STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JUANA LORENA HERNANDEZ, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3025-E PERB Decision No. 2415 March 4, 2015

Appearances: Rosenquest & Associates by Nils Rosenquest, Attorney, for Juana Lorena Hernandez; William M. Quinn, Jr., Senior Deputy General Counsel, for San Francisco Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION[1]

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Juana Lorena Hernandez (Hernandez) of PERB's Office of the General Counsel's dismissal (attached) of her unfair practice charge. Hernandez's charge, as amended, alleges that the San Francisco Unified School District (District) retaliated against Hernandez for exercising rights protected by the Educational Employment Relations Act (EERA).[2]

[1] PERB Regulation 32320(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 of Regs., tit. 8, § 31001 et seq.)

[2] EERA is codified at Government Code section 3540 et seq. While Hernandez fails to allege which section of EERA was violated, the Board, upon a review of the charge, may determine under what section the charge should be analyzed. (*Los Banos Unified School District* (2007) PERB Decision No. 1935 [where the charging party fails to allege that any

We have reviewed the unfair practice charge, the amended charges, the appeal, the District's responses thereto and the warning and dismissal letters. We affirm the Office of the General Counsel's dismissal of Hernandez's charge.

PROCEDURAL HISTORY

On July 17, 2013, Hernandez filed her initial unfair practice charge. On August 22, 2013, the District filed its initial position statement. On February 27, 2014, Hernandez filed her first amended charge. On March 14, 2014, the District filed its response. On May 23, 2014, the Office of the General Counsel sent Hernandez a warning letter. On June 23, 2014, Hernandez filed a second amended charge. On July 2, 2014, the District filed its response. The Office of the General Counsel dismissed Hernandez's charges on August 4, 2014. Hernandez timely filed an appeal on September 15, 2014. The District filed its opposition to Hernandez's appeal on October 3, 2014.

FACTS[3]

The District is a public school employer within the meaning of EERA section 3540.1(k). Hernandez is employed by the District as a special education paraprofessional in the Community Access and Transition (CAT)[4] program at Thurgood Marshall High School (TMHS). Hernandez is a classified employee of the District and a public school employee within EERA section 3540.1(j).

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specific section of the Government Code has been violated, a Board agent, upon a review of the charge, may determine under what section the charge should be analyzed].)

[3] At this stage of the proceedings, we assume, as we must, that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB].)

[4] Based on Hernandez's allegations, the CAT program appears to provide for off-campus activities and classes.

Sometime in October of 2010, a food bank operated by the San Francisco Young Men's Christian Association (YMCA) filed a complaint about Hernandez with the District. It appears that Hernandez was banned from the food bank. On or about September 12, 2011, City College of San Francisco (CCSF) informed the District that Hernandez was banned from all of CCSF's campuses. TMHS' CAT students perform volunteer services at the food bank and attend classes and training at CCSF. As a result of the bans, the District no longer sent Hernandez to the food bank or CCSF with her students.

During the 2012-2013 school year, Hernandez was assigned to the classroom of Elizabeth Bell (Bell).[5] On or about March 6, 2013, Hernandez asked to attend the Individualized Education Program (IEP)[6] team meeting for one of Hernandez's assigned students. Bell refused Hernandez's request to attend the meeting. Hernandez objected to her exclusion from the meeting to TMHS school administrators who refused to intervene. Hernandez then sought the assistance of her union representative.[7] Hernandez's union representative contacted TMHS Assistant Principal John W. Atchinson (Atchinson).[8] Atchinson ordered that Hernandez be allowed to attend the IEP meeting.

At the conclusion of the IEP team meeting, Bell apparently angry that Hernandez was allowed to attend the meeting, told Hernandez, "I am the teacher and your evaluation is coming up." On the evening of March 6, 2013, Bell sent an e-mail to TMHS administrators,

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[5] Bell was a substitute teacher.

[6] An IEP is a written statement for a special education student developed, reviewed and revised by the student's instructor and a team of appropriate professionals with input from his or her parents and specifies the student's academic goals and the method to obtain these goals. (See 34 Code of Federal Regs. 300.20 et seq.)

[7] Hernandez's union was not identified in the charges or the District's responses.

[8] Atchinson is also Hernandez's supervisor.

Hernandez's union representative and Hernandez alleging that Hernandez had threatened Bell before the IEP team meeting.

On or about March 7, 2013, Hernandez was called into Atchinson's office. Atchinson told Hernandez that he had a witness statement corroborating Bell's threat accusation. Hernandez alleges that Atchinson did not provide her with a copy of the witness statement. However, it is unclear from the charge whether Hernandez ever requested a copy of the witness statement from Atchinson.

Subsequently, on March 19, 2013, Hernandez was formally reprimanded by the District for threatening Bell. Hernandez requested a follow-up meeting with the TMHS principal, but Bell refused to attend and no follow-up meeting took place.

From approximately April 1 to May 30, 2013, Hernandez was on disability leave. Hernandez alleges that she received a negative evaluation from Atchinson while she was on leave and that the evaluation was based on Bell's observations of her performance.[9] The District subsequently denied Hernandez summer school employment during the Summer of 2013. Hernandez alleges that the denial of summer employment in 2013 was based on the negative evaluation she received while she was on leave.

[9] Hernandez submitted a copy of her April 15, 2013, evaluation for the first time with her appeal. Hernandez claims that good cause exists for her failure to submit to PERB with her charge a copy of her April 15, 2013, evaluation because she was unable to obtain a copy of the evaluation before filing her charge. It appears that Hernandez did obtain a copy of the evaluation from the District at some point after filing her first amended charge, but before filing her second amended charge. Hernandez claims she did not submit the April 15, 2013, evaluation with her second amended charge "because the overall 'unsatisfactory' rating had been alleged along with the defects and violated procedures." (Hernandez Appeal, p. 4, fn. 1.) We are not convinced that this exculpates her failure to submit a key piece of evidence. We determine, therefore, that Hernandez has failed to show good cause under PERB Regulation 32635(b) to allow her to submit for the first time on appeal this new supporting evidence regarding her April 15, 2013, evaluation.

