

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



PAMELA JEAN LUKKARILA,

Charging Party,

v.

JURUPA UNIFIED SCHOOL DISTRICT,

Respondent.

Case Nos. LA-CE-5510-E  
LA-CE-5659-E

PERB Decision No. 2458

October 23, 2015

Appearances: David Lukkarila, Personal Representative, and the Law Offices of Richard D. Ackerman by Richard D. Ackerman, Attorney, for Pamela Jean Lukkarila; Fagen, Friedman & Fulfroost, by Kerry 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 both parties to a proposed decision (attached) by an administrative law judge (ALJ) subsequent to a combined hearing on Case Nos. LA-CE-5510-E and LA-CE-5659-E.

The complaint in Case No. LA-CE-5510-E<sup>1</sup> alleged that the Jurupa Unified School District (District) violated the Educational Employment Relations Act (EERA)<sup>2</sup> by retaliating against Pamela Jean Lukkarila (Lukkarila) because of her protected activity.

<sup>1</sup> The PERB Office of the General Counsel issued this complaint pursuant to the decision in *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*), which affirmed in part and reversed in part, the dismissal of the underlying unfair practice charge, and remanded the matter for issuance of a complaint.

<sup>2</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

According to the complaint in Case No. LA-CE-5510-E, the District took adverse action against Lukkarila by: (1) issuing a written warning to her in mid-March 2010; (2) negatively evaluating her teaching performance between March and May 2010; (3) directing that she undergo a second consecutive annual evaluation during 2010-2011; (4) investigating allegations of misconduct in her interaction with a student in September and October 2010<sup>3</sup>; and (5) disciplining her by presenting her with a Summary of Meeting memorandum following an investigatory meeting in October 2010.

The complaint also alleged that the District, through District Assistant Superintendent for Personnel Tamara Elzig (Elzig), interfered with Lukkarila's protected rights by issuing a written communication to employees, including Lukkarila, on June 25, 2010, that criticized employees for filing a group grievance with the District's governing board a few days earlier (the Master Grievance.)

The complaint in Case No. LA-CE-5659-E alleged that the District violated EERA section 3543.5(a) by retaliating against Lukkarila, because of her protected activity by denying her August 16, 2011, request for a paid leave of absence. According to the complaint, the District denied Lukkarila's request because she had filed the unfair practice charge in PERB Case No. LA-CE-5510-E and utilized PERB's processes by appealing the initial dismissal of that charge to the Board itself.<sup>4</sup>

The Board itself has reviewed the administrative record in its entirety and considered the parties' exceptions and responses thereto. The record as a whole supports the findings of

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<sup>3</sup> The ALJ notes that although the complaint stated that this investigation occurred in September and October 2011, the evidence in the record indicates that it occurred in September and October 2010.

<sup>4</sup> Lukkarila's appeal resulted in Board decision *Jurupa, supra*, PERB Decision No. 2283.

fact, and the proposed decision is well-reasoned and consistent with applicable law.

Accordingly, the Board hereby affirms the ALJ's rulings, findings and conclusions of law and adopts the proposed decision as the decision of the Board itself, subject to the following discussion of the parties' exceptions.

### PROPOSED DECISION

The attached proposed decision is thorough in its coverage of the procedural history of this case, the factual background of the parties' various disputes, the issues raised by the unfair practice complaints, and the legal analysis supporting the outcome reached. Therefore, the substance of the proposed decision is not repeated here, except as necessary to provide factual context for the discussion.

In Case No. LA-CE-5510-E, the ALJ concluded that Lukkarila engaged in protected conduct between February and October 2010, including: (1) obtaining assistance from National Education Association Jurupa (Union) in February 2010 regarding her performance evaluation and in an investigatory meeting convened by the District; (2) obtaining representation from a Union attorney regarding an employment issue; (3) participating with other employees in filing the Master Grievance on June 21, 2010; and (4) filing and processing an individual written complaint pursuant to the Unit Member Complaint Resolution Procedure contained in the collective bargaining agreement (CBA) between the Union and the District.

The ALJ concluded that the District retaliated against Lukkarila because of her protected activity<sup>5</sup> when it: (1) issued a March 19, 2010, letter threatening her with insubordination; (2) issued a negatively rated March 15, 2010, observation report; (3) issued a

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<sup>5</sup> The ALJ concluded that Lukkarila's participation in the Master Grievance did not motivate the District to take the adverse actions described in Case No. LA-CE-5510-E, because the District did not know that Lukkarila was a participant in the Master Grievance until sometime in November 2010, well after the adverse actions occurred.

negatively rated 2009-2010 final evaluation; and (4) ordered a consecutive annual evaluation in 2010-2011.

The ALJ also concluded that the District interfered with protected rights when Elzig sent an e-mail on June 25, 2010, to all District employees that criticized employees' collective protected activities, i.e., filing the Master Grievance, which complained of a variety of working conditions.<sup>6</sup>

The ALJ dismissed all of the other allegations, specifically those pertaining to the District's investigation of student complaints about Lukkarila. She was accused of calling one student a "bitch" and pulling another student's pony tail with excessive force. In accordance with its policy and practice, the District investigated the allegations and interviewed Lukkarila on October 11, 2010. The District secured Lukkarila's attendance at this meeting after summarily relieving her of her teaching responsibilities with no advance warning and arranging for a Union representative to be present at the interview. Lukkarila denied the allegations in the interview and Elzig was satisfied with her response and considered the matter closed. She informed Lukkarila that she would be receiving a Summary of Meeting, but that it was not disciplinary and no other type of discipline would come from the incident.

The ALJ concluded that the District both had and acted because of a legitimate non-discriminatory reason when it investigated complaints that Lukkarila allegedly mistreated two students. Likewise, the Summary of Meeting memorandum given to Lukkarila after the District's investigatory interview was not motivated by animus and in fact, was not an adverse action, according to the ALJ, because it did not accuse Lukkarila of misconduct, did not discipline or threaten to discipline her, and there was no evidence it was placed in her personnel file, or would otherwise be used to support any future disciplinary action.

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<sup>6</sup> The District did not except to this determination.

The ALJ dismissed the complaint in Case No. LA-CE-5659-E, having concluded that the District's refusal of paid special leave was not an adverse action because "[i]t is not reasonable to expect that an employee will be paid by an employer to stay home and perform no work in order for the employee to feel comfortable while pursuing her legal claims against the employer." (Proposed Dec., p. 38.)

## DISCUSSION

We begin with Lukkarila's exceptions, and conclude with the District's exceptions.

### I. Lukkarila's Exceptions

#### a. Objections to the Remedy

Lukkarila excepts to the lack of specificity in the ALJ's proposed remedy. She asserts that the cease-and-desist order prohibiting the District from "[r]etaliating against employees for engaging in protected activities" and "[i]nterfering with or harming employee rights protected by EERA" is overly broad. (Proposed Dec., p. 55.) According to Lukkarila, this lack of specificity "leaves an open invitation for site administrators to employ the same discriminatory reprisals first used against Lukkarila four-years ago." (Exceptions, p. 4.) She requests that the Board specify the exact type of retaliatory adverse actions and results the District must avoid. She uses, as a point of comparison, the remedy ordered by PERB in *County of Riverside* (2009) PERB Decision No. 2090-M (*Riverside*), which directed the respondent to "CEASE AND DESIST FROM: Issuing to employees disciplinary memoranda, placing them under investigation, ordering them on administrative leave, and terminating their employment, in retaliation for their protected activities." (*Id.* at p. 43.)

Lukkarila also excepts to the substantive provisions of the ALJ's remedy, arguing that she should be placed on a five-year evaluation cycle under Education Code section 44664, that she should return to two preparatory periods of US History and World History, and that she

should receive attorney fees and costs. Lukkarila also argues that she should be paid full back pay with interest, since the District's adverse actions created conditions that were unpleasant enough to cause Lukkarila to request a special leave of absence in August 2011.<sup>7</sup>

In response to these exceptions, the District avers that: (1) the proposed order is sufficiently specific as written; (2) that Lukkarila's proposed revisions to the remedial order are unsupported by the ALJ's findings, were not litigated in the underlying hearing and do not meet the "unalleged violation" test; and (3) the *Riverside* case is distinguishable.

