STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LORI E. EDWARDS, Charging Party, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5753-E PERB Decision No. 2353 February 6, 2014

Appearances: Lori E. Edwards, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by William A. Diedrich, Attorney, for Lake Elsinore Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION[1]

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lori E. Edwards (Edwards) from the dismissal (attached) by the Office of the General Counsel of Edwards' unfair practice charge. The charge, as amended, alleges that the Lake Elsinore Unified School District (District) violated the Educational Employment Relations Act (EERA)[2] by unilaterally changing terms and conditions of employment, by interfering with her right to engage in protected activity and by retaliating against her because of her protected activity. These allegations are made in a post-arbitration

[1] PERB Regulation 32320, subdivision (d), provides in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [Board Review of Dismissals] shall determine whether the decision or order, or any part thereof, shall be designated as precedential." Having met none of the criteria enumerated in the regulation, the decision herein has not been designated as precedential. (PERB Regs. are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

[2] EERA is codified at Government Code section 3540 et seq. Undesignated section references are to the Government Code.

context. The charge, as amended, alleges that PERB should not defer to the arbitration decision of May 20, 2012, because the decision is repugnant to EERA.

The Office of the General Counsel dismissed the charge. The Office of the General Counsel determined that Edwards lacks standing to allege an unlawful unilateral change, an EERA violation under section 3543.5, subdivision (c), and that Edwards' charge of interference and retaliation, EERA violations under section 3543.5, subdivision (a), was untimely filed. Therefore, as the Office of the General Counsel concluded, the allegation that the arbitration decision of May 20, 2012, is repugnant to EERA cannot be reached.

The Board has reviewed the record in its entirety and has fully considered the appeal and the response thereto.[3] Based on this review, we find the warning and dismissal letters to be well-reasoned and in accordance with applicable law. Accordingly, the Board hereby adopts the warning and dismissal letters as the decision of the Board itself as supplemented below.

DISCUSSION

As the Office of the General Counsel points out, before PERB can reach Edwards' allegations that the arbitration decision is repugnant to EERA, the allegations of unlawful conduct by the District first must be assessed. Edwards' unfair practice charge breaks down into unilateral change allegations, on the one hand, and interference/retaliation allegations, on the other. Regarding the unilateral change allegations, the Office of the General Counsel determined that Edwards lacks standing. We agree with that determination and Edwards'

[3] Subsequent to the filing of the District's response, Edwards submitted a document to the Board entitled "Response to the Opposition to the Appeal of Dismissal of Charge" (Response to Opposition). On review of a dismissal, PERB Regulations provide only for the filing of an appeal and a response. (PERB Reg. 32635.) Thus, the Board did not consider Edwards' Response to Opposition in rendering its decision nor is it to be considered "filed" as part of the official case file on appeal. (See *Los Rios Community College District* (1994) PERB Decision No. 1048 [Board declined to consider charging party's supplemental brief and respondent's opposition to it, which were filed after the filing deadline].)

appeal raises no issues warranting the Board's further review of the dismissal as it concerns the unilateral change allegations.

Regarding the interference/retaliation allegations, the Office of the General Counsel determined that they are untimely because the September 2010 involuntary reassignment is well outside the six-month period preceding the filing of the unfair practice charge on October 15, 2012. Edwards asserted during the investigation of the charge that the statute of limitations should be tolled for the time the parties were engaged in the grievance and arbitration process from September 22, 2010, the date of the grievance, through May 20, 2012, the date the arbitration decision issued. The Office of the General Counsel determined, however, that tolling is not appropriate because Edwards failed to establish that her union, the Lake Elsinore Teachers Association (LETA), grieved the interference/retaliation matter,[4] or if it did, that it pursued the matter beyond the initial grievance stage. On appeal, Edwards makes several arguments in support of her position that the statute of limitations should be tolled. None has merit.

