopt them as the findings of the Board itself, except as noted below. The ALJ's conclusions with regard to Abrahamian's placement on administrative leave and his involuntary transfer are in accordance with relevant law, and we adopt them except as noted below.

For the reasons set forth below, the Board reverses the ALJ's finding that Abrahamian reported to the District cheating by students during the administration of the California Standardized Test (CST) in 2009 and the California High School Exit Exam (CAHSEE) in 2009 and 2011, and the ALJ's conclusion that Abrahamian engaged in conduct protected under EERA, when he reported those cheating allegations to the District. We find instead that Abrahamian reported to the District cheating by District teachers and conclude that such reports are not protected conduct under EERA.

PROCEDURAL HISTORY

On November 30, 2011, Abrahamian filed an unfair practice charge alleging that the District discriminated and retaliated against him by involuntarily transferring him for engaging in protected conduct.² PERB's Office of the General Counsel issued a warning letter on February 15, 2012. The District submitted a position statement on February 21, 2012.

On March 9, 2012, Abrahamian filed an amended charge adding a new allegation of protected conduct during March of 2011, and also alleging that he had been placed on administrative leave for filing an unfair practice charge. The District filed a second position statement on April 25, 2012.

² The ALJ's proposed decision incorrectly stated that Abrahamian filed his unfair practice charge on November 30, 2010. We conclude that this was a typographical error that has no bearing on the outcome of the case.

The Office of the General Counsel issued a partial dismissal of Abrahamian's charges on May 14, 2012. The Office of the General Counsel dismissed all of Abrahamian's allegations regarding teacher cheating and the District's retaliation therefor as either untimely or for failing to state a prima facie case. However, the Office of the General Counsel issued a complaint regarding his allegation that he was placed on paid administrative leave for filing an unfair practice charge. Abrahamian filed an appeal of the Board agent's partial dismissal on May 25, 2012.³

On June 4, 2012, Abrahamian moved to amend the complaint to add an allegation that he was involuntarily transferred a second time because he had filed an unfair practice charge. The parties met for an informal conference on June 25, 2012, but did not settle. On September 10, 2012, the case was transferred from ALJ Thomas J. Allen to ALJ Eric J. Cu. On September 14, 2012, the District filed an answer to the PERB complaint, a motion to deny Abrahamian's motion to amend the complaint, and three (3) motions in limine.

A formal hearing was held on September 18-20, 2012. At hearing, the ALJ granted Abrahamian's motion to amend the complaint. The District's motions in limine were either denied or resolved by stipulation between the parties.⁴

On December 14, 2012, Abrahamian filed a motion to reopen the record to present evidence of additional adverse actions that allegedly took place after the close of hearing. This

³ We have since affirmed the partial dismissal. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2335.)

⁴ The District's three motions in limine sought to exclude the testimony of Abrahamian's spouse, who had filed her own unfair practice charge against the District; sought to exclude evidence and testimony related to Abrahamian's amendment to the complaint; and sought to exclude evidence and testimony regarding the allegations which were dismissed by the Office of the General Counsel on May 14, 2012. The parties stipulated that Abrahamian's spouse would not testify and the District's other two motions in limine were denied.

motion was denied on January 15, 2013. The parties submitted their post hearing briefs on or before February 18, 2013. The ALJ issued his proposed decision on June 7, 2013.

On June 26, 2013, Abrahamian filed forty nine (49) exceptions to the ALJ's proposed decision. The District requested an extension of time to file an opposition to Abrahamian's exceptions. On August 7, 2013, the District filed its opposition to Abrahamian's exceptions. On August 8, 2013, PERB's Appeals Assistant notified the parties that the filings were complete and the matter was submitted to the Board.

FACTUAL SUMMARY

Abrahamian holds doctoral degrees in veterinary medicine and biology. He holds teaching credentials for biology and chemistry in both Pennsylvania and California. The District first hired Abrahamian as a probationary teacher for the 2007-2008 school year. Abrahamian was assigned to teach chemistry and biology at Coachella Valley High School (CVHS). Abrahamian's first year evaluation rated him as meeting or exceeding District standards in all categories.

During Abrahamian's tenure at CVHS, he observed and reported cheating by other members of CVHS's certificated staff during administration of the CST and the CAHSEE.⁵ According to Abrahamian, his cheating reports proved to be a catalyst for a series of retaliatory and discriminatory actions against him by the District. On or about June 1, 2011, Abrahamian was involuntarily transferred from CVHS to West Shores High School (WSHS) for the 2011-2012 school year.

Abrahamian's tenure at WSHS was problematic from the start. WSHS Principal Rudy Wilson (Wilson) was unable to contact Abrahamian and was unsure if he was going to

⁵ We reverse the ALJ's finding that Abrahamian reported student cheating on the CST and CAHSEE to the District. The record clearly supports Abrahamian's contention in his exceptions that his reports were about teacher misconduct.

report for work at WSHS. Wilson was about to begin the process of finding a replacement for Abrahamian when Wilson finally reached him. Abrahamian also missed several professional development sessions that were part of a School Improvement Grant that WSHS had received for 2011-2012. In addition, once the school year began there arose an issue between Abrahamian and Wilson regarding the amount of paper that Abrahamian needed for his students.

Abrahamian had developed an instructional packet that he wanted to issue to his students and he was unable to issue the packet due to the restrictions on the amount of paper allotted to each teacher at WSHS. Wilson doubled Abrahamian's paper allotment, but it still fell far short of what he needed to reproduce the packet for each of his students.

On September 6, 2011, Wilson held a conference with Abrahamian to discuss the paper issue as well as other issues regarding his teaching. Wilson issued several directives to Abrahamian regarding the use of his packets and his teaching methods. The "Conference Summary" provided to Abrahamian specified that he would be subject to discipline if he failed to follow Wilson's directives. Because Wilson did not have a background in science, he assigned direct supervision of Abrahamian to WSHS Assistant Principal Richard Pimentel (Pimentel). Thereafter, Pimentel observed Abrahamian's classes frequently and developed several concerns about Abrahamian: Pimentel observed Abrahamian discussing his ongoing paper dispute during class and telling WSHS student-athletes that they had to choose between being a student or being an athlete.

Abrahamian and Wilson had a second conference on September 19, 2011. Wilson raised Abrahamian's paper allotment to 4,500 pages per month (i.e., triple the paper allotment for all other WSHS teachers) and issued several more directives ordering Abrahamian to stop discussing his issues and disputes with the District and WSHS administration during class time and to stop forcing students to choose between academics and extra-curricular activities. The

“Conference Summary” again specified that Abrahamian would be subject to discipline if he failed to comply with Wilson’s directives. Nevertheless, Pimentel subsequently observed Abrahamian contravening Wilson’s directives by discussing the paper dispute during class time and telling his students that the administration was trying to replace him.

On or about November 8, 2011, Abrahamian was placed on an assistance plan to improve his classroom teaching. On November 30, 2011, Abrahamian filed his initial unfair practice charge with PERB alleging that he had been involuntarily transferred to WSHS in retaliation for his whistleblowing at CVHS regarding teacher misconduct during administration of the CST and CAHSEE exams. On December 2, 2011, District Director of Human Resources, Elaine Alexandres (Alexandres), issued Abrahamian a letter of reprimand. Alexandres’ letter noted a “repeated disregard” of Wilson’s directives from the two September conferences, reiterated those directives and warned Abrahamian that any failure to follow those directives may result in further discipline.

On December 6, 2011, Wilson issued his own letter of reprimand to Abrahamian. The impetus for Wilson’s letter was an instance where Wilson provided Abrahamian information about a student who was being bullied in his class. Abrahamian discussed the situation with the bullied student within earshot of the students who were bullying him, which caused the bullied student to stop attending WSHS. Additionally, Wilson received complaints from students about Abrahamian’s teaching. As a result, Wilson observed Abrahamian’s class on two occasions. During one of these observations, Wilson observed what he felt was ineffective teaching by Abrahamian. After the second observation, a student told Wilson that Abrahamian made a statement in class that he knew who was informing Wilson about what went on in class. These three incidents became the subject of Wilson’s letter of reprimand. The letter also informed

Abrahamian that he would be subject to discipline if he failed to comply with the directives in the letter.

