STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CHRISTOPHER GILLOTTE, Charging Party, v. JURUPA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5693-E PERB Decision No. 2420 April 23, 2015

Appearances: Richard D. Ackerman, Attorney, for Christopher Gillotte; Fagen, Friedman & Fulfrost by Kerrie Taylor, Attorney, for Jurupa Unified School District.

Before Huguenin, Winslow and Banks, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions by Christopher Gillotte (Gillotte) and Jurupa Unified School District (District) to a proposed decision (attached) by an administrative law judge (ALJ). The complaint alleged that the District violated the Educational Employment Relations Act (EERA) section 3543.5(a)[1] by terminating Gillotte's employment in retaliation for his protected activity of filing the present unfair practice charge.

At the administrative hearing, the ALJ granted Gillotte's motion to amend the complaint to include an allegation that the District retaliated against Gillotte by denying him paid personal necessity leave to attend a court proceeding involving another District employee.

The Board has reviewed the entire record in this case, including the ALJ's findings of fact and conclusions of law, and both parties' exceptions and response thereto, and we find that the ALJ's findings of fact are supported by the record. Accordingly, we adopt the ALJ's

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

findings of fact as the findings of the Board itself, except as otherwise indicated in our discussion below. Specifically, we agree with the ALJ that Gillotte established the four factors identified in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) as necessary to prove a prima facie case of discrimination in violation of EERA section 3543.5(a). Gillotte engaged in protected conduct; the District's relevant decision-makers had knowledge of the protected conduct; and the District took the adverse action against Gillotte by terminating his employment; and the District's action was motivated, at least in part, by Gillotte's protected activity.

Although we agree with the ALJ's conclusion that Gillotte proved a causal nexus between his protected activity and the District's termination of his employment, we find a different basis for this conclusion which we explain below. However, in light of Gillotte's repeated instances of misconduct, both before and after his protected conduct, we concur with the ALJ's conclusion that the District satisfied its burden of proving that it would have taken the same actions even if Gillotte had not participated in protected conduct.

Therefore, in accordance with the following discussion of issues raised by both parties' exceptions, we affirm the ALJ's conclusions of law, except for the conclusion that requesting personal necessity leave was not protected conduct.

PROCEDURAL HISTORY

Gillotte initiated this action on April 30, 2012, by filing an unfair practice charge against the District alleging that the District violated EERA by denying his request for personal necessity leave in October 2011. The District filed a position statement in response to that allegation on May 16, 2012. A first amended charge was filed on May 29, 2012, alleging that the District violated EERA by terminating Gillotte's employment on May 7, 2012. A second amended charge was filed on September 7, 2012, stating that the charging party "restricts the

scope of the instant complaint" [*sic*] to the District's decision to terminate Gillotte's employment on or about May 7, 2012. On November 13, 2012, the Office of the General Counsel issued a complaint alleging that the District terminated Gillotte's employment on May 7, 2012, because he filed the instant unfair practice charge with PERB on April 30, 2012.

The District answered the complaint on December 3, 2012, denying that its actions were retaliatory and raising various affirmative defenses. A formal hearing was held on April 8-9, 2013. At the hearing, Gillotte moved to amend the complaint to re-allege that the District had retaliated against him by denying his request for a day of personal necessity leave in October 2011, because he requested to attend a court hearing regarding the termination of another employee with whom he was participating in collective grievance activity. The ALJ granted Gillotte's motion to amend the complaint over the District's objection, but in the proposed decision dismissed this allegation as untimely.

The proposed decision issued on October 31, 2013, and both parties filed timely exceptions to it.

FACTUAL SUMMARY

During the relevant period of time in this case, Gillotte taught math at two different high schools within the District: Rubidoux High School (Rubidoux) and Patriot High School (Patriot). During the same period of time, Tamara Elzig (Elzig) was the District assistant superintendent of personnel services.

Beginning in 2007, the District received student complaints about Gillotte. These complaints described Gillotte expressing anger at and disciplining students without provocation, embarrassing and belittling students, making ethnically insensitive comments, engaging in conduct that distracted his students and interfered with their learning, scaring and humiliating students with physically aggressive movements such as slamming tables, and being

frequently rude, sarcastic, and condescending when he spoke to students. These complaints, lodged in 2007, preceded Gillotte's first acts of protected conducted, viz. filing 15 grievances in late Spring of 2010.

Site and District administrators met with Gillotte in multiple meetings over the course of the 2007-08 school year in response to these complaints and presented him with summaries of meeting or summaries of allegations,[2] but the actual written student complaints were not presented to Gillotte at this time. Gillotte was permitted to respond to all allegations. He typically claimed that the student complaints mischaracterized the facts, or he gave purported justifications for his actions. Gillotte admitted to some of the accusations. Elzig was informed of the student complaints, the District's investigation of them, and Gillotte's response.

When Elzig was involved in an investigation of alleged employee misconduct, her practice was to issue a written summary of allegations to the employee. After presenting a summary of allegations to Gillotte in November 2008, Elzig issued Gillotte a letter of reprimand on December 10, 2008, directing him to treat all students with courtesy and respect, and to develop classroom management skills that facilitated learning rather than demeaning students.

On or about May 5, 2009, Elzig received another memorandum outlining continuing concerns regarding Gillotte with new student statements attached. Elzig then prepared a notice of unprofessional conduct dated June 2, 2009, which summarized the new student complaints

[2] A "summary of meeting" is a written memorialization of a meeting between a site administrator and a teacher regarding concerns raised about the teacher. The site administrator provides the summary of meeting to the teacher after the meeting. The District considers a summary of meeting to be on the spectrum of progressive discipline. It is typically generated after a verbal interaction between the administrator and the teacher in which the administrator expresses the concern, receives the teacher's response, and sets expectations for the future. (R.T. Vol. II, p. 20.) A "summary of allegations," on the other hand, is typically a document created by Elzig or another District administrator to summarize more serious allegations against a teacher. (*Id.* at p. 22.)

and previous allegations, and presented it to Gillotte in a meeting on or around that date.[3] Gillotte responded by claiming that the District was penalizing him twice by repeating the previous allegations from the December 2008 letter of reprimand.

At the conclusion of the 2008-2009 school year, Gillotte voluntarily agreed to transfer from Rubidoux to Patriot for the following year in order to get a fresh start.

After complaints were lodged against Gillotte at the new school in the Fall of 2009, Roberta Pace (Pace), the assistant principal of curriculum and instruction at Patriot, interviewed the two complaining students and other students from Gillotte's classes selected at random. She then provided a written summary of her investigation with the attached student statements to school Principal Jay Trujillo (Trujillo) and Elzig.

After a January 14, 2010, summary of allegations, Elzig issued another notice of unprofessional conduct dated March 24, 2010, to Gillotte based upon the incidents included in the January 2010 summary of allegations. Gillotte was directed, among numerous other things, to refrain from mocking students or calling them demeaning names, to provide assistance to students who needed it, and not to discuss an individual student's performance or grades in front of other students. Gillotte was warned that failure to immediately correct the performance deficiencies outlined therein may result in his dismissal from employment.

In Gillotte's performance evaluation by Trujillo for the 2009-2010 school year, he was rated as "Meets Criteria" in four categories, but "Unsatisfactory" in the categories of "CREATING AND MAINTAINING EFFECTIVE ENVIRONMENTS FOR STUDENT LEARNING," and "DEVELOPING AS A PROFESSIONAL EDUCATOR." The overall

[3] A notice of unprofessional conduct is prescribed by Education Code section 44938, and requires a school district to provide a permanent certificated employee with notice of alleged unprofessional conduct and an opportunity to correct the conduct at least 45 days prior to the school district dismissing the employee.

rating was "unsatisfactory." Trujillo noted the District's ongoing concerns regarding Gillotte's classroom management skills and behavior toward students.

On May 27, 2010, Trujillo sent Elzig an e-mail message that stated in relevant part: "I'm taking out a hit on Chris Gillotte. He is bad for kids. I think I can get it done for free."[4] Sometime in June 2010, Trujillo awarded Gillotte with a certificate for being a "Champion of Character." The record was unclear about the circumstances that led to this award, but it appeared to be intended to recognize some positive contribution by an employee.

Gillotte's Grievance and Group Activities

Gillotte filed approximately 15 grievances sometime in late Spring of 2010. Sometime near the end of the 2009-2010 school year, Gillotte and several other District employees submitted an anonymous group complaint through an attorney at a regular meeting of the District's governing board. According to Gillotte's testimony, the District was not aware that Gillotte was a member of the group who submitted the complaint until approximately late Summer or Fall of 2010, when Patriot Assistant Principal Sarah Niemann (Niemann) asked Gillotte if he was part of a class action group that was suing the District, and he responded that he was. (R.T. Vol. I, pp. 37-39.)[5] The group complaint was not submitted into the record.

Later, Gillotte and some or all of the group of employees that had presented the group complaint to the District filed a lawsuit against the District. Since the record does not reflect the lawsuit's allegations, it is impossible to determine if the lawsuit constituted protected activity.

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[4] The proposed decision mistakenly stated that the e-mail was sent on May 24, 2010, and that it stated, "I'm taking a hit out on Chris Gillotte." (Proposed Dec., p. 15.) These minor errors do not alter our assessment.

[5] Gillotte did not allege or otherwise present evidence that this inquiry by Niemann interfered with any rights protected under EERA, and the ALJ therefore did not consider whether Niemann's question violated EERA, a matter to which Gillotte did not except. The matter is therefore not before us.

Subsequent to Gillotte's Spring 2010 grievances, the District received additional student complaints about Gillotte, including complaints that he belittled and embarrassed students, was sarcastic on a daily basis, and refused to help students with their questions about the curriculum.

Events in 2010-2011 and 2011-2012 School Years

Gillotte voluntarily agreed to participate in the peer assistance and review (PAR) teacher mentorship program in 2010-2011 for improving his performance issues. Gillotte's PAR participation was satisfactory, and his teaching mentor made generally positive observations.

A meeting was scheduled with Gillotte for December 9, 2011, to discuss student complaints and a related District investigation, but this meeting was cancelled and rescheduled more than once to accommodate the schedule of Gillotte's attorney. The District placed Gillotte on paid administrative leave on or about December 15, 2011, pending the completion of the investigation. At a meeting on January 26, 2012, (with his attorney participating by telephone), Gillotte was presented with a written summary of allegations. Unlike previous disciplinary documents, this summary of allegations had actual student statements attached, rather than just summaries of their statements. Elzig testified that it is the District's general policy and practice not to share student complaints with employees until they are going to a dismissal hearing.[6] Gillotte did not respond verbally during the meeting to these latest

[6] The District asserted in its response to Gillotte's statement of exceptions that it attached the student statements to the summary of allegations to preemptively address Gillotte's anticipated defense that he was not provided the documents in a timely manner. (Response, p. 38:10-12.) In a response to the 2009 notice of unprofessional conduct, Gillotte objected to the District's use of anonymous student allegations that deprived him knowing of the context in which his alleged remarks to students were made.

allegations, but his union, National Education Association-Jurupa (NEA-J), submitted a written response dated February 17, 2012.

On April 30, 2012, Gillotte filed the present unfair practice charge, alleging that the District violated EERA section 3543.5 by denying him personal necessity leave the previous October in order to attend the court hearing of a fellow employee.

On or about May 7, 2012, Elzig initiated the dismissal process against Gillotte by submitting to the District's governing board a statement of charges consisting of approximately 325 pages.[7] Gillotte was not informed before May 7, 2012, that management intended to submit the charges to the board of education, nor was he provided with a *Skelly* hearing.[8] The governing board voted to approve initiating the formal process required by the Education Code to dismiss a permanent certificated employee.

Gillotte received the notice of charges and intent to proceed with his termination on or about May 8, 2012. These documents included actual student statements concerning Gillotte's conduct between 2008 and 2011. At some point in May 2012, Gillotte requested a copy of his site files and personnel file, and he was told that he could review these at the District office

[7] Elzig inadvertently failed to attach a signed verification of the charges at that time. She later corrected her error on August 17, 2012, by signing a verification of the charges against Gillotte and presenting it to the board of education. She also testified, however, that when the charges were submitted to the board of education in May 2012, she believed them to be true and correct.

[8] The term "*Skelly* hearing" refers to a pre-disciplinary hearing that complies with due process requirements set forth in *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194. According to Elzig, it is the District's practice to provide a *Skelly* hearing only when an employee is charged with "immoral conduct," which did not apply in this circumstance. Moreover, *Kolter v. Commission on Professional Competence of the Los Angeles Unified School Dist.* (2009) 170 Cal.App.4th 1346, held that a *Skelly* hearing is not required prior to the initiation of permanent teacher dismissal proceedings, because the procedural protections of Education Code section 44934 et seq., provide the procedural due process mandates of *Skelly*. (*Id.* at p. 1353.)

under supervision, and would be allowed to copy certain documents. Gillotte received a copy of his personnel file, but did not review his site and investigation files at the District office.

The Commission on Professional Competence Hearing

Pursuant to Education Code section 44944, a five-day evidentiary hearing was held before a three-person commission on professional competence (CPC) panel in February 2013 regarding whether there was cause for the District to terminate Gillotte. Ten then-current or former students testified on behalf of the District. Two of these students were from Rubidoux, and had taken Gillotte's classes during the 2008-2009 school year. The other eight students who testified were from Patriot. Two of the Patriot students had Gillotte as a teacher in the 2009-2010 school year. The other six Patriot students had Gillotte as a teacher during 2011. All of the students who testified had provided statements and been interviewed during the course of the District's three different investigations into Gillotte's alleged misconduct during the 2008-2009; 2009-2010, and 2011-2012 school years.

The CPC unanimously determined on March 19, 2013, that Gillotte should be dismissed. The following day, the District's governing board voted to terminate his employment.[9]

ALJ PROPOSED DECISION

The ALJ determined that Gillotte established a prima facie case that the District terminated his employment in retaliation for his engaging in protected activity, including filing the instant unfair practice charge and filing grievances in September 2010, all of which the ALJ correctly determined were activities unquestionably protected by EERA. Elzig, the individual primarily responsible for taking the adverse action of terminating Gillotte's

[9] Pursuant of Education Code section 44944(c)(4), the decision of the CPC shall be deemed the final decision of the school district's governing board.

employment, knew of these protected activities. The ALJ also concluded that Gillotte engaged in protected conduct by having NEA-J represent him during a meeting in May 2009 and responding to proposed disciplinary action in February 2012 with the District's knowledge. While the ALJ recognized that these instances of protected conduct were not included in the complaint, as amended, the ALJ concluded that these facts related to matters in the PERB complaint and were fully litigated, and thus it was appropriate to consider them. The District did not except to the ALJ's conclusion on this point.