EERA section 3541.5, subdivision (a)(2) states, in relevant part: "The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery." For the statute of limitations to be tolled, the grievance must specifically place an employer on notice of the alleged violation. (*North Orange County Community College District* (1998) PERB Decision No. 1268 (*North Orange County*).) For

[4] Article 17 of the parties' collective bargaining agreement (CBA) is a section on non-discrimination. Article 17.1 provides:

> The Board shall not discriminate against any unit member on the basis of race, color, creed, age, sex, national origin, political affiliation, domicile, marital status, sexual orientation, physical handicap, membership in an employee organization or participation in the activities of an employee organization.

example, a discrimination grievance must specifically put the employer on notice that the grievant believes she was retaliated against because of her protected activity if that grievance is to become the basis for tolling. (*Peralta Community College District* (2001) PERB Decision No. 1462.) If the issue presented in the PERB unfair practice charge is different from the issue presented in the contractual grievance, tolling is not appropriate. (*Santa Monica-Malibu Unified School District* (2000) PERB Decision No. 1389; *North Orange County, supra,* PERB Decision 1268.) Finally, statutory tolling applies only during the time it takes a charging party to exhaust the contractual grievance machinery. PERB has held that the process is exhausted once a grievant ceases to pursue a claim. (*Santa Monica-Malibu; North Orange County.*)

The dismissal letter thoroughly analyzes the documents submitted by Edwards in support of her tolling argument, including the grievance, the arbitration transcript and the post-arbitration briefs, in concluding that Edwards' discrimination claim was not pursued through the grievance machinery. We will not repeat that analysis here. We will instead focus on Edwards' reliance on an e-mail message she sent to District representatives on September 16, 2010, less than a week prior to the filing of the grievance, which was admitted into evidence at the arbitration. Edwards asserts that this e-mail message provides definitive support for her position that the statute of limitations should be tolled.

The e-mail message states:[5]

[5] A copy of this message was attached along with other e-mail messages as part of Exhibit 8 to Edwards' initial unfair practice charge. It was also attached in a version containing a longer thread as Exhibit W to the first amended charge. On appeal, Edwards asserts that this message was admitted into evidence at the arbitration as Exhibit 11. Because the marked arbitration exhibits were not provided to the Office of the General Counsel during its investigation of the charge, it is unknown whether only the one message, or the longer thread, was admitted. Also, the fact that the e-mail message was admitted into evidence at the arbitration is technically a new allegation. Although new allegations may not be presented on appeal absent good cause under PERB Regulation 32635, subdivision (b), because the arbitration transcript identifies the message by date and the message itself was provided to the Office of the General Counsel during the charge investigation stage of these proceedings, we discuss it herein.

Hi Kip,

I would like to correct your count of my seniority.

According to the LEUSD Board's, DECISION OF THE BOARD OF EDUCATION, dated: August 2008, I was re-hired under Education Code 44918. Education Code 44918 states:

44918. (a) Any employee classified as a substitute or temporary employee, who serves during one school year for at least 75 percent of the number of days the regular schools of the district were maintained in that school year and has performed the duties normally required of a certificated employee of the school district, **shall** be deemed to have served a complete school year as a **"probationary employee"** if employed as a probationary employee for the following school year.

Therefore under the laws of the State of California, I was a "probationary employee" in the 2007/2008 school year. Thereby my year of full-time employment as a "probationary employee" counts towards my seniority under the terms and provisions as outlined in the Lake Elsinore Teacher Association contract.

Since, I have the Administration and the Board's attention I would like to request that all discrimination and harassment related to me stops immediately, including involuntarily transferring me (Education Codes 44111 through 44114).

My seniority date is higher than Mrs. de Graff's, a good teacher and we both would like to focus our energy and attention on teaching our students verses engaging in inefficient and wasteful activities.

I apologize if I appear curt, but I have suffered enough.

Lori Edwards
LVS Teacher
LETA

(Text in the original.)