According to the District, there is no evidence in the record to support Lukkarila's claims for additional remedies. For example, the District asserts that no evidence demonstrates that she was qualified to be placed on a five-year evaluation cycle, and Lukkarila did not allege that the District violated EERA by not placing her on a five-year evaluation cycle.<sup>8</sup> Likewise, notes the District, Lukkarila never alleged that her class assignments constituted an adverse action under EERA. Thus, the District claims that a remedy directing it to change class assignments would not be justified. It also argues that such an order would be an undue burden on the District's statutory right to make assignments.

The District also urges the Board to deny Lukkarila's request for paid special leave, because she never alleged constructive discharge in the proceedings prior to her filing exceptions, there is no evidence she resigned her position after being put on unpaid leave, and she failed to provide any legal authority to reverse the ALJ's decision that the denial of

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<sup>7</sup> Lukkarila's exceptions fail to object to any of the ALJ's factual findings or legal conclusions that supported the dismissal of the complaint in Case No. LA-CE-5659-E, which complained of the District's refusal to grant Lukkarila's request for paid leave.

<sup>8</sup> Education Code section 44664(a)(3) permits permanent certificated employees to be evaluated once every five years under certain conditions, including the employee having ten years of experience and the evaluator agrees to a five-year cycle.

Lukkarila's request for a paid special leave of absence was not adverse action. The District also opposes Lukkarila's request for attorney fees and costs.

We are unpersuaded by Lukkarila's exceptions to the proposed remedy. First, the proposed order read as a whole describes the District's illegal conduct, e.g., threatening Lukkarila with discipline for insubordination, issuing negative evaluations and ordering consecutive annual evaluations, and by sending an e-mail to all employees on June 25, 2010, criticizing employees' protected activities. The District is thereby placed on notice of the conduct that was found to have violated EERA.<sup>9</sup> Regardless of the specificity of the remedy, the text of the proposed decision and Order sufficiently identifies the District's unlawful actions, which the District may not repeat in the future.

Moreover, the more general and expansive wording of the remedy better serves the purpose of EERA by prohibiting the District from taking any retaliatory action against Lukkarila, regardless of what form it may take.<sup>10</sup>

We are also unpersuaded by Lukkarila's exceptions that: (1) the remedy was in error because it failed to order the District to place her on a five-year evaluation cycle under Education Code section 44664; (2) she should be awarded back pay with interest; (3) she

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<sup>9</sup> The District's employees will also be notified of its illegal conduct when the attached notice is posted and disseminated to them.

<sup>10</sup> We also note that prior PERB remedial orders have been worded in a similar ways to that of the proposed order in this case. (See, e.g., *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S, p. 19.):

Based upon the foregoing facts, conclusions of law and the entire record in this case, it is ORDERED that the State of California, Department of Parks and Recreation shall: A. CEASE AND DESIST FROM: 1. Violating SEERA subsection 3519(a) by discriminating against Frank Pearson because of his participation in protected activity.

should be awarded specific course assignments; (4) and she should be awarded attorney fees and costs. These exceptions do not satisfy PERB Regulation 32300(a)(3),<sup>11</sup> and (4), because they fail to state a ground for the exception, viz., the basis for her claim that the ALJ erred. Even had Lukkarila complied with PERB Regulation 32300(a)(4), we would reject each of her exceptions, for they lack merit, as we now explain.

The remedy and order proposed by the ALJ corrects the violations she determined to have occurred. We agree with the District that an order that purports to remedy claims that were not litigated or charged would be improper. (See for example, *Service Employees International Union, Local 1021 (Sahle)* (2012) PERB Decision No. 2261-M, pp. 12-15.) Thus, there is no basis for amending the remedy to require the District to place Lukkarila on a five-year evaluation cycle. She did not claim that the District wrongfully failed to put her on such a schedule, and presented no evidence that she would qualify for this benefit. For the same reason we find no merit in Lukkarila's argument that she should be given a class assignment with two preparations in US History and World History.

Likewise, with respect to her claim for back pay, there is no basis for such a remedy because there is no evidence (and Lukkarila did not argue) that the District's actions caused her constructive discharge. The legitimacy of this claim is further undermined by the fact that Lukkarila did not except to the ALJ's dismissal of the complaint in Case No. LA-CE-5659-E.

Lastly, Lukkarila is not entitled to attorneys' fees and costs, because such award is appropriate where the fees were "incurred as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (*Hacienda La Puente Unified School*

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<sup>11</sup> PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

*District* (1998) PERB Decision No. 1280, p. 4.)<sup>12</sup> More recently, PERB refined the standard for an award of attorney's fees to require that a case be both without arguable merit and pursued in bad faith, i.e., conduct that is dilatory, vexatious, or otherwise an abuse of process. (*Omnitrans* (2010) PERB Decision No. 2143-M, p. 8; *City of Alhambra* (2009) PERB Decision No. 2036-M, p. 19.) Lukkarila has presented no evidence that the District's conduct and defense of this case was without arguable merit or that it engaged in frivolous, vexatious, dilatory or bad faith conduct. Consequently, an award of attorneys' fees is not appropriate.

b. Investigation of Student Complaints

Lukkarila excepts to the ALJ's conclusion that although the District's investigation of alleged misconduct in September and October 2010, and issuance of the September 19, 2010, Summary of Meeting memorandum satisfied the prima facie elements of retaliation, the District had met its burden in proving that it both had and acted because of an alternative non-discriminatory reason, namely investigating students' complaints that Lukkarila allegedly mistreated them.

According to Lukkarila, the District failed to notify Child Protective Services or the sheriff of the students' allegations against Lukkarila. She asserts that this failure defied the standard reporting procedures required by the California Penal Code, as well as the CBA's Public Complaint Procedure, and speculates that the District most likely failed in its reporting duty, because the investigation was designed to threaten, harass, frighten, and intimidate her.

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<sup>12</sup> The Board has also awarded attorneys' fees and costs where the employer's unfair practice has caused the employee to incur such fees in a forum other than PERB. (*Omnitrans* (2009) PERB Decision No. 2030-M, p. 33; *County of San Joaquin (Health Care Services)* (2003) PERB Decision No. 1524-M, pp. 2-3.) However, these cases are not applicable here, where there is no evidence that Lukkarila incurred attorneys' fees in a non-PERB forum as a direct result of the District's unfair practices.

Lukkarila also excepts to the ALJ's failure to find that the District's removal of her from the middle of an instructional period on October 11, 2010, was evidence of retaliatory motivation, because it was not the standard District policy under the "mandated reporter" and CBA's Public Complaint Procedure, and because of shifting justifications for the District's actions.

The District argues that the ALJ properly found that the District instituted the 2010 investigation and issued the October 2010 Summary of Meeting memorandum for a legitimate, non-discriminatory reason.

We agree with the District and reject Lukkarila's exception to the ALJ's conclusion that the District had and acted because of an alternative non-discriminatory reason for investigating student allegations concerning Lukkarila. First, there is no evidence that the District in fact failed to report these incidents to outside authorities. Testimony shows that Roberta Pace (Pace) did not make the report, but that does not establish that the District, acting through some other administrator, failed to report.

More importantly, the District's alleged failure to report these accusations to Child Protective Services and/or the sheriff's office does not logically lead to the conclusion Lukkarila urges, i.e., that the investigation was a subterfuge for retaliation. Common sense and the District's practice dictate that student complaints of mistreatment at the hands of teachers require investigation. That the District may have also had a duty to report the complaints to Child Protective Services does not vitiate the District's legitimate non-discriminatory reason to interview Lukkarila about the complaints.

As for the District's abrupt order to Lukkarila in the middle of her instructional period to attend the investigatory meeting regarding these students' complaints, we note that this was not alleged in either PERB complaint as a violation of EERA. To the extent that such conduct

could be considered as part of the District's illegal motivation, the ALJ concluded that various other facts established a prima facie case against the District for undertaking the investigation. We have considered Lukkarila's assertions regarding being summoned from her classroom, which support her prima facie case. However, we nonetheless conclude that the District both had and acted because of a non-discriminatory reason for conducting the investigation of Lukkarila's alleged misconduct.