However, the ALJ concluded that Gillotte's attendance at a hearing concerning another employee named Lenore Boykin (Boykin) was not protected, as Gillotte had failed to demonstrate that his attendance was in pursuance of his right to gather information related to his participation in collective action. The ALJ also inferred that the amended complaint alleged that requesting personal necessity leave under the collective bargaining agreement (CBA), regardless of the purpose for the leave, was a protected right. This was not protected activity, according to the ALJ because it was not a "logical continuation of group activity" (*San Joaquin Delta Community College District* (2010) PERB Decision No. 2091, p. 3 (*San Joaquin Delta*)), but rather was for his own benefit. As we explain further below, we do not adopt this conclusion of the ALJ.

With regard to the nexus between protected conduct and adverse action, the ALJ found that Elzig's submission of a statement of charges and intent to terminate Gillotte to the District's governing board approximately one week after Gillotte filed the unfair practice charge and approximately three months after NEA-J responded to proposed disciplinary action on Gillotte's behalf supported a finding of nexus.[10]

[10] However, the ALJ concluded that nexus was not demonstrated by Gillotte's failure to receive a *Skelly* hearing, by his not receiving prior notice that the District's board of education was going to vote over whether to issue a notice of intent to terminate his employment on

This timing, along with the following factors, led the ALJ to conclude that Gillotte had established nexus. According to the ALJ, the District departed from its investigation procedures when responding to the various student complaints against Gillotte. Specifically the ALJ noted the fact that the January 26, 2012, summary of allegations had written student complaints attached. Prior to then, all previous disciplinary documents provided to Gillotte by the District contained administrator summaries of student statements, but not the statements themselves. Elzig testified that the District's practice was not to provide written student complaints to employees until the employee was going to a dismissal hearing. The ALJ concluded that, according to Elzig's admission, the attachment of student statements meant that the District had already decided at that point to terminate Gillotte's employment before he was allowed input into the investigation, which was inconsistent with the investigation process that Elzig testified to.

The ALJ also determined that Trujillo, one of the administrators who investigated Gillotte, appeared biased, as demonstrated by an e-mail message he sent to Elzig that stated, in relevant part: "I'm taking out a hit on Chris Gillotte. He is bad for kids. I think I can get it done for free." The ALJ concluded that this e-mail statement, coupled with the District's inconsistent statements at hearing regarding Trujillo's involvement in the investigation, was evidence of nexus. Based on these findings, the ALJ concluded that Gillotte had satisfied the nexus element of the *Novato* test for establishing a prima facie case of retaliation.

The ALJ concluded, however, that the District had satisfied its defensive burden of proving that it would have terminated Gillotte even if he had not participated in protected conduct, in light of Gillotte's repeated instances of misconduct, both before and after his

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May 7, 2012, by being deprived of the ability to address the board of education on that issue, by Elzig's failure to verify the charges against him at the time they were presented to the board of education, or by the District's maintenance of investigation and site files separate from his official personnel file. (See Proposed Dec., pp. 45-47.)

protected conduct. Based on Gillotte's misconduct and failure to respond to the District's summary of allegations over the 2011 investigation, the ALJ concluded that the District terminated Gillotte's employment because of repeated and credible complaints about his treatment of students, and not because of his protected conduct. The District therefore successfully rebutted the prima facie case, according to the ALJ.

With regard to the allegation over the denial of personal necessity leave that Gillotte raised in his original unfair practice charge filed on April 30, 2012, the ALJ concluded that Gillotte intended to abandon his original allegation and withdraw it from the charge at the time he filed his second amended charge. The ALJ also concluded that when Gillotte moved during the hearing on April 8, 2013, to amend the complaint to include the denial of leave allegations, the claims were untimely. The ALJ concluded that the amendment of the complaint did not relate back to facts in the operative charge (viz., the second amended charge, in which Gillotte withdrew the allegation concerning the denial of personal necessity leave), and that the relation back doctrine does not excuse the untimely filing.

Further, the ALJ determined that Gillotte had not demonstrated that his participation in an anonymous group complaint submitted through an attorney in or around June 2010 was known by the District.

GILLOTTE'S EXCEPTIONS

Gillotte's exceptions fail to comply with PERB Regulation 32300(a)(1) in several respects. He has failed to "state the specific issues of procedure, fact, law or rationale to which each exception is taken," and he has failed to designate the portions of the record he relies on for his exceptions. Instead he has identified in general terms and with citations to a range of page numbers of the proposed decision the conclusions to which he excepts.

Reading his exceptions liberally, the exceptions can be fairly summarized as follows. He excepts generally to the ALJ's analysis of the District's investigation and discipline policies, as well as to the conclusion that he was given access to his site personnel file prior to his termination. Gillotte asserts that there was no proof that he was presented with information allegedly received from students by the District and complains that the "summary of meeting" documents were no substitute for the actual student complaints, implying that he never received copies of the student complaints. He asserts that the District kept secret files on his conduct that were later used to discipline him in violation of Education Code section 44031. He also complains that he was not given a fair opportunity to defend himself because he was allegedly not provided the names of the students who lodged complaints against him until a point in time that was too late for him to interview those students in preparation for his defense.

Gillotte also excepts to the ALJ's discussion of his misconduct, on the ground that he was not provided with actual student complaints at the time. He also objected to the ALJ's discussion of his performance evaluation on the ground that it was allegedly done in violation of the CBA. He further takes exception to the ALJ's interpretation and application of *Novato, supra,* PERB Decision No. 210.

Gillotte also excepts to the ALJ's "discussion of the 'personal necessity' leave request" and to her conclusion that attending the Boykin hearing was not protected activity. According to Gillotte, attendance at this hearing was designed to benefit more than just him, although his exceptions fail to explain the basis for this assertion.

Notably absent from his exceptions is a clear statement that Gillotte excepts to the ALJ's ultimate conclusion that the District did not violate EERA section 3543.5(a) by terminating his employment.

DISTRICT'S RESPONSE AND CROSS-EXCEPTIONS

The District urges PERB to deny Gillotte's exceptions because he has failed to comply with PERB Regulation 32300.[11] The District argues that because of this failure, the District and the Board are incapable of adequately responding to Gillotte's exceptions. Moreover, according to the District, the evidence and the law support the ALJ's factual findings and conclusions of law, except her conclusion that Gillotte established a prima facie case.

The District also argues that Gillotte inappropriately raised new allegations with regard to Gillotte's May 10, 2010, performance evaluation which do not satisfy the requirements for consideration of unalleged violations. According to the District, Gillotte also inappropriately

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[11] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32300 states, in relevant part:

> (a) A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision issued pursuant to Section 32215, and supporting brief . . . . The statement of exceptions or brief shall:
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> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.
>
> (b) Reference shall be made in the statement of exceptions only to matters contained in the record of the case.
>
> (c) An exception not specifically urged shall be waived.

attempted to introduce new evidence in his exceptions by referring the Board to the facts of a separate Board decision, without satisfying the necessary requirements for doing so.[12]

The District cross-excepted to the ALJ's conclusion that Gillotte had satisfied his burden of proving a prima facie case of retaliation. Specifically, the District argues that Gillotte failed to present evidence of nexus between his protected activity and the District's termination of his employment, denying that it acted inconsistently by attaching student statements to the summary of allegations dated December 13, 2011, or that it offered inconsistent statements at the hearing regarding Trujillo's involvement in the investigation.

DISCUSSION

We concur with the ALJ's conclusions that Gillotte satisfied the elements of the test for retaliation as proscribed in *Novato, supra,* PERB Decision No. 210, specifically that Gillotte engaged in protected activity, that the relevant decision-makers had knowledge of the protected activity, and that the District took adverse action against Gillotte.

With respect to the nexus element of retaliation, viz. whether the District terminated Gillotte's employment because of his protected activity, we agree that Gillotte met his burden of proving nexus, but we rely on different reasons than the ALJ.

We first address Gillotte's exceptions, and then consider the District's exceptions.

1. Gillotte's Exceptions

We agree with the District that Gillotte's exceptions fail to comply with PERB Regulation 32300. Specifically, the exceptions fail to state the specific issues of procedure, fact, law or rationale to which each exception is taken as required by subsection (a)(1) of PERB Regulation 32300; fail to designate by page citation or exhibit number the portions of the record relied upon for each exception as required by subsection (a)(3); and fail to

[12] This decision is *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*).

adequately state the grounds for each exception as required by subsection (a)(4). Gillotte's exceptions consist largely of a reiteration of arguments he made to the ALJ, but contain no reference to the record and "point[] to no specific errors of law or prejudicial errors of fact made by the ALJ." (*Los Angeles Unified School District* (1989) PERB Decision No. 785, p. 2.)

Furthermore, Gillotte failed to meet the minimum requirement of excepting to the ALJ's ultimate conclusion that the District terminated his employment for non-retaliatory or discriminatory reasons unrelated to his protected conduct. We will disregard exceptions that fail to address the "issue central to the proposed decision." (*State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S, p. 3.) For these reasons, we deny Gillotte's exceptions.

We disregard Gillotte's new allegations with regard to his May 10, 2010, performance evaluation, since it fails to satisfy any of the requirements for the Board to address unalleged violations as enumerated in *Fresno County Superior Court* (2008) PERB Decision No. 1942-C:

> unalleged violations may be reviewed by the Board when the following requirements are met: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue. [Citations omitted.] The failure to meet any of these requirements prevents the Board from considering the unalleged conduct as a violation.

(*Id.* at p. 14.)

We also disregard Gillotte's attempt to introduce the facts of a separate Board decision, viz. *Jurupa, supra,* PERB Decision No. 2283, without satisfying the necessary requirements for doing so. (See PERB Reg. 32300(b).)

Even if we were to consider Gillotte's exceptions, we agree with the ALJ's conclusion that the District satisfied its burden of proving that it would have taken the same actions even if Gillotte had not participated in protected conduct, in light of Gillotte's repeated instances of misconduct that occurred both before and after his protected conduct.

Gillotte alleges various violations of the District's progressive discipline policy, the CBA of "the parties,"[13] the Education Code, and the First Amendment to the U.S. Constitution. However, Gillotte has not pointed to any part of the record indicating that, subsequent to his engaging in protected activities, the District's treatment of student complaints and its discipline of Gillotte for his treatment of students differed from its handling of his discipline prior to his protected activity. Nor does the evidence show that the District's handling of Gillotte's discipline differed from that of any other similarly-situated employee.

Gillotte's allegations that the District violated Education Code section 44031 numerous times *prior* to his protected conduct erode his claim that similar alleged violations *subsequent* to his protected conduct were evidence of nexus. Even assuming, arguendo, that the District violated the Education Code (a matter we do not decide), it apparently did so without regard to Gillotte's protected activity. Consistent violations of the Education Code before and after Gillotte's protected activity that allegedly demonstrated a lack of just cause or procedural violations would not, by themselves, indicate improper motivation because of protected activity. (See, e.g., *Moreland Elementary School District* (1982) PERB Decision No. 227, pp. 14-15; *Baker Valley Unified School District* (2008) PERB Decision No. 1993, pp. 9-10 ["[E]ven if the District's conduct violated the Education Code, it does not establish a retaliatory motive because all teachers were treated the same, whether Association members or not."]; *California State University (San Francisco)* (1986) PERB Decision No. 559-H, p. 7

[13] Gillotte appears to be referring to the CBA between the District and NEA-J, which is not a party to the present case.

["There was no evidence that the employer departed from established procedures or standards, since, even though Chief Schorle's practices with regard to evaluations did not adhere to those of CSUSF, he applied his own standards consistently."].)

Gillotte cites to *Novato*, *supra*, PERB Decision No. 210 in support of his assertion that the District's alleged maintenance of a site file concerning student complaints demonstrates the District's anti-union animus. We disagree. There are significant factual distinctions between this case and the facts in *Novato*. The Board found in *Novato* that a school district principal's "secret file" about an employee's union activity and job performance was evidence of an unlawful motive (*Id.* at pp. 20-21.) The school district's unlawful motivation in transferring charging party was inferred by the fact that the charging party had generally and consistently received good evaluations. (*Id.* at p. 9.) The school district employer had compiled a secret file only on the charging party, which contained information regarding union activities as well as job performance. (*Id.* at p. 10.) The majority of the information was placed in the file only after the charging party had engaged in protected activity, even though many of the parental complaints, class drops, and transfers occurred months earlier. (*Ibid.*) The district usually kept records of parental complaints so that it could later discuss the matter with the teacher if it was at all serious. The district, however, did not investigate or discuss with the charging party the merits of several of the parental and student complaints. (*Ibid.*) This was not done even though many of the complaints dealt with aspects of teaching which the district had praised in the charging party's evaluation, written very shortly before these complained-of events. (*Ibid.*)

In contrast with *Novato*, *supra*, PERB Decision No. 210, here there was no evidence that the District treated employees not engaged in protected activity differently than it treated Gillotte with respect to investigating and responding to student complaints. Nor was there any evidence that the District treated Gillotte differently after it learned of his protected activities

by, for example, increasing its scrutiny of his classroom conduct, or starting a site file where none had existed before. Gillotte was the subject of student complaints before he filed any grievances or engaged in other protected conduct, and the District followed its procedures in responding to those complaints, both before and after Gillotte engaged in protected activity.

The other differences between *Novato*, *supra*, PERB Decision No. 210 and the present case are significant. Unlike in *Novato*: (1) Gillotte had not generally and consistently received good evaluations; (2) there is no evidence that the District kept a secret file on Gillotte; (3) there is no allegation that the District kept information regarding union activities in any of Gillotte's files; (4) there is no evidence that the District handled or organized Gillotte's personnel file differently from its handling of other employees; (5) there is no allegation that the District began compiling complaints about Gillotte only after he engaged in protected activity; (6) there is no evidence that the District failed to investigate any of the complaints against Gillotte; and (7) none of the complaints against Gillotte deal with aspects of teaching for which Gillotte had previously been praised.[14]

In *Novato, supra,* PERB Decision No. 210, most of the material contained in the secret file had never been shown to or discussed with the charging party as is required under Education Code section 44031. (*Novato*, p. 11.) Here, the District discussed student complaints with Gillotte as part of its immediate investigation of those complaints.

The Board also found in *Novato*, *supra*, PERB Decision No. 210 that:

> The fact that the District violated the above-mentioned Education Code provision as well as its own official policy [fn. omitted] by not notifying [charging party] of the majority of the complaints filed against him when the District in fact claimed to have relied on that information for his transfer is evidence of improper motive. [Citation omitted.] Therefore, it is not inappropriate to

[14] Although Trujillo awarded Gillotte with a certificate for being a "Champion of Character" sometime in June 2010, the record is silent as to what aspects of Gillotte's teaching this award recognized, if any.