Edwards' e-mail message does not advance her tolling argument for several reasons. First, tolling only applies to matters that are pursued through the grievance machinery. Though sent close in time to the filing of the grievance, the message cannot be considered equal to the grievance for tolling purposes. Second, even if the message were considered equal

to the grievance, it does not provide notice to the District of an EERA violation, i.e., that Edwards believed she was retaliated against because of her protected union or organizational activities or that her protected rights under EERA were interfered with.[6] Third, even if we assumed Edwards' e-mail message placed the District on notice of an EERA interference/retaliation violation, it was not pursued at arbitration. As the Office of the General Counsel concluded with respect to the grievance, assuming the e-mail message placed the District on notice of an EERA interference/retaliation violation, it was abandoned by the time the grievance reached the arbitration stage. A matter can be abandoned prior to the

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[6] In response to Edwards' message, a District representative responded, in part: "I understand you have a different account. The District is not discriminating against or harassing you." To that, Edwards responded, in part:

> I do believe you are discriminating against me because you keep changing the parameters as to how seniority is calculated and earned just so I can be transferred or reassigned.
>
> [¶ ... ¶]
>
> (3rd) your next great idea was to take away my full-time teaching as a "probationary" employee provided to me as per the LEUSD Board's decision, insisting that I had less seniority than the (white) teachers because my work was as a substitute (This theory rejects and undermines the Board's decision as well as the CA Ed Code 44918 provisions).
>
> I don't know about anyone else but I believe you are directly discriminating and attacking me.
>
> There was at least 3 other non-African American teacher's with lower seniority than me and if you were following the "LETA contract" verses coming directly after me, I would not be a part of this involuntary transfer/reassignment process at all.

(Text in the original.)

The longer thread suggests that the type of discrimination at issue relates to race, a protected class under the Fair Employment and Housing Act (§ 12900 et seq.), not to Edwards' participation in union or organizational activities, a protected right under EERA.

arbitration by some affirmative act, representation or stipulation. It can also be abandoned by simply not pursuing it at the arbitration.

Edwards argues that the Office of the General Counsel did not adequately review the arbitration transcript in concluding that her discrimination claim was abandoned by the time of arbitration. We have reviewed the arbitration transcript, which is 562 pages long, and agree with the Office of the General Counsel that Edwards' discrimination claim under Article 17.1 of the CBA was not pursued at arbitration. We have examined the page cites relied on by Edwards to support her tolling argument. We also have gone much further in examining the transcript to uncover any real basis for tolling the statute of limitations. None exists.

Edwards relies heavily on page 561 of the transcript, the second to last page. The arbitration was nearing its conclusion when the arbitrator began reviewing the exhibits to make sure everything was in order. A copy of Exhibit 11 had not yet been provided to the arbitrator. Edwards' attorney identified it as follows: "Grievant's 11 is an e-mail from Lori Edwards to Kip Meyer, Terry Harris, and Bill Cavanaugh in which she voiced an objection to her reassignment, which was 9/16/2010." At that point, the exhibit was admitted. The admission of Edwards' e-mail message at the arbitration does not change our analysis. As mentioned above, the e-mail message does not place the District on notice of an EERA interference/retaliation claim. No testimony was elicited from any of LETA's witnesses at the arbitration concerning discrimination perpetrated by the District against Edwards ***because of*** her union or organizational activities in violation of Article 17.1. For that matter, there was no testimony concerning any of the other types of discrimination prohibited under Article 17.1 either.

That a discrimination claim was not pursued at arbitration[7] is confirmed by LETA's post-arbitration brief. It neither mentions Article 17.1 nor does it argue that discrimination is at issue. LETA's post-arbitration brief states the issue to be decided as: "Whether or not the Grievant, Ms. Lori Edwards, was improperly[8] and involuntarily displaced from her first grade assignment to a fourth grade assignment based upon a misinterpretation or misapplication of the Collective Bargaining Agreement in the 2010-2011 school year?" The brief goes on to argue why the District was incorrect in not counting a year in which Edwards taught as a substitute teacher toward her seniority when the District involuntarily reassigned her to teach fourth grade. The brief is devoid of any mention, let alone hint, that LETA pursued at the arbitration a claim of discrimination under Article 17.1 of the CBA.[9]

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[7] Although Edwards argues that she was denied due process at the arbitration, there is nothing in the arbitration transcript to suggest that the arbitrator prevented LETA in any way from litigating a discrimination claim. We would agree with Edwards that the statute of limitations would be tolled through the date of the arbitration decision if LETA had litigated the issue and the arbitrator had failed to address it in his decision, but that is not the case.