## II. District's Cross-Exceptions

The District excepts to various findings of fact and legal conclusions in the proposed decision.

### a. Removal of Adverse Documents From Personnel Files

The District excepts to the ALJ's conclusion that the March 15, 2010, observation report, the March 19, 2010, insubordination warning letter, and the 2009-2010 final evaluation of Lukkarila constitute adverse actions. Because the District removed these documents from Lukkarila's personnel files, it asserts that it has cured any adverse action, and urges the Board to consider its removal of these documents an "honestly given retraction" within the meaning of *Jurupa Unified School District* (2013) PERB Decision No. 2309 (*Nelson*), among other cases. We decline to do so.

In *Nelson, supra*, PERB Decision No. 2309, Ermine Fredrica Nelson, the charging party, had been placed on a re-employment list after taking medical leave. When she learned she had been placed on the re-employment list, she filed a grievance and other complaints. In response, the district informed her that because she was on the re-employment list, she was no longer an employee of the district and had therefore no right to file a grievance. Nelson then filed an unfair practice charge alleging that the district's assertion that she was no longer an employee was retaliation against her for filing the earlier grievance. The district defended by

claiming that it had cured its unfair practice when it sent a second letter to Nelson correcting its misstatement that she was no longer an employee, because she was on the re-employment list. PERB rejected that defense:

In [*Sacramento City Unified School District* (1985) PERB Decision No. 492], the Board recognized a doctrine employed by the National Labor Relations Board (NLRB) under which an honestly given retraction can erase the effects of a prior coercive statement if the employer retraction was made in a manner that “completely nullified the coercive effects of the earlier statement.” (*Sacramento, PD*, at p. 28-29, citing *Bartley Co. v. NLRB* (6<sup>th</sup> Cir 1969) 410 F.2d 517; *Redcor Corp.* (1967) 166 NLRB 1013.)

(*Nelson*, p. 9.)

The Board stated in *Nelson, supra*, PERB Decision No. 2309, that “to be effective any retraction would have to have been tendered within a few days.” (*Nelson*, p. 10.) (See also, *Regents of the University of California* (2012) PERB Decision No. 2300-H, pp. 30-31.)

Our precedents concerning employer retraction of threats or coercive statements are generally in accord with private sector precedent. The National Labor Relations Board (NLRB) in *Passavant Memorial Area Hospital* (1978) 237 NLRB 138 (*Passavant*) noted that in certain circumstances an employer may relieve itself of liability for unlawful conduct by effectively disavowing and repudiating that conduct.

To be effective, however, such repudiation must be “timely,” “unambiguous,” “specific in nature to the coercive conduct,” and “free from other proscribed illegal conduct.” [Citations omitted.] Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer’s part after the publication. [Citation omitted.] And finally, . . . such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.

(*Passavant*, pp. 138-139.) It is appropriate to apply the factors outlined in *Passavant* to the facts here and to adopt those factors as a tool for analyzing when an employer's retraction will be considered an effective disavowal and repudiation of at least some types of unlawful conduct.<sup>13</sup>

In this case, the District did not remove the challenged documents until several months after it issued them. The District's tardy retraction of the documents was not made "in a manner that 'completely nullified the coercive effects of the earlier statement'." (*Nelson, supra*, PERB Decision No. 2309, p. 9.) It was certainly not timely.

Although the August 13, 2010, letter responding to her complaint notified Lukkarila that the offending documents would be removed from District files, the District then replaced the retracted documents with a new adverse action, viz., notification of a consecutive annual evaluation during the 2010-2011 school year. Simply replacing one adverse action with another does nothing to ameliorate the coercive effects of the earlier statement. It is simply not a valid retraction of an adverse action, and it fails the *Passavant* factor of being free from other proscribed illegal conduct.

The fact that Elliot Duchon (Duchon) stated in his August 13, 2010, letter "my initial investigation has revealed no evidence of . . . a [violation of policy]" also fails the required factor that the retraction be unambiguous and "specific in nature to the coercive conduct." The failure of the employer in *Passavant* to admit wrongdoing led the NLRB to conclude that the

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<sup>13</sup> We note that, unlike the NLRB, PERB has refused to apply the retraction doctrine in unilateral change/refusal-to-bargain cases. (*City of Escondido* (2013) PERB Decision No. 2311-M; *Desert Sands Unified School District* (2010) PERB Decision No. 2092; *County of Sacramento* (2008) PERB Decision No. 1943-M; *Amador Valley Joint Union High School District* (1978) PERB Decision No. 74.) cf. *River's Bend Health & Rehabilitation Services* (2007) 350 NLRB 184, 193. Nothing in this decision should be interpreted as questioning our precedent on this issue.

alleged retraction was not sufficiently clear or specific to be a valid retraction. An employer cannot assert a *Passavant* defense and argue that its conduct was lawful. (*Passavant, supra*, 237 NLRB 138, 139; *Pride Care Ambulance Co.* (2011) 356 NLRB No. 128, slip op. pp. 6-7.)

Moreover, these documents were removed only after Lukkarila filed a complaint with the District over her 2010 evaluations and after the District investigated the complaint.<sup>14</sup> These circumstances differ markedly from an employer's rapid and spontaneous retraction of a coercive statement. (See *Sam's Club* (1996) 322 NLRB 8, 9, enf'd. 6th Cir. 1998, 141 F.3d 653, 661 [merely removing a disciplinary or negative document from personnel file does not satisfy the *Passavant* criteria].) As in *Nelson, supra*, PERB Decision No. 2309, we find this alleged "retraction" inadequate because the District's removing the documents from Lukkarila's files was in response to her formal complaint and followed discussions between the District and a Union attorney acting on behalf of Lukkarila. This fact, coupled with the fact that the District imposed a new adverse action and insisted that it engaged in no wrongdoing, suggests that the District was motivated solely by a desire to avoid further litigation over the issue, rather than by a sincere effort to retract a coercive statement or action.

By removing the documents from its files under these circumstances, the District has not made any attempt to assure Lukkarila or employees in general that it will not interfere with their exercise of protected rights in the future.

For these reasons we reject the District's exception. The "retraction" was not made in a manner that completely nullifies the coercive effects of the earlier adverse action. (*Nelson, supra*, PERB Decision No. 2309, p. 9.)

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<sup>14</sup> Although the District's investigator, Superintendent Duchon, concluded that there was no violation of its policies, he nevertheless agreed to remove the documents of his own volition without requiring any concession from Lukkarila.

b. Evaluation Cycles

The District excepts to the ALJ's conclusion that it may only evaluate a permanent teacher on an annual basis if the teacher's performance is unsatisfactory, arguing that neither the Education Code, nor any other statute, precludes a school district from evaluating permanent teachers on an annual basis for any non-discriminatory reason, such as upon an employee's return from a leave of absence, or after transfer to a new school, etc. The District relies on Education Code sections 35160<sup>15</sup> and 44660 et seq., and *Modesto City Schools* (1983) PERB Decision No. 347 (*Modesto*).

The critical issue here is not what the Education Code permits or prohibits in terms of permanent certificated evaluations, but whether consecutive annual evaluation of a permanent employee is an adverse action. That question was settled in *Jurupa, supra*, PERB Decision No. 2283 and indeed is the law of the case in the instant matter. The District's assertion that its decision to evaluate Lukkarila for three consecutive years is not an adverse action completely ignores *Jurupa*, and therefore provides no basis for overturning recent precedent or ignoring the law of the case.