> conclude that the file was kept for the purpose of building a case against [charging party].

(*Novato*, p. 12.)

This finding highlights two additional distinctions between *Novato*, *supra*, PERB Decision No. 210 and the present case: (1) there is no evidence that the District violated its own official policy in its handling of Gillotte's personnel file; and (2) there is no evidence that the District kept any file on Gillotte solely for the purpose of building a case against him and refused to disclose that information to him.

Regarding Gillotte's attendance at the Boykin hearing, the ALJ concluded that his attendance was not protected, because there was insufficient evidence to establish that the purpose for his attendance was to investigate possible contract violations or other policy violations. Gillotte excepts to this finding, asserting that it was "self-evident that there were a number of employees involved in assessing evidence and patterns of conduct by the DISTRICT." (Charging Party's Statement of Exceptions, p. 3.) That there may have been others at the Boykin hearing is irrelevant to the ALJ's finding that no evidence was presented showing how or why Boykin's employment dispute had anything to do with Gillotte's disputes with the District. For reasons explained by the ALJ, we affirm her conclusion that Gillotte failed to establish that his attendance at the Boykin hearing was protected activity.

The ALJ also concluded that Gillotte's request for personal necessity leave under the CBA was not protected because it was not a "logical continuation of group activity," citing *San Joaquin Delta, supra,* PERB Decision No. 2091, p. 3, and relying on *State of California (Department of Forestry & Fire Protection)* (2004) PERB Decision No. 1690-S and other cases for the proposition that merely requesting a benefit provided by a CBA, as opposed to seeking to enforce its provisions, is not protected conduct. Gillotte does not except to this conclusion, so the issue is not before us, strictly speaking. However, we decline to affirm the

ALJ on this point, saving for another day full consideration of whether our precedent should be overturned.

Despite PERB's earlier decisions, there is persuasive authority from the United States Supreme Court and the National Labor Relations Board (NLRB) calling into question these earlier cases on which the ALJ relied. In *NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, the Supreme Court approved of the NLRB's *Interboro* doctrine[15] which held that an individual's assertion of a right grounded in a CBA is recognized as "concerted activity" and therefore protected by section 7 of the National Labor Relations Act (NLRA). See also *Rogers Corporation* (2005) 344 NLRB 504, holding that good faith assertion of contractual right to bid on a permanent job was protected conduct under the NLRA.

In any event, even if Gillotte's request for personal necessity leave was protected, such a conclusion does not change the outcome of this case, as there is ample evidence that the District met its burden of showing that it would have terminated Gillotte's employment even in the absence of his protected activity. Moreover, Gillotte has not shown a nexus between his protected activity and the District's denial of his request for personal leave, and therefore has not demonstrated a prima facie case of retaliation for this allegation.

We concur with the ALJ's conclusion that Gillotte's withdrawal of his personal leave allegation in his second amended charge was valid, and that his motion to re-introduce this charge by amending the complaint at the hearing was untimely, since the alleged conduct occurred more than six months prior to the motion.

2. The District's Exceptions

The District takes issue with the ALJ's legal conclusion that the circumstantial evidence supported a finding that that the District harbored an illegal motive in dismissing

[15] *Interboro Contractors, Inc.* (1966) 157 NLRB 1295 (*Interboro*).

Gillotte, i.e., a nexus between the protected conduct and the adverse action. In support of this claim, the District asserts several exceptions to the ALJ's findings of fact.

Specifically, the District excepts to the ALJ's finding that attaching student statements to the January 2012 summary of allegations deviated from District practice and therefore indicated that the District had decided to terminate Gillotte by January 2012.

The District also objects to the ALJ's finding that it offered inconsistent statements at the hearing regarding Trujillo's involvement in the investigation of student complaints against Gillotte. It also excepts to the ALJ's finding that Trujillo was biased against Gillotte. We address these exceptions below.

a. Elzig's Attachment of Student Complaints to Summary of Allegations

The District excepts to the ALJ's finding that Elzig's attachment of student complaints to the January 2012 summary of allegations demonstrates that the District predetermined the outcome of its 2011 investigation of Gillotte. Contrary to the ALJ, we find that Elzig's actions do not constitute circumstantial evidence of causal nexus between Gillotte's protected activity and the District's termination of his employment.

According to the ALJ, "Elzig admitted during cross examination that it is the District's policy and practice not to provide written student complaints to employees until the employee is going to a dismissal hearing." (Proposed Dec., p. 48.)

The exact testimony is as follows:

> Q And as a matter of fact, it's always been your policy and practice to not share student complaints with a teacher until they go to an OAH[16] hearing, correct?
>
> A Correct.

[16] We assume that in asking this question, Gillotte's counsel intended to refer to the CPC hearing, which is administered through the office of administrative hearing or Office of Administrative Hearings (OAH).

(R.T. Vol. II, p. 137.)

From this premise, the ALJ extrapolates that Elzig would *only* attach student complaints to a summary of allegations if the District had already decided at that point to terminate Gillotte's employment. According to the ALJ, when Gillotte was presented with the student statements, the investigation should have been ongoing, because Gillotte had not yet been given an opportunity to respond to the January 26, 2011, summary of allegations. (Elzig testified that she considers the employee's response as part of the District's investigation.) Since it was the District's practice to attach student statements after the District initiates dismissal proceedings, the ALJ concluded that the District had already determined to dismiss Gillotte without hearing his response to the January 2012 summary of allegations. Thus, the ALJ concluded that "the District appeared to be acting inconsistently with its investigation practice by predetermining the outcome of the investigation before Gillotte had the opportunity to respond to the most recent allegations against him." (Proposed Dec., p. 49.)

We do not share the ALJ's inference of retaliatory intent from these facts. First, the District benefitted Gillotte by giving him the student statements along with the summary of allegations. An employer's conduct that departs from past investigatory practice, but which inures to an employee's benefit, is not evidence of unlawful motivation.[17]

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[17] See, e.g., *Regents of the University of California* (1987) PERB Decision No. 615-H, pp. 20-21:

> [W]e are unable to draw an inference that Yeary's protected conduct was a motivating factor in any of UC's actions during the course of the two appeals. *To begin with, two of the incidents resulted in no harm to Yeary (indeed, one was to his benefit) and thus cannot be the basis for an inference of unlawful motive.*

(Emphasis added.)

Second, there is no basis to conclude that Gillotte was prevented from responding to this summary of allegations. John Vigrass, the NEA-J president, submitted a response on behalf of Gillotte on February 12, 2012. Presumably as a result, the District dropped five allegations when it finally did prepare the statement of charges, which initiated the dismissal proceedings.

Thus, the record does not support the inference that the District had made up its mind to dismiss Gillotte at the time he was provided the summary of allegations with attached student statements, regardless of whether or not it changed its investigation procedures. We conclude that Elzig's above-described actions do not support a finding of nexus, especially in light of the fact that Gillotte had previously complained in his 2009 response that the District unfairly withheld the actual student statements from him.

b. Trujillo's Role In Investigating Allegations Against Gillotte

The ALJ concluded that Trujillo had assisted in investigating the allegations against Gillotte in the December 2011 summary of allegations, and that the testimony of Elzig and Pace regarding Trujillo's involvement in the investigation was contradictory. The ALJ also concluded that Trujillo's May 27, 2010, e-mail stating he was "taking out a hit on" Gillotte indicated bias, and that these facts indicate causal nexus between Gillotte's protected activity and the District's adverse action.

We agree with the ALJ's assessment that the inconsistency in the District's witness' testimony regarding Trujillo's level of involvement in the 2011 investigation of student allegations against Gillotte permit an inference of unlawful motivation.[18] (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, p. 19.)

[18] However, we disagree with the ALJ's conclusion that there was "at least an appearance of bias by Trujillo (namely, the admittedly inappropriate 'hit' comment)". A manager's mere dislike of a charging party does not, in and of itself, demonstrate nexus.

Elzig's and Pace's testimony presented two different views of Trujillo's role in the investigation of Gillotte. After the District Superintendent, Elliot Duchon (Duchon), reviewed a student complaint against Gillotte in November 2011, Duchon e-mailed Elzig, in relevant part: "Sounds perfect for Roberta [Pace] or Jay [Trujillo] to investigate." Elzig responded by e-mail, in relevant part: "Actually, I was already second guessing who should investigate. No seriously, Roberta [Pace] is more thorough than I am and will be a great witness. Jay [Trujillo] is solid on this kind of thing also. . . ." (Charging Party Exh. 29.)

The evidence indicates that Pace conducted the 2011 investigation and presented her findings and recommendations to Trujillo. Pace testified that Trujillo was "involved in the investigation . . . from day one . . . until its end," and that Pace would give Trujillo regular summaries of interviews to update Trujillo and have verbal discussion with Trujillo as well. (Testimony of Pace, R.T. Vol. II, 97:24-98:17.) Pace understood that Trujillo conveyed the information in Pace's reports to Elzig throughout the investigation. (Testimony of Pace, R.T. Vol. II, 119:16-24.)

Elzig, on the other hand, testified that Trujillo was not an investigator in the 2011 investigation and had no input into the investigation of Gillotte or with respect to the District's ultimate decision to move for Gillotte's termination "to any great extent." (Testimony of Elzig, R.T. Vol. II, 53:16-25.)

Pace's version of events is supported by a November 16, 2011, e-mail from Trujillo to Elzig, in which Trujillo states, in relevant part:

(*Garden Grove Unified School District* (2009) PERB Decision No. 2086 [hostile comments that do not bear on protected activities or protected group are insufficient to demonstrate animus].) From his e-mail, it is apparent that Trujillo harbored a bias against Gillotte, but not because of Gillotte's protected activity. The bias instead stemmed from Trujillo's belief that he was "bad for kids." Such bias does not violate EERA.

> Roberta [Pace] and Monty [Owens] have interviewed several random students, as well as students who have brought forth concerns about Chris Gillotte. Roberta and I have discussed this thoroughly, and our general summary and recommendations are attached. No surprise... several of the complaints and recommendations are not new.

To this e-mail, Elzig replies, in relevant part:

> Hi Jay and Roberta, Nice job on the investigation. We are giving it to legal for review. I will call for further discussion soon.

These e-mails indicate that, Trujillo was involved in the evaluation of the students' statements and recommending a course of action to Elzig. In sum, the ALJ's conclusion that the District offered inconsistent statements regarding Trujillo's involvement in the investigation of Gillotte is supported by the evidence and will not be disturbed.

3. The District's Defense

For reasons described in the proposed decision, we agree with the ALJ that the District met its burden to show that it had legitimate, non-discriminatory reasons for terminating Gillotte's employment. We, therefore, dismiss the complaint and underlying unfair practice charge.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the complaint and underlying unfair practice charge in Case No. LA-CE-5693-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Huguenin and Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CHRISTOPHER GILLOTTE, Charging Party, v. JURUPA UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5693-E PROPOSED DECISION (10/31/2013)

Appearances: Richard D. Ackerman, Attorney, for Christopher Gillotte; Fagen, Friedman & Fulfrost by Kerrie Taylor, Attorney, for Jurupa Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a former public school employee alleges that his former employer retaliated against him because of his exercise of protected conduct under the Educational Employment Relations Act (EERA).[1] The employer denies any violation of the law.

Christopher Gillotte initiated this action on April 30, 2012 by filing an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Jurupa Unified School District (District). The charge alleged that the District violated EERA by denying a request for personal necessity leave in October 2011. The District filed a position statement in response to that allegation on May 16, 2012. A first amended charge was filed on May 29, 2012, alleging that the District decided to terminate Gillotte's employment on May 7, 2012. A second amended charge was filed on September 7, 2012. The second amended charge stated that "complainant restricts the scope of the instant complaint" to the District's

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

decision to terminate Gillotte's employment on or about May 7, 2012. On November 13, 2012, the PERB Office of the General Counsel issued a complaint alleging that the District terminated Gillotte's employment on May 7, 2012 because he filed the instant unfair practice charge with PERB on April 30, 2012.

The District filed its answer to the complaint on December 3, 2012, denying that its actions were retaliatory and raising various affirmative defenses. PERB conducted an informal settlement conference with the parties on January 7, 2013, but the matter was not resolved. On March 26, 2013, the District filed a motion in limine to limit issues, asserting that because Gillotte had the opportunity to fully litigate the cause for his termination before the Commission on Professional Competence (CPC), he should be collaterally estopped from relitigating these claims before PERB. The District also requested that administrative notice be taken of the five-day CPC hearing transcript and exhibits.

A formal hearing was held on April 8-9, 2013. The District's motion in limine and request for administrative notice were denied by the administrative law judge (ALJ). Gillotte moved to amend the complaint to re-allege that the District retaliated against him by denying his request for a day of personal necessity leave in October 2011, because he requested to attend a court hearing regarding the termination of another employee with whom he was participating in collective grievance activity. The ALJ granted Gillotte's motion to amend the complaint over the District's objection. The parties also stipulated to the admission in the record of portions of the transcript from the CPC hearing, specifically, day one, pages 42-150,

and day two, pages 19-104.[2] With the submission of the parties' final post-hearing briefs on July 10, 2013, the record was closed and the case was submitted for decision.

FINDINGS OF FACT

The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k). Prior to his dismissal from the District, Gillotte was an employee within the meaning of EERA section 3540.1(j). Gillotte had been employed by the District as a high school mathematics teacher since 2004. Teachers at the District are included in a bargaining unit that is represented by the National Education Association-Jurupa (NEA-J). At all relevant times, the District and NEA-J were parties to an operative collective bargaining agreement (CBA).

The District's Policies on Investigation of Employee Misconduct and Progressive Discipline

When students complain about their teachers to District administrators, the District's routine practice is to refer that complaint back to the teacher for resolution, unless the complaint is of a "serious" nature, for example, sexual harassment or verbal or physical abuse. There is no provision of the CBA that sets forth a procedure for notifying a teacher regarding

[2] The CPC transcript excerpt was identified in the record as Respondent's exhibit TT. It consists only of testimony by students. Initially, Charging Party objected to admitting the students' testimony on the basis of hearsay, that it was not the best evidence, and on other grounds. Charging Party withdrew these objections when the District clarified that it was introduced to corroborate the thoroughness of its investigation regarding Gillotte's alleged misconduct. Both parties and their respective counsel participated in the CPC hearing and had an equal opportunity to examine and cross-examine witnesses. The students' testimony will be considered herein as though it was produced during the course of the PERB hearing. Student names will be identified in this proposed decision by initials only.

student complaints.[3] The District does not immediately move for dismissal of an employee upon receipt of student or parent complaints, but rather, investigates them, especially to determine whether there is a repeated issue that the District needs to manage.