On February 15, 2012, Pimentel observed Abrahamian's class. When Pimentel entered the class, Abrahamian told Pimentel that he was creating an uncomfortable situation for him and that he could not teach under those circumstances. When Abrahamian asked Pimentel what he wanted him to do, Pimentel directed Abrahamian to continue teaching. After a pause of about thirty seconds, Abrahamian resumed a presentation about Charles Darwin and "survival of the fittest." During the presentation Abrahamian used himself and the WSHS administration as an example stating, "Dr. A is not the fittest because administration wants to get rid of him because he will not adapt. I want you to tell your parents that administration is trying to drive Dr. A out of this school by being here."⁶ Abrahamian also told Pimentel that he was sending a letter to his students' parents about the administration's efforts to "get rid of" him. Pimentel wrote an incident report to Wilson about the encounter. On February 16, 2012, Abrahamian was placed on paid administrative leave pending an investigation. Abrahamian did not teach for the remainder of the school year.

On June 1, 2012, the District involuntarily transferred Abrahamian to its independent study program (ISP). Sometime during the Summer of 2012, Abrahamian submitted two transfer requests to fill open teaching positions at CVHS. Abrahamian was not offered either position. In August of 2012, Abrahamian met with Alexandres and District Superintendent Darryl Adams (Adams) about his placement for the 2012-2013 school year. Abrahamian wanted to return to CVHS, but Adams offered only to return him to WSHS. Abrahamian declined the offer to return to WSHS.

⁶ Abrahamian referred to himself as "Dr. A" several times at hearing.

Although ISP follows a University of California approved curriculum, it does not have a laboratory and, therefore, does not offer biology or chemistry courses. At ISP, teachers have to teach all of the courses in the curriculum to the students who are assigned to them. As a result, multiple teachers at ISP teach courses in subjects for which they are not credentialed.

PROPOSED DECISION

The complaint issued by the Office of the General Counsel alleged that the District placed Abrahamian on administrative leave on February 16, 2012, because he had filed an unfair practice charge against the District on or about November 30, 2011. On September 18, 2012, on the first day of hearing, the ALJ granted Abrahamian's motion, over the District's objection, to include Abrahamian's allegation that he was involuntarily transferred to the ISP on June 4, 2012, in retaliation for filing his unfair practice charge. The ALJ framed the issue as, "Did the District retaliate against Dr. Abrahamian for engaging in protected conduct?"

The ALJ noted that to demonstrate a discrimination or retaliation violation under EERA section 3543.5(a), the charging party must show: (1) that the employee exercised rights protected under EERA; (2) that the employer had knowledge that the employee exercised those rights; (3) that the employer took adverse action against the employee; and (4) that the employer took adverse action against the employee because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210.)

The ALJ concluded that Abrahamian had engaged in protected activity both when he made allegations of students cheating on the CST and CAHSEE exams at CVHS and when he filed his unfair practice charge with PERB on November 30, 2011. The ALJ also concluded that the District knew of the unfair practice charge and both Alexandres and Wilson knew about Abrahamian's cheating allegations at CVHS. The ALJ also concluded that the District's

placement of Abrahamian on paid administrative leave and his involuntary transfer to the ISP were both adverse actions.

The ALJ then concluded that Abrahamian's cheating allegations were too remote in time from the adverse actions to provide evidence of nexus, but he did conclude that the filing of the unfair practice charge was in close temporal proximity to the adverse actions. The ALJ also found that there were inconsistencies in the manner that the District handled Abrahamian's administrative leave and in its failure to follow its own personnel procedures. Therefore, the ALJ concluded that Abrahamian had established a prima facie case of retaliation.

As Abrahamian had established a prima facie case of retaliation, the burden shifted to the District to prove by a preponderance of the evidence that it would have taken the same actions even if the charging party had not engaged in protected activity. The ALJ concluded that the District would have placed Abrahamian on administrative leave and involuntarily transferred him notwithstanding his protected activities. The ALJ found that the District had grave doubts about whether Abrahamian could function effectively in the classroom and whether he was capable and willing to follow Wilson's directives. The ALJ determined that it was these doubts about Abrahamian, not his protected conduct that motivated the District's adverse actions.

DISCUSSION

Motion for a New Hearing

As a preliminary matter, in his statement of exceptions, Abrahamian asks for a new "trial" that incorporates PERB complaints that were issued subsequent to the hearing in this case and joins his wife as a party.⁷ It is unclear whether Abrahamian intends this as a motion to the Board, or as an appeal of the ALJ's ruling on his previous motion to reopen the record and

⁷ Abrahamian has informed us that on May 21, 2013, the Office of the General Counsel issued another complaint against the District (PERB Case No. LA-CE-5785-E). In addition, his spouse has two pending complaints against the District (Case Nos. LA-CE-5702-E and LA-CE-5780-E).

amend his complaint, or as a requested remedy. Motions are normally filed with the Board agent assigned to the proceeding, in this case, the ALJ. On January 15, 2013, the ALJ denied Abrahamian's motion to reopen the record and amend his complaint after hearing. An ALJ's ruling on a motion is generally not appealable unless the ALJ joins in the request and certifies the matter to the Board. (PERB Reg. 32200 et seq.)⁸ That has not happened here.

While PERB regulations do not have a specific procedure for requesting a hearing de novo, upon receiving exceptions to an ALJ's decision, the Board may:

- (1) Issue a decision based upon the record of hearing, or
- (2) Affirm, modify or reverse the proposed decision, order the record re-opened for the taking of further evidence, or take such other action as it considers proper.

(PERB Reg. 32320(a).) Thus, the Board may remand a case to the ALJ for the purpose of taking further evidence should it deem such action necessary. We find no compelling reason for remanding this case for the taking of further evidence. Abrahamian has been afforded a full opportunity to present his contentions and supporting evidence in the instant case.

⁸ PERB Regulation 32200 "Appeal of Rulings on Motions and Interlocutory Matters," states:

A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service pursuant to Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:

- (a) The issue involved is one of law;
- (b) The issue involved is controlling in the case;
- (c) An immediate appeal will materially advance the resolution of the case.

Nor do we find it necessary or appropriate to allow Abrahamian an opportunity to relitigate the instant case in a subsequent hearing regarding a separate unfair practice charge. The Office of the General Counsel has issued a complaint regarding the District's post-hearing conduct and Abrahamian will have an opportunity to present his case and relevant evidence at the hearing on that complaint. With regard to joining Abrahamian's case with his spouse's, Abrahamian's brief states that either the Office of the General Counsel or the ALJ assigned to the case has suggested that his and his spouse's post-hearing cases be joined. Thus, Abrahamian's request is merely another request to reopen the instant case and combine it with his and his spouse's pending complaints. We decline to do so.

Although Abrahamian claims that there is new evidence, and that certain evidence was either not considered or misrepresented by the ALJ in writing his proposed decision, we conclude, after a review of the entire record of hearing and the exhibits submitted by both parties, that all evidence relevant to this case was submitted and duly considered by the ALJ. Abrahamian has not demonstrated that there is any new admissible and relevant evidence that would warrant remand or a new hearing in this matter. We affirm the ALJ's denial of Abrahamian's motion to reopen the record and amend his complaint after hearing.