[8] We reject Edwards' assertion that the word "improperly" puts the District on notice of an EERA interference/retaliation claim. Edwards relates the word "improperly" in LETA's post-arbitration brief back to her e-mail message of September 16, 2010, which references Education Code sections 44111 through 44114. These sections are encompassed within the Reporting by School Employees of Improper Governmental Activities Act (Ed. Code, §§ 44110-44114), which defines "public school employee" and "public school employer" by reference to the definitions provided in EERA. In Edwards' view, placing the District on notice of a violation under the Reporting by School Employees of Improper Governmental Activities Act is tantamount to placing it on notice of an EERA violation. Edwards' attempts to re-envision the dispute that went to arbitration as a discrimination claim through arguments such as these are unavailing.

[9] LETA summed up its opening statement at the arbitration as follows: "[S]he had the greater seniority. She should have been retained, not displaced. [¶] That's what this case is all about." The District shared LETA's understanding of the disputed issue. As argued by the District during its opening statement: "That is the arbitrator's job today, exactly how do we compute district seniority under the contract under these facts."

For all the foregoing reasons, the statute of limitations is not subject to tolling, Edwards' allegations of interference and retaliation are untimely, and the dismissal of Edwards' unfair practice charge by the Office of the General Counsel is affirmed.[10]

ORDER

The unfair practice charge in Case No. LA-CE-5753-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Banks joined in this Decision.

[10] The District contends that Edwards put forth new evidence on appeal without a showing of good cause in violation of PERB Regulation 32635. Attached to Edwards' appeal is a document entitled "Dismissal Exhibit 1," which is described as "New evidence of continuous discrimination and irreparable harm." The exhibit is an e-mail message from Edwards to Nick Powers, Val Roark and Bill Cavanaugh, copied to Juan Caballero (the union representative) and Kim Rosales, sent on Friday, September 20, 2013, regarding a meeting they had the day before. The meeting concerned an involuntary reassignment to kindergarten. Edwards asserts: "I believe these repeated targeted transfer attempts and this reassignment are in violation of my protected rights due to my union activities and PERB and I should not have been involuntarily reassigned to kindergarten."

"Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence." (PERB Reg. 32635, subd. (b).) The Board has found good cause when "the information provided could not have been obtained through reasonable diligence prior to the Board agent's dismissal of the charge." (*Sacramento City Teachers Association (Ferreira)* (2002) PERB Decision No. 1503.) Edwards did not make a showing of good cause and therefore no consideration by the Board of Edwards' new evidence is warranted. Even were we to consider it, although the e-mail message was not sent until after issuance of the dismissal, and therefore could not have been obtained prior to the dismissal of the charge, it is chronologically irrelevant to the issue whether the statute of limitations on an EERA interference/retaliation violation arising out of Edwards' involuntary reassignment of September 2010 should be tolled until the date of the arbitration decision, May 20, 2012. Edwards appears to be relying on this new evidence to support application of the continuing violation rule in an effort to avoid the statute of limitations problem. Under the continuing violation rule, a violation within the limitations period may revive an earlier violation of the same type that occurred outside the limitations period. (*California State University* (2009) PERB Decision No. 2038-H.) Those are not the factual allegations here.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1025
Fax: (510) 622-1027

September 10, 2013

Lori E. Edwards

Re: *Lori E. Edwards v. Lake Elsinore Unified School District*
Unfair Practice Charge No. LA-CE-5753-E
DISMISSAL LETTER

Dear Ms. Edwards:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 15, 2012. Lori E. Edwards (Charging Party) alleges that the Lake Elsinore Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by unilaterally changing the terms and conditions of employment, by interfering with her right to engage in protected activity, and by retaliating against her because of her protected activity.

Charging Party was informed in the attached Warning Letter dated July 8, 2013, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it on or before July 22, 2013, the charge would be dismissed.