Site administrators most typically investigate allegations of employee misconduct, but sometimes administrators in the human resources department may conduct an investigation if the issue is serious. Tamara Elzig is the District assistant superintendent of personnel services. When Elzig is involved in an investigation, she issues a written summary of allegations to aid the employee in responding. Elzig considers any response by an employee, whether written or verbal, to be part of the investigation. If an employee's response raises new information, then the District may continue the investigation by conducting additional interviews. Otherwise, the employee's response may conclude the investigation.

The District maintains that its disciplinary practices are intended to improve employee performance. The first level of discipline involves a verbal interaction between a teacher and administrator, where concerns are discussed, the teacher's explanations are taken into account, and future performance expectations are expressed. The next level would involve the same type of meeting, followed by a summary of meeting document to memorialize the discussion and performance directives. From there, progressive discipline moves to more formal disciplinary documentation in the form of letters of concern and letters of reprimand. Under the Education Code, a written notice of unprofessional conduct must be issued to the employee

[3] Complaints by parents, however, are addressed at CBA article V, section 13, "Public Complaint Procedure." A public complaint regarding a teacher's job performance is to be discussed with the teacher "as soon as possible." Meetings between the complainant, the teacher, and the supervising administrator are held when deemed to be "appropriate." No explanation for those appropriate circumstances is provided.

prior to pursuing termination.[4] The District considers this to be the most serious disciplinary memorandum. The highest level of progressive discipline before termination is an unpaid suspension. The District "always" affords an employee with the opportunity to respond, either verbally or in writing, to all forms of written disciplinary action.

Gillotte's Employment Issues in 2007-2008

During the 2007-2008 school year, Gillotte taught mathematics at Rubidoux High School (Rubidoux). Laurel Fretz was the principal of Rubidoux at that time. According to Gillotte, Fretz was "unreasonable, dishonest, hostile, unable to keep even the most basic facts straight about what was occurring on her campus or with her employees." Sometime early in the 2007-2008 school year, Fretz began receiving complaints from Gillotte's colleagues about his behavior toward staff and perceived undermining of the math department chair.[5] Fretz held a meeting with Gillotte over these issues on March 11, 2008, and she thereafter presented him with two written summaries of meeting.[6] Fretz also informed Elzig about these events.

Gillotte's Employment Issues in 2008-2009

A. Fall 2008

On or around October 30, 2008, Fretz provided Elzig with a memorandum that outlined several areas of concern regarding Gillotte's performance, and included attached statements by students recounting various negative encounters with Gillotte. Elzig prepared a summary of allegations dated November 12, 2008, and also met with Gillotte on or around that date. The summary of allegations summarized the student complaints. Gillotte responded to the

[4] See Education Code section 44938(b)(1).

[5] Fretz is now employed by another school district and did not testify.

[6] The second summary of meeting was issued because Gillotte purportedly violated a directive contained in the first summary of meeting.

allegations by letter dated November 21, 2008. Pertinent allegations, Gillotte's written responses thereto, and his testimony regarding these allegations during the PERB hearing, are summarized below.

1. The Backpack Incident

According to the District, on October 23, 2008, Gillotte became angry when a male student arrived late to class and made too much noise while unpacking his things. Gillotte then required the student to exit and enter the classroom multiple times (as many as 45), and to pack and unpack his belongings each time. A female student complained that the student's actions were distracting to the class and interfering with her learning. Gillotte then reprimanded the female student for complaining.

Gillotte maintained in his written response that several of his students acted in concert that day to prevent him from teaching the class. Gillotte stated that he had "facetiously" asked the class whether they needed to practice entering the classroom, and L.L. took him up on that offer in lieu of working on the math assignment for the day. About three minutes into the exercise, Gillotte reported that L.L. began yelling about a spider being in the doorway and then "pandemonium" ensued in the classroom, which Gillotte had to bring under control. Gillotte denied that any students complained during L.L.'s exercise, but admitted that there were some who "barked out orders" at him, which resulted in him having to move a couple of students to other parts of the classroom and to send one student to another room for the rest of the period.

Gillotte admitted in his testimony that he required L.L. to enter and exit the classroom multiple times. When asked whether this was disruptive, Gillotte replied, "Not to me, not to the class. I made sure he was able to maneuver through the classroom so that he was not

crossing in front of the students, and he did so, what he needed to do, quietly without being disruptive."

2. Slamming a Student's Desk Into the Wall

The District alleged that in the fall of 2008, Gillotte became angry with several students for talking in class. He told one student to stand up, and then he forcefully slammed her desk against the wall and yelled, "sit down!" The student was scared and humiliated.

In his written response, Gillotte identified the student in question as B.R. Gillotte maintained that this allegation was replete with factual errors, and that the "only accurate statement" was that he "moved a desk out of its row…so it faced towards a wall." B.R. defied Gillotte's directive, stating that she did not have to sit there, and then continued to disrupt the class.

When asked during the hearing whether he "forcefully push[ed] a student by the name of [B.R.]'s desk against a wall and direct[ed] her to sit down in a loud voice," Gillotte responded: "Yeah. I was moving a desk and it knocked into the wall pretty hard. And yes, I did tell her to sit down, and I was loud because I needed to have her hear me over her shouting."

3. Scrubbing Toilets and Mowing Lawns

According to the District, in or around September 2008, Gillotte told two Hispanic female students words to the effect that if they kept talking during class, they would be "scrubbing his toilets and mowing his lawn for the rest of their lives." One of the student's written statements over this incident stated, "Mr. Gillotte puts our hopes down instead of putting them up."

Gillotte asserted in his written response that the students' accounts were perhaps a deliberate distortion of one of his "motivational" class lessons. Gillotte maintained that this lesson was also used by other math teachers in the department, and involved describing "menial unskilled labor," and then linking the necessity of a high school diploma to attain a more rewarding skilled labor job. Gillotte recalled that some students were immaturely shouting out responses that implied he meant that those particular students would have such menial jobs in the future. Gillotte further noted: "I recall the 'hopes' comment, but it was made to reject the need to get a diploma to be successful in life (as in 'We have to get a diploma?!?'). It was another display of immaturity, which I turned back to the topic of why earning a diploma is important."

4. Seating Students According to Their Grades

The District asserts that students informed administrators that Gillotte selected their seats in the classroom according to their grades, which the students found to be demeaning and unfair. A student asked if she could be moved closer to the board because she could not see well, and Gillotte informed her that she could not move because she sat in the "F" section. Another student reported that Gillotte spent a lot of time with "A" and "B" students, but did not teach the other students.

Gillotte asserted in his written response that students are not aware of each other's grades unless they choose to discuss them. Regarding the amount of time spent with students, Gillotte stated, "I would point out that I am the class room instructor and not a personal tutor. I do make it a point to circulate around the room, but the amount of time I spend with a student

depends on their needs." When asked during the hearing whether he made the "tutor" comment, Gillotte replied, "Yes, I stated my job title."

Elzig testified to fully considering Gillotte's written response to the summary of allegations. Elzig noted that the students' statements describing the backpack incident differed significantly from the way it was portrayed by Gillotte. When Elzig reviewed Gillotte's response describing the student's comment regarding putting students' hopes down, Elzig came to the conclusion that the student's opinion on this matter had only been expressed in the written statement, and thus was not a comment made verbally in class. Elzig then began to question Gillotte's veracity, because he had responded as if the comment was made in his presence. Regarding the admission that Gillotte did not consider himself to be a personal tutor, Elzig found his statement consistent with the students' accounts of his lack of attention to poorly performing students. Elzig concluded that disciplinary action was warranted, and issued a letter of reprimand dated December 10, 2008. Gillotte was directed to treat all students with courtesy and respect, and to develop classroom management skills that facilitated learning rather than demeaning students.

B. Spring 2009

On or about May 5, 2009, Fretz provided Elzig with another memorandum outlining continuing concerns regarding Gillotte with new student statements attached. The memorandum also recounted Gillotte's verbal responses to the new concerns in a meeting held between Fretz and Gillotte where he had been accompanied by a union representative. After reviewing this memorandum, Elzig concluded that Gillotte had not heeded the directives from the December 2008 letter of reprimand. Elzig then prepared a notice of unprofessional conduct dated June 2, 2009, which summarized the student complaints, and presented it to Gillotte in a

meeting on or around that date. This document contained all of the allegations previously outlined in the letter of reprimand, as well as the new incidents reported to Elzig by Fretz. It also included his most recent performance evaluation (from 2008), in which Gillotte was rated overall as "meets standards."

Gillotte responded to the notice of unprofessional conduct through his legal counsel by letter dated June 11, 2009.[7] Gillotte protested generally that the District was penalizing him twice by repeating the previous allegations from the December 2008 letter of reprimand. Pertinent new allegations, Gillotte's written responses thereto, and his testimony regarding these allegations during the PERB hearing, are summarized below.

1. Rude and Condescending Comments to Senior Students

The District asserted that Gillotte expressed to his classes that seniors are insignificant because they do not impact the results of California standardized tests, and that only sophomores and juniors are going to make him look good because they take those tests. Students also reported that Gillotte made generally rude comments about students' appearance, such as, "is the reason you have a hood on because you didn't fix your makeup today?"

Gillotte denied generally in his written response that he ever said senior students were insignificant or that he was rude or condescending to students. He asserted that his comment over the hood was simply that the student could not wear a hood in class and was therefore appropriate. In his testimony, Gillotte also denied ever telling seniors they do not matter.

2. The "Jerk" Comment

The District alleged that Gillotte refused to provide detailed explanations of math

[7] Gillotte testified to reviewing this document before it was submitted on his behalf.

problems while teaching, and became angry and rude if students requested additional information. Specifically, student L.B. asked Gillotte to teach the class how to do a particular problem rather than simply writing the problem on the board with no explanation over the mathematical process. At that point, Gillotte became angry, told L.B. to "stop being a jerk," and threatened to suspend her. L.B. also indicated that Gillotte's behavior on that day was typical for him. The District further asserted that Gillotte admitted in a meeting with Fretz that he had behaved in the manner as alleged.

Gillotte's written response described this allegation as "particularly offensive" since L.B. had a history of truancy and she actually passed the test over the material in question. He reasoned that she could not have passed the test if his explanations were inadequate. Gillotte denied that he had admitted to behaving in the manner alleged during the meeting with Fretz. In his testimony over this issue, Gillotte denied that he told L.B. to stop "*being* a jerk," rather, what he said was words to the effect of, "you need to stop *acting like* a jerk in my classroom." (Emphasis added.)

The June 2009 notice of unprofessional conduct directed Gillotte, among other things, to avoid confrontations with students, and to refrain from mocking students or calling them demeaning or offensive names. At the conclusion of the 2008-2009 school year, Gillotte voluntarily agreed to transfer from Rubidoux to Patriot High School (Patriot) for the following year in order to get a fresh start.

Events in 2009-2010

A. Actions Taken Over Additional Complaints by Students

During the 2009-2010 school year, Roberta Pace was the assistant principal of curriculum and instruction at Patriot. Jay Trujillo was the principal of the school at that time.

One of Pace's responsibilities was to investigate allegations of employee misconduct. At the time of the hearing in this matter, she had conducted approximately 100 employee investigations for the District. Pace had occasion to investigate Gillotte in the fall of 2009.

The 2009 investigation was initiated by two nearly simultaneous events: Trujillo gave Pace a written complaint from a student regarding Gillotte, and then another student and parent visited the campus together to discuss their concerns about Gillotte with the administration. Trujillo then requested that Pace begin an investigation.[8] Pace first interviewed the two complaining students. She then obtained class rosters for Gillotte's classes, selecting students at random (either every fifth or seventh student on the list), for additional interviews. Pace asked the students a series of set questions, but would deviate as necessary based on the responses given. She kept notes of pertinent information and also asked students to write statements in their own words. Pace directed the students to be truthful. Pace believed the students' accounts, primarily because of the similarity in what had been reported by various students. Pace provided a written summary of her investigation with the attached student statements and presented it to Trujillo. Elzig also received a copy of Pace's report.

Elzig prepared a summary of allegations based upon Pace's investigation dated January 14, 2010. Within this document, Elzig provided a summary of the students' concerns. Elzig also met with Gillotte on or around January 14, 2010. Gillotte responded to the summary of allegations through his legal counsel by letter dated February 19, 2010.[9] Pertinent allegations, Gillotte's written responses thereto, and his testimony regarding these allegations during the PERB hearing, are summarized below.

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[8] Trujillo did not testify.

[9] Gillotte testified to reviewing this document before it was submitted on his behalf.

1. General Concerns About Rudeness and Inattentiveness

Several students reported that Gillotte was frequently rude, sarcastic, and condescending when he spoke to students, that he frequently "pick[ed] on" students, and that he did not help students with their questions. Gillotte protested in his written response that allegations appeared to be restated multiple times and that there were few specific allegations. In his testimony, Gillotte pointed out that there were other teachers who, in his opinion, had acted less professionally than he, and they had not been disciplined. No specific examples were provided. Gillotte also testified to various incidents where teachers and administrators had observed his classroom teaching and made positive comments. Documentation of these incidents were introduced in the record.

2. "Super Senior" Comment and Efforts to Embarrass a Student Over Test Performance

R.M. reported that Gillotte called him a "super senior" as he was entering class one day in early December 2009. A super senior was roughly defined in the record as a senior who had been attending school for four or more years, but had not accrued enough credits to graduate. Other students' statements also corroborated R.M.'s account. In his written response, Gillotte asserted that it was other students who actually called R.M. a super senior, "since he's a senior with approximately 30 credits; he's only passed six semesters." Gillotte testified that he never labeled R.M. as a super senior.

The District alleged that Gillotte publicly asked a student whether he had passed the California High School Exit Exam (CAHSEE). When the student said yes, Gillotte responded, "no you didn't...I just wanted to know if you were going to be honest." Gillotte's written response stated: "What is wrong with asking a student if he passed the exit exam? Where is the violation of policy? The senior is in a class with freshman and complains because he is

being asked if he passed an exit exam?" During testimony, it was established that the student in question was R.M. Gillotte admitted that he asked R.M. whether he had passed the CAHSEE in front of the class, and that he knew before asking that the student had not actually passed the examination.