On or about October 18, 2013, Atchinson informed Hernandez that she had been placed on probation[10] and asked her to sign her evaluation.[11] Hernandez refused to sign the evaluation and Atchinson told her to "get the hell out" of his office.

During the 2013-2014 school year, the TMHS special education class had a new classroom Teacher, Marc Ventre (Ventre). At some point during the Fall 2013 semester, Ventre informed Hernandez that he planned to give her an "Outstanding" evaluation. Subsequently, on or about November 22, 2013, Atchinson met with Ventre to discuss Hernandez's evaluation and allegedly disclosed to Ventre that Hernandez had received an "unsatisfactory" evaluation from Bell the previous year. Hernandez alleges that on December 6, 2013, she received from Ventre a "Satisfactory" overall evaluation.

On December 11, 2013, Atchinson sent Hernandez an e-mail stating:

> It was brought to my attention today that you refused to work with the student that you have been assigned to work with as a one on one in the way you were assigned by Mr. Ventre. I understand that you expressed that working in the community alone with Andy is a violation of your contractual rights. I found no such reference in the contract to support such an assertion. However, if I overlooked it I would be happy to have you bring the specific citation to my attention. In the meantime this blatant refusal to accept your work assignment as assigned by your supervising teacher is insubordination and should it continue will be grounds for further discipline. Please continue supporting Andy in the community in whatever manner Mr. Ventre sees fit.

[10] We employ the terminology used by Hernandez in her charge. We understand probation in this sense to be some sort of negative employment status which may have a bearing on Hernandez's continued employment with the District and do not equate the term with "probationary" as that term is used in the California Education Code section 45301.

[11] Hernandez alleges that Atchinson asked her to sign a "new evaluation." There was no allegation that a second evaluation took place between October 18, 2013, and the Spring of 2013, so it appears that the "new evaluation" is the evaluation that Hernandez submitted for the first time on appeal.

Hernandez alleges that she merely raised a safety issue with Ventre which Atchison misconstrued as a refusal to accept her work assignment.

DISMISSAL

The Office of the General Counsel dismissed Hernandez's charge on August 4, 2014. The Office of the General Counsel applied PERB's analysis for retaliation and discrimination claims: the charging party must show that: (1) the employee exercised rights protected under EERA; (2) the employer had knowledge that the employee exercised EERA protected rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action because of the employee's exercise of protected rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

Untimely Allegations

The Office of the General Counsel determined that several incidents alleged by Hernandez fell outside of EERA's six-month limitations period and therefore were not timely alleged. Hernandez's bans from the YMCA food bank and the CCSF campuses occurred in 2010 and 2011. Therefore, the Office of the General Counsel determined that the allegations arising from these events—even if they alleged some sort of action attributable to the District—were well outside the limitations period for a charge filed in July of 2013 and were dismissed. The Office of the General Counsel also dismissed as untimely an allegation that Hernandez had received an "informal warning" via e-mail in November 2012.

The Events of March and April 2013

Hernandez alleged that she sought the assistance of a union representative in her dispute with Bell over attending the IEP team meeting and that both her March 19, 2013, formal reprimand and the Spring 2013, negative evaluation were a direct response to Hernandez's invocation of her protected rights. The Office of the General Counsel

determined: (1) that Hernandez had failed to establish that she had received a negative evaluation in "April or May 2013"; (2) even if Hernandez received a negative evaluation in April 2013, she had not demonstrated that the District possessed an unlawful motive in giving her a negative evaluation; and (3) aside from timing, Hernandez had not alleged facts sufficient to show that her March 19, 2013, formal reprimand was a result of her exercise of protected rights.

In addition, the Office of the General Counsel determined that any unlawful motive on Bell's part could not be attributed to Atchinson (Hernandez's supervisor) under a theory of subordinate bias liability or a "cat's paw" theory.[12] The Office of the General Counsel stated that:

> the unlawful motive of a supervisor or other lower-level official may be imputed to the decision maker responsible for authorizing an adverse action against the charging party, when: (1) the lower-level official's recommendation, evaluation, or report was motivated by the employee's protected conduct; (2) the lower-level official intended for his or her conduct to result in an adverse action; and (3) the lower-level manager's conduct was a motivating factor or proximate cause of the decision to take adverse action against the employee. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M.) The basic rationale for imputing the unlawful motive of the supervisor or lower-level official to an uninformed and otherwise innocent decision maker is that, by providing inaccurate, biased or incomplete information about the charging party, the supervisor or lower-level manager has effectively tainted the decision-making process for the employer as a whole.

(Dismissal Ltr., pp. 4-5.) However, the Office of the General Counsel did not apply subordinate bias liability or cat's paw theory to Bell, because it determined that Bell could not be considered Hernandez's supervisor under PERB precedent (see *Redlands Unified School District* (1982) PERB Decision No. 235 (*Redlands*)) and therefore the theory was inapplicable.

[12] Cat's paw refers to an innocent or unwitting person or entity being used as a conduit to accomplish another's purpose. (See *Shager v. Upjohn Co.* (7th Cir. 1990) 913 F.2d 398, 405.)

The Events of December 2013

The Office of the General Counsel determined that Atchinson's disclosure to Ventre of Hernandez's prior "unsatisfactory" evaluation and Ventre's subsequent "Satisfactory" evaluation of Hernandez on December 6, 2013, did not constitute adverse actions. (Citing *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S [an overall positive performance evaluation that contains some written comments and constructive criticism does not transform an otherwise positive evaluation into an adverse action]; *Palo Verde Unified School District* (1988) PERB Decision No. 689 [objective test applied to determine whether District's action resulted in an injury to the employee]; *State of California (Department of Parks and Recreation)* (1994) PERB Decision No. 1031-S [no adverse action because charge did not allege facts establishing how (using an objective test) the employer's disclosing confidential information to co-workers caused harm or had impact on the employee's employment].)