In *Jurupa, supra*, PERB Decision No. 2283, the Board explained why a consecutive annual evaluation for a permanent certificated employee is an adverse action:

The Education Code establishes and the negotiated evaluation procedure accordingly provides, for a "uniform system of evaluation" of certificated employees. Under that system probationary employees are evaluated annually, while permanent

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<sup>15</sup> California Education Code section 35160 states, in relevant part:

On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

employees are assessed less frequently, either biannually or under specified circumstances even less often. [Fn. omitted.] Only in exceptional circumstances, viz., following an unsatisfactory evaluation and “until the employee achieves a positive evaluation,” must a school district assess annually a permanent employee. [Fn. omitted.] Thus, requiring a consecutive year evaluation of a permanent employee treats the permanent employee as though she were probationary and simultaneously signals a performance deficiency requiring remediation and or termination. We conclude that as to a permanent employee subject normally to biannual evaluation under collectively-bargained procedures tracking Education Code sections [44664] et seq., a directive that the employee undergo a consecutive annual evaluation is the functional equivalent of an unsatisfactory evaluation, and thus adverse.

(*Id.* at pp. 18-19.)

Although Education Code section 44664<sup>16</sup> does not explicitly prohibit a school district from annually evaluating employees who have received positive evaluations, permitting a district to do so would render meaningless the portion of subsection (b) that states “until the employee achieves a positive evaluation or is separated from the district.” The only way to give meaning to subsection (b) is to interpret it as the Board did in *Jurupa, supra*, PERB

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<sup>16</sup> Education Code section 44664 states, in relevant part:

(a) Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis as follows:

- (1) At least once each school year for probationary personnel.
- (2) At least every other year for personnel with permanent status.

[¶]

(b) . . . If any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee *until* the employee achieves a positive evaluation or is separated from the district.

(Emphasis added.)

Decision No. 2283. The default evaluation cycle for permanent certificated employees who are performing satisfactorily is every two years.

The District's reliance on *Modesto, supra*, PERB Decision No. 347 is misplaced. In that case, the Board commented:

The Stull Act [Educ. Code § 44664, et seq.] and the District's policy on teacher evaluations did not arise from a concern to protect teachers from an excessive number of evaluations. Rather, the issue of teacher evaluations grew from a public policy concern that a minimum frequency of evaluations be insured. In other words, the language of the policy must be read not as intending to restrict evaluations but to guarantee the maintenance of teacher competency.

(*Modesto*, p. 11.)

But the issue in *Modesto, supra*, PERB Decision No. 347 was whether a school district unilaterally changed a past practice by evaluating substandard teachers on an annual basis. After reviewing the bargaining history and past practice, the Board concluded that there had been no change. *Modesto* did not purport to establish what is permitted by the Stull Act and did not expansively read the Stull Act to permit public school employers to evaluate permanent certificated employees whose performance met expectations to be evaluated more frequently than every other year. We see no basis for doing so in this case.

The Stull Act permits annual evaluations of permanent certificated employees if their performance fails to meet expectations or is substandard. If the Stull Act also permits annual evaluations for other reasons such as those suggested by the District, that is a matter to be negotiated with the exclusive representative. It is not an issue in this case, and we need not address circumstances, if any, under which the Education Code permits annual evaluations of permanent certificated employees who are not under-performing.

The parties' CBA supports the ALJ's conclusion that a teacher who has performed satisfactorily should only be evaluated every two years. Article IX, Section 3.A states, in relevant part:

Evaluation and assessment of the performance of each unit member shall be made on a continuing basis, at least once each school year for probationary unit members and at least every other year for unit members with permanent status. Permanent employees who have been employed by the District for at least 10 years may be evaluated every three to five years *instead of every other year* . . . . By request of the evaluator or employee, the employee shall immediately be returned to the evaluation cycle of *every other year* . . . .

(Respondent Exh. A, p. 59; emphasis added.)

The underlined language indicates the parties' mutual understanding that the default evaluation period for permanent employees with satisfactory evaluation records was every other year. Temporarily placing Lukkarila on an annual evaluation cycle was therefore an adverse action, and the ALJ did not err in observation that the District was permitted to evaluate satisfactorily performing teachers every other year only.

c. Principal Jay Trujillo's Negative Assessment of Lukkarila's Performance

The District excepts to the ALJ's conclusion that Principal Jay Trujillo's (Trujillo) negative assessment of Lukkarila's performance after she sought assistance from the Union was a pretext for his hostility to her protected conduct.

The District argues that it "had consistent concerns regarding Charging Party's performance that pre-dated Charging Party's protected activity," and that "it would have issued the negative observation and evaluation in 2010 regardless of Charging Party's protected conduct." (Respondent's Response, p. 24.) In light of this argument, it is instructive to compare Lukkarila's evaluations and observation reports before and after the Trujillo learned of her protected activity.

Prior to Lukkarila's initial notification to the District that she had sought the assistance of the Union on February 22, 2010, some of Trujillo's critiques from the 2008-2009 evaluation dated May 13, 2009, presage his later critiques in his post-protected activity observation reports and evaluation of Lukkarila issued after February 22, 2010:

- Under the "Engaging And Supporting All Students In Learning" section, Trujillo wrote in relevant part: "[E]quitable expectation communication and engagement for ALL students. Given that teacher lecture is the predominant strategy used by Ms. Lukkarila, it's essential that all students have equal opportunity to respond to teacher questions." (Charging Party Exh. 3, p. 2.)
- Under the "Understanding And Organizing Subject Matter For Student Learning" section, Trujillo wrote in relevant part: "[M]ake subject-matter more accessible to ALL students (i.e., NOT just students with strong auditory-processing skills.)" (*Id.*)
- Under the "Planning Instruction And Designing Learning Experiences For All Students" section, Trujillo wrote in relevant part: "Modify instructional plans beyond the use of lecture to adjust for student needs (e.g. English Learners, students with auditory processing deficits)." (*Id.*)
- Under the "Assessing Student Learning/Student Progress" section, Trujillo wrote in relevant part: "Involving and guiding all students in assessing their own learning." (*Id.*)

Despite these comments, Trujillo rated Lukkarila as "Meets Criteria" in all of these areas, with an overall rating of "Meets District Standards."<sup>17</sup> (*Id.* at p. 4.)

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<sup>17</sup> The District's evaluation forms contain four ratings for the individual standards ("Exceeds Criteria," "Meets Criteria," "Needs Improvement," and "Unsatisfactory"), and four ratings for the overall evaluation ("Exceeds District Standards," "Meets District Standards," "Needs Improvement," and "Unsatisfactory"). (Respondent Exh. G.)

If the alleged weaknesses persisted in subsequent observation or evaluation periods, the logical approach to addressing these weaknesses (barring extreme dereliction of duties by Lukkarila) would be for Trujillo to mark Lukkarila as “Needs Improvement” in these areas before proceeding to “Unsatisfactory,” presuming Trujillo’s chief purpose was to remedy Lukkarila’s perceived shortcomings. However, in Lukkarila’s January 20, 2010, observation report<sup>18</sup> (which was issued to her prior to her protected activity), Trujillo rated Lukkarila as “Meets Standards” for all standards except for “Assessing Student Learning/Student Process,” for which Trujillo rated her “Needs Improvement.” Trujillo’s critical recommendations from the 2008-2009 evaluation dated May 13, 2009, did not reappear in the January 20, 2010, observation report, except for “Assessing Student Learning/Student Process.”

In Lukkarila’s first post-protected activity observation report for March 15, 2010, Trujillo rated Lukkarila as “Unsatisfactory” (the lowest rating) in both “Engaging And Supporting All Students In Learning” and “Planning Instruction And Designing Learning Experiences For All Students,” for which Trujillo had rated Lukkarila “Meets Standards” in both the May 2009 evaluation and the January 2010 observation report. Under “Engaging And Supporting All Students In Learning,” Trujillo described an activity in Lukkarila’s class where “there was considerable engagement and focused attention by many additional students.”

(Charging Party Exh. 20, p. 1.) Yet, Trujillo then wrote, in relevant part:

Consistently high expectation communication for student engagement and learning was not observed. Mrs. Lukkarila asked well over 60 questions to students [*sic*] this class review, as this was the focus objective for the class. Over 90% of those questions were answered by only 7 students – sometimes in chorus, sometimes independently. Of the 18 students in class,

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<sup>18</sup> The District’s observation form contains four ratings for the individual standards (“Exceeds District Standards,” “Meets District Standards,” “Needs Improvement,” and “Unsatisfactory”). (Respondent Exh. G.)