Charging Party filed a First Amended Charge on July 24, 2013, and a Second Amended Charge on August 19, 2013.[2]

1. Unilateral Change Allegations

As discussed in detail in the July 8, 2013, Warning Letter, Charging Party lacks standing to allege violations of EERA section 3543.5(c). (*Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667 (*Oxnard*).) Although the amended Charges do not include the

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

[2] The Second Amended Charge is "additional evidence" in the form of an arbitration transcript.

allegation that the District violated EERA section 3543.5(c), the amended Charges continue to argue throughout that the District breached various articles of its collective bargaining agreement (CBA) with the Lake Elsinore Teachers Association (LETA). For the reasons discussed in the Warning Letter, all allegations that the District unilaterally changed Charging Party's terms and conditions of employment, including by violating the CBA between the District and LETA, are hereby dismissed. (*Ibid.*)

2. Interference and Retaliation Allegations

The July 8, 2013, Warning Letter also addressed Charging Party's allegations that the District violated EERA section 3543.5(a) by discriminating or retaliating against her. Because Charging Party's involuntary reassignment in September 2010 is well outside the six-month period preceding the filing of this charge, the July 8, 2013, Warning Letter informed Charging Party that these allegations are untimely. (EERA section 3541.5(a)(1); *Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.)

In the First Amended Charge, Charging Party argues that the statute of limitations should be tolled for the time the parties were engaged in the grievance and arbitration process from September 22, 2010, to May 20, 2012, the date the arbitration decision issued.

EERA section 3541.5(a)(2) states, in relevant part, "The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery." For the statute of limitations to be tolled, the grievance must specifically place an employer on notice of the alleged violation. (*North Orange County Community College District* (1998) PERB Decision No. 1268.) For example, a discrimination grievance must specifically put the employer on notice that the grievant believes she was retaliated against because of her protected activity if that grievance is to become the basis for tolling. (*Peralta Community College District* (2001) PERB Decision No. 1462.) If the issue presented in the PERB unfair practice charge is different from the issue presented in the contractual grievance, tolling is not appropriate. (*Santa Monica-Malibu Unified School District* (2000) PERB Decision No. 1389; *North Orange County Community College District*, *supra*, PERB Decision No. 1268.)

In the present case, the original grievance filed on September 22, 2010, alleges, in relevant part:

> Further, the District violated Contract Article 17 by specifically targeting and discriminating against the unit member. First, the District attempted to involuntary [*sic*] transfer Lori Edwards in 2009 (Butterfield Elementary School) in violation of the Contract. Second, in early September 2010, the District initiated a subsequent attempt to Involuntary [*sic*] Transfer Lori Edwards from her current site (Lakeland Village School). Third, the

> District has now Involuntary [*sic*] Reassigned Lori Edwards *in violation of the contract.* In all three cases above, the District is in full knowledge of the completed paid service credits for Lori Edwards, Yet the District continues to target Lori Edwards for Involuntary Transfers and Involuntary Reassignments in violation of Article 17.

[Emphasis in original.]

Article 17.1 of the CBA is a broad non-discrimination clause stating:

> The Board shall not discriminate against any unit member on the basis of race, color, creed, age, sex, national origin, political affiliation, domicile, marital status, sexual orientation, physical handicap, membership in an employee organization or participation in the activities of an employee organization.

The September 22, 2010, grievance does not describe with any specificity what kind of discrimination was alleged to have occurred. The mere citation to Article 17 is not sufficient to put the District on notice that the grievant believed that she was being retaliated against because of her protected employee organization activity, given the myriad other forms of discrimination it protects against. Charging Party has therefore not provided sufficient facts showing that tolling is appropriate under these circumstances. (*Peralta Community College District*, *supra*, PERB Decision No. 1462.)

Even supposing the grievance form's citation to Article 17 was sufficient to put the District on notice of the allegation presented in this unfair practice charge, tolling through May 20, 2012, is not appropriate. This is because the arbitration decision makes no reference to any discrimination or interference claims. If such a grievance was ever brought, it was abandoned no later than March 1, 2012, with the filing of Charging Party's arbitration brief,[3] as discussed further below.