3. Comments Regarding a Student's Plan to Serve in the Army

The District alleged that on December 14, 2009, Gillotte told a student that he would never "be anything in life and no one would want him for a job" after the student shared his plans to join the Army. Gillotte also said that the Army would not want, or trust, the student and that he (Gillotte) would not trust the student with a gun. Gillotte did not address these allegations in his written response. During the hearing, Gillotte denied making any of these comments to the student in question.

After Elzig reviewed Gillotte's response to the January 14, 2010 summary of allegations, she concluded that it was consistent with what she had observed from Gillotte over the years, because he: "didn't so much deny that the things had happened, but provided rationalizations and excuses for why the things had happened." Elzig therefore decided to issue another notice of unprofessional conduct dated March 24, 2010 based upon the incidents included in the January 2010 summary of allegations. Gillotte was directed, among numerous other things, to refrain from mocking students or calling them demeaning names, to provide assistance to students who needed it, and not to discuss individual student's performance or grades in front of other students. Gillotte was warned that failure to immediately correct the performance deficiencies outlined therein may result in his dismissal from employment. Gillotte's most recent performance evaluation (2008) was attached.

B. The Performance Evaluation and Other Actions by Trujillo

Gillotte's performance was evaluated by Trujillo for the 2009-2010 school year. The evaluation was dated May 10, 2010. He was rated "meets criteria" in four categories, but "unsatisfactory" in the categories of "creating and maintaining effective environments for student learning," and "developing as a professional educator." His overall evaluation rating was unsatisfactory. Trujillo noted the District's ongoing concerns regarding Gillotte's classroom management skills and behavior toward students.

On May 24, 2010, Trujillo sent Elzig an e-mail message that stated in relevant part: "I'm taking a hit out on Chris Gillotte. He is bad for kids. I think I can get it done for free." Elzig testified that Trujillo's e-mail was "an unfortunate way of expressing his deep disappointment" in Gillotte's teaching performance and that Trujillo was counseled that the "hit" language was inappropriate. Then, sometime in June 2010, Trujillo awarded Gillotte with a certificate for being a "Champion of Character." The circumstances that led to the awarding of the certificate were not clearly described in the record, but it appeared that such an award was unsolicited and meant to recognize some positive contribution by an employee.

C. Gillotte's Grievance and Group Activities

According to Gillotte, he filed approximately 15 grievances sometime in "late Spring 2010." Around that same time, some other employees, who were not explicitly identified in the record, also filed numerous grievances.[10] In Gillotte's opinion, because so many grievances were filed by multiple employees around the same time, the District should have known that he was participating in group activity. Gillotte's written grievances were not introduced into the record, and there was no detail provided over their substance. They were

[10] The content of the other employee's grievances was also not described in the record.

not pursued to arbitration, because NEA-J did not participate.[11] Elzig admitted to remembering that Gillotte filed "a series of grievances," but she recalled that they were filed from August through September 2010. She was not questioned over any grievance filings by other employees that occurred around the same time. There is simply not enough information in the record to determine precisely when Gillotte's grievances were filed, but it can be presumed that it was no later than September 2010.

Sometime near the end of the 2009-2010 school year, perhaps in June 2010, Gillotte and several other District employees submitted an anonymous group complaint through an attorney at a regular meeting of the District board of education.[12] The group complaint was not introduced into evidence, and there also was very little substantive description of it by witnesses. Since the group complaint was anonymous, Gillotte was not identified as a complainant, and Elzig credibly testified that she did not recognize that Gillotte's specific employment issues were recounted in the complaint. Elzig further noted that at that time, Gillote had been represented by a different attorney than the one who submitted the group complaint. In addition to objecting to various District employment practices, the group complaint also accused Elzig of sexually harassing employees and infidelity in her marriage.

Elzig felt compelled to dispute the very personal allegations of misconduct made against her. The District superintendent, Elliot Duchon, gave Elzig permission to send an

[11] According to Gillotte, an individual employee cannot pursue arbitration over a grievance. The grievance procedure of the CBA at Article XXI, section 7, supports this contention, as it says "the Association" may notify the District of its intent to submit a grievance to arbitration, but is silent over an employee's ability to do so.

[12] The group complaint was sometimes referred to a "Master Grievance" in testimony because it was purportedly entitled as such. However, there is no indication in the record that this document was filed pursuant to the grievance procedure in the CBA. The precise date that this document was submitted to the District is unclear from the record.

e-mail message to all employees for this purpose. On June 25, 2010, Elzig sent an e-mail to all District employees denying any sexual misconduct or that she had been unfaithful to her husband. She also noted that the group complaint originated from "a small number of employees who have employment issues," that had chosen to retain the attorney of a member of the board of education with whom she had previously had a public physical and verbal altercation. Elzig denied that the allegations in the group complaint were true.

Later, at some point in time that was not clearly defined in the record, Gillotte and some or all of the group of employees that had presented the group complaint to the District filed a lawsuit together against the District. The court-filed documents were not introduced into evidence, and the allegations in the lawsuit were not described in the record. According to Gillotte, he was a named litigant, and at some point between August and October 2010, an assistant principal at Patriot, Sarah Niemann, asked him whether he was "part of a class action group that was suing the District." Gillotte told her that he was a part of that group. Niemann did not testify. Gillotte believed that Niemann's question over the lawsuit coupled with Elzig's e-mail to all employees responding to the group complaint showed that the District was aware of his participation in the group. Elzig was also sued personally through the group lawsuit and she was aware that Gillotte was one of the litigants. It is concluded, based on the limited facts in the record, that the group lawsuit was filed approximately between August and October 2010.

Events in 2010-2011

Gillotte voluntarily agreed to participate in the Peer Assistance and Review (PAR) teacher mentorship program in 2010-2011 in an effort to remediate his performance issues. The record showed that Gillotte's PAR participation was satisfactory, and that his teaching

mentor made generally positive observations. Elzig implied that the mentor did not feel comfortable critiquing Gillotte; however, the mentor did not testify. Therefore, Elzig's testimony on this point is uncorroborated hearsay that cannot be relied upon.[13]

Events in 2011-2012

A. Request for Personal Necessity Leave

On October 26, 2011, Gillotte submitted a personal necessity leave request form to the Patriot administration office requesting to take off one day of work on October 28, 2011. The form requires the employee to attest that the leave is not requested for "purposes of personal convenience, the extension of a holiday or vacation period, matters which reasonably can be taken care of outside of work hours, or recreational activities." The form also notes that employees should read the applicable CBA section regarding the use of personal necessity leave before submitting the request, and that the District does not require the requesting employee to state a reason for the request "unless the District has reason to believe this Section has been abused."

CBA Article XI, section 11 restates the reasons listed on the form for which personal necessity leave is prohibited. It also provides several examples of typical uses of the leave, but notes that these are not intended to be "all inclusive," The examples provided include, among others: death or serious illness of an employee's immediate family member; serious accidents involving the employee's property; attendance at a funeral of a close friend; attendance at a final oral or written examination required for completing an advanced degree; and a

[13] Uncorroborated hearsay alone is not sufficient to establish a matter of fact. (PERB Regulation 32176; *County of Riverside* (2009) PERB Decision No. 2090-M.) PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

condition/circumstance that would result in "serious financial loss" without the immediate attention of the employee. This section of the CBA also requires that the form be submitted to the District personnel office and "whenever possible...two (2) workdays in advance of the leave." The CBA advises that "[f]ailure to secure advanced permission may result in the absence being taken without compensation." These requests are subject to approval by Elzig. After the leave form was presumably forwarded from the Patriot school site, the District personnel office received Gillotte's request on October 31, 2011.

Gillotte used his time off on October 28, 2011 to attend oral argument in a court hearing regarding the dismissal from employment of a fellow District employee and group complaint participant, Lenore Boykin. Gillotte also met with his attorney afterward. Gillotte wanted to attend the hearing because he thought that Boykin had been treated similarly to him by the District, specifically he believed that they both had items removed from their personnel files, and he wanted to "get a better understanding of what was going on." Gillotte also indicated that his attendance at the Boykin hearing would somehow help him evaluate his rights under the CBA. Other District employees purportedly attended the Boykin hearing, but Gillotte could definitively recall who was there.[14] Elzig did not attend the hearing, but the District's attorney was present, and she told Elzig that she saw Gillotte. The Boykin hearing date had been calendared for over one month prior to Gillotte's submission of the personal necessity leave request. Gillotte had requested personal necessity leave in the past and had never been required to provide his reasons therefor.

[14] Gillotte said regarding the other potential attendees at the hearing: "I wasn't the only one there. I *don't recall all of the parties*, however. Leslie Braden, *I believe*, was there. And I'm *trying to recall if* Ermine Nelson was there *and or* Dave and Pam Lukkarila. Those are the only persons I recall." (Emphasis added.) It is concluded that this testimony is too vague to establish that Gillotte had any clear recollection of who was present.

On November 1, 2011, Gina Chacon, an employee working under Elzig in the personnel office, sent an e-mail message to Gillotte informing him that because the District received the personal necessity leave request after the day of the absence, she needed him to provide a reason for the absence in order to process the request. When Gillotte did not respond, Chacon e-mailed him again on November 4, 2011. He did not respond to that e-mail either. Consequently, Elzig e-mailed Gillotte on November 8, 2011, noting that they had tried to reach him several times over the issue and he had failed to respond. Elzig stated that the District had reason to believe that his leave request was in violation of the CBA, and thus his absence would be without pay for that day. She invited Gillotte to contact her and discuss the situation if desired.

Gillotte conceded that it was "possible" that he did not respond to the District's request for information regarding his personal necessity leave day until he sent Elzig and Chacon an e-mail message on November 16, 2011. Gillotte admitted in this e-mail message that he attended a court hearing on October 28, 2011, and stated that his purpose in doing so was "to obtain information for a case where I am the plaintiff." He also stated that he had a meeting with his attorney after the hearing, and that this meeting could not be scheduled at times that were convenient for him. Gillotte testified that he talked with every other employee who took personal necessity leave that day, and he was the only one who was contacted by the District. Gillotte did not identify these other employees, nor were they called as witnesses. Gillotte's testimony on this point is uncorroborated hearsay and is therefore not relied upon.

By letter dated November 17, 2011, Elzig denied the personal necessity leave request, citing applicable provisions in the CBA. She also noted that Gillotte's presence was not required at the hearing since he was not a party to that matter, and also since school ends at

2:10 p.m., a meeting with his attorney could easily have been scheduled after working hours. Finally, Elzig noted that Gillotte failed to timely submit his request, because it was not received in the personnel office until October 31, 2011, which was after his absence. Gillotte's pay was docked for one day.

According to Gillotte, employees routinely use personal necessity leave for reasons like extending their camping trips and Las Vegas vacations, and are not questioned by the District. Elzig, however, testified that she regularly instructs employees in the personnel office to follow-up with employees to provide more information regarding requests for personal necessity leave. Elzig previously denied a similar request from a different employee who attended another employee's court hearing. Gillotte admitted to being aware that Elzig had denied this employee's request. Elzig has also denied personal necessity leave requests for reasons of employee convenience, like extending vacations, and where an employee took the day off to get a massage to relieve stress.

B. New Student Complaints and the District's Decision to Terminate Employment

Trujillo was back as principal at Patriot during the start of the 2011-2012 school year, and Pace was returned to her position of assistant principal of curriculum and instruction. Later, in February 2012, Pace again became interim principal.

In the fall of 2011, students in Gillotte's integrated math and advanced placement (AP) statistics classes raised concerns about Gillotte with administrators. The initial complaint from an integrated math student was not clearly described in the record. J.S., an AP statistics student, sent an e-mail to Pace complaining there was a teacher at Patriot that did not help students with their questions and made belittling remarks to students. Pace shared this e-mail with Trujillo and Elzig and informed them that she would be interviewing the student to obtain

more information. When interviewed, J.S. identified the teacher as Gillotte. Shortly thereafter, the mother of another AP statistics student, M.G., called Pace to complain about Gillotte. Pace then followed up with M.G. directly. M.G. complained about difficulties students faced in receiving help from Gillotte.

Pace again investigated by selecting random students from Gillotte's class rosters in AP statistics and integrated math, and by asking set questions with deviations as necessary based upon the responses received. Assistant principal Monte Owens also conducted student interviews.[15] Pace reviewed the student statements collected by Owens, and his interview notes, then summarized them into a memorandum combined with her own investigative research. Pace was struck by the level of consistency in the complaints made by students from both classes—chiefly Gillotte's failure to help students with their questions and belittling and demeaning comments toward students. For example, one student in integrated math told Pace that Gillotte had told her or the class generally that she was "dumber than a box of rocks." Pace provided the summary of investigation to Trujillo and Elzig. According to Elzig, Trujillo did not participate "to any great extent" in the 2011 investigation, nor in the decision to recommend Gillotte's termination. According to Pace, however, Trujillo was involved in the investigation "from day one" by being regularly updated on its progress. Pace testified that she told administrators that unless Gillotte was able to provide evidence to refute these allegations, especially because of his history of discipline for similar misconduct, he should be terminated.

A meeting was scheduled for December 9, 2011 to discuss the investigation with Gillotte. That meeting was cancelled and rescheduled several times at Gillotte's request

[15] Owens did not testify.

because of the unavailability of his legal counsel.[16] During his direct examination, Gillotte claimed that no administrator had informed him by the first week of December 2011 that there were any "charges pending" against him. However, during cross-examination, Gillotte admitted that Pace sent him an e-mail message on or about November 8, 2011, informing him that students had raised concerns about him, and that the District would be investigating and meeting with him to discuss those issues. Gillotte was placed on paid administrative leave on or about December 15, 2011, pending the completion of the investigation.

The meeting was finally held on January 26, 2012 with Gillotte's legal counsel participating by telephone. Gillotte was presented with a written summary of allegations with attached student statements during the meeting.[17] In contrast to previous disciplinary documents, this one also had actual student statements attached, rather than just summaries of their statements. Elzig testified that it is the District's policy and practice not to share student complaints with employees until they are going to a dismissal hearing. Gillotte did not respond verbally during the meeting to these latest allegations, but NEA-J submitted a written response dated February 17, 2012, authored by its president, John Vigrass.[18] Gillotte admitted to reviewing NEA-J's written response before it was submitted to the District, but denied that it was submitted on his behalf. Elzig testified to considering that response as part of the

[16] By December 2011, Gillotte was represented by a different attorney then the one who responded on his behalf to the earlier disciplinary actions in 2009 and 2010.

[17] This document was dated December 11, 2011.