6 students never spoke, 4 students spoke only 1 time (teacher specifically asked 2 for response), and 1 student spoke 3 times (twice reading). At the other extreme, 1 student answered 17 questions by himself and a number of additional times in chorus with other students in class. Of the students not engaged, 2 were continuously on the wrong page of the book, 1 dozed on and off throughout the period, and 2 closed their book before it was time to do so.

(*Id.* at p. 1, emphasis in original.)

Under “Planning Instruction And Designing Learning Experiences For All Students,” Trujillo wrote that Lukkarila “focused student attention” and that her “use of the graphic organizer to facilitate student understanding of concepts related to supply, demand, etc. was especially effective.” (*Id.* at p. 3.) Then Trujillo repeated many of the critical comments found under “Engaging And Supporting All Students In Learning.”

In Lukkarila’s May 2010 evaluation for school year 2009-2010, Trujillo raised the ratings in both “Engaging and Supporting All Students In Learning” and “Planning Instruction and Designing Learning Experiences For All Students” to “Needs Improvement.” The critical comments for those areas reflect similar critical comments Trujillo had previously written, including a recommendation that Lukkarila focus less on lecturing in order to engage students more effectively. Unlike in the previous observation forms, Trujillo notes in the “Planning Instruction And Designing Learning Experiences For All Students” section that Lukkarila has the highest failure rate in the department, and that her students’ failure rate is over 20 percent higher than any other teacher in the department. Trujillo does not state over what period of time he calculated these percentages, nor whether Lukkarila had a history of percentage gaps prior to the 2009-2010 school year. Besides these two areas, Trujillo gave Lukkarila two separate “Needs Improvement” ratings and two separate “Meets Criteria” ratings, with an overall rating of “Needs Improvement.”

Other than the issue of students' failure rate, the essence of Trujillo's critical observations, both before and after Lukkarila's protected activity, was that Lukkarila was not actively involving many of her students in classroom discussions and projects. While this is a valid area of concern, there is no indication that Lukkarila's alleged shortcomings worsened precipitously between her January 2010 and March 2010 observation reports, or that her shortcomings had objectively sunk below the norm for comparable teachers by March 2010, to merit a jump from "Meets District Standards" to "Unsatisfactory" in two different categories (which clearly had a downward effect on the ratings that Trujillo gave to Lukkarila on her May 2010 evaluation compared to her May 2009 evaluation and January 2010 observation report).

These facts support the ALJ's finding that the District's negative performance evaluations were a pretext for its "hostility to [Lukkarila's] protected conduct." (Proposed Dec., p. 48.) (See, e.g., *Achene v. Pierce Joint Unified School Dist.* (2009) 176 Cal.App.4th 757, 770 ["Telling an employee that she needs to refine her performance is a far cry from telling her that her performance is unsatisfactory."].)

The District points to the fact that Patriot High School Principal Pace identified the same performance deficiencies during the 2010-2011 evaluation as evidence that Trujillo's negative assessment of Lukkarila's performance was not a pretext for his hostility towards Lukkarila's protected conduct. Assuming the substantive similarity of the deficiencies noted by both Trujillo and Pace, the District's argument is undermined by the disparity in ratings that Pace gave to Lukkarila on her observation and evaluation forms for the 2010-2011 school year, when compared with the ratings given by Trujillo for the 2009-2010 school year.

Under the standard "Engaging And Supporting All Students In Learning," Pace rated Lukkarila as "Meets Standards" on her December 2010 observation, February 2011

observation, and April 2011 evaluation (Respondent Exh. G). These ratings stand in stark contrast to Trujillo's rating of "Unsatisfactory" on the March 2010 observation and "Needs Improvement" on the May 2010 evaluation. Under the standard "Planning Instruction And Designing Learning Experiences For All Students," Pace rated Lukkarila as "Meets Standards" in the February 2011 observation. This again stands in stark contrast to Trujillo's rating of "Unsatisfactory" in his March 2010 observation. Pace's evaluation rated Lukkarila overall as "Meets Standards," while Trujillo's 2009-2010 evaluation rated Lukkarila overall as "Needs Improvement." If, as the District argues, Lukkarila suffered from "the same performance deficiencies" from 2008 to 2011, these wildly fluctuating assessments between Trujillo and Pace support the ALJ's conclusion that Trujillo's choice of ratings was the result of hostility towards Lukkarila's protected conduct.<sup>19</sup>

The District cites to various PERB cases in which an employer was found to have taken an adverse action against a charging party because of legitimate concerns regarding the employee's work performance that predate the employee's protected activity, rather than because of the employee's protected activity. However, these cases are factually distinguishable from the present case.

In *City of Santa Monica* (2011) PERB Decision No. 2211-M (*Santa Monica*), PERB held that the respondent city established that it would have rejected the charging party employee on probation because of performance deficiencies, despite his protected activity of

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<sup>19</sup> The only standard for which Pace gave Lukkarila a lower rating than Trujillo was under the standard "Creating And Maintaining Effective Environments For Student Learning," in which Pace gave Lukkarila a "Needs Improvement" rating on the 2010-2011 evaluation, while Trujillo gave Lukkarila a "Meets Criteria" rating. However, this disparity is tempered by the fact that Pace gave Lukkarila a "Meets Criteria" rating in this standard on the December 2010 observation report. The more dramatic disparity in ratings for other standards in the opposite direction appears to be the more germane consideration for determining whether the ALJ's conclusions regarding pretext were supported.

seeking union assistance in filing grievances. Unlike in the present case, the city had given the employee multiple performance evaluations with an overall performance rating of “Further Development Needed” prior to the employee’s protected activity. (*Id.* at pp. 2-3.)

Furthermore, the two events precipitating the city’s final adverse action constituted safety violations that were qualitatively more serious than any of the employee’s previous misconduct. (*Id.* at pp. 6-9.) Those facts render the *Santa Monica* decision inapposite to the present case, where there was no precipitating event justifying the significantly less favorable ratings subsequent to Lukkarila’s protected activity.

There is also a dispositive factual distinction between the present case and *Bellevue Union Elementary School District* (2003) PERB Decision No. 1561 (*Bellevue*). In *Bellevue*, the Board held that the school district denied permanent status to the probationary teachers in question for the legitimate reason that it had a policy of granting tenure only to teachers rated “superior”, and the probationary teachers had not been rated “superior” in performance evaluations either before or after their protected activity. (*Id.* at p. 4.) The relevant fact in that case (*viz.*, the teachers’ less-than-“superior” ratings) did not change from before the teachers’ protected activity to afterwards. By contrast, the relevant fact in the present case (*i.e.*, the individual and overall ratings) changed significantly from pre- to post-protected activity.

*San Diego Unified School District* (1991) PERB Decision No. 885 (*San Diego*) is also inapposite to this case. The District asserts that in *San Diego*, “the employee at issue was repeatedly insubordinate, and failed to improve her behavior over the course of several years.” (Respondent’s Exceptions, p. 28.) However, in *San Diego*, there is no indication that the employee was insubordinate prior to her protected activity. To the contrary, the district did not cite the employee for insubordination until after she engaged in protected activity. (*Id.* at pp. 5, 21.) This indicates that the employee’s misconduct escalated after the protected activity,

justifying the employer's adverse actions against her. In the present case, however, Trujillo's comments both before and after Lukkarila's protected activity indicate similar performance shortcomings both before and after she engaged in protected activity, yet the ratings that Trujillo gave her dropped precipitously after her protected conduct.

d. Performance Concerns

The District challenges the ALJ's conclusion that it failed to establish legitimate performance concerns warranting consecutive annual evaluations of Lukkarila and therefore failed to establish that it would have required Lukkarila to participate in a consecutive year evaluation during the 2010-2011 school year even absent her engaging in protected activity. The District points to its concerns regarding Lukkarila's performance that predate her protected activity, and that Pace noted the same deficiencies with Lukkarila's performance during the 2010-2011 school year as did Trujillo during the 2008-2009 and 2009-2010 school years.