Charging Party's Exceptions

Abrahamian takes forty nine (49) exceptions to the ALJ's proposed decision. One of those exceptions is to the procedural history and twenty nine (29) are to the ALJ's findings of fact. We conclude that the ALJ's procedural history and findings of fact, including his credibility determinations of the witnesses who testified, are largely accurate and supported by the testimony and exhibits presented at hearing. While there may have been a minor inaccuracy or two in the ALJ's findings, those inaccuracies would not have changed the outcome of his case. Accordingly, Abrahamian's first thirty (30) exceptions are overruled.

Abrahamian's next nineteen (19) exceptions are to the ALJ's conclusions of law. We conclude that two (2) of them merit discussion. We overrule Abrahamian's other seventeen (17) exceptions.

Protected Activity

Abrahamian takes exception to the ALJ's statement that Abrahamian "claims that the adverse actions were taken because he reported what he believed to be students cheating on standardized tests." In relevant part, Abrahamian takes exception to the ALJ's statement that his complaints were about student cheating. Abrahamian claims that his reports concerned teachers cheating on the CST and CAHSEE at CVHS. In the record of hearing, the ALJ interchangeably refers to both student and teacher cheating. The confusion may lie in the fact that Abrahamian actually reported that teachers were helping and encouraging students to cheat on the CST and CAHSEE in 2009 and 2011 at CVHS. Nevertheless, the gravamen of his reports to the District school board and superintendent was that teachers were involved in, and even encouraging cheating. Both the record of hearing and Abrahamian's unfair practice charge, as amended, support his contention that his reports concerned teacher misconduct, not student misconduct, during standardized testing at CVHS.

We conclude that Abrahamian's conduct in reporting cheating by teachers is not protected conduct under EERA. PERB's jurisdiction is limited to the determination of unfair practices arising under EERA and the other public sector labor statutes which we administer. Whistleblowing in California K-12 public schools is protected under section 44100 et seq., of the Education Code. It is well established under PERB precedent that we do not have jurisdiction to enforce the Whistleblower Act or pure Education Code violations. (See *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S; *Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046; *American Federation of State, County*

and Municipal Employees, Council 36 (Moore) (2011) PERB Decision No. 2165-M; *San Francisco Unified School District* (2009) PERB Decision No. 2040; *Wygant v. Victor Valley Joint Union High School Dist.* (1985) 168 Cal.App.3d 319, 323.) However, PERB does have jurisdiction to interpret the Education Code whenever it is necessary to administer EERA. (See *Barstow Unified School District* (1996) PERB Decision No. 1138a; *San Bernardino City Unified School District* (1989) PERB Decision No. 723.) Although an employee engages in EERA protected activity when individually seeking to enforce rights stated in a collective bargaining agreement (CBA) or when employees jointly prosecute alleged violations of workplace rights (*Jurupa Unified School District* (2012) PERB Decision No. 2283, at p. 31), Abrahamian's reporting of alleged cheating by teachers did not seek to enforce employee workplace rights or rights stated in the CBA. Thus, it is not protected under EERA.

The protected activity in this case instead concerned Abrahamian's filing of an unfair practice charge with PERB. As the ALJ pointed out, filing an unfair practice charge with PERB is itself protected activity. (Proposed Dec., at p. 13 citing *San Bernardino City Unified School District* (1998) PERB Decision No. 1270 [filing an unfair practice charge or a grievance is protected activity].) Since Abrahamian has engaged in protected conduct by sheer virtue of filing an unfair practice charge, the merit of the underlying charge is not itself at issue and the alleged protected activity—the reporting of cheating by other teachers—need not be addressed.

Adverse Action

Abrahamian takes exception to the ALJ's conclusion that his consent was not required under Education Code section 44865 prior to the District's transferring him to the ISP. The ALJ determined that Abrahamian's argument was rejected in *California Teachers' Association v. Governing Board of Central Union High School District* (1983) 141 Cal.App.3d 606, 616 (*Central Union*). However, the ALJ's reliance on *Central Union* is misplaced. *Central Union*

involved the involuntary reassignment under section 44865 of a teacher holding a general secondary credential. The court concluded that consent was not required for a teacher holding a general credential since that assignment was within the scope of the credential. The court distinguished, however, teachers who were being transferred to an assignment outside the scope of their credential.

There is good reason for the requirement of consent if a teacher is assigned outside the scope of his or her expertise. Evaluation is made on the basis of performance of the assigned task. A teacher may be unwilling to risk a critical evaluation while teaching outside the ambit of his or her credential.

(*Id.* at p. 612.) Section 44865 allows school districts to assign teachers outside of the scope of their credential to certain enumerated special schools or programs, including independent study, but it may only do so with the consent of the teacher. The court in *Central Union* found that the teacher in that case was transferred to an assignment within his credential and, therefore, his consent was not required.

At hearing, the District presented testimony that its “credential specialist” had determined that Abrahamian’s credential allowed his assignment to the ISP without his permission. Abrahamian submitted a copy of his California Preliminary Single Subject Teaching Credential as an exhibit. Abrahamian’s credential authorizes him to teach biological sciences and chemistry “in grades twelve and below, including preschool, and in classes organized primarily for adults.” However, it is unclear, based on the testimony and exhibits, whether his credential is strictly limited to those subjects or allows him to teach other classes. We find the conflicting evidence presented at hearing to be inconclusive. However, because the ALJ determined that Abrahamian’s assignment to the ISP was adverse to Abrahamian on other grounds, we conclude that there is no need to remand the issue for further evidence.

CONCLUSION

We conclude with the ALJ that although Abrahamian proved a prima facie case for retaliation, the District established its affirmative defense that it both had alternative, non-retaliatory reasons for its involuntary transfers of Abrahamian and acted because of those reasons. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337 [once the charging party presents a persuasive prima facie case that the employer acted against an employee because of the employee's protected conduct, the employer must then demonstrate persuasively that it had both a permissible (alternative and non-discriminatory) reason for its action and that it acted because of this reason and not the employee's protected conduct].)

ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in the case, we conclude that the Coachella Valley Unified School District did not violate the Educational Employment Relations Act when it involuntarily transferred Asad Abrahamian during the 2011-2012 and 2012-2013 school years. The complaint and underlying unfair practice charge in Case No. LA-CE-5635-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



ASAD ABRAHAMIAN,

Charging Party,

v.

COACHELLA VALLEY UNIFIED SCHOOL
DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-5635-E

PROPOSED DECISION
(June 7, 2013)

Appearances: Asad Abrahamian, on his own behalf; Fagen, Friedman & Fullfrost by Brian D. Bock and Milton E. Foster III, Attorneys, for Coachella Valley Unified School District.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a public school employee alleges that his public school employer violated the Educational Employment Relations Act (EERA)¹ by placing him on administrative leave and transferring him to a different assignment in retaliation for protected activities. The employer denies any violation.

On November 30, 2010, Dr. Asad Abrahamian filed the instant unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Coachella Valley Unified School District (District). On May 14, 2012, the PERB Office of the General Counsel dismissed the allegation that the District unlawfully transferred him from Coachella Valley High School (CVHS) to West Shores High School (WSHS) in 2011 after concluding that the claim was untimely and that there was no connection alleged between the transfer and any protected activity. On the same day, the General Counsel's Office issued a complaint alleging

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

that the District placed Dr. Abrahamian on administrative leave in 2012 in retaliation for his participation in the PERB unfair practice charge process.²

On June 4, 2012, Dr. Abrahamian moved to amend the PERB complaint to add the allegation that the District transferred him to its Adult Education, Independent Studies (IS) Program. That motion was taken under submission. An informal settlement conference was held on June 25, 2012, but the matter did not settle. A formal hearing was scheduled for September 18-20, 2012.

On September 10, 2012, the case was transferred to Administrative Law Judge Eric J. Cu (ALJ). The parties were notified of the transfer by letter and were further notified to be prepared to address Dr. Abrahamian's proposed amendments. Neither party objected.

On September 14, 2012, the District filed an answer to the PERB complaint denying the substantive allegations and asserting different affirmative defenses. It simultaneously filed its opposition to Dr. Abrahamian's motion to amend the complaint and three motions in limine.