The Office of the General Counsel determined that the December 11, 2013, e-mail message from Atchinson to Hernandez could be considered an adverse action, because it threatened future discipline, but determined that Hernandez's charge did not allege facts demonstrating that the e-mail message was in response to protected activity. The Office of the General Counsel determined that Hernandez had raised an issue regarding "student safety concern" with Ventre which led to the December 11, 2013, e-mail from Atchinson. The Office of the General Counsel determined that raising student safety concerns is not protected activity under EERA. (Citing *Coachella Valley Unified School District* (2013) PERB Decision No. 2342.)

Race and National Origin Claims

In the warning letter issued on May 23, 2014, the Office of the General Counsel warned Hernandez that PERB lacked jurisdiction over race and national origin allegations included in her initial and first amended charge. Hernandez did not repeat the race and national origin allegations in her second amended charge and the Office of the General Counsel dismissed these allegations for lack of jurisdiction.

Office of the General Counsel's Conclusion

The Office of the General Counsel determined that Hernandez's allegations supported: (1) one instance of protected activity when she sought union assistance concerning the March 2013 IEP meeting; and (2) two adverse actions in the March 19 and December 11, 2013, reprimands. The Office of the General Counsel determined, however, that Hernandez had failed to demonstrate any nexus between her protected activity and the adverse actions and on that basis dismissed her charge.

APPEAL

On appeal, Hernandez challenges the Office of the General Counsel's determinations regarding nexus. Hernandez argues that the District's adoption or ratification of a teacher's retaliatory acts forms a sufficient nexus for finding an unfair practice and, moreover, that a special education classroom teacher satisfies the definition of supervisory employee under EERA section 3540.1(m)[13] because "the special education classroom teacher directs and

[13] Under EERA section 3540.1(m):

> "Supervisory employee" means an employee, regardless of job description, having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or the responsibility to assign work to and direct them, or to adjust their grievances, or effectively recommend that action, if, in connection with the foregoing functions, the exercise of that authority is not of a

assigns work to the paraprofessional and effectively recommends actions concerning the paraprofessional's assignments, rewards (evaluations), and discipline." (Hernandez Appeal, pp. 6-7.) Hernandez urges the Board to limit *Redlands, supra,* PERB Decision No. 235 to unit determination cases and not apply its holding that classroom teachers are not supervisory employees to alleged retaliation cases.

Hernandez does not appeal the Office of the General Counsel's determination regarding the untimeliness of her CCSF and YMCA food bank allegations or the dismissal of her race and national origin discrimination claims. Therefore, the allegations regarding her bans from CCSF and the YMCA food bank as well as her race and national origin discrimination claims are not before us and the dismissal of these allegations is final.

The District opposes Hernandez's appeal on the grounds that: (1) the actions she complains of are not unlawful; (2) the actions complained of cannot be attributed to the District; and (3) her claims are time-barred. The District urges the Board to affirm the dismissal.

DISCUSSION

Standard of Review

Because this case is an appeal from a dismissal and refusal to issue a complaint by the Office of the General Counsel, our inquiry at this stage is focused solely on the sufficiency of Hernandez's allegations. We test Hernandez's allegations against the legal standards for a violation of EERA, not against contrary allegations of the District, even where those contrary allegations may be more persuasively stated. We do not resolve conflicting allegations. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489.) Instead, we refer

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merely routine or clerical nature, but requires the use of independent judgment.

them to a hearing and ultimate resolution following findings by an administrative law judge (ALJ). (*Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*).)

The question presented by Hernandez's appeal is whether Hernandez alleged a prima facie case that the District retaliated against her for exercising rights protected under EERA by issuing an unsatisfactory work evaluation, placing her on probation, denying her summer school employment and issuing her two reprimands.

Retaliation or Discrimination under EERA

In order to establish a prima facie 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 adverse action because of the employee's exercise of protected rights. (*Novato, supra,* PERB Decision No. 210.) An employer's threats to impose reprisals, discriminate, or otherwise interfere with, restrain, or coerce employees because of the exercise of those EERA protected rights are also adverse actions. (*Los Angeles Unified School District* (2010) PERB Decision No. 2124.)

Exercise of EERA Protected Rights

Seeking the assistance of a union representative in a workplace dispute is a right protected under EERA. (*County of Riverside* (2011) PERB Decision No. 2184-M [seeking the assistance of the exclusive representative in connection with a workplace issue is protected activity]; *Santa Clara Unified School District* (1979) PERB Decision No. 104 [reliance on an employee organization's support and advice is protected activity].) Therefore, we conclude with the Office of the General Counsel that Hernandez has sufficiently alleged that she engaged in protected activity when she sought union assistance in resolving her dispute over attending the IEP team meeting.

Employer Knowledge

Atchinson is Hernandez's supervisor and as the assistant principal at TMHS he is a supervisory employee of the District under EERA section 3540.1(m). Hernandez alleges that Atchinson was contacted by the union regarding the IEP team meeting dispute and that Atchinson responding to the union representative's demand, himself placed Ms. Hernandez in the IEP. Therefore, we conclude that Hernandez has sufficiently alleged that the District, generally, and her supervisor, specifically, had knowledge that she sought union assistance in her dispute over attending the IEP team meeting.

Adverse Actions

We agree with the Office of the General Counsel that the District took adverse actions on March 19, 2013, when it reprimanded Hernandez based on Bell's threat allegation and on December 11, 2013, when it sent Hernandez an e-mail regarding Hernandez's alleged insubordination and threatened future discipline.

The Office of the General Counsel determined that it was unclear whether Hernandez's Spring 2013 evaluation constituted an adverse action. The Office of the General Counsel noted that Hernandez did not allege with any specificity the nature of the evaluation and only supplied a conclusory characterization that it was "negative." The Office of the General Counsel took notice of the contract provision that Hernandez supplied to PERB as part of a separate unfair practice charge against her union to determine that "negative" was not part of the terminology used to describe the actual ratings used in performance evaluations.