As discussed earlier, the generally higher ratings that Pace gave during the 2010-2011 school year indicate that Pace would likely have given higher ratings than Trujillo for the 2009-2010 school year, even if their concerns about Lukkarila's alleged performance deficiencies were similar. From that conclusion, it is reasonable to infer that the District would not have ordered Lukkarila to participate in an evaluation during the 2010-2011 school year in the absence of Trujillo's hostility towards Lukkarila's protected conduct.

The District argues that "given that the District removed the 2009-2010 evaluation documents from Charging Party's personnel files, the District was required, under Education Code section 44664, to conduct an evaluation during the 2010-2011 school year."

(Respondent's Exceptions, p. 30.) Under the District's reasoning, "A one year delay in conducting an evaluation would have resulted in the District being out of compliance with the

Agreement and Education Code section 44664.” However, the District substantially fulfilled the evaluation requirements of Education Code section 44664 for the 2009-2010 school year by conducting the original evaluation. As the ALJ found, removing the 2009-2010 evaluation from Lukkarila’s file after investigating her complaint did not retroactively diminish its substantial compliance with section 44664 for that school year. Consequently, the District was not compelled by the Education Code or the CBA to evaluate Lukkarila for the 2010-2011 school year. Otherwise, a school district could find itself in violation of section 44664 any time an arbitrator or adjudicative body ordered it to remove an evaluation from an employee’s personnel file, if the time for a subsequent annual evaluation (and in-class observations required for an accurate evaluation) had passed. Under these circumstances, we do not believe school districts would be subject to liability under the Education Code.

e. CBA’s Public Complaint Procedure

Finally, the District excepts to the ALJ’s conclusion that the CBA’s Public Complaint Procedure in Article 5, Section 13, and the applicable side letter memorandum of understanding (MOU) (Appendix D) apply to student complaints, and that the District violated that procedure, in determining that the nexus element was satisfied relating to the District’s investigation of Lukkarila’s alleged misconduct in September and October 2010. The CBA’s Public Complaint Procedure states, in relevant part:

B. Every effort will be made to resolve complaints concerning unit members at the earliest possible stage in accordance with the following procedures:

[¶]

(2) Complaints not resolved at the informal level above, shall be directed by the complainant to the unit member’s immediate supervisor.

(a) Any complaint regarding the unit member’s job performance shall be discussed with the unit member as soon as possible.

(Respondent Exh. A, p. 18.)

Appendix D to the CBA (also referred to as the “side letter memorandum of understanding”) states, in relevant part:

The Parties acknowledge the importance of protecting the integrity and professionalism of unit members. The District will continue to make every effort to resolve complaints concerning unit members at the earliest possible stage in accordance with Article V, Section 13 of the Collective Bargaining Agreement. The District acknowledges that the procedure outlined in Section 13 includes complaints from parents and community members.

(Respondent Exh. DD.)

As an initial matter, the ALJ did not find that CBA’s Public Complaint Procedure applies to student complaints. Footnote 38 of the proposed decision states: “It is unclear from the testimony of all District witnesses and from the language in this CBA section and side letter whether it applies to student complaints. Thus, for purposes of establishing a prima facie case it is assumed that it does.”

We find that the ALJ’s assumption and analysis are supported by the record. Neither the CBA’s Public Complaint Procedure nor the side letter MOU exclude student complaints from their scope. Students are members of the public. Superintendent Duchon, who has served as district superintendent since May 2004, testified that the CBA’s Public Complaint Procedure could be applicable to students “[u]nder some circumstances,” that the procedure “specifically deals with complaints that come from the public,” and that “[a] student could be a member of the public.” (Reporter’s Transcript (RT) Vol. 2, pp. 87-88.) The ALJ reasonably relied on the testimony of Duchon (as opposed to Elzig and Pace) as the person “responsible for the overall operations of the School District.” (RT Vol. 2, p. 6.)

Even had the ALJ erred in her conclusion, it would have been harmless error, since the ALJ relied on other facts to support her nexus determination not excepted to by the District, including the close timing between Lukkarila's protected activity and the District's adverse actions, the fact that the District may have departed from established procedures in its investigation of student complaints against Lukkarila, the fact that Elzig demonstrated animus against protected activity in her June 25, 2010, e-mail to employees in response to the Master Grievance, Elzig's cavalier attitude toward Lukkarila's due process rights, and the fact that the District's justification in its position statement for Elzig's September 19, 2010, issuance of the Summary of Meeting to Lukkarila differs significantly from its verbal and written reassurances to Lukkarila and from Elzig's and Pace's testimony. (Proposed Dec., pp. 43-45.)

#### ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, it is found that the Jurupa Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a) by issuing to Pamela Jean Lukkarila (Lukkarila) a letter threatening her with insubordination on March 19, 2010, a negative observation report and final evaluation on or about March 15 and May 15, 2010, and ordering a consecutive evaluation year for Lukkarila in 2010-2011 in retaliation for her EERA-protected conduct. The District also violated EERA section 3543.5(a) by sending an e-mail to all District employees on June 25, 2010 that criticized employees' collective protected activities, thereby interfering with the employees' exercise of rights protected by EERA. All other allegations in the complaints in PERB Case No. LA-CE-5510-E and PERB Case No. LA-CE-5659-E are DISMISSED.

Pursuant to section 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activities.
2. Interfering with or harming employee rights protected by EERA.
3. Ordering an evaluation year for Lukkarila unless and until she has

returned to service in the District for at least one year.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Rescind the observation and evaluation documents issued in connection

with her 2010-2011 performance evaluation, unless Lukkarila informs the District within ten (10) days of final decision in this matter that she desires for those documents to remain a part of her employment records.

2. Within ten (10) workdays of the service of a final decision in this matter,

post at all work locations where notices to employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or to the General Counsel's designee. The District shall provide reports, in writing, as directed

by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be served concurrently on Lukkarila.

Members Huguenin and Banks joined in this Decision.

**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California**



After a hearing in Unfair Practice Case No. LA-CE-5510-E, *Pamela Jean Lukkarila v. Jurupa Unified School District*, in which all parties had the right to participate, it has been found that the Jurupa Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by issuing to Pamela Jean Lukkarila (Lukkarila) a letter threatening her with insubordination on March 19, 2010, a negative observation report and final evaluation on or about March 15 and May 15, 2010, and ordering a consecutive evaluation year for Lukkarila in 2010-2011 in retaliation for her EERA-protected conduct. The District also violated EERA section 3543.5(a) by sending an e-mail to all District employees on June 25, 2010, that criticized employees' collective protected activities, thereby interfering with the employees' exercise of rights protected by EERA.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activities.
2. Interfering with or harming employee rights protected by EERA.
3. Ordering an evaluation year for Lukkarila unless and until she has returned to service in the District for at least one year.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

Rescind the observation and evaluation documents issued in connection with her 2010-2011 performance evaluation, unless Lukkarila informs the District within ten (10) days of final decision in this matter that she desires for those documents to remain a part of her employment records.

within ten (10) days of final decision in this matter that she desires for those documents to remain a part of her employment records.

Dated: \_\_\_\_\_

JURUPA UNIFIED SCHOOL DISTRICT

By:

\_\_\_\_\_  
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD



PAMELA JEAN LUKKARILA,

Charging Party,

v.

JURUPA UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE

CASE NOS. LA-CE-5510-E

LA-CE-5659-E

PROPOSED DECISION

(04/30/2014)

Appearances: David Lukkarila, Personal Representative, and the Law Offices of Richard D. Ackerman by Richard D. Ackerman, Attorney, for Pamela Jean Lukkarila; Fagen, Friedman & Fulfrost by Kerrie Taylor, Attorney, for Jurupa Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

In these two cases, a public school teacher alleges interference and retaliation by her employer because of her protected individual and group activities under the Educational Employment Relations Act (EERA).<sup>1</sup> The employer denies committing any unfair practices.