On September 18, 2012, the first day of hearing, the ALJ granted Dr. Abrahamian's motion to amend the complaint. All of the District's motions were either denied or resolved by stipulation between the parties.³

Dr. Abrahamian finished his testimony on September 19, 2012. He requested that PERB order additional witnesses to testify on his behalf but the ALJ denied the request. He

² Dr. Abrahamian has appealed the partial dismissal to the Board itself. That appeal is currently pending. This proposed decision has no effect on the outcome of that appeal.

³ One such stipulation was that Dr. Abrahamian agreed not to call his wife, Dr. Shaleh Mazdeh, as a witness. Because of that agreement, the ALJ declined to rule on the District's motion to exclude her testimony. The ALJ informed the parties that he would reconsider the motion if Dr. Abrahamian later decided that Dr. Mazdeh's testimony was necessary. After the hearing, on February 18, 2013, Dr. Abrahamian alleged that Dr. Mazdeh was precluded from testifying. The ALJ corrected him on what transpired at the hearing.

did state that he would entertain a valid subpoena for witnesses if one was submitted. No subpoenas for witnesses were submitted during the remainder of the hearing.

On September 20, 2012, the last day of hearing, the District presented its case in chief. The ALJ informed Dr. Abrahamian that he had the right to present a case in rebuttal “to present . . . evidence that responds to the evidence that was presented here by [the District’s counsel].” Dr. Abrahamian replied that he had no additional witnesses.

On December 14, 2012, Dr. Abrahamian filed a motion to reopen the record to present evidence of additional adverse actions occurring after the close of the hearing. That motion was denied on January 15, 2013.

The parties filed closing briefs on or before February 18, 2013. At that point, the record was closed and the matter was submitted for decision.

FINDINGS OF FACT⁴

The Parties

The District is a public school employer within the meaning of EERA section 3543.1(k). Dr. Abrahamian is a public school employee within the meaning of EERA section 3543.1(j) and is employed at the District as a teacher. Teachers at the District are in a bargaining unit that is represented by a union. The District and the union are parties to a Collective Bargaining Agreement (CBA) that was not provided for the record.

⁴ Dr. Abrahamian frequently referenced facts in his closing brief that were not supported by the evidence in the record. This includes, but is not limited to, incidents that were expressly excluded from the record by rulings on objections, the ALJ’s ruling on the post-hearing motion to amend the complaint, and the General Counsel’s partial dismissal of claims prior to the issuance of the complaint. Reference to those facts will be ignored. Even his discussion about incidents relevant to the complaint contain several details unsupported by the record. These references will also not be relied upon in this proposed decision and will be noted, where relevant. However, even considering these numerous unsupported factual references, it does not substantially alter the outcome of this proposed decision.

Dr. Abrahamian's Teaching Experience

Dr. Abrahamian holds doctorate degrees in veterinary medicine and biology and is credentialed to teach high school biology and chemistry in both California and Pennsylvania. He first began teaching those subjects in 1971. He has published numerous scholarly articles in the field of biology and pathology. He testified that he left prior teaching, in part, because he was not assigned biology and chemistry courses.

Dr. Abrahamian's Assignment to CVHS⁵

Dr. Abrahamian was hired by the District as a probationary teacher on June 25, 2007. He was assigned to teach biology and chemistry at CVHS for the 2007-2008 school year. His wife, Dr. Mazdeh, was hired as a math teacher around the same time.

During the 2007-2008 school year, Dr. Abrahamian received a performance evaluation rating him as meeting or exceeding the District's expectations in all categories.

Dr. Abrahamian received other performance evaluations during his tenure at the District, but the District did not retain any records of those evaluations for reasons unknown.

The 2011-2012 School Year

The District involuntarily transferred Dr. Abrahamian from CVHS to WSHS for the 2011-2012 school year. WSHS received a School Improvement Grant (SIG) that year which provided additional funding for hiring and training effective teachers.

As part of the SIG, WSHS teachers received seven additional days of professional development prior to the beginning of instruction for the 2011-2012 year. WSHS Principal Rudy Wilson informed all WSHS faculty about the scheduled training dates. Some training

⁵ Allegations of adverse actions taken against Dr. Abrahamian in 2011 were dismissed by the General Counsel's Office and are currently subject to appeal. Information relating to Dr. Abrahamian's tenure at CVHS are described here only briefly for background purposes.

sessions were held at Wilson's private ranch. Dr. Abrahamian did not attend all sessions due to a misunderstanding about when the school year began.⁶

During their first meeting in mid-August 2011, Dr. Abrahamian tried to explain to Wilson that he (Dr. Abrahamian) was transferred to WSHS after reporting that students were cheating on standardized tests. Dr. Abrahamian believed that such cheating was one of multiple conspiracies occurring at CVHS. Wilson requested that Dr. Abrahamian not involve him in those issues. Around that time, Dr. Abrahamian also met with the District Executive Director of Human Resources Elaine Alexandres to discuss his assignment. He made the same cheating claims to her at that time.

Student instruction at WSHS began late in August 2011. Dr. Abrahamian was assigned biology, chemistry and earth science courses. Wilson allotted 1,500 sheets of paper per month to each teacher for photocopying instructional materials. Dr. Abrahamian requested 500 sheets of paper for each of his 125 students, for a total of 62,500 sheets, roughly 50,000 more than what other teachers received.⁷ Dr. Abrahamian had a large packet of teaching materials (presumably 500 pages long), that he wanted to give each student by the end of the year.⁸ Wilson rejected the request and expressed concern that Dr. Abrahamian's packets were supplanting, rather than supplementing, existing District-approved textbooks and other curriculum materials. He also said that he could not justify the cost of all the paper

⁶ Dr. Abrahamian references the content of those trainings and the salary he lost by not attending in his closing brief. However, those references are not supported by evidence in the record.

⁷ Dr. Abrahamian asserts in his closing brief that other teachers had unlimited access to copy paper. These assertions are not supported by evidence in the record.

⁸ Dr. Abrahamian's detailed description of the content of his packets is not supported by evidence in the record. In fact, he affirmatively decided against including his packets as part of the evidentiary record.

Dr. Abrahamian was requesting. Wilson allotted Dr. Abrahamian an additional 1,500 pages to allow him to transition to using the District curriculum.⁹

However, Dr. Abrahamian continued to believe that his packets were effective instructional tools and that his paper request, over the course of the year, was reasonable. He accordingly did not relent in his demands for additional paper. Around that time, parents began complaining to Wilson about Dr. Abrahamian's teaching. Among the complaints were that Dr. Abrahamian did not manage instructional time effectively, that students were not using their textbooks, and that Dr. Abrahamian's worksheets had no clear correlation to his lessons.

The First Conference Summary

On September 6, 2011, Wilson held a conference with Dr. Abrahamian about the paper issue and about his concerns over Dr. Abrahamian's teaching. Also in attendance were WSHS Assistant Principal Richard Pimentel, union representative Krystal Gallindo, and Dr. Mike Jones, who oversaw implementation of the SIG. During the conference, Wilson expressed his opinion that Dr. Abrahamian's behavior had a negative effect on learning at WSHS. He also explained classrooms must be kept unlocked because SIG observers may visit and Wilson felt it was disruptive to unlock the door during every visitation. Wilson issued Dr. Abrahamian a number of directives, that were later reduced to writing in a "Conference Summary" dated September 8, 2011. Specifically, he ordered Dr. Abrahamian to:

- Work directly with Mr. Pimentel on appropriate use of instructional time
- Follow the state-adopted curriculum

⁹ Dr. Abrahamian asserts in his closing brief that Wilson refused to provide him with the District science curriculum. No evidence of either Dr. Abrahamian's request or Wilson's refusal was produced for the record. Nor was evidence produced about the quality of the District curriculum, other than Dr. Abrahamian's conclusory statements.