While Hernandez does often refer to her Spring 2013 evaluation as a "negative evaluation," she also refers to it as "unsatisfactory" in her first amended charge. In addition, there is an inference that the Spring 2013 evaluation was adverse based on Hernandez's allegation that she did not receive summer employment because of the evaluation. Hernandez

also alleged that she may have been placed on probation as a result of the Spring 2013 evaluation. Therefore, we conclude that her allegations when viewed in the light most favorable to Hernandez sufficiently allege that her Spring 2013 evaluation was adverse. In addition, by alleging that the District denied her employment during the Summer of 2013, Hernandez has sufficiently alleged that she has suffered an adverse action. Finally, we conclude that Hernandez's allegation that Ventre's evaluation of her performance during the Fall of 2013 was downgraded from "Outstanding" to "Satisfactory" as a result of Atchinson's conversation with Ventre is conclusory and therefore unpersuasive.[14]

Nexus

As an initial matter, we note that Hernandez did not allege that Atchinson–her titular supervisor and unquestionably a supervisory employee of the District under section 3540.1(m)–discriminated against her for seeking union assistance with the IEP team meeting. Consequently, the Office of the General Counsel refused to issue a complaint regarding Hernandez's Spring 2013 evaluation largely on the ground that Bell, a classroom teacher and not Atchinson, was the person alleged to have the retaliatory motive and Bell's unlawful motive could not be imputed to Atchinson. According to the Office of the General Counsel:

> The basic rationale for imputing the unlawful motive of the supervisor or lower-level official to an uninformed and otherwise innocent decision maker is that, by providing inaccurate, biased or incomplete information about the charging party, the supervisor or lower-level manager has effectively tainted the decision-making process for the employer as a whole.

[14] While the Board has previously determined that satisfactory evaluations are not adverse, we do not agree that a "Satisfactory" evaluation can never be an adverse action. (*State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, adopting the Proposed Dec., p. 33 [a reasonable person could conclude that a performance report which included some, though not a majority of, substandard ratings had an adverse impact on employment].)

(Dismissal Ltr., pp. 4-5, citing *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M.) The Office of the General Counsel reasoned that because classroom teachers have long been held by PERB not to be the supervisors of the classified personnel they "direct incidentally to the performance of their professional duties," classroom teachers could not be considered supervisory employees under EERA and their actions could not be imputed to the employer. (Dismissal Ltr., p. 5, citing *Redlands*, *supra,* PERB Decision No. 235.)

Citing NLRB authority, the decision in *Redlands, supra,* PERB Decision No. 235 determined that employees' "input into the decisions to hire, fire, discipline or promote" other employees did not make such input supervisory because the input was not given in the interests of their employer rather than insuring that, consistent with their professional responsibilities, their workplace was staffed with competent personnel. (*Redlands*, *supra,* PERB Decision No. 235, Proposed Dec., p. 11.) In addition, *Redlands* determined that the "quasi-'supervisory'" power exercised by classroom teachers was exercised too infrequently to "justify a finding of 'supervisory' status." (*Id.* at Proposed Dec., p. 13.)

Moreover, with regard to involvement in the evaluation process itself, PERB has determined:

> The Board has noted that final decisions regarding hiring, discipline and salaries are traditionally reserved to persons far removed from the employee's immediate supervisor. [Citations omitted.] Therefore, the ability to indirectly, but effectively, bring about changes in employment status, usually through the evaluation process, is accorded great weight. . . . However, conducting evaluations or effectively recommending the outcome of the evaluation process is only indicative of supervisory status when it can be shown to have an effect on promotions and terminations and when it is not subject to substantial review.

(*West Contra Costa Unified School District* (2000) PERB Decision No. 1404.)

Redlands, *supra,* PERB Decision No. 235 was a unit determination case primarily concerned with determining whether certificated classroom teachers and classified teaching

assistants could be represented by the same employee organization under EERA. Hernandez has failed to allege facts or provide documentation that, unlike the classroom teachers in *Redlands*, special education classroom teachers at TMHS use independent judgment, in the interest of the employer, to perform, or effectively make recommendations concerning the performance of, one of the supervisorial functions or duties enumerated in EERA section 3540.1(m). Hernandez has also failed to allege or provide documentation that TMHS special education classroom teachers perform evaluations of classified paraprofessionals without substantial review by higher level supervisors.

Thus we conclude that Hernandez has failed to allege sufficient facts regarding the substantiality of the supervisory functions and duties performed by TMHS special education classroom teachers to overcome the Board's *Redlands*, *supra,* PERB Decision No. 235 determination that the sporadic performance of "quasi-'supervisory'" functions is "insufficient to confer supervisory status" upon classroom teachers. (*Redlands*, Proposed Dec., p. 14.)[15]

While in an appropriate case, the actions of non-supervisory personnel may be attributed to the employer, Hernandez has not alleged that Bell possessed actual or apparent authority to act on behalf of either Atchinson or the employer in conducting evaluations of the

[15] We note that in the thirty plus years since *Redlands*, *supra,* PERB Decision No. 235 was decided, the National Labor Relations Board's (NLRB) analysis in assessing supervisory status has substantially changed. (See *NLRB v. Health Care & Retirement Corp. of America* (1994) 511 U.S. 571 [NLRB erred in finding that nurse's supervisory activity incidental to patient care was not exercised "in the interest of the employer"]; *NLRB v. Kentucky River Community Care, Inc.* (2001) 532 U.S. 706, 721 (*Kentucky River*) [NLRB erred in finding no "independent judgment" where nurses use ordinary professional or technical judgment in directing less-skilled employees] (*Kentucky River*); see also *Oakwood Healthcare, Inc.* (2006) 348 NLRB 686; Croft Metals, Inc. (2006) 348 NLRB 717; and *Beverly Enterprises-Minnesota, Inc.* (2006) 348 NLRB 727 [adopting the *Kentucky River* three-part test for determining supervisory status: Employees are statutory supervisors if: (1) they hold the authority to engage in one of the twelve supervisory functions listed in NLRA § 2(11); (2) their exercise of such authority is not of a merely routine or clerical nature, but requires use of independent judgment; and (3) the authority is held in the interest of the employer].) Nonetheless, *Redlands* is currently Board law.

paraprofessional staff in her classroom such that Bell should be considered an agent of the District.[16] For its part, the District neither confirms nor denies that Bell, rather than Atchinson, performed Hernandez's evaluation and provided no information regarding the evaluation process at TMHS.[17] Even assuming Bell were an agent of the District, Hernandez's charge fails to allege sufficient facts to demonstrate that Bell was motivated principally by anti-union animus.[18]

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[16] The Board has determined that in order to state a prima facie case of an agency relationship between a non-supervisory employee and the employer,

> some factual demonstration of a relationship beyond employment alone is necessary to impute or infer an agency relationship. [Citation omitted.] For an agency relationship to exist, [charging party] must allege facts which show that [the non-supervisory employee] was acting with some direction, instigation, approval or ratification of the action by the District.