[18] Vigrass did not testify. No representative from NEA-J attended the meeting on January 26, 2012, but the union was later provided with a copy of the allegations against Gillotte.

investigation.[19] There is no information in the record to indicate that Gillotte or his counsel informed the District that NEA-J was not responding on Gillotte's behalf. Notably, the District's counsel wrote a letter to Gillotte's counsel on or about February 2, 2012, notifying him that if Gillotte wished to submit a written response to the allegations, he needed to do so by February 10, 2012. However, neither Gillotte nor his counsel provided a written response to those allegations.

In brief, some of the allegations included in the December 2011 summary of allegations (with attached statements by students) were that Gillotte: walked around the room calling his students "idiots" in French; was sarcastic on a daily basis; told students that they have "reading comprehension" problems; refused to help students with their questions over the material, particularly with review of math concepts previously taught; required students to stand at the board to work on problems for long periods of time, without assistance, even after they protested that they did not know how to solve the problem; called students in his integrated math class stupid and "dumb as rocks"; and told his AP students that certain math concepts were "cookbook" and/or "cookie cutter," meaning that anyone should be able to do it.

Elzig believed that the students' separate interviews yielding similar reports of Gillotte's misconduct lent credence to their stories. Elzig further believed that after several years of progressive discipline, including two notices of unprofessional conduct under different administrators at different schools, and Gillotte's continuing demeaning, inappropriate behavior toward students, termination was appropriate.

[19] NEA-J protested that Gillotte was voluntarily participating in the PAR program, and that he had not been given ample opportunity to make progress under that program. NEA-J also contended that the number of complaining students was low compared to the total number of students taught, and therefore they should not be given credence.

On or about May 7, 2012, Elzig submitted to the District board of education an approximately 325-page statement of charges against Gillotte. Elzig inadvertently failed to attach a signed verification of the charges at that time.[20] Gillotte was not informed beforehand that management intended to submit the charges to board of education, nor was he provided with a *Skelly* hearing.[21] The board of education voted to approve the intent to terminate Gillotte's employment at its meeting on May 7, 2012. Thus, the board of education determined to proceed with a termination hearing without Gillotte being afforded the opportunity to address them on that issue. According to Elzig, prior notice to Gillotte of the board of education's action on May 7, 2012 was not required, because the board of education did not *rule on* the charges that night, but rather, voted to *issue* them to Gillotte. Thereafter, Gillotte would be given the opportunity to present his case before the CPC, and the board of education would also be bound by the evidentiary findings of the CPC.

Gillotte received the notice of charges and intent to proceed with his termination on or about May 8, 2012. The charges included all of the allegations previously discussed herein that were the subject of the prior disciplinary actions, as well as the most recent 2011 allegations.[22] They also included statements by students spanning from 2008-2011.[23] Similar

[20] Elzig later corrected her error on August 17, 2012 by signing a verification of the charges against Gillotte and presenting it to the board of education. She also testified, however, that when the charges were submitted to the board of education in May 2012, she believed them to be true and correct.

[21] The term "*Skelly* hearing" refers to a pre-disciplinary hearing that complies with due process requirements set forth in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194. According to Elzig, it is the District's practice to provide a *Skelly* hearing only when an employee is charged with "immoral conduct," which did not apply in this circumstance.

[22] The statement of charges also included other allegations of misconduct from the 2011 investigation as well as from various prior disciplinary actions that were not specifically

to the summaries of students' statements that had been previously provided, the students' full names were redacted, but first and last initials were identified.

At some point in May 2012, Gillotte requested a copy of his site files and personnel file, and he was told that he could come to the District office to review these under supervision, and would be allowed to copy certain documents. Gillotte believed that he should simply be furnished with copies of whatever documents the District had maintained regarding his employment record. During the course of the hearing, Elzig admitted that school administrators routinely maintain site files on employees that are separate from the official personnel file kept in the District office. Elzig maintained that the reason for this is because it would be unfortunate if minor incidents became a part of the employee's permanent file. During investigations regarding allegations of employee misconduct, separate investigation files are also kept, and student complaints, if any, are housed there. Gillotte received a copy of his personnel file at some point, but declined the invitation to review his site and investigation files at the District office.

C. The CPC Hearing

A five-day evidentiary hearing was held before a three-person panel in February 2013 regarding whether there was cause for the District to terminate Gillotte. An ALJ from the state Office of Administrative Hearings (OAH) presided over the hearing, and the District and Gillotte each selected one panel member. Ten current or former students testified on behalf of the District. Two of these students were from Rubidoux, and had taken Gillotte's classes

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addressed through testimony at the hearing. This proposed decision has omitted discussion of those other allegations.

[23] It is not clear from the record whether these were all of the student statements collected during this time period, or if it was a sampling of those statements.

during the 2008-2009 school year. All of the other students who testified were from Patriot. Two of the Patriot students had Gillotte as a teacher in the 2009-2010 school year. The other six Patriot students had Gillotte as a teacher during 2011; three students were from AP statistics, and three were from integrated math. All of the students who testified had provided statements and been interviewed during the course of the District's three different investigations into Gillotte's alleged misconduct during the 2008-2009, 2009-2010, and 2011-2012 school years.

All but one student described Gillotte's behavior towards students generally as either "rude," "sarcastic," "mean," "offensive," or some combination thereof. The student who did not describe his classroom behavior in those terms confirmed that Gillotte had required a student to enter and exit a classroom multiple times during a class period, that he forcefully pushed a student's desk against the wall, and that he made the comment about students "scrubbing toilets" during the 2008-2009 school year. Another student who was in Gillotte's class during 2008-2009 testified that Gillotte would ridicule female students over their appearance when they wore hoods, asking if they did not have time to do their makeup that day. This same student also confirmed that Gillotte said senior students did not matter because they do not take the standardized tests.

A student from Gillotte's class in the 2009-2010 school year testified that Gillotte called R.M. a super senior and embarrassed him over his failure to pass the CAHSEE. E.P., another student from 2009-2010, testified that when he told Gillotte of his plan to enlist in the Army, Gillotte said the Army would not want him or trust him. Two of the integrated math students who testified confirmed that he told the class generally and/or particular students that

they were "dumb as rocks," or words to that effect. These two students also testified that Gillotte said something to the effect that a horse could sit in class and be smarter than them.

Eight students testified that Gillotte frequently would not help students with their questions, instead telling them that they should look in the book or figure it out on their own. Several students testified that Gillotte would tell students to "stop whining." J.S. testified and confirmed that Gillotte called his AP students "idiots" in French. J.S. and another AP student stated that Gillotte would ridicule the students in his lower-level math classes for not being able to figure out simple problems. Two AP students confirmed that Gillotte would make comments that certain math concepts were "cookbook," meaning simple, and berating them for not understanding those concepts. At least two AP students also testified that Gillotte commented that they must have a reading comprehension problem. A student from integrated math and another from AP statistics testified that Gillotte would require students to stay at the board for extended periods, without help, even when they did not know how to solve a problem.

The CPC unanimously upheld the District's intent to terminate Gillotte's employment in a written decision dated March 19, 2013.[24] Thereafter, on March 20, 2013, the District board of education voted to terminate his employment.

[24] At the time of the PERB hearing, Gillotte had appealed this decision and no court of competent jurisdiction had yet rendered a decision on that appeal. Repeatedly during the hearing, Respondent objected to the introduction of certain lines of testimony on the grounds that those factual issues had been litigated and ruled upon by the CPC. In *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S, the Board found that one requirement for barring the relitigation of issues that had been litigated in other forums is that the previous proceeding resulted in a final judgment on the merits. As there is no information in the record that the CPC decision has become final, PERB may not rely on the CPC's factual findings.

ISSUES

1. Was the amendment to the complaint granted during the hearing timely?

2. Did the District deny Gillotte's request for personal necessity leave, and/or decide to terminate his employment, because of his EERA-protected conduct?

CONCLUSIONS OF LAW

1. Timeliness of the Amendment to the Complaint

EERA section 3541.5(a)(1) prohibits PERB 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." The limitation 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.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024.)

The statute of limitations for new allegations contained in an amended charge begins to run based upon the filing date of the amended charge (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458) unless the new allegations in the amended charge relate back to the original allegations in the initial charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959 (*Franz*).) The "relation back" doctrine allows for an exception to the limitations period if the amended charge is sufficiently connected to the original charge; it "does not apply, however, when the amended charge raises new factual allegations, separate conduct or acts not sufficiently related to or raised by the initial charge." (*Id.*, proposed decision, p. 18.) An amended charge relates back to the initial

charge only when it clarifies facts originally alleged in the initial charge or adds a new legal theory based on facts originally alleged in the initial charge. (*Ibid.*)

In this instance, the allegation over the denial of personal necessity leave was raised in the original unfair practice charge filed by Gillotte on April 30, 2012, and was reiterated in the first amended charge filed on May 29, 2012. In Gillotte's second amended charge filed on September 7, 2012, he stated at paragraph one: "Complainant hereby realleges and incorporates *all* prior allegations, *factual in nature*, from any previous complaint filed herein." (Emphasis added.) Gillotte then continued at paragraph two: "Complainant restricts the scope of the *instant complaint* to the unlawful retaliatory action taken against him…on or about May 7, 2012…."[25] (Emphasis added.) Later, at paragraph eight of the second amended charge, Gillotte stated: "Complainant is not pursuing *any further prosecution* of the allegations concerning the 'personal necessity leave' from the prior complaint (*without prejudice*)." (Emphasis added.) In the next paragraph (nine) Gillotte noted, "I seek to have PERB prosecute the claims relating to the District's retaliatory action (i.e., dismissal of Complainant) within mere days after the District's receipt [of the original unfair practice charge]." Thereafter, on November 13, 2012, the PERB Office of the General Counsel issued a complaint that was limited to the District's actions on May 7, 2012.

Gillotte's request to amend the complaint during the hearing was granted over the District's objection. It was concluded that the District would not suffer prejudice, since it had addressed the denial of personal necessity leave in its initial position statement.[26] There was

[25] As noted previously, May 7, 2012 was the date that the District board of education voted to issue the statement of charges and intent to terminate Gillotte's employment.

[26] PERB Regulation 32648 provides that during hearing, a charging party may move to amend the complaint by oral motion on the record. "If the Board agent determines that

some confusion during the hearing regarding why the allegation was omitted from the complaint, as it had not been dismissed by PERB. Neither party appeared to recall the above-discussed language in the second amended charge. The District was also offered additional days of hearing, if needed, to defend against the amended allegation. Ultimately, the District did not need to avail itself of that opportunity and the hearing was completed on schedule.

The allegation over the denial of personal necessity leave is factually unrelated to and distinct from the alleged violations of EERA occurring on May 7, 2012, which are the only subjects of the PERB complaint. The District's final decision over the denial of personal necessity leave occurred on or around November 17, 2011. Because the facts underlying this allegation occurred more than six months before they were amended into the PERB complaint on April 8, 2013, the allegation is untimely unless it can be determined that the amendment either clarifies facts originally alleged in the initial charge or adds a new legal theory based on facts originally alleged in the initial charge. (*Franz*, *supra*, PERB Decision No. 1959.)

Under the unique facts of this case, the "initial charge" has become what PERB issued its complaint upon—namely, the allegations from the first and second amended charges regarding the District's actions on May 7, 2012. This is so, because nothing from the charge as originally filed was actually included in the PERB complaint. Thus, the newly amended allegation may be found to relate back to the "initial charge" only if it can be concluded that Gillotte did not withdraw this allegation before the complaint issued. This is so, because the facts underlying the allegation over the denial of personal necessity leave are completely distinct from those underlying the complaint. Thus, the amendment could neither clarify facts

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amendment of the charge and complaint is appropriate, the Board agent shall permit an amendment." (*Ibid.*) The possibility of prejudice to the respondent is to be considered when determining appropriateness of the amendment.

originally alleged, nor add a new legal theory based on facts originally alleged, unless those facts were *still* in the charge. (*Trustees of the California State University* (2010) PERB Decision No. 2151-H (*CSU*) [where the amendment is based on facts not included in the initial charge, the relation back doctrine does not apply to excuse the late filing].)

In *County of Santa Barbara* (2012) PERB Decision No. 2279-M, a Board agent partially dismissed allegations regarding changed job duties and "increased scrutiny." After the issuance of a warning letter, the Board agent considered those allegations to either be withdrawn by the charging party's failure to specifically incorporate them into the amended charge, or dismissed under the rationale of the warning letter. The Board disagreed, finding that although the amended charge contained new allegations that did not refer to those in the original charge, the charging party had also provided additional factual details in the amended charge regarding those original allegations. The Board concluded, therefore, that the charging party did not actually mean to withdraw those allegations, nor did the warning letter provide an "adequate basis for dismissal," and reversed the partial dismissal of those allegations. (*Id.* at p. 15.)

Here, it is not entirely clear whether the PERB Office of the General Counsel considered Gillotte's statements at paragraphs two and eight of the second amended charge to be a withdrawal of the allegation over the denial of personal necessity leave.[27] However, it is reasonable to conclude that PERB considered the allegation to be withdrawn, because the

[27] There was no notice of partial withdrawal issued to the parties after receipt of the second amended charge. Issuing a notice of withdrawal or partial withdrawal is a customary practice by PERB, but that practice is not addressed in PERB regulations. Thus, the omission of that step in this case does not preclude a finding that the allegation was withdrawn from the charge.

complaint is limited in scope to the District's intent to terminate Gillotte's employment on May 7, 2012. PERB Regulation 32625, "Withdrawal of Charge," requires in relevant part:

> Any request for withdrawal of the charge shall be in writing, signed by the charging party or its agent, and state whether the party desires the withdrawal to be with or without prejudice. Request for withdrawal of the charge before complaint has issued *shall be granted.*

(Emphasis added.)

If Gillotte had included only paragraphs one and two in the second amended charge, it would be logical to assume that while he was realleging all previous allegations from the original and first amended charge, the second amended charge was focused on the District's actions regarding his termination. In that case, it would not automatically follow that Gillotte intended to withdraw the allegation over the denial of personal necessity leave. However, with the addition of paragraphs eight and nine, that is the inescapable conclusion. Gillotte's language in paragraph eight of the second amended charge complies with all of the pertinent requirements of PERB Regulation 32625 for withdrawal of charges of unfair practices, because it was in writing, signed by Gillotte, and stated that he desired the withdrawal of the allegation to be without prejudice. Furthermore, the next paragraph (nine) clarified precisely what Gillotte did *not* want to be withdrawn from the charge. Thus, for whatever reason, it is clear that Gillotte intended to abandon his original allegation and withdraw it from the charge at that time. Because his request was made *prior* to the issuance of a complaint, it *shall* be granted by PERB under the requirements of PERB Regulation 32625.