In the Second Amended Charge, Charging Party states, "In the Charging Party's opening statement, final brief, and throughout the arbitration proceedings the Charging Party addresses the due process, discrimination, and interference allegations against the respondents (See also AT pages 22 through 24 as example.)" Page 22 of the arbitration transcript contains part of the grievant's opening statement, including:

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[3] LETA's post-arbitration brief is dated August 23, 2011, which predates the arbitration hearing by one week. Because the brief cites to pages of the arbitration transcript, this is presumed to be a typographical error. The District's post-arbitration brief was filed on March 1, 2012. LETA's brief is presumed to have been submitted simultaneously to the District's, at the latest.

> The evidence will also show that throughout the last two years, for some reason – and you will have to make that determination for yourself if the evidence so shows – Ms. Edwards has always been the one who's been selected to be either displaced or reassigned.

This suggestion of some unspecified singling-out of Charging Party is not the same as an allegation that the District involuntarily transferred Charging Party because of her prior protected activity.[4] The arbitration hearing occurred on August 30 and 31, 2011, more than a year before the instant charge was filed. Given that Charging Party has provided no other examples of the prosecution of such claims, Charging Party has not met her burden to show that the allegation is timely filed. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.)

LETA's arbitration brief, the submission date for which is unclear, also fails to mention anything regarding interference or discrimination.

Statutory tolling pursuant to EERA section 3541.5(a)(2) applies only during the time it takes a charging party to exhaust the contractual grievance machinery. PERB has held that the process is exhausted once a grievant ceases to pursue the claim. (*Santa Monica-Malibu Unified School District*, *supra*, PERB Decision No. 1389.) Because Charging Party has not shown that LETA continued to pursue the claim for discrimination or interference beyond the initial grievance stage, if indeed such a claim was ever brought, tolling through May 20, 2012, is not appropriate. (*Ibid.*; *North Orange County Community College District*, *supra*, PERB Decision No. 1268.)

For these reasons, Charging Party has not alleged sufficient facts showing that the claims for discrimination and interference in violation of EERA section 3543.5(a) are timely filed. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 1929.) These allegations are hereby dismissed.

3. Repugnancy

As discussed in the July 8, 2013, Warning Letter, before PERB can determine whether an arbitration decision is repugnant to the Act, the charging party must first establish that the respondent has engaged in unlawful conduct. (*Ventura County Community College District* (2009) PERB Decision No. 2082.) An allegation that an arbitration decision is repugnant to

[4] Based on the concordances to the 562-page arbitration transcript, the words "discrimination," "retaliation," or "interference," were never uttered during the two-day hearing. "EERA" appears twice: once in the context of a discussion of whether school principals are in the certificated bargaining unit; and once in a discussion of whether school district regulations have to comport with collective bargaining agreements.

the Act is an element of the post-arbitration deferral standard, not a separate cause of action or grounds for PERB review. (*Ibid.*)

Because Charging Party lacks standing to allege violations of EERA section 3543.5(c), and has not filed a timely charge for a violation of EERA section 3543.5(a), the allegation that the arbitration decision issued on May 20, 2012, is repugnant to EERA cannot be addressed. (*Ventura County Community College District*, *supra*, PERB Decision No. 2082.)

Right to Appeal

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

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

The Board's address is:

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

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

Service

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

may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

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

Final Date

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

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Daniel Trump
Regional Attorney

Attachment

cc: Mark W. Thompson, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: 510-622-1025
Fax: (510) 622-1027

July 8, 2013

Lori E. Edwards

Re: *Lori E. Edwards v. Lake Elsinore Unified School District*
Unfair Practice Charge No. LA-CE-5753-E
WARNING LETTER

Dear Ms. Edwards:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on October 15, 2012. Lori E. Edwards (Charging Party) alleges that the Lake Elsinore Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by unilaterally changing the terms and conditions of employment, by interfering with her right to engage in protected activity, and by retaliating against her because of her protected activity.