(*Compton Community College District* (1987) PERB Decision No. 649, p. 8.)

Similarly, an agent acts with actual authority,

> when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act.

(Rest. 3d Agency, § 2.01.) In addition:

> Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations.

(Rest. 3d Agency, § 2.03.)

[17] We note that PERB Regulation 32620(c) allows but does not require the respondent to file a response to a charging party's allegations.

[18] According to Hernandez, Bell was hostile toward her for a different reason, long before Hernandez's exercise of protected rights, i.e., an incident in which a student got

Therefore, we conclude with the Office of the General Counsel that Hernandez has failed to allege prima facie a sufficient nexus between her protected activity and the District's adverse actions.

CONCLUSION

Based on our review of the entire record, we affirm the Office of General Counsel's dismissal of Hernandez's allegations.

ORDER

The unfair practice charge in Case No. SF-CE-3025-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

separated from a group, which Hernandez reported to the vice-principal who then contacted Bell about it by cell phone.

PUBLIC EMPLOYMENT RELATIONS BOARD

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August 4, 2014

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Re: *Juana Hernandez v. San Francisco Unified School District*
Unfair Practice Charge No. SF-CE-3025-E
DISMISSAL LETTER

Dear Mr. Rosenquest:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 17, 2013. Juana Hernandez (Charging Party) alleges that the San Francisco Unified School District (SFUSD or Respondent) violated the Educational Employment Relations Act (EERA or Act).[1]

Charging Party was informed in the attached Warning Letter dated May 23, 2014 (Warning Letter), that certain allegations contained in the 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 these allegations to state a prima facie case or withdrew them prior to May 30, 2014, the allegations would be dismissed.

Charging Party was granted an extension of time to file the Second Amended Charge to June 23, 2014. On June 23, 2014, Charging Party filed the Second Amended Charge.

Charging Party is a classified special education paraprofessional employee of SFUSD. She escorts special education students on activities in the community, and assists the classroom teacher. The essential facts of the original charge and First Amended Charge are discussed in the Warning Letter. The Second Amended Charge contains additional factual information for the various allegations.

Charging Party alleges that she suffered retaliation and "harassment" from SFUSD because of her protected activity. As noted in the Warning Letter, to demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), 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.

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*).)

A discussion of the amended allegations follows. For the reasons discussed below and in the Warning Letter, the charge fails to state a prima facie case of retaliation.

YMCA and City College of San Francisco Allegations

As noted in the Warning Letter, Charging Party alleges that she has been banned from the premises of a food bank operated by the San Francisco YMCA, as well as the campus of City College of San Francisco (CCSF). The Second Amended Charge alleges that these events occurred in October 2010, and September 12, 2011, respectively.

Charging Party alleges that her employer, SFUSD, "perpetuated" the ban by enforcing it, despite Charging Party's assertions that it is "all gossip." Charging Party asserts that a teacher at SFUSD is responsible for perpetuating the bans, insofar as the teacher has informed District administrators of them.

As noted in the Warning Letter, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

The conduct relating to Charging Party's restrictions from YMCA and CCSF property are well outside the limitations period. Therefore, even assuming that the allegations describe conduct attributable to SFUSD, these allegations must be dismissed.

November 2012 "Informal Warning"

The original charge contained an allegation that Charging Party received an "informal warning" via e-mail message from Assistant Principal John Atchinson (Atchinson). This allegation is not repeated in the Second Amended Charge. Because this conduct also occurred outside the six months prior to the filing of the charge, it must be dismissed. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board*, *supra*, 35 Cal.4th 1072.)

Project Open Hand

As discussed in the Warning Letter, Charging Party alleges that on February 26, 2013, paraprofessionals and students were given waiver forms from Project Open Hand, which appears to be a third-party non-profit organization Charging Party and her students were

visiting that day. Charging Party objected to signing the waiver, on the basis of her belief that SFUSD policy did not permit paraprofessionals to enter into written agreements on behalf of the school district. A dispute arose between Charging Party and the classroom teacher, Elizabeth Bell (Bell) over the matter. On March 7, 2013, Charging Party contacted Atchinson about the matter. Nothing further concerning this dispute or its resolution is alleged.

It appears that Charging Party intends to allege that her contact with Atchinson is protected activity under EERA. As noted in the Warning Letter, individual efforts to enforce the employer's policies or the Education Code are not protected activity under EERA. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342.)

Events of March through May 2013

On March 6, 2013, a dispute arose between Charging Party and Bell, the classroom teacher. The dispute concerned whether Charging Party would be permitted to attend a meeting regarding a student's Individualized Education Program (IEP). According to the Second Amended Charge, Charging Party sought the assistance of a union representative in the dispute. The union representative contacted Bell and Atchinson, and Atchinson intervened to allow Charging Party to attend the meeting.

Charging Party alleges that after the meeting, Bell told her, "I am the teacher and your evaluation is coming up." That evening, Bell sent an e-mail message to Charging Party, the union representative, and SFUSD administrators, accusing Charging Party of having threatened her prior to the meeting. Following Bell's complaint, a disciplinary meeting was held. On March 19, 2013, SFUSD issued a formal reprimand against Charging Party for the conduct complained of by Bell.