PROCEDURAL HISTORY

Case No. LA-CE-5510-E

On November 12, 2010, Pamela Jean Lukkarila filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Jurupa Unified School District (District). The PERB Office of the General Counsel assigned this matter PERB case number (Case No.) LA-CE-5510-E. A first amended charge was filed on June 21, 2011.

The General Counsel's Office dismissed Case No. LA-CE-5510-E on August 25, 2011. On October 13, 2011, Lukkarila timely filed with the Board an appeal of the dismissal of the charge.

<sup>1</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references herein are to the Government Code.

On August 21, 2012, the Board partially reversed the dismissal in Case No. LA-CE-5510-E and remanded the case to the General Counsel's Office to issue a complaint consistent with the Board's decision. (*Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*).

On September 21, 2012, the General Counsel's Office issued a complaint in Case No. LA-CE-5510-E, alleging six distinct adverse actions in connection with: Lukkarila's performance evaluation in the 2009-2010 school year; the District's decision to evaluate her performance again during the following school year; and an investigation into Lukkarila's alleged misconduct and written discipline in September and October 2010.<sup>2</sup> The complaint further alleged that a District administrator interfered with employee rights by sending an email message to all District employees, including Lukkarila, which criticized the concerted activities of a group of employees that had filed a written complaint over the District's employment practices in June 2010.

The District filed its answer to the complaint in Case No. LA-CE-5510-E on October 11, 2012, admitting certain factual allegations and denying any violation of the law. Case No. LA-CE-5659-E

On February 21, 2012, Lukkarila filed a second unfair practice charge with PERB against the District. The General Counsel's Office assigned this matter Case No. LA-CE-5659-E.

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<sup>2</sup> The complaint contains a typographical error at paragraph 4.e. that will be disregarded. It states that the District investigated Lukkarila's alleged misconduct in September and October 2011, rather than in September and October 2010, as demonstrated by the evidence in the record.

On September 21, 2012, the General Counsel's Office issued a partial dismissal in Case No. LA-CE-5659-E.<sup>3</sup> On the same date, the General Counsel's Office issued a complaint alleging that the District retaliated against Lukkarila for her protected conduct by denying her request for paid "special leave" in August 2011.

The District filed its answer to the complaint in Case No. LA-CE-5659-E on October 11, 2012, admitting certain factual allegations and legal conclusions, and denying any violation of the law.

#### Consolidation of the Cases for Further Proceedings

The General Counsel's Office conducted a combined informal settlement conference for the two cases on November 1, 2012, but the parties did not reach an agreement to settle their disputes. The matter was then set for a consolidated formal hearing.

The formal hearing was held on four days between February 27 and March 7, 2013. With the receipt of the parties' reply briefs on June 21, 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 section 3540.1(k). Lukkarila is an employee within the meaning of section 3540.1(j). At all times relevant to these charges, Lukkarila had been employed as a teacher at the District's Patriot High School (Patriot) since 2005 and was included in the certificated bargaining unit exclusively represented by the National Education Association-Jurupa (NEA-J or Union).<sup>4</sup> The District

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<sup>3</sup> Lukkarila did not file an appeal with the Board of the partial dismissal in Case No. LA-CE-5659-E.

<sup>4</sup> At the time of the hearing, Lukkarila was not teaching at Patriot. She had exhausted all of her paid and unpaid leave time, but had not returned to work and was therefore included on a 39-month reemployment list in accordance with Education Code provisions. Lukkarila

and NEA-J were, at all relevant times, parties to an operative collective bargaining agreement (CBA).

### Background Events

Lukkarila is a permanent certificated employee. She typically teaches World History and U.S. History. Under the evaluation procedures in CBA Article IX, Section 3.A., unit employees with permanent status are to be evaluated “at least once every other year,” whereas probationary unit employees are to be evaluated at least once each school year.<sup>5</sup> This provision of the collective agreement models the parameters of the Education Code. The 2008-2009 school year was scheduled as an evaluation year for Lukkarila. Jay Trujillo was the principal of Patriot at that time.<sup>6</sup> Lukkarila’s most recent previous evaluation had taken place during the 2006-2007 school year and was satisfactory. Lukkarila was on maternity leave for a portion of the 2008-2009 school year.

Trujillo was present for at least two formal classroom observations, which is typical, for Lukkarila’s 2008-2009 evaluation cycle. Article IX, Section 2.B., “Observations and Observation Conferences,” requires permanent unit members to be observed a minimum of one and maximum of four times for at least 30 minutes per observation period. Before negative comments are included in an evaluation, the unit member must have been observed at least twice. Trujillo also noted that the final evaluation was based on “many informal classroom

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acknowledged that she may return to active employment with the District upon her notice to the District that she intends to do so. (See Education Code section 45195.)

<sup>5</sup> Article IX, “Evaluation Procedures,” spans over 10 pages of the CBA. It provides detailed processes to be followed for all performance evaluation processes, including pre-evaluation and post-evaluation procedures.

<sup>6</sup> At the time of the hearing, Trujillo held the position of Director of Secondary Education for the District.

observations, walkthroughs.” This practice is also typical in the evaluative process according to Trujillo.

In a final evaluation, the District assesses teachers in six categories or “standards,” which mirror the standards for the teaching profession set forth by the California Department of Education. This final evaluation rated Lukkarila’s performance overall as “Meets District Standards.” She was also rated “M” for “meets criteria” under each of the six individual standards. Each standard included generally positive comments from Trujillo regarding Lukkarila’s performance. For example, in the comments section under “Standard 6 –

Developing as a Professional Educator/Adjunct Duties,” Trujillo expressed:

Ms. Lukkarila has demonstrated satisfactory personal growth and development as a professional educator. This has been most evident through both her contribution and participation associated with her “data team,”<sup>[7]</sup> *as well as through her general classroom responsibilities.* Ms. Lukkarila, in partnership with his [sic] team/department colleagues, has helped to create a “community of learners” among the Patriot teaching faculty. Effective collaboration, goal setting, reflective practice, appropriate intervention, and the overall pursuit of excellence are becoming firmly established on campus—in large part, due to the efforts of Ms. Lukkarila and her colleagues. *I appreciate her openness to feedback and desire to improve as an instructor. Lastly, I want to commend Ms. “L” for successfully transitioning back to “full-time” employment after the birth of her first child.* She is beaming with energy and joy, and her PHS students are happy she’s back!

(Emphasis added.)

Several standards also included comments by Trujillo for “recommended actions.” His recommendations included, for example, utilizing instructional variety “beyond lecture,” monitoring of students’ routines (i.e., not allowing students to pack up their belongings during

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<sup>7</sup> Instead of traditional departments, teachers at Patriot are assigned to data teams based on their teaching subject matter. Data teams collaborate on issues related to student performance and success.

lecture time), and engaging all students in the learning process by adjusting instructional strategies.

Accompanying the final 2008-2009 evaluation was a cover memorandum informing Lukkarila that Trujillo had decided to evaluate her again in the upcoming 2009-2010 school year. Trujillo did not recall during his examination by Lukkarila's representative that he had compelled Lukkarila to be evaluated for consecutive school years, but he had a clear recall of doing so when answering essentially the same question posed by District counsel.<sup>8</sup> Lukkarila testified that the reason she was given for being evaluated again, despite her permanent status and having just received an overall satisfactory evaluation, was that Trujillo had not seen her "enough" during the year due to her maternity leave. Trujillo testified that his recommendations in the 2008-2009 evaluation actually reflected his concerns over Lukkarila's teaching performance, and those concerns coupled with his expectation for her improvement in those areas were "exclusively the reasons why" he ordered a subsequent evaluation year for her in 2009-2010. District witnesses contended that the CBA does not prohibit them from evaluating permanent teachers every year as long as the teacher is notified in writing of the upcoming evaluation cycle.