- Collaborate with the science department on common assessments and objectives
- Use note taking instead in lieu of the packets
- Communicate all requests [for paper or other supplies] through the principal
- Leave the entry door to the classroom unlocked and accessible.

Wilson stated that failure to follow his directives would result in discipline.

Wilson assigned Pimentel to supervise Dr. Abrahamian directly because both had science backgrounds. Pimentel began conducting regular observations of Dr. Abrahamian's class. Wilson also suggested that Dr. Abrahamian observe other teachers' classroom management techniques.

Pimentel observed Dr. Abrahamian raise his ongoing dispute over paper during class. Dr. Abrahamian admitted saying to his class "I won't be able to give [the next chapter of materials] to you because there is a restriction on the use of the copy machine." Pimentel also observed Dr. Abrahamian informing student football and volleyball players that they needed to choose between being a student and being an athlete after they had missed some class time. Pimentel instructed Dr. Abrahamian that it was District policy to give those students the opportunity to catch up on missed work.¹⁰

The Second Conference Summary

On September 19, 2011, Wilson held another conference with Dr. Abrahamian. A union representative also attended. The issue of paper and other supplies was discussed again.

¹⁰ Dr. Abrahamian asserts in his closing brief that Wilson encouraged student-athletes to miss his class and that there was no way for students to redo missed laboratory experiments. These facts are not supported by evidence in the record.

Wilson explained that the vast majority of SIG money was allocated for salaries, training, and technology and only a small fraction could be spent on supplies. Nevertheless, Wilson allotted Dr. Abrahamian an additional 1,500 sheets of paper, for a total of 4,500 sheets that month. However, Wilson directed Dr. Abrahamian to use the District curriculum and not his packets as his primary instructional materials.¹¹ Wilson also directed Dr. Abrahamian not to discuss personnel issues or his disputes with District administration, with students during instructional time, and not to force students to choose between class and District-sanctioned extra-curricular activities. Finally, Wilson acknowledged Dr. Abrahamian's right to voice concerns about personnel issues, but said it was not appropriate to render unfounded accusations about conspiracies against him. Wilson directed Dr. Abrahamian to cease doing the latter during the school day unless he had a basis for those accusations. Those directives were included in a second conference summary, dated September 21, 2011. The conference summary stated that failure to comply with the directives would result in discipline.

Pimentel continued to have concerns about Dr. Abrahamian's teaching. During subsequent observations, Pimentel heard Dr. Abrahamian say "I have run out of copies. I have asked the administration a couple of times and they have accommodated. But I don't have any more paper to help you." He also said that student instruction would be negatively affected because of his lack of paper and there was not anything he could do about it. Pimentel also observed Dr. Abrahamian state "who does not want me to be your teacher? The administration does not want me to be your teacher."¹² Pimentel reported these concerns to Wilson.

¹¹ Dr. Abrahamian implies that Wilson's explanations are incorrect because the District had funds for a \$9 million tablet computer initiative. However, no evidence about that initiative was produced for the record.

¹² Dr. Abrahamian admits making the first of the two quoted statements, but denies making the second. Pimentel's testimony is credited over that of Dr. Abrahamian because it is consistent with other statements Dr. Abrahamian admits to making.

The Assistance Plan

In November 2011, Wilson and Pimentel placed Dr. Abrahamian on an Assistance Plan. Their primary concerns were Dr. Abrahamian's poor classroom management and the lack of quality instruction relating to the District science curriculum. Under the plan, Dr. Abrahamian was to work with Pimentel and the WSHS science department on improving use of instruction time and District curriculum. Wilson also instructed Dr. Abrahamian to work with three other teachers about improving classroom management. Finally, he was to meet regularly with Wilson and Pimentel.

Pimentel began working with Dr. Abrahamian under the terms of the assistance plan and, for a short period of time, he felt Dr. Abrahamian's teaching improved.

The December 2, 2011 Letter of Reprimand

Wilson kept Alexandre informed about his concerns with Dr. Abrahamian. By December 2011, Alexandre determined that the cumulative effect of Dr. Abrahamian's conduct was worthy of formal discipline. On December 2, 2011, she issued Dr. Abrahamian a letter of reprimand for repeatedly disregarding Wilson's directives. In the letter of reprimand, Alexandre referenced each of the two conference summaries and Pimentel's observation reports. She reiterated the directives in the conference summaries and stated that failure to follow the directives would result in further discipline. Pimentel was not aware that the letter of reprimand had issued.

The December 6, 2011 Letter of Reprimand

Wilson continued receiving complaints from students about Dr. Abrahamian in November 2011. One common complaint was that Dr. Abrahamian's classes were not productive. Another student complained to Wilson that Dr. Abrahamian said "I know who is

telling Mr. Wilson everything. It is the students who are never here.”¹³ In addition, Wilson also received a complaint about Dr. Abrahamian’s decision to publicly share confidential information Wilson shared with him about a bullied student.¹⁴

On December 6, 2011, Wilson issued Dr. Abrahamian a second letter of reprimand. In the letter, Wilson directed Dr. Abrahamian not to publicly disclose confidential or sensitive student information, to observe other teachers’ classroom management techniques, and to not threaten or discourage students from reporting concerns to District administration. Wilson informed Dr. Abrahamian that failure to follow his directives would result in further discipline.

Placement on Administrative Leave

On February 15, 2012, Pimentel visited Dr. Abrahamian’s class during a science presentation. Dr. Abrahamian admitted during the hearing that he was frustrated by what he felt were frequent visits and said to Pimentel “this is [a] discomfoting, uncomfortable situation you are creating.” He also said “I would have to sit here and wait for you to really do your work and go before I can teach. What else do you want me to do?” He then sat down and ceased his presentation. Pimentel directed Dr. Abrahamian to continue with his lesson.

After a brief pause, Dr. Abrahamian resumed. When the presentation came to the issue of Charles Darwin and his theory of “survival of the fittest,” Dr. Abrahamian said “let’s say Dr. A is not liked by his boss and his boss comes in and just says this is wrong, this is this, this is that. Well, Dr. A could either leave by himself, or Dr. A could actually stay here until he is eliminated by the system.”¹⁵ Dr. Abrahamian admitted to making that statement, but said it

¹³ Dr. Abrahamian denies making this statement but did not confirm or deny that a student made that complaint to Wilson.

¹⁴ Dr. Abrahamian asserts that he knew about the bullied student before being informed by Wilson, but this information is not supported by evidence in the record.

¹⁵ During the hearing, Dr. Abrahamian referred to himself as “Dr. A.”

was only a hypothetical example. However, there is no evidence in the record that he explained the hypothetical nature of his statement to the class or to Pimentel.

According to Pimentel, Dr. Abrahamian then said “I want you to tell your parents that administration is trying to drive Dr. A out of this school by being here.” He then took out a document and said to Pimentel that “I’m sending this letter to parents that you’re trying to get rid of me.” He instructed a student to read the document out loud, but the student did not comply.¹⁶ Pimentel never saw the text of the document. Pimentel reported the incident to Wilson and Alexandres.

On February 16, 2012, Alexandres issued Dr. Abrahamian a letter stating:

You are hereby placed on administrative leave with pay effectively immediately, due to a pending investigation.

You are directed not to be on District property or in contact with students or employees of the District. If for any reason you need to come on any District property, please contact my office in advance.

Dr. Abrahamian would not return to the classroom for the remainder of year.

Dr. Abrahamian’s Assignment for 2012-2013

On June 1, 2012, the District involuntarily transferred Dr. Abrahamian to the IS Program for the 2012-2013 school year. Dr. Abrahamian filed a grievance over the assignment. In August 2012, Dr. Abrahamian met with Alexandres and other District representatives to discuss both his pending grievance and his 2012-2013 assignment, but the two sides did not resolve their disagreements. Dr. Abrahamian applied for health and biology positions at CVHS, but neither application was approved.