Charging Party was on disability leave from April 1, 2013 to May 30, 2013. However, during that time period, SFUSD issued her a "negative employment evaluation" with input from Bell. Charging Party asserts that, in doing so, "Ms. Bell and Mr. Atchinson failed to follow nearly all the SFUSD procedures and provision in the collective bargaining agreement concerning employment evaluations."[2]

Charging Party alleges that "the actions of the teacher were directly in response to [Charging Party's] protected action of contacting her union representative to complain about the working conditions affecting attendance at the IEP on March 6, 2013."

[2] In the First Amended Charge, Charging Party alleged that this conduct violated the collective bargaining agreement. The Warning Letter informed Charging Party that individual employees lack standing for unilateral change allegations. (*Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667.) The Second Amended Charge recasts this allegation in support of the retaliation allegation.

Performance Evaluation

It is not clear that the performance evaluation issued sometime in April or May 2013 constitutes an adverse action. The Warning Letter noted that the Board uses an objective test and will not rely on the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later case, the Board specifically held that an evaluation which contains negative comments, but is generally satisfactory overall, is not an adverse action. (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S.) Charging Party does not describe with any specificity the nature of this evaluation beyond the conclusory characterization of it as a "negative employment evaluation." It is noted that the collective bargaining agreement provision on the evaluation procedure, which Charging Party provides in the related case against her union, SF-CO-783-E, does not use this terminology to describe the actual ratings on a performance evaluation.[3] Section 7.1.6.3 of the agreement refers to ratings of "needs improvement" and "unsatisfactory." Because the charge does not contain sufficient facts to determine whether the evaluation given to Charging Party in April or May 2013 contained an overall rating of "needs improvement" or "unsatisfactory," Charging Party has not met her burden to establish that it was an adverse action. (*Ibid.*; *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.)

Even assuming that the evaluation Charging Party received in April or May 2013 contained an overall rating of "needs improvement" or "unsatisfactory" so as to be considered an adverse action, Charging Party has not demonstrated that SFUSD possessed an unlawful motive.

It is clear from the charge that Charging Party is alleging that it was Bell, a classroom teacher, who was motivated to retaliate against Charging Party because of Charging Party's insistence on attending the Individualized Education Program meeting on March 6, 2013. However, Atchinson, not Bell, is responsible for evaluations, according to section 7.1.3 of the collective bargaining agreement.

Nor is Bell's alleged unlawful motivation attributable to Atchinson under a "subordinate bias liability," or "cat's paw" theory. Under the subordinate bias liability theory, the unlawful motive of a supervisor or other lower-level official may be imputed to the decision maker responsible for authorizing an adverse action against the charging party, when: (1) the lower-level official's recommendation, evaluation, or report was motivated by the employee's protected conduct; (2) the lower-level official intended for his or her conduct to result in an adverse action; and (3) the lower-level manager's conduct was a motivating factor or proximate cause of the decision to take adverse action against the employee. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M.) The basic rationale for imputing the unlawful motive of the supervisor or lower-level official to an uninformed and otherwise innocent decision maker is that, by providing inaccurate, biased or incomplete information about the charging party, the supervisor

[3] PERB may take official notice of matters within its own files and records. (*Antelope Valley Community College District* (1979) PERB Decision No. 97.)

or lower-level manager has effectively tainted the decision-making process for the employer as a whole. (*Ibid.*)[4]

However, PERB has long held that classroom teachers are not the supervisors of classified staff they direct incidentally to the performance of their professional duties rather than in the promotion of the employer's interests. (*Redlands Unified School District* (1982) PERB Decision No. 235.) PERB has referred to the function performed by classroom teachers in providing input on the hiring, assignment, and transfer of classroom aides as "quasi-supervisory," as distinguished from supervisory within the meaning of EERA section 3540.1(m). (*Ibid.*) Therefore, because Bell is not a supervisory employee under EERA, her alleged motivations to retaliate against Charging Party due to Charging Party's protected activity on March 6, 2013 may not be imputed to Atchinson and SFUSD.

As for the allegation concerning the issuance of the evaluation of Charging Party while she was on leave, it is assumed that Charging Party intends to reiterate the assertion contained in the First Amended Charge—that Respondent placed the evaluation in her file without giving her notice or an opportunity to respond. PERB has held placing "derogatory" material in an employee's file without notice may support an inference of nexus, if it violates Education Code section 44031 and the rule in *Miller v. Chico Unified School District* (1979) 24 Cal.3d 703. (*Novato*, *supra*, PERB Decision No. 210.) However, Charging Party does not describe in any detail what the contents of the evaluation were, and so it is unclear whether it contained "derogatory" information within the meaning of these authorities.

Formal Reprimand

Although a formal written reprimand may be considered an adverse action (see e.g. *Central Union High School District* (1983) PERB Decision No. 324), Charging Party has not alleged facts showing that the March 19, 2013 reprimand she received was a result of her protected activity. In addition to the problems described above concerning imputing Bell's motivations to Atchinson and SFUSD, the only fact that supports a finding of nexus is the closeness in time between Charging Party's protected activity and the reprimand. As noted in the Warning Letter, timing, without more, does not demonstrate the necessary causal nexus between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) For this reason, in addition to those discussed above, the allegation does not state a prima facie case.

[4] PERB's approach is consistent with that of the National Labor Relations Board and the Federal courts. (See *Boston Mut. Life Ins. Co. v. N.L.R.B.* (1st Cir. 1982) 692 F.2d 169, 171 ["[W]e are reluctant to adopt a rule that would permit the company to launder the 'bad' motives of certain of its supervisors by forwarding a dispassionate report to a neutral superior].")

Satisfactory Performance Evaluation of December 6, 2013

Charging Party alleges that on December 6, 2013, she received a performance evaluation with a "satisfactory" rating. However, Charging Party alleges, the teacher with whom she was working informed her that he intended to give her an "outstanding" rating. Charging Party also alleges that the change in her performance evaluation rating came about after Atchinson informed the classroom teacher that Charging Party had received an unsatisfactory rating in 2012. Charging Party alleges that this information should have remained confidential.