The charge alleges the following violations, verbatim:

> Unilateral change in the determination of a bargaining unit member
> Unilateral change in the determination of district seniority
> Unilateral change transfer and reassignment policies
> Unilateral change in the terms and conditions of employment
> Scope and Representation – Failure to meet and negotiate salary
> Arbitration award is repugnant to Educational Employment Relations Act
> Violation of right to participate and exercise protected rights
> Interference, adverse actions, discrimination, and reprisals

The undersigned Board Agent has reviewed the statement of facts and supporting documentation included with the charge. The statement of facts is composed almost entirely of legal conclusions. An effort has been made to decipher these allegations and summarize them as follows.

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

Charging Party is an employee of the District in the certificated bargaining unit exclusively represented by the Lake Elsinore Teachers Association (LETA). She was originally hired in August 2003. Charging Party continued in her position until August 2006, when she resigned. Charging Party states that she resigned because she needed to care for her ailing daughter, and the District denied her request for leave under the Family and Medical Leave Act (FMLA).[2]

In August 2007, Charging Party was rehired by the District. The nature of Charging Party's appointment for the 2007/2008 school year is a central issue of contention in this case. For present purposes, it is undisputed that the District classified Charging Party as a day-to-day substitute for the entire 2007/2008 school year and paid her accordingly. Charging Party returned to the District for the 2008/2009 school year, as a permanent, full-time teacher. She continued in that position, teaching first grade, for the 2009/2010 school year.

At the beginning of the 2010/2011 school year, the District needed to reassign one teacher from the first grade to the fourth grade. Pursuant to Article 6.6 of the collective bargaining agreement between LETA and the District, an "involuntary reassignment" from one grade level to another must be in accordance with "Least District Seniority." It appears that none of the first grade teachers volunteered for the fourth grade assignment, and so the District initiated the involuntary reassignment process. Charging Party was informed at some point, that the District intended to involuntarily transfer her to the fourth grade assignment.

The District concluded that Charging Party had the least "District seniority" of the first grade teachers. On September 21, 2010, LETA filed a grievance on behalf of Charging Party, alleging that the District violated the collective bargaining agreement when it involuntarily reassigned Charging Party, rather than another employee, Sherry de Graaf (de Graaf) to the fourth grade assignment.

The grievance was ultimately submitted to arbitration. On May 20, 2012, arbitrator Robert Bergeson issued a decision denying the grievance. On October 15, 2012, Charging Party filed the instant unfair practice charge.

Charging Party's Burden

PERB Regulation 32615(a)(5) requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." To do so, the charging party should include sufficient facts that describe the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

[2] The FMLA is codified at 29 U.S.C. 2601 et seq.

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

Discussion

As previously noted, attached to the charge is a "statement of facts" consisting almost entirely of legal conclusions. These are not sufficient to state a prima facie case. (*Charter Oak Unified School District, supra*, PERB Decision No. 873.) The listed purported violations of EERA, quoted above, are themselves conclusory. It is unclear from the charge what factual allegations should be relied on to support the listed allegations. The undersigned Board Agent has attempted to address Charging Party's allegations pursuant to PERB Regulation 32620(b)(1)[3] by organizing the charge into the following two[4] claims:

1. The District unilaterally changed terms and conditions of employment, including salary, seniority, reassignment criteria, and bargaining unit composition, when it involuntarily reassigned Charging Party to teach fourth grade in September 2010. PERB should not defer to the arbitration decision issued on May 20, 2012 because it is repugnant to the Act.

2. The District involuntarily reassigned Charging Party to teach fourth grade in September 2010 because of Charging Party's

[3] PERB Regulation 32620(b)(1) states that in processing an unfair practice charge, a Board Agent has the powers and duties to "[a]ssist the charging party to state in proper form the information required by section 32615."

[4] Although Charging Party states that she is presenting four separate unilateral change allegations, and an additional allegation that the District failed "to meet and negotiate salary," it appears that the only change in District policy at issue was the September 2010 decision to involuntarily reassign Charging Party. Although Charging Party presents the purported repugnancy of the May 20, 2012 arbitration award as a separate violation, such a claim is not within the scope of the Act, as discussed further below. The retaliation and interference claims are apparently distinct.

> protected activity, and so interfered with her right to participate in protected activity.

For the reasons that follow, each of these allegations must be dismissed.