¹⁶ Dr. Abrahamian denies that this occurred. Pimentel’s testimony is credited over that of Dr. Abrahamian because it is consistent with Dr. Abrahamian’s other conduct.

The IS Program is part of the Adult Alternative Complex, which houses different alternative education programs. The principal of the Adult Alternative Complex is Jereme Weischedel. Dr. Abrahamian is one of three full-time IS teachers. There were also around 26 part-time teachers. Teachers share classroom space and meet with students one-on-one for approximately one hour per week to go over assignments, deliver instruction, and administer tests. The IS Program administers the same curriculum as the District's traditional classes with some notable differences. First, a single teacher instructs each student in all subjects for that year. Second, instruction is provided one subject at a time, in a concentrated form. Students typically perform 20-30 hours of work per week for 3 weeks to complete a subject. Third, the IS Program has no laboratory science classes such as biology or chemistry.¹⁷

According to Weischedel, most IS students are minors that do not thrive in a traditional classroom. Weischedel described the Adult Alternative Complex as "a very safe place," because students do not typically stay on campus for longer than needed to receive their assignments and meet with instructors.

While at the IS Program, Dr. Abrahamian was required to teach subjects, such as English, that he had no training in and had never taught before. However, Dr. Abrahamian was just one of multiple teachers in the IS Program that taught subjects for which they were not credentialed. Those assignments are permissible under the Education Code.

Dr. Abrahamian met with Weischedel on the first day of the 2012-2013 school year. After observing a black dome device in some of the classrooms, Dr. Abrahamian expressed his belief he was being monitored by video camera. Weischedel assured Dr. Abrahamian that the devices were not cameras, but were used to amplify a teacher's voice during instruction, particularly when working with students whose primary language was not English.

¹⁷ Dr. Abrahamian asserts in his closing brief that instruction at the IS Program does not comply with State standards but this assertion is not supported by evidence in the record.

Unconvinced, Dr. Abrahamian affixed a piece of paper in front of one of the devices, only to find the paper removed the next day. According to Dr. Abrahamian, this was evidence that the devices were, in fact, cameras. At Dr. Abrahamian's request, Weischedel allowed Dr. Abrahamian to share classroom space with his wife, who was also transferred to the IS Program that year.

ISSUE

Did the District retaliate against Dr. Abrahamian for engaging in protected activity?

CONCLUSIONS OF LAW

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 (Novato USD).*)

1. Protected Activity

The first element of a prima facie case is whether Dr. Abrahamian engaged in activity protected under EERA.

a. Protected Activity Alleged in the PERB Complaint

The PERB complaint alleges that Dr. Abrahamian engaged in protected activity by filing and pursuing the instant unfair practice charge starting on November 30, 2011. PERB has held that participation in the PERB unfair practice charge process is protected under EERA. (*San Bernardino City Unified School District (1998) PERB Decision No. 1270.*) The District does not dispute this conclusion.

b. Protected Activities Not Alleged in the PERB Complaint

Dr. Abrahamian also alleges retaliation based on protected activities not described in the PERB complaint. Namely, he claims that the adverse actions were taken because he reported what he believed to be students cheating on standardized tests. PERB has held that it may consider previously unalleged protected activities where:

- (1) adequate notice and opportunity to defend has been provided the respondent;
- (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct;
- (3) the unalleged [issue] has been fully litigated; and
- (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241 (*Lake Elsinore USD*), citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668.) This is the same standard used for evaluating unalleged violations. (*Ibid.*)

In *Lake Elsinore USD, supra*, PERB Decision No. 2241, the Board found insufficient grounds to consider a union's previously unalleged protected activities, where the activities were not mentioned in the underlying unfair practice charge, and the employer was not otherwise informed of the new retaliation theory until reading the union's closing brief.

In the present case, the District had ample notice of Dr. Abrahamian's cheating complaints as well as his belief that the District was retaliating against him because of those complaints. He levied that accusation against the District early and often, including multiple times during the formal hearing. Unlike in *Lake Elsinore USD, supra*, PERB Decision No. 2241, those allegations were raised in Dr. Abrahamian's underlying unfair practice charge. The District was further put on notice when the PERB General Counsel's Office stated its opinion that Dr. Abrahamian's cheating allegations were protected under EERA in its partial

dismissal letter.¹⁸ Moreover, the ALJ overruled the District's objections to exclude evidence of the cheating allegations.¹⁹ The District also questioned its own witnesses about the relationship between the cheating allegations and the adverse actions. Accordingly, all of the criteria for considering the cheating claims as protected activity are met in this case.

EERA section 3543 expressly protects public employees' "right to represent themselves individually in their employment relations with the public school employer." This right to self-representation is protected only to the extent that it amounts to "a logical extension of group activity." (*Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, citing *Meyers Industries* (1984) 268 NLRB 493, 497.) In other words, the issue raised must impact employees generally. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) In *County of Riverside* (2009) PERB Decision No. 2090-M, the Board found that an individual engaged in protected self-representation by complaining that unlicensed contractors were unlawfully directing the work of licensed engineers like himself and his colleagues. In contrast, in *San Joaquin Delta Community College District* (2010) PERB Decision No. 2091, PERB held that an employee's complaints about reductions to his own teaching assignment were not protected because they were made solely for his own benefit.²⁰

¹⁸ The District's assertion that Dr. Abrahamian's cheating allegations were dismissed by the General Counsel's Office is not accurate. As explained above, certain retaliation claims were dismissed, but those dismissals have no bearing on whether Dr. Abrahamian's reports on cheating were protected under EERA.

¹⁹ The ALJ initially excluded evidence about the cheating allegations, but he later reversed that ruling and allowed both parties to present evidence on that issue.

²⁰ It is for this reason that Dr. Abrahamian's complaints about Wilson's directives about paper usage and other issues concerning Dr. Abrahamian's individual personnel disputes with Wilson are not protected under EERA.

In this case, Dr. Abrahamian testified that he reported concerns about students cheating on standardized tests to the District's superintendent, its governing board, and to both Alexandres and Wilson in June and August of 2011. As in *County of Riverside, supra*, PERB Decision No. 2090-M, Dr. Abrahamian's claims relate to teachers' job duties and possible illegal activity. These claims are therefore protected under EERA.²¹

2. Knowledge

The District admits to knowing about Dr. Abrahamian's unfair practice charge activity. Likewise, it has not presented any evidence disputing that Dr. Abrahamian reported his cheating concerns to both Alexandres and Wilson in August 2011. This is sufficient to satisfy the knowledge element of a prima facie case.

3. Adverse Action

The third element of a prima facie case is whether Dr. Abrahamian suffered an adverse employment action. 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); emphasis supplied;

fn. omitted.)

²¹ Dr. Abrahamian also filed a grievance over his transfer in June 2012. Filing grievances is protected under EERA. (*Los Angeles Unified School District* (2012) PERB Decision No. 2244.) However, this protected activity cannot form the basis for Dr. Abrahamian's retaliation claims under these facts because it occurred after the adverse actions. (*Oxnard Union High School District* (2010) PERB Decision No. 2265.)

In this case, the PERB complaint alleges two adverse actions. Dr. Abrahamian also eludes to other adverse actions as well. Each will be discussed separately below.

a. Placement on Administrative Leave

PERB has held that “the District’s imposition of involuntary [paid] leave is a form of adverse action.” (*Oakland Unified School District* (2003) PERB Decision No. 1529 (*Oakland USD*), citing *California State University, Hayward* (1991) PERB Decision No. 869-H; *California State University, Long Beach* (1987) PERB Decision No. 641-H (*CSULB*)). Therefore, placing Dr. Abrahamian on administrative leave is an adverse action in this case. The District’s arguments to the contrary are rejected.

b. Transfer to the IS Program

The PERB complaint also alleges that the District took further adverse action against Dr. Abrahamian by transferring him to the IS Program for the 2012-2013 school year. Loss of pay or benefits are not the sole factors when considering whether an involuntary transfer is objectively adverse to employment. (*Compton Unified School District* (2003) PERB Decision No. 1518 (*Compton USD*)). However, where salary, benefits, and job duties remain the same, the charging party bears the burden of proving the transfer caused some other negative change to working conditions. (*County of San Diego* (2012) PERB Decision No. 2258-M.) In other words, the charging party must “present facts demonstrating that a reasonable employee would consider the transfer an adverse action.” (*Alvord Unified School District* (2009) PERB Decision No. 2021, citing *Compton USD*.)