Gillotte, unlike the charging party in *County of Santa Barbara*, *supra*, PERB Decision No. 2279-M, expressed a clear intent to withdraw the personal necessity leave allegation from the charge and did not provide any additional factual details about the original allegation in his

second amended charge. Accordingly, it is concluded that the allegation was withdrawn on September 7, 2012. Despite the withdrawal being "without prejudice," at that time, the limitation period for that allegation had already run. This means that the allegation could not timely be re-filed. Thus, when Gillotte brought his motion to amend that allegation into the complaint several months later on April 8, 2013, it was untimely. Because it is found that the personal necessity leave allegation was withdrawn, the amendment of the complaint to include that allegation does not relate back to facts in the initial charge, and the relation back doctrine does not excuse the untimely filing. (*CSU, supra*, PERB Decision No. 2151-H.) The allegation over the denial of personal necessity leave can be dismissed for this reason alone. However, for the purpose of discussion, assuming it was timely, the merits of the claim will be addressed below.

2. Retaliation Claims

Gillotte alleges retaliation for EERA-protected activity regarding both the denial of personal necessity leave and the District's decision to terminate his employment. A charging party must prove the allegations in a complaint by a preponderance of the evidence. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H; PERB Regulation 32178.) Preponderance of the evidence has been defined by the courts as "evidence that has more convincing force than that opposed to it." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324.)

To demonstrate a prima facie case of employer discrimination or retaliation against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer

took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*).)

Regarding the third element of the test set forth above in *Novato*, *supra*, PERB Decision No. 210, the District does not dispute in its post-hearing briefs that termination from employment is an adverse action.[28] (See, e.g., *City & County of San Francisco* (2011) PERB Decision No. 2207-M.) The District also does not dispute that Gillotte's pay was docked for one day due to the denial of personal necessity leave, and that such action is considered adverse. (See *Chula Vista Elementary School District* (2011) PERB Decision No. 2221 [loss of pay is adverse]; *Rio Hondo Community College District* (1982) PERB Decision No. 226 [even the denial of an unpaid leave request may be adverse].) Thus, the adverse action element for both allegations is established and requires no further discussion. The District's arguments against the existence of a prima facie case focused on the *Novato* elements of protected activity, the employer's knowledge thereof, and the nexus between protected conduct and adverse actions. A general discussion of protected activity and employer knowledge will be followed by separate discussions regarding nexus for each allegation.

A. Protected Conduct With the District's Knowledge

The threshold requirements to establish a prima facie case of unlawful retaliation are evidence that the employee engaged in activities protected under EERA and that the employer was aware of those activities. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) EERA section 3543(a) protects employees' right to form, join, and participate in the

[28] It is noted that the PERB complaint alleges that the District terminated Gillotte's employment on or about May 7, 2012. However, the record demonstrated that the District issued its written *intent* to terminate Gillotte's employment on that date, but that his job was not actually terminated until March 2013, after the CPC found adequate cause to justify the District's decision.

activities of employee organizations. That section also protects employees' right to represent themselves individually before their employer. (*Ibid.*)

To demonstrate the knowledge element of a prima facie case, at least one of the individuals responsible for taking the adverse action must be aware of the protected conduct. (*Oakland Unified School District* (2009) PERB Decision No. 2061 (*Oakland*).) In other words, the issue is whether "the individual(s) who made the ultimate decision to take adverse action against the employee had such knowledge." (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 7, citing *City of Modesto* (2008) PERB Decision No. 1994-M.)

1. Representation by Union Representatives, Filing Grievances, and Filing an Unfair Practice Charge

The record showed that Gillotte was represented by NEA-J in a meeting with administrators over potential disciplinary action sometime in May 2009. Documentary evidence showed that Elzig was aware of this union representation. NEA-J also provided a written response regarding the District's allegations against Gillotte in February 2012, and Elzig was aware of NEA-J's involvement in this regard.[29] No later than September 2010, Gillotte filed several grievances utilizing the CBA grievance provisions. The substance of the grievances were not described in the record. Elzig, however, admitted to being aware of these grievances.

[29] Despite Gillotte's protestations that the NEA-J's response was not provided on his behalf, the substance of it was disputing the District's allegations against Gillotte, and no one informed Elzig that the response was not made on his behalf. Elzig thus considered it as part of the 2011 investigation, which was logical, given the substance of the response. It is concluded that NEA-J responded for Gillotte's benefit.

None of the above-described instances of protected conduct were included in the PERB complaint, even as amended. It is well-established that seeking help from a union regarding employment concerns is protected activity. (*County of Riverside* (2011) PERB Decision No. 2184-M.) Utilizing the grievance procedure of the CBA, with or without the assistance of the exclusive representative, is protected activity. (*Sacramento City Unified School District, supra*, PERB Decision No. 2129; *Healdsburg Union High School District* (1997) PERB Decision No. 1185 (*Healdsburg*).) These facts relate to matters in the PERB complaint and were fully litigated; thus, it is appropriate to consider them. (*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241.) Gillotte's protected conduct and the District's knowledge thereof is adequately shown regarding his CBA grievance activity and NEA-J representation.

The PERB complaint specifically alleged that Gillotte exercised protected rights under EERA by filing an unfair practice charge with PERB on April 30, 2012. The Board has found that filing unfair practice charges with PERB and participating in the Board's adjudication processes are acts protected by EERA. (*Healdsburg, supra*, PERB Decision No. 1185; *Los Angeles Unified School District* (1992) PERB Decision No. 957.) Elzig admitted to being aware of the unfair practice charge at least by May 7, 2012,[30] but she did not inform the District board of education that it had been filed at that time. Elzig drafted the statement of charges and notice of intent to dismiss from employment. Thus, it is adequately demonstrated that the individual primarily responsible for taking the adverse action was aware of this protected conduct. (*Oakland, supra*, PERB Decision No. 2061.)

[30] The District did not submit its initial position statement in response to the charge until May 16, 2012.

2. Attendance at the Boykin Hearing

The complaint as amended during the hearing alleged that Gillotte exercised rights under EERA by requesting a personal necessity leave day to attend the Boykin hearing because it involved issues common to him. The only common issue that was described in detail by Gillotte was his belief that he and Boykin both had items removed from their personnel files. Boykin testified at the PERB hearing, but she was not questioned about the removal of documents from her personnel file, over any details of her employment history with the District, or about her participation in any concerted employment activities with Gillotte. It is also not clear from the record what sort of position Boykin held with the District during her employment. Gillotte testified that he thought that attending the hearing would help him attain a better understanding of "what was going on" regarding District personnel practices and evaluate his rights under the CBA. He did not explain what CBA provisions, if any, he believed to be at issue in the Boykin hearing. Gillotte also informed Elzig in writing that his purpose in requesting leave to attend the hearing was "to obtain information for a case where I am the plaintiff."

While investigating possible contract violations for the purpose of pursuing grievances may constitute protected activity (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S), here there is simply not enough information in the record to conclude that was Gillotte's purpose in attending the Boykin hearing. There was no evidence that any District administrator was to be testifying that day about the CBA between NEA-J and the District.[31] Elzig did not attend the hearing, so it was

[31] The record indicates that the purpose of the hearing was for oral argument rather than witness testimony.

not possible for her to testify about personnel practices. Furthermore, as stated above, it is not clear from this record if Boykin was a certificated employee that would be subject to the NEA-J agreement, as she was not questioned about her former employment status.

Concerted activities of employees that are related to terms and conditions of employment are generally protected. (*Santa Clara Unified School District* (1985) PERB Decision No. 500.) However, Boykin was not questioned about common employment issues, if any, that she shared with Gillotte, or about any concerted activities on their part. Gillotte testified that other employees also attended the Boykin hearing, but as concluded above, his testimony regarding their attendance was too vague to ascertain which employees even attended. None of these employees testified. There is a dearth of information in the record about collective activities in which employees engaged as a result of attending the Boykin hearing. Therefore, Gillotte has not met his burden in demonstrating that his attendance at the Boykin hearing was protected pursuant to his right to gather information or participate in collective action.

The amended complaint also implies that requesting personal necessity leave under the CBA is itself a protected right. As stated above, EERA section 3543(a) includes a right of self-representation. However, that right is limited. To qualify as protected self-representation, the individual activity must be "a logical continuation of group activity." (*San Joaquin Delta Community College District* (2010) PERB Decision No. 2091, p. 3.) However, an individual's activity made solely for his or her own benefit is not protected.[32] (*Ibid.*)

[32] Although not specifically alleged to be protected conduct, it is noted that Gillotte's individual responses, either on his own behalf or through legal counsel, regarding various proposed disciplinary actions does not qualify as protected conduct because these were taken for his own individual benefit and were not a logical continuation of group activity. This is distinguished from an employee's request for an *exclusive representative* to assist in individual

Using a negotiated dispute resolution process or complaint procedure to enforce provisions of a CBA is protected. (*Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*); *Los Angeles Unified School District* (2005) PERB Decision No. 1787; *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246.) However, merely requesting to exercise an option available under the CBA is not. In *State of California (Department of Forestry & Fire Protection)* (2004) PERB Decision No. 1690-S (*Department of Forestry*), the Board found that "case law does not support a finding that a request for a transfer constitutes protected conduct any more than, for example, would a request by an employee for a vacation day, or an employee's application for a promotion, or a request to work overtime." (*Id.* at dismissal letter, p. 3; see also *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S [individual's overtime request was not protected]; *State of California (Department of Corrections & Rehabilitation)* (2008) PERB Decision No. 1961-S [bid for job assignment under CBA not protected]; *Marin County Law Library* (2004) PERB Decision No. 1655-M [request for schedule change solely for employee's own benefit was not protected].)

Here, Gillotte has not demonstrated that his request for personal necessity leave under the CBA was a logical extension of group activity. Rather, the record demonstrates that Gillotte was merely attempting to exercise a leave provision under the CBA for his own benefit. Notably, Gillotte informed Elzig that his purpose for attending the hearing was to gather information for a case in which he was a plaintiff. There was no reference to any collective action in his stated reason. Nor was Gillotte utilizing a negotiated procedure to

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employment concerns, as this activity has an established history of being found protected. (See *County of Riverside, supra*, PERB Decision No. 2184-M; *County of Riverside, supra*, PERB Decision No. 2090-M.)

enforce a CBA provision. Rather, Gillotte was merely exercising an option available under the CBA for his individual benefit, similar to a request for a vacation day or taking sick leave. (*Department of Forestry*, *supra*, PERB Decision No. 1690-S.) Thus, his request for personal necessity leave was not an action protected by EERA.

3. 2010 Group Complaint and Litigation Activity

As previously noted, the anonymous group complaint submitted through an attorney in or around June 2010 was not received in evidence.[33] The substance of the complaint was also not described in any detail by Gillotte or other witnesses, other than a vague reference to "employment concerns." Gillotte did not assert that his own employment circumstances were actually described in the group complaint. Elzig credibly testified that she did not associate Gillotte with the group complaint at the time it was submitted. Similarly, Gillotte did not seek to admit in the record the lawsuit that was filed by a group of employees sometime in the fall of 2010. The substance of that lawsuit was not described at all by Gillotte or other witnesses. Elzig admitted to knowing that Gillotte was a litigant in the lawsuit.

In general, group complaints about employment concerns are protected under EERA. (*Jurupa*, *supra*, PERB Decision No. 2283; *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1091; *Mt. San Antonio Community College District* (1982) PERB Decision No. 224.) This rationale would also apply to a lawsuit filed by a group of employees, if that lawsuit addressed common employment concerns. While it seems probable that the June 2010 group complaint was of a character that would qualify for protected status, there is simply not enough information in the record to be able to reach that conclusion. Furthermore, even if it was protected, Gillotte has not met his burden in

[33] The ALJ inquired of Gillotte's counsel whether he would seek to admit the document. The counsel replied: "It may very—yes," but then never sought its admission.

demonstrating that Elzig or another administrator was aware of his involvement. Similarly, although the knowledge element is shown for the group lawsuit, there is a fatal lack of information about its content. It is thus impossible from the current record to conclude that the lawsuit was protected under EERA.

In conclusion, Gillotte has demonstrated that he engaged in protected conduct with the District's knowledge by having NEA-J represent him during a meeting in May 2009 and respond to proposed disciplinary action in February 2012. Gillotte has also demonstrated protected activity of which the District was aware by filing several grievances around September 2010, and an unfair practice charge with PERB in April 2012. However, Gillotte has failed to meet his burden in demonstrating that his group activities in 2010 or request for personal necessity leave in 2011 were protected under EERA. Therefore, this proposed decision will not further consider whether the District's actions were in retaliation for group activities or because of Gillotte's request to take personal necessity leave.

B. Nexus

A critical element of a prima facie case is whether there is a causal connection, or nexus, between the adverse actions and the protected activity. The existence or absence of nexus is usually established circumstantially after considering the record as a whole. (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278; *Moreland Elementary School District* (1982) PERB Decision No. 227 (*Moreland*).) The timing between protected activity and adverse action is an important circumstantial factor to consider in determining whether evidence of unlawful motivation is present. (*North Sacramento School District* (1982) PERB Decision No. 264.) However, "'the closeness in time (or lack thereof) between the protected activity and the adverse action goes to the strength of the inference of

unlawful motive to be drawn and is not determinative in itself.'" (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096, p. 11, quoting *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M.)

1. Denial of Personal Necessity Leave

The only instances of protected activity that preceded the District's denial of Gillotte's personal necessity leave request was his representation by NEA-J in a meeting with administrators in May 2009, and filing several grievances in September 2010.[34] This protected activity occurred between one and two years before the adverse action. PERB has found such gaps in time to be too attenuated to support an inference of unlawful motivation. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086 [lapse of two years between protected activity and alleged adverse action was insufficient to establish timing element of nexus]; *Los Angeles Unified School District* (1998) PERB Decision No. 1300 [gap of five or six months between protected activity and adverse action is not close enough in time to show nexus].) Thus, the timing of Gillotte's protected activity and the District's adverse action does not support finding nexus. Because timing alone is not determinative, however, other circumstantial evidence may be examined. (*Moreland, supra*, PERB Decision No. 227.)

Gillotte alleged that he had never before been questioned over or denied the use of personal necessity leave, and that he was the only person questioned over leave taken that day. Disparate treatment of employees may demonstrate the employer's unlawful motivation. (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S.) An

[34] Gillotte also exercised protected rights after the District took this action; however, PERB typically does not consider adverse actions which pre-date protected conduct to demonstrate nexus. (*County of San Bernardino (County Library)* (2009) PERB Decision No. 2071-M.)

employer's departure from established procedures may also provide evidence of nexus. (*Santa Clara Unified School District* (1979) PERB Decision No. 104.) However, neither the specific details of his previously-approved requests, nor the circumstances surrounding other employees who took leave that day were introduced in the record. Thus, Gillotte has not shown disparate treatment or a departure from procedures based on these assertions.