#### The 2009-2010 Evaluation Process

##### 1. The January Observation

Trujillo and Lukkarila originally planned for his first scheduled classroom observation to occur on November 20, 2009. An "Element Conference" held between the evaluating administrator and teacher prior to classroom observations, wherein the standards to be evaluated that year are discussed and modified if so agreed, is set forth at CBA Article IX, Section 1.B. Trujillo and Lukkarila held this conference in October 2009. When he failed to

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<sup>8</sup> Comparing Hearing Transcript (TR) Volume (Vol.) I, page (p.) 64, line (ln.) 1, to TR Vol. I, p. 191, ln. 17.

appear that day as scheduled, Lukkarila called the office and was told that staff neglected to inform her that he was unable to attend.

Trujillo and Lukkarila then agreed at some point that he would observe her classroom on January 20, 2010. He arrived a few minutes after the class period started. Lukkarila's lesson plan that day required students to work independently or in small groups and utilize vocabulary words from their recently completed unit on World War I to create a song or poem. By the time that Trujillo arrived, the students were working on their assignment while Lukkarila circulated around the room observing the students' groups and answering their questions.

Trujillo and Lukkarila met for a post-observation conference per CBA requirements. Trujillo presented a written observation report dated January 25, 2010. He rated her "M" on all standards except "Standard 5—Assessing Student Learning/Student Progress," in which he rated her as "N," for needing improvement. His comments regarding that category were centered upon Lukkarila's alleged deficient monitoring of students' work progress without providing her input or feedback.<sup>9</sup>

During the post-observation meeting, Lukkarila expressed her concerns over the comments under the negatively rated standard as well as some of the comments under standards rated satisfactorily that she believed were inaccurate. Trujillo listened to Lukkarila's concerns and told her that she could also express her disagreement in writing.

On February 1, 2010, Lukkarila wrote a detailed account of her views of the observed lesson and requested that Trujillo reconsider some of the comments in his report. During the

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<sup>9</sup> According to Lukkarila, the point of the lesson that day was for students to work independently after the parameters of the project had been explained in prior class sessions. The students were to present their final projects the next day in class. Lukkarila invited Trujillo to attend her class the following day so that he could view the students' work product, but he did not attend.

morning of February 3, 2010, Trujillo wrote an email message to Lukkarila expressing that he would “consider making some adjustments” to the observation report, but also expressed that he did not believe he had “ever” heard Lukkarila agree with his constructive assessments.

During his testimony, Trujillo denied that his statement in the email regarding his belief that he had not ever heard Lukkarila agree with his evaluative assessments was at odds with his earlier statement in her 2008-2009 evaluation that he appreciated her “openness to feedback and desire to improve as an instructor.”<sup>10</sup> He explained that his comment in the evaluation under Standard 6 was strictly limited to describing her participation in the data team environment.

District counsel then asked whether he was commenting on Lukkarila’s performance in her classroom, to which he replied, “Absolutely not.”

Trujillo sent Lukkarila another email on February 3, 2010 stating that he had never before dealt with a situation where an employee requested changes to an observation report. He mentioned that if the report were to be adjusted, then they both would have to agree to “back date” the form, otherwise the observation would be “null and void.” Trujillo testified that his concern stemmed from CBA timelines, and whether a modified observation report would be deemed to have been signed on the date reflected on the form. Article IX, Section 2.D., requires an observation form/report to be given to the unit member within five work days of the observation. Section 2.F. requires that a post-observation conference be held within five work days of the receipt of the observation report unless mutually waived. However, any performance in need of improvement or that is unsatisfactory must be explicitly described in writing with a mandatory conference. The observation report evaluates teachers on the first five standards that are included on a final evaluation and omits the sixth standard regarding professional development.

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<sup>10</sup> He also did not acknowledge that his statement in the email was equivalent to saying that he had “never” heard her agree with his assessments.

Around February 17, 2010, Lukkarila received a letter in her school mailbox from Trujillo, describing some changes that he had made to the observation report. He also wrote that she could attach her comments regarding his modifications if she desired. Lukkarila then requested and received from Trujillo's secretary a full copy of the modified observation report so that she could read the revisions in proper context. Still having concerns about some of the content of the report, Lukkarila decided to contact the Union for advice on how to respond. A Union site representative suggested that Lukkarila write an example of what she thought the comments should be and then share it with Trujillo.

With the Union's instruction in mind, Lukkarila sent Trujillo and his secretary an email at 8:09 a.m. on February 22, 2010 stating that she had contacted the union, and "per their request," she would respond shortly in writing. A little over two hours later, at 10:44 a.m., Trujillo sent Lukkarila an email response copying, for the first time in their communications over the issue, District Assistant Superintendent of Personnel Services Tamara Elzig. Trujillo stated that "[u]pon further review of this matter," he would not make any formal changes to his original January 20, 2010 observation report. He noted that Lukkarila's written rebuttal would be attached to the original report.<sup>11</sup> He requested that Lukkarila return the modified report to him because it was void and would be destroyed. Trujillo testified that prior to notifying Lukkarila that he had changed his mind about modifying the report, he had not consulted with any other District administrator regarding his concerns over back dating or changing the content of the observation report, but rather had reached the conclusion that the original report should stand based on his own reflections over evaluation policies in the CBA. However, Elzig testified that while she did not speak to Trujillo before he made the revisions, he called

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<sup>11</sup> District witnesses, including Trujillo, acknowledged that an employee's written rebuttal should be attached to an observation report.

her to discuss it right around the same time that Lukkarila was not “happy with” the revised report.<sup>12</sup>

2. The March Observation and Letter Referencing Insubordination

On March 15, 2010, Trujillo observed Lukkarila’s classroom unannounced. The lesson that day was a review activity in preparation for a test. Lukkarila testified that he made positive comments to her about this class period immediately afterward, stating that the students’ “high level of excitement and engagement in the room was overflowing.” Lukkarila had also continued to communicate with the Union over her concerns regarding Trujillo’s handling of her January observation around this same period of time and had met with a Union attorney over those issues.

On March 16, 2010, Lukkarila received communication from Trujillo’s secretary that her post-observation meeting with Trujillo was scheduled for March 19, 2010.<sup>13</sup> Lukkarila called Trujillo’s secretary the next day (March 17) to inform her that she had a parent-teacher conference during the scheduled time for the meeting, but she was available any day the following week. Lukkarila was informed that the secretary would check Trujillo’s schedule and get back to her.

On March 18, 2010, contemporaneous with Lukkarila’s efforts to schedule her post-observation meeting with Trujillo through his secretary, the Union attorney sent a letter via facsimile and regular mail to Trujillo with a copy to Elzig. The letter summarized the events surrounding the January observation and requested that Trujillo cease and desist from taking reprisals and/or interfering with Lukkarila’s EERA-protected right to seek help from the Union. Trujillo testified that he recalled receiving this letter, but did not recall when that was

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<sup>12</sup> See TR Vol. I, p. 215, ln. 25 – p. 216, ln. 2, and TR Vol. III, p. 13, ln. 7-13.

<sup>13</sup> Trujillo’s secretary at that time, Polly Heverly, did not testify.

or if he had read it carefully enough to determine what the letter was requesting of him. He thought he might have sent it via email to Elzig, but he did not recall speaking with her about it.

During class time late that same afternoon (March 18), Trujillo's secretary called Lukkarila's classroom to request that she stop by the office after school to sign her observation form that day. Lukkarila found this request confusing as she believed that they were still in the process of trying to schedule a post-observation meeting wherein she would usually sign the document. Lukkarila was unable to stop by the office after school, however, because of issues related to child care.

The next morning, March 19, 2010, Lukkarila went to the school office before the start of classes to sign the observation form. When she got to her classroom and checked her computer, there was an email from Trujillo's secretary received at 7:22 a.m. informing her that she had to sign the observation form no later than 2:20 p.m. that afternoon. Lukkarila printed a copy of this email and hand-wrote on it that she had picked up and signed the observation form that morning at 7:30 a.m.

Later that same day (March 19), Lukkarila received a letter from Trujillo. The letter noted that Lukkarila had requested in a phone conversation on March 17, 2010 to reschedule their post-observation meeting on March 19. Trujillo stated that his secretary, "understanding contractual guidelines" had then requested that Lukkarila come to the office the next morning, i.e., Thursday, March 