In *San Joaquin Delta Community College District* (1982) PERB Decision No. 261 (*San Joaquin Delta CCD*), PERB held that an employer’s reassignment of a police officer to a groundskeeper was an adverse employment action even though his salary and benefits did not change. Noting that the employee had extensive experience and training as a police officer, the

Board reasoned that a reasonable person would find the reassignment adverse because it denied the employee the ability to pursue his chosen profession.

In this case, Dr. Abrahamian's interest in teaching biology and chemistry spans more than 40 years. He is not only credentialed to teach these subjects, but also has two related doctorate degrees and has authored multiple scholarly publications on these subjects. Dr. Abrahamian also testified that he left prior school districts specifically because he was not offered biology or chemistry courses. When the District moved him to the IS program, he was no longer able to teach either course because the IS program has no laboratory sciences.

The District correctly points out that Dr. Abrahamian is qualified under the Education Code to teach in the IS program, but this assertion misses the point of why the reassignment is adverse.²² In *San Joaquin Delta CCD, supra*, PERB Decision No. 261, the employee was, no doubt, legally able to perform the duties of a groundskeeper but the assignment was adverse because it ended his career as a police officer. In this case, although the reassignment was not as drastic as in *San Joaquin Delta CCD*, Dr. Abrahamian was nevertheless precluded from pursuing his chosen profession as a career biology and chemistry teacher. A reasonable person under these circumstances would find the transfer to be adverse.²³

²² Dr. Abrahamian contends that Education Code section 44865 requires the District to obtain his consent prior to assigning him to an independent studies program. This argument was rejected in *California Teacher Association v. Central Union High School District* (1983) 141 Cal.App.3d 606, 616. The court instead found such assignments within a school district's discretion under Education Code section 35035. (But see *Mountain Empire Unified School District* (1998) PERB Decision No. 1298 (*Mountain Empire USD*), [holding that the assignment of a teacher to a continuation school was an adverse action because he did not have a specific credential for that program and opposed that assignment].) He also contends that the assignment violates the CBA between the District and the union, but did not provide evidence of which section was violated.

²³ Dr. Abrahamian also asserts that the Adult Alternative Complex was unsafe and because he was being monitored by video camera. Dr. Abrahamian has not met his burden of proving these conditions existed at the IS Program.

c. Other Adverse Actions

None of the conference summaries or letters of reprimand were alleged to be adverse actions in the PERB complaint and it is not appropriate to consider them as unalleged violations at this point. In addition to meeting the above referenced criteria for unalleged conduct, the new claim must also be timely. (*County of Riverside, supra*, PERB Decision No. 2097-M.) Here, none of those documents were discussed in Dr. Abrahamian's underlying unfair practice charge and were only referenced generally in the District's position statements. No real details about the documents were raised until the September 2012 hearing, which is more than six months from the date the conference summaries and the letters of reprimand issued. Those claims are, accordingly, untimely. (See EERA, § 3541.5(a)(1); *United Teachers of Los Angeles (Thomas)* (2010) PERB Decision No. 2150.)

Dr. Abrahamian also alleges that he was constructively discharged. PERB has previously described "constructive discharge" as when "the burden imposed on the employee must cause, and intend to cause, a change in his working conditions so difficult or unpleasant as to force him to resign." The charging party must also show "that those burdens were imposed because of the employee's [protected] activities." (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) However, PERB has declined to find a constructive discharge where it was not established that the employment relationship was severed. (*Yuba Community College District* (2007) PERB Decision No. 1936.) Here, there is no evidence in the record that Dr. Abrahamian's employment was terminated either by his own actions or by the District. Therefore, there is no constructive discharge.

4. Nexus

The fourth 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 through circumstantial evidence after considering the record as a

whole. (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278, citing *Moreland Elementary School District* (1982) PERB Decision No. 227.)

a. 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 nexus.

(*North Sacramento School District* (1982) PERB Decision No. 264.) Accordingly, PERB has found that an adverse action occurring within two months of protected activities support a finding of nexus. (*Mountain Empire USD, supra*, PERB Decision No. 1298.) In contrast, *Los Angeles Unified School District* (1998) PERB Decision No. 1300, PERB held that a time lapse of five or six months between the protected activity and the adverse actions did not suggest a causal connection

Temporal proximity, while demonstrative, is not a requirement of a prima facie case. In other words, “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.” (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096, quoting *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M.) However, in absence of close timing, greater evidence of the employer's unlawful motive is required. (See *Oakdale Union Elementary School District* (1985) PERB Decision No. 548.)

The two adverse actions in this case are close in time to Dr. Abrahamian's unfair practice charge activity. Alexandres placed him on administrative leave in February 2012, roughly two months from when he first filed his charge. Dr. Abrahamian was transferred to the IS Program in June 2012, around two weeks after the General Counsel's Office issued its complaint in the matter and scheduled the case for an informal settlement conference. This temporal proximity supports a finding of nexus.

The adverse actions were not, on the other hand, close in time to Dr. Abrahamian's reports about student cheating. According to Dr. Abrahamian, he most recently raised the cheating issue with the District in June and August 2011, around 6 months from when he was placed on administrative leave and 10 months from when he was transferred to the IS Program. This time difference does not provide circumstantial evidence of nexus.

b. Other Circumstantial Evidence of Nexus

Nexus is not established through timing alone. (*North Sacramento SD, supra*, PERB Decision No. 264.) Other circumstantial evidence is needed to demonstrate a causal connection between the protected acts and the adverse actions.

Other circumstantial criteria for establishing nexus could include an employer's inconsistent or contradictory conduct. (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S.) In this case, there were multiple inconsistencies in the manner the adverse actions were handled. For example, Alexandres stated in her February 16, 2012 letter that Dr. Abrahamian was being placed on administrative leave "due to a pending investigation." Yet, she made no mention of that investigation when testifying at the hearing about the reasons she placed him on leave. This inconsistency is evidence of nexus.

The District's conduct regarding the investigation itself, was also evidence of nexus. In *Oakland USD, supra*, PERB Decision No. 1529, the Board found circumstantial evidence of nexus where the employer placed an individual on administrative leave, pending an investigation, but never informed him of the outcome of that investigation. In this case, Alexandres admitted that the only thing she did was "gather[] the information that we already had, and it was all there." She never discussed the leave or the investigation with Dr. Abrahamian until after he had already been transferred to the IS Program. Even then, she

never formally informed him that her investigation had concluded or even that his administrative leave ended. These inconsistencies are further evidence of nexus.

In addition, there is evidence the District failed to follow its own personnel procedures. An employer's departure from existing procedures may be evidence of nexus. (*Santa Clara Unified School District* (1979) PERB Decision No. 104.) Dr. Abrahamian explained that he received multiple performance evaluations during his tenure at the District, but it is undisputed that there is only one evaluation in his personnel file.²⁴ In addition, Pimentel, Dr. Abrahamian's direct supervisor, testified that he never saw the December 2, 2011 letter of reprimand, which he found unusual given that he was Dr. Abrahamian's direct supervisor. Around that time, Pimentel felt Dr. Abrahamian was temporarily improving at least in the area of his instruction. These deficiencies are accordingly notable because they tend to conceal what might have been favorable information about Dr. Abrahamian's job performance and his ability to follow either Wilson's directives and/or the assistance plan.