1. Post-arbitration Deferral and Repugnancy Review under EERA

EERA section 3541.5(a) states that PERB shall not "[i]ssue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration," and that PERB "shall have discretionary jurisdiction to review the settlement or arbitration award reached pursuant to the grievance machinery solely for the purpose of determining whether it is repugnant to the purposes [of EERA]." In those circumstances, PERB limits its review solely to the question of whether the arbitration decision is "repugnant" to the Act. (*Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a.)

However, before PERB can determine whether an arbitration decision is repugnant to the Act, the charging party must first establish that the respondent has engaged in unlawful conduct. (*Ventura County Community College District* (2009) PERB Decision No. 2082.) An allegation that an arbitration decision is repugnant to the Act is an element of the post-arbitration deferral standard, not a separate cause of action or grounds for PERB review. (*Ibid.*) Therefore, before PERB can reach Charging Party's allegations that the May 20, 2012 arbitration decision was repugnant to EERA, the allegations of unlawful conduct by the District must be assessed.

2. Charging Party Lacks Standing for Unilateral Change Allegations

Unilateral changes to the terms and conditions of employment are per se violations of EERA section 3543.5(c), which states that a public school employer shall not "[r]efuse or fail to meet and negotiate in good faith with an exclusive representative." The right inherent in this section of the Act belongs to the exclusive representative.

PERB has long held that individual employees lack standing to assert violations of section 3543.5(c). (*Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667 (*Oxnard*).) Because the rationale behind this rule is pertinent to issues presented in the instant case, it will be discussed in some detail.

In *Oxnard*, the Board discussed the concept of exclusivity of representation as follows:

> The purpose of EERA is to promote the improvement of employer-employee relations by recognizing one employee organization as the exclusive bargaining representative of the employees in an appropriate unit. Under the Act, we find no corresponding individual employee bargaining rights.

(*Oxnard School District (Gorcey and Tripp)*, *supra*, PERB Decision No. 667 [internal quotations and citations omitted].) Thus, the employer's duty to negotiate in good faith is owed only to the exclusive representative employee organization. (*Ibid.*) Where an individual employee alleges that the employer has failed to fulfill its statutory duty to bargain in good faith, "the collective bargaining process is, of necessity, interfered with." (*Ibid.*)

Charging Party therefore lacks standing to allege violations of EERA section 3543.5(c). All allegations that Respondent unilaterally changed various terms and conditions of employment when it involuntarily reassigned Charging Party to teach fourth grade in September 2010 will be dismissed. (*Oxnard School District (Gorcey and Tripp)*, *supra*, PERB Decision No. 667.) Any other allegations that Respondent failed to negotiate any terms or conditions of employment will similarly be dismissed. (*Ibid.*)

Because Charging Party lacks standing before PERB to allege that Respondent's conduct addressed by the arbitrator in the May 20, 2012 decision was unlawful, her allegation that the decision is repugnant to EERA cannot be addressed. (*Ventura County Community College District*, *supra*, PERB Decision No. 2082.)

3. Interference and Retaliation

The charge states, verbatim:

> Throughout her employment the Charging Party has been an active LETA member, director, site representative, grievance team member, and executive board member. By its own actions and those of its agents, the Superintendent, and Assistant Superintendent, have interfered with, restrained, coerced, imposed or threated to impose reprisals and has discriminated against the Charging Party because of her right to participate and exercise her protected rights (resulting in an involuntary reassignment)....

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*).) 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.)

Charging Party appears to allege that her September 2010 involuntary reassignment was an adverse action taken by the District because of her exercise of protected rights. However, as noted above, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board, supra*, 35 Cal.4th 1072.) Because September 2010 is well outside the six-month period preceding the filing of the charge, the interference and retaliation allegations based on Charging Party's reassignment are untimely and will be dismissed. (*Ibid.*) The sufficiency Charging Party's allegations vis-à-vis the *Novato* standard need not be addressed.

For these reasons the charge, as presently written, does not state a prima facie case.[5] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before July 22, 2013,[6] PERB will dismiss your charge.

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[5] 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.*)

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

If you have any questions, please call me at the above telephone number.

Sincerely,

Daniel Trump
Regional Attorney

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