It is unclear what Charging Party intends with this allegation. As noted in the Warning Letter, a satisfactory, but not outstanding, performance evaluation is not an adverse action. (*State of California (Department of Corrections & Rehabilitation), supra*, PERB Decision No. 2118-S; *Palo Verde Unified School District, supra*, PERB Decision No. 689.) PERB has also specifically held that an employer's disclosure of confidential information about an employee's grievance is not an adverse action. (*State of California (Department of Parks and Recreation)* (1994) PERB Decision No. 1031-S.)[5] Insofar as the allegation is intended to support an inference of retaliation relative to some other adverse action, no facts are alleged which show that SFUSD evaluators are not permitted to share an employee's performance history with the certificated employees providing input on the evaluation.

December 11, 2013 Reprimand

In the First Amended Charge, Charging Party alleged that on an unspecified date, Atchinson sent an e-mail message to Charging Party because he "mistakenly believed that [Charging Party] had improperly refused a work assignment when she had actually raised a student safety concern...." The e-mail message appears to address a dispute between Charging Party and a classroom teacher, "Mr. Ventre," over whether Charging Party would work with a particular student one-on-one. Charging Party alleges that the she had raised a "student safety concern" with Ventre, and had not refused an assignment. The Second Amended Charge clarifies that the e-mail message from Atchinson was sent on December 11, 2013.

Insofar as the e-mail message threatens future discipline, it may be considered an adverse action. (*Los Angeles Unified School District* (2007) PERB Decision No. 1930; *Central Union High School District, supra*, PERB Decision No. 324.) However, the charge does not contain facts showing that the e-mail message was in response to any protected activity. Charging Party's "student safety concerns" are not protected under EERA. (*Coachella Valley Unified School District, supra*, PERB Decision No. 2342.)[6]

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[5] Furthermore, Charging Party has not alleged facts that support the assertion that the information at issue should have remained confidential.

[6] Although Charging Party does not allege as much, December 11, 2013 is too remote in time from March 6, 2013 to support an inference of nexus between Atchinson's e-mail message and Charging Party's contact with her union representative concerning the IEP meeting. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300.)

Race and National Origin Claims

The original and First Amended Charges contained allegations that Charging Party suffered several adverse actions because of her ethnicity or national origin. These are not repeated in the Second Amended Charge. The Warning Letter noted that PERB lacks jurisdiction over such claims. (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748.) Because it is unclear whether Charging Party intends to withdraw these allegations, they are dismissed for the reasons contained in the Warning Letter.

Summary

In summary, Charging Party's allegations support one instance of protected activity: the March 6, 2013 communication with her union representative concerning her attendance at the IEP meeting. The allegations support two adverse actions: the March 19, 2013 reprimand based on Bell's complaint, and the December 11, 2013 reprimand based on the dispute over Charging Party's "student safety concern." However, for the reasons discussed above, Charging Party has not alleged facts showing a nexus between Charging Party's March 6, 2013 protected activity and either adverse action. For the above reasons and those contained in the Warning Letter, the charge is hereby dismissed.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (PERB Regulation 32635(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. (PERB Regulations 32135(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. (PERB Regulation 32135(b), (c) and (d); see also PERB Regulations 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 Charging Party files a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five (5) copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (PERB Regulation 32635(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 PERB Regulation 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. (PERB Regulation 32135(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. (PERB Regulation 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,

WENDI L. ROSS
Acting General Counsel

By
Daniel Trump
Regional Attorney

DT
Attachment

cc: William M. Quinn Jr., Senior Deputy General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

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

May 23, 2014

Nils Rosenquest, Attorney
Rosenquest & Associates
2720 Taylor Street, Suite 420
San Francisco, CA 94133

Re: *Juana Hernandez v. San Francisco Unified School District*
Unfair Practice Charge No. SF-CE-3025-E
WARNING LETTER

Dear Mr. Rosenquest:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on July 17, 2013. Juana Hernandez (Charging Party) alleges that the San Francisco Unified School District (SFUSD or Respondent) violated the Educational Employment Relations Act (EERA or Act).[1]

On March 3, 2014, Charging Party filed a First Amended Charge

FACTS ALLEGED

Charging Party is an employed by SFUSD as a special education paraprofessional. She escorts special education students on activities in the community, and assists the classroom teacher.

Charging Party alleges that she was assigned to escort students to City College of San Francisco. However, Charging Party discovered that she had been banned from the City College campus "for unknown reasons." Charging Party alleges that SFUSD "refused to intervene" on her behalf. SFUSD has not resolved the issue, and continues not to authorize Charging Party to escort students to City College. No dates are provided for any of these allegations.

Charging Party also alleges that, while escorting a student to a food bank run by the San Francisco YMCA, YMCA personnel "misconstrued her actions with the student and made a complaint against her with the classroom teacher." Charging Party alleges that the YMCA "conceded that it had not followed its own procedures" in this matter. Charging Party

[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.

demanded that SFUSD take steps to rectify the situation, but SFUSD was unwilling to do so. No dates are provided for any of these allegations.

Charging Party alleges that in November 2012, she received an "informal warning" in an e-mail message from Assistant Principal John Atchinson (Atchinson). The warning was precipitated by a complaint from the classroom teacher, Elizabeth Bell (Bell). Charging Party alleges that Bell has been hostile toward her ever since an incident surrounding a student who had been separated from the group,[2] and that Bell's complaint was baseless.

Charging Party alleges that at various times, she has suffered discrimination based on her ethnicity or national origin.

Charging Party alleges that she has suffered retaliation based on "justified objections to proposed work conditions that violated SFUSD policy." Specifically, on "February 26,"[3] students and paraprofessionals were given waiver forms from Project Open Hand.[4] Charging Party believed that SFUSD policy did not permit paraprofessionals to enter into written agreements on behalf of the school district, and so asked for clarification from Bell. Bell "refused to talk to" Charging Party, and so the question was referred to Atchinson.

Charging Party alleges that on March 6,[5] a dispute arose between Charging Party and Bell concerning whether Charging Party would be allowed to attend a meeting concerning a student's Individualized Education Program. Then, sometime in March, Bell sent an e-mail message to "the administrators," a union representative, and Charging Party, stating that Charging Party had threatened her and that security was called. Charging Party denied these accusations, but the next morning a security guard was stationed in her classroom. On March 19, 2013, Atchinson issued a formal reprimand to Charging Party about her March 6 conduct. "At the same time," Atchinson and Bell gave Charging Party a "negative employment evaluation." As a result, Charging Party was denied employment in the summer school program.