For all these reasons, Dr. Abrahamian has established a prima facie case for retaliation notwithstanding the fact that not all of the protected activity occurred close in time to the adverse actions.

5. District's Burden of Proof

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 USD*, *supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Board*. (1981) 29 Cal.3d 721, 729-730.) In other words, the issue is whether the adverse action

²⁴ That evaluation was issued in 2008, prior to his transfer to WSHS. Dr. Abrahamian was rated as meeting or exceeding District expectations in all categories in that evaluation.

would have occurred “but for” the protected acts. (*Ibid.*) 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. PERB* (1991) 228 Cal.App.3d 166, 169.)

In *Fall River Joint Unified School District* (1998) PERB Decision No. 1259 (*Fall River JUSD*), 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 special education program. In *Coast Community College District* (2003) PERB Decision No. 1560 (*Coast CCD*), the Board held that a transfer was warranted where “the record was replete with examples” of the employee’s inappropriate confrontations with his supervisor and his refusal to comply with directives. (See also, *Scotts Valley Union Elementary School District* (1994) PERB Decision No. 1052.)

In contrast, in *Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista ESD*), the employer asserted that adverse actions were justified because of the charging party’s lack of “interpersonal skills.” The Board, however, held that explanation was pretext, because the evidence showed that she worked well with others and there was no evidence that the employer previously counseled or directed her to improve in that area. In *Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa CSD*), the Board held that the District’s asserted justifications for taking adverse actions were pretextual because they were either overblown, trivial, or based entirely on hearsay.

In this case, Wilson’s concerns with Dr. Abrahamian’s work performance were well-documented over the course of the 2011-2012 school year. There is no dispute that Dr. Abrahamian repeatedly demanded more paper for his instructional packets even after Wilson ordered him to either use District-approved instructional materials or have students take notes of the information in his packets. Dr. Abrahamian maintains that Wilson “did not

have the ability or intention” to understand the instructional value of his packets, but this case is not about whose approach to education was better. In *CSULB, supra*, PERB Decision No. 641-H, the Board held that an employer’s adverse actions were justified as part of the employer’s effort to “conduct [its education] program in the way determined by [the supervisors’] own judgments and preferences” and because of the employee’s expressed “resistance to accepting directions and criticism from the supervisors.” In other words, even if Dr. Abrahamian’s packets were useful education tools, his refusal to comply with Wilson’s directives was still insubordination which may constitute a legitimate non-retaliatory basis for the adverse actions.

The record is equally clear that Dr. Abrahamian’s disputes with Wilson began to spill over into instructional time. Dr. Abrahamian admitted to making statements to his students implying that he could not provide them with adequate instruction because of the lack of paper and also suggesting that the District was trying to “eliminate” him. These actions continued after Wilson and Alexandres expressly directed Dr. Abrahamian to not discuss those matters with students during instructional time. This was around the time that Wilson began receiving complaints about unproductive use of classroom time. Unlike in *Chula Vista ESD, supra*, PERB Decision No. 2221, Dr. Abrahamian was issued two counseling summaries and two letters of reprimand with specific directives for improving his behavior but Dr. Abrahamian showed no sustained improvement.²⁵ It was at this point that Alexandres felt it necessary to

²⁵ Dr. Abrahamian repeatedly argues that the counseling summaries and the letters of reprimand were “concocted” or based on “bogus” information but he offered only insignificant evidence supporting his conclusions. For example, Dr. Abrahamian points out that he and Wilson discussed Dr. Abrahamian’s hat during the September 6, 2011 conference, but that was not addressed in the following conference summary. This omission is inconsequential in light of the other more serious issues included in the document. Dr. Abrahamian also argues that it is implausible that Wilson would already have concerns about his performance so early in the 2011-2012 year. However, the timing is not suspicious under the facts presented in this case, given how soon Dr. Abrahamian demonstrated an unwillingness to comply with Wilson’s instructions.

remove Dr. Abrahamian from the classroom and place him in a different teaching environment. Because of his demonstrated lack of classroom management skills, Alexandres felt that he might be successful providing instruction to students one-on-one in the IS Program. As in *Fall River JUSD, supra*, PERB Decision No. 1259, the District's legitimate concerns about Dr. Abrahamian's classroom behavior provides a reasonable basis for the two adverse actions.

Unlike in *Jurupa CSD, supra*, PERB Decision No. 1920-M, evidence about these issues came from student and parent complaints,²⁶ Wilson and Pimentel's personal observations, and from Dr. Abrahamian's own testimony. For instance, Dr. Abrahamian and Pimentel testified relatively consistently that Dr. Abrahamian became frustrated and stopped instruction during Pimentel's February 15, 2011 classroom observation. When Pimentel directed him to continue, Dr. Abrahamian admits to making an oblique reference to the District's effort to eliminate his employment. Dr. Abrahamian also admitted making prior references to the paper issue and the District's plan to remove him from the classroom.

Dr. Abrahamian argues that the adverse actions in this case were not justified because a majority of his students at WSHS demonstrated average or above-average proficiency in biology and chemistry standardized tests in the 2011-2012 school year. This argument is unpersuasive for at least three reasons. First, the evidence about student performance is incomplete. It is unclear from the record whether the subject matter of those tests were covered during Dr. Abrahamian's classes. Nor is it clear to what degree he, or his replacement, were responsible for the test scores. In addition, contrary to Dr. Abrahamian's assertion in his closing brief, there was no evidence of whether these scores indicated any improvement in student performance. Second, there is no evidence in the record about student

²⁶ Dr. Abrahamian asserts in his closing brief that 40 parents of students were pleased with his performance as a teacher, but evidence of those parents' opinions was not produced for the record. Even if it was, the record would show that different parents had conflicting views of Dr. Abrahamian's teaching.

performance in earth sciences, another course taught by Dr. Abrahamian that year. Third, and most significantly, even if Dr. Abrahamian was directly responsible for improving student performance on test scores, it would not change the fact that he intentionally disobeyed several of Wilson's directives. In *Coast CCD, supra*, PERB Decision No. 1560, the Board recognized that the charging party in that case was a "very capable instructor," but nevertheless found his transfer was justified due to his inappropriate confrontations with his supervisor and others. The same reasoning applies here. Dr. Abrahamian's performance as a teacher does not insulate him from action by the District where it has other legitimate concerns about his behavior.

Based on a review of the record as a whole, it is concluded that the District would have placed Dr. Abrahamian on administrative leave and transferred him notwithstanding this protected activities. The District's concerns with Dr. Abrahamian's behavior persisted throughout the 2011-2012 school year. It is true, as mentioned above, that there were some inconsistencies in how the District handled the situation. But this case is not a referendum of the District's personnel practices. Rather, evidence about those practices is only relevant to the extent that it provides insight into the District's underlying motives.²⁷ In this case, any discrepancies in how the District handled its concerns about Dr. Abrahamian do not overshadow the legitimacy of the concerns themselves. The substantial record in this case shows that the District had serious doubts about whether Dr. Abrahamian could function effectively in the classroom and whether he was capable or willing to follow Wilson's directives. It was those doubts, and not Dr. Abrahamian's unfair practice charge activity or his reports about student cheating, that precipitated the adverse actions. The District has therefore

²⁷ In *Regents of the University of California* (2012) PERB Decision No. 2302-H, the Board recognized that the issue in a retaliation case is not whether the employer's actions were justified or were taken for "good cause," but whether retaliation was the true motive for the adverse actions. (Citing *City of Santa Monica, supra*, PERB Decision No. 2211-M.)

met its burden of proving that it would have taken the same adverse actions even without Dr. Abrahamian's protected activities.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-5635-E, *Asad Abrahamian v. Coachella Valley Unified School District*, is 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

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 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.)

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).)