Gillotte also contended, again without any supporting evidence, that employees regularly take personal necessity leave for reasons such as extending their camping and Las Vegas trips, and have never been questioned by the District. He did not, however, introduce evidence that the District has actually been aware of such employee activity and chose to ignore it. At most Gillotte's assertion shows that employees have been fortunate for not getting caught for requesting personal necessity leave for prohibited reasons under the CBA. The CBA specifically prohibits personal necessity leave to be taken for reasons of employee convenience, and though while not exclusive, provides very specific examples of serious reasons that do justify the leave. Elzig's testimony regarding routinely denying such requests for reasons of convenience is consistent with the terms of the CBA and is therefore credited over Gillotte's testimony.

Notably, all of Elzig's actions over the processing of Gillotte's personal necessity leave request were consistent with the terms of the CBA. She denied Gillotte's request because it was not timely submitted, and after inquiring over his reasons, she learned that they did not fall within the parameters set forth in the CBA. In contrast, Gillotte essentially admitted that he did not submit the request to the District *personnel office* more than two days before the leave was requested as required under the CBA. He did not offer any reason for his failure to do so. Given that the Boykin hearing date had been calendared for over one month prior to his

request, there is no obvious excuse for this failure. Furthermore, and consistent with Elzig's testimony, Gillotte admitted to knowing that the District previously had denied a similar request by another employee to attend the court hearing of a fellow employee. Thus, the denial in this case was consistent with that prior action and should have come as no surprise to Gillotte. Moreover, attending an employment hearing of another employee, under the facts presented here, does not align with the serious personal and/or emergency situations described as exemplars for personal necessity leave under the CBA.[35] In short, Gillotte has failed to establish that the District treated him disparately or departed from usual procedures when his request was denied.

Gillotte has not shown a nexus between his protected activity and the District's denial of his request to take personal necessity leave, and therefore has not demonstrated a prima facie case of retaliation for this allegation. Additionally, it was not timely amended into the complaint. For these reasons, this allegation is hereby dismissed.

2. Intent to Terminate Gillotte's Employment

a. Gillotte's Theories of Nexus

Gillotte advanced several theories of nexus that are not sufficient, some of which warrant discussion. First, Gillotte asserted departure from procedures by his failure to receive a *Skelly* hearing, by not receiving prior notice that the board was going to vote over whether to issue a notice of intent to terminate his employment on May 7, 2012, and by being deprived of

[35] Gillotte also asserted, without elaboration, that he could not arrange his meeting with his attorney after the Boykin hearing for times that were convenient to him. Elzig found this assertion unpersuasive when she denied the request. As previously discussed, the CBA specifically prohibits the use of personal necessity leave for reasons of convenience. Without further explanation from Gillotte, Elzig's conclusion in this regard aligns with CBA mandates and does not show a departure from procedure.

the ability to address the board of education on that issue.[36] In its briefs, the District cited *Kolter v. Commission on Professional Competence of the Los Angeles School District* (2009) 170 Cal.App.4th 1346 (*Kolter*) to dispute these assertions. In *Kolter*, the court specifically found that the California Supreme Court's decision in *Skelly* did not mandate a full evidentiary hearing prior to the employer's initial decision to take disciplinary action, just prior to that action becoming final. Thus, the court rejected the idea of an absolute right to address a school district governing board prior to their vote over the mere intent to impose discipline. (*Kolter* at p. 1353.) The court further held that the hearing process provided under Education Code section 44934, adopted by the Legislature one year post-*Skelly*, provides the procedural due process safeguards mandated by *Skelly*. (*Id.* at p. 1353.) Moreover, the court concluded that a school district governing board may deliberate in closed session regarding the *initiation* of charges against an employee without providing the statutory notice required under Government Code section 54957. (*Id.* at p. 1352.) Thus, Gillotte has not shown that the District departed from these procedures under applicable law.

Next, Gillotte argued at hearing that the District's maintenance of investigation and site files separate from his official personnel file was an impermissible departure from established procedures under the law. *Novato*, *supra*, PERB Decision No. 210 found that maintenance of

[36] Gillotte also asserted impermissible irregularities in the dismissal process under Education Code section 44944 by Elzig's failure to verify the charges against him at the time they were presented to the board of education. Elzig credibly testified that at the time she presented the allegations against Gillotte to the District board of education, she believed them to be true, and that her failure to include the signed verification was simply a mistake. Notably, Gillotte failed to explain how this mistake had any negative effect, or effect whatsoever, on his ability to respond to the charges against him. Furthermore, where a mere record keeping error has no effect on the decision to impose discipline, it will not demonstrate evidence of nexus. (See *Regents of the University of California* (2012) PERB Decision No. 2302-H.) Thus, Gillotte has failed to demonstrate that Elzig's inadvertent error was a departure from procedures under these facts.

"secret files" regarding an employee may show evidence of unlawful motive where documents contained therein are never discussed with the employee and such file creation is inconsistent with the employer's personnel practices. (*Id.* at pp. 20-21.) However, where consistent with the employer's existing practices, the maintenance of a "working file" regarding an employee does not evidence nexus unless the employee is not provided with reasonable access to the file in order to respond to proposed discipline. (*Woodland Joint Unified School District* (1987) PERB Decision No. 628 at pp. 43-44.) Here, Elzig testified that the maintenance of employee site files and investigation files, separate from the official personnel file, is the District's regular practice, and Gillotte was afforded the opportunity to review these files, which he chose not to do. Thus, it does not appear that the employer's practices in this instance are a departure from its procedures or applicable law.[37]

b. Other Evidence of Nexus

Elzig submitted the statement of charges and intent to terminate Gillotte to the District board of education within approximately one week of the filing of the unfair practice charge, and approximately three months after NEA-J responded to proposed disciplinary action on Gillotte's behalf. Thus, the timing of the District's action supports finding nexus. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019.) There are also other circumstantial nexus factors present.

[37] Although the argument was not entirely fleshed out, Gillotte also appears to contend that he could not fully participate in the final investigation against him because he lacked the opportunity to interview students after he was placed on administrative leave. This argument is rejected because Gillotte had always provided written responses to earlier disciplinary actions against him (2008, 2009, 2010) and there is no indication that he ever interviewed students to do so. The fact that he chose not to provide his own written response to the 2011 investigation does not demonstrate that the District departed from investigation procedures or that the investigation was cursory.

Elzig admitted during cross examination that it is the District's policy and practice not to provide written student complaints to employees until the employee is going to a dismissal hearing. The January 26, 2012 summary of allegations had written student complaints attached. Prior to that, all previous disciplinary documents provided to Gillotte by the District contained administrator summaries of student statements, but not the statements themselves.

At the time that Gillotte received the summary of allegations in January 2012, the District's investigation into the 2011 complaints should have been ongoing. This is so, because Gillotte had not yet been given an opportunity to respond to the allegations. Elzig testified earlier that she considers an employee's response to a summary of allegations to be a part of the District's *investigation* into alleged misconduct, and that employees are always given that opportunity to respond. Yet, in January 2012, Gillotte was provided with the summary of allegations with student statements attached *before* he had ever been given an opportunity to respond, either verbally or in writing. According to Elzig's admission, however, the attachment of student statements meant that the District had already decided at that point to terminate Gillotte's employment before he was allowed input into the investigation. If the District had acted consistently with the investigation process that Elzig testified to, then Gillotte should not have received any student statements until he received the statement of charges and intent to dismiss on May 8, 2012, after the conclusion of the investigation process.

In *City of Santa Monica* (2011) PERB Decision No. 2211-M (*Santa Monica*), the Board found no evidence of nexus in an employer's failure to interview an employee prior to releasing him from probation. The Board reasoned that the city's decision was consistent with existing investigation practices. (*Id.* at p. 15, citing *County of Riverside*, *supra*, PERB

Decision No. 2184-M, *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.) In that case, no other evidence of nexus was present. (*Ibid.*) Here, in contrast, the District appeared to be acting inconsistently with its investigation practice by predetermining the outcome of the investigation before Gillotte had the opportunity to respond to the most recent allegations against him.

Additionally, unlike in *Santa Monica*, *supra*, PERB Decision No. 2211-M, the departure from investigation procedures here is accompanied by close timing between adverse action and protected conduct. Also, there is at least an appearance of bias by Trujillo (namely, the admittedly inappropriate "hit" comment), one of the administrators who investigated Gillotte. This, coupled with the District's inconsistent statements at hearing regarding Trujillo's involvement in the investigation, is evidence of nexus. (See *Chula Vista Elementary School District*, *supra*, PERB Decision No. 2221 [inconsistent statements by the employer regarding its conduct may provide evidence of nexus].) For example, Pace testified that Trujillo, was closely involved in her investigations into Gillotte's alleged misconduct "from day one," whereas Elzig tried to distance Trujillo from the investigation process by repeatedly claiming that he had no great level of involvement. Thus, the record considered as a whole suggests an inference of unlawful motivation. Accordingly, Gillotte has demonstrated a prima facie case of retaliation regarding the District's intent to terminate his employment.

C. The District's Burden

Once the charging party establishes a prima facie case of retaliation, as Gillotte has done here, the respondent then bears the burden of proving that it would have taken the same actions even if the employee had not participated in protected conduct. (*Novato*, *supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981)

29 Cal.3d 721; *Wright Line* (1980) 251 NLRB 1083.) Where it appears that the employer's adverse actions could have been motivated by both valid and invalid reasons, "the question becomes whether the [adverse actions] would not have occurred 'but for' the protected activity." (*Martori Bros.* at p. 729.) The "but for" test is an "affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

In this case, any slight irregularities in the investigation process or hints of bias are overshadowed by several factors. First, Gillotte admitted several allegations of misconduct against him, and many of these occurred prior to his protected conduct.[38] The Board has found that even where there is some evidence of nexus, an employee's dismissal may be justified where the charges against an employee are mostly true. (*Healdsburg, supra*, PERB Decision No. 1185, p. 67.) The Board has also concluded that retaliation was not the true motive for an employee's dismissal, despite some evidence of investigation bias and animus against union activity, where an employer had legitimate concerns about work performance that predated the employee's protected conduct. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561.) Gillotte's history of reprimand for inappropriate behavior toward students began well before any exercise of protected conduct. This implies that the District's actions were not unlawfully motivated.

[38] For example, even though he attempted to place the impetus for several incidents on students' behavior and/or misinterpretation of his motives, rather than as a result of his failure to respond appropriately, Gillotte still admitted to: the backpack incident, slamming a student's desk against the wall and shouting at her, making comments about menial labor jobs, stating that he was a teacher and not a personal tutor, the "jerk" comment, and asking a student whether he passed the high school exit exam in front of the class, when he in fact already knew that the student had failed the exam. These admissions prove the truth of the District's allegations.

Furthermore, the Board has found, despite prima facie evidence of retaliation, that an employer was justified in terminating employment where, after a long history of complaints, an employee had repeatedly been warned of his deficiencies and failed to improve. (*Santa Monica*, *supra*, PERB Decision No. 2211-M.) Whereas, a teacher's dismissal was not upheld where the employer asserted that a lack of interpersonal skills was the reason for the firing, yet there was no evidence that such an issue had been brought to the employee's attention, or that any classroom management problems had been observed. (*Chula Vista Elementary School District*, *supra*, PERB Decision No. 2221.) Notably, as in *Santa Monica*, Gillotte had been warned starting in 2008 that his interactions with students were unacceptable, and yet students continued to complain through 2011 regarding his classroom behavior. Still, Gillotte did not modify his behavior despite being issued a letter of reprimand and two separate notices of unprofessional conduct.

Moreover, there was consistent and credible evidence relied upon by the District in its investigation process. Notably, where an employer has legitimate concerns over how a teacher's conduct may affect the integrity of its education program, PERB has refused to disturb the employer's decision to terminate employment. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259.) Although it is not clear from the record the manner in which student complaints were brought to Fretz's attention, the assertions set forth in her investigations (even one that Gillotte did not expressly admit to, i.e., the "hood" comments) were corroborated by student testimony before the CPC. Additionally, Gillotte never asserted that Pace was biased against him or possessed animus against union activity, and she credibly testified that her investigations in 2009-2010 and 2011 were initiated because students had brought forth complaints about Gillotte to the administration. The fact that students repeatedly

raised concerns about Gillotte to administrators, especially across multiple years and at different school sites, suggests that the District's concerns about his effect on the integrity of the educational program were legitimate.

The charges levied against Gillotte by the District were corroborated by 10 students who testified credibly and consistently that not only had he engaged in the specific instances of misconduct discussed herein, but also that, on a daily basis, he was generally rude, sarcastic, demeaning, and did not help with them with their questions. For instance, two different students testified that Gillotte said that they were dumb as rocks and that a horse could sit in class and learn the material more effectively. Credibility of the students' testimony was also enhanced by their candid answers to potentially embarrassing questions over their sometimes poor grades, history of cheating, and problems with truancy. The consistency of the students testimony, again, across multiple years of instruction at different school sites, also lends credence to their collective accounts. The students' testimony was consistent with the District's statement of charges against Gillotte adopted on May 7, 2012.

As discussed above, Gillotte contested some of the allegations brought against him, for example, his comments to the student who planned to enlist in the Army, and calling R.M. a super senior. However, students credibly testified to these events and have no motivation to lie,[39] whereas Gillotte has a motivation to lie to protect his job. Furthermore, some of Gillotte's testimony at the PERB hearing was inconsistent with his prior written responses to the allegations, which casts doubt over the veracity of his testimony. As one example, his written response over the backpack incident, describing "pandemonium" breaking out in class that he had to control after the student's outburst over the spider, was markedly different from

[39] Notably, several students who testified had already graduated at the time of the CPC hearing.

his testimony over that same incident during the hearing. At hearing, Gillotte's account was that the student's behavior during the exercise was quiet and not disruptive to him or the class. Elzig's questioning of Gillotte's honesty in his written responses is underscored by his inconsistent testimony. Furthermore, Gillotte chose, without explanation, not to respond to the District's summary of allegations over the 2011 investigation, nor did his testimony really address those latest allegations. After considering the entire record, it is concluded that the District decided to terminate Gillotte's employment because of repeated and credible complaints over his treatment of students, and not because of his protected conduct. The District has therefore successfully rebutted the prima facie case.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-5693-E, *Christopher Gillotte v. Jurupa Unified School District*, are hereby DISMISSED.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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