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[2] Charging Party discovered a student wandering outside, and returned him or her to Atchinson, who then reached Bell by cell phone.

[3] The calendar year of this incident is not provided. It is assumed, however, based on the allegation that Bell was assigned to Charging Party's classroom in October 2012, that this incident occurred in February 2013.

[4] The website www.openhand.org describes the organization as a private nonprofit providing meals to persons with serious illnesses in San Francisco and Alameda counties.

[5] The calendar year of this incident is not provided. It is assumed, however, based on the allegation that Bell was assigned to Charging Party's classroom in October 2012, that this incident occurred in March 2013.

In the First Amended Charge, Charging Party alleges that she was on disability leave from April 1, 2013 to May 30, 2013. During this time, Charging Party received another negative performance evaluation. Charging Party alleges that this violates provisions of the collective bargaining agreement requiring an opportunity to review negative evaluations prior to them becoming part of an employee's personnel file.

In the First Amended Charge, Charging Party alleges that on an unspecified date, Atchinson disclosed to a teacher that Charging Party received an unsatisfactory evaluation, which should have remained confidential. Also on an unspecified date, Atchinson allegedly became upset with Charging Party during a meeting, and told her to "get the hell out of [his] office." Also on an unspecified date, Atchinson sent an e-mail message to Charging Party because he "mistakenly believed that [Charging Party] had improperly refused a work assignment when she had actually raised a student safety concern...."

In the First Amended Charge, Charging Party alleges that in October 2013, Atchinson met with Charging Party's teacher to discuss a performance evaluation. Charging Party alleges that prior to the meeting, the teacher informed her that he wished to give her an "outstanding" rating. However, the rating Charging Party received was merely "satisfactory."

DISCUSSION

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.)

The charging party should also allege 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.)

PERB Lacks Jurisdiction Over Race and National Origin Claims

As noted above, the charge contains allegations that Charging Party suffered several adverse actions because of her ethnicity or national origin. PERB lacks jurisdiction over race and national origin discrimination claims. (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748.) These allegations will therefore not be considered.

Some of Charging Party's Allegations Are Untimely

Several allegations in the charge are either untimely or lack sufficient information to establish timeliness. As noted above, Charging Party has not provided dates concerning her alleged banning by the San Francisco YMCA or City College of San Francisco, the alleged improper disclosure of the negative performance evaluation, Atchinson's exclamation that Charging Party "get the hell out of [his] office," or the reprimand about refusing work assignments. It is Charging Party's burden to allege facts showing that the alleged unlawful conduct occurred within the six-month period preceding the filing of the charge. (*Los Angeles Unified School District, supra*, PERB Decision No. 1929.) Because the charge lacks information concerning the timing of these events, it cannot be determined whether these allegations are timely filed.

Similarly, the allegations concerning the November 2012 informal warning from Atchinson is outside the six-month limitations period, and will be dismissed. (*Los Angeles Unified School District, supra*, PERB Decision No. 1929.)

The Timely Allegations Fail to State a Prima Facie Case

The remainder of the allegations—the February 26, 2013 dispute with Bell, the March 19, 2013 reprimand, the performance evaluation during the period while Charging Party was on leave, and the October 2013 performance evaluation—all fail to state a prima facie case for the reasons that follow.

PERB's Standard for Retaliation and Discrimination Allegations

EERA protects the rights of employees "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (EERA section 3543(a).) 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.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

Nowhere in the charge does Charging Party allege facts showing that she engaged in protected activity. The conduct claimed to be protected is: 1) Charging Party's refusal to sign a waiver for Project Open Hand on February 26, 2013; and 2) Charging Party's insistence on attending the Individualized Education Program meeting on March 6, 2013. However, neither of these activities is protected under EERA. EERA protects the rights of employees who individually seek to enforce rights stated in a collective bargaining agreement or when jointly prosecuting alleged violations of workplace rights. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342.) Here, Charging Party sought individually to enforce what she understood to be SFUSD policy on contracts with third parties, and the Education Code. Such activity is not protected under EERA. (*Ibid.*)

For this reason, Charging Party has not alleged sufficient facts showing that SFUSD retaliated or discriminated against her because of her protected activity.[6] (*Novato, supra*, PERB Decision No. 210.)

Charging Party Lacks Standing to Raise a Contract Violation Claim

Charging Party alleges that the negative performance evaluation she received while on disability leave in April or May 2013 violates the contract's provisions on employees' opportunity to review evaluations. However, PERB has no authority to remedy a breach of a collective bargaining agreement unless that breach also constitutes an unfair practice. (*Los Angeles Unified School District* (2009) PERB Decision No. 2073.) Specifically, a contract breach may in some circumstances amount to a unilateral change in established policy in violation of EERA section 3543.5(c). However, because the employer's duty to bargain in good faith is owed to the employee organization and not to individual employees, PERB has long held that an individual employee lacks standing to allege a unilateral change violation. (*Ibid.*; *Oxnard School District (Gorcey and Tripp)* (1988) PERB Decision No. 667.) Therefore, Charging Party's allegation concerning violations of the collective bargaining agreement must be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case.[7] 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

[6] Because Charging Party has not shown that she engaged in protected activity, it is not discussed in detail herein whether the other elements of a retaliation claim are stated. However, in any amended charge that is filed describing activity protected under EERA, Charging Party must show that she suffered an adverse action *because* of that protected activity. Certain timely allegations, such as Bell's refusal to talk to Charging Party on February 26, 2013, and the October 2013 satisfactory (but not outstanding) performance evaluation do not appear to be adverse actions. (*Palo Verde Unified School District, supra*, PERB Decision No. 689.)

[7] 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.*)

PERB. If an amended charge or withdrawal is not filed on or before **May 30, 2014**,[8] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Daniel Trump
Regional Attorney

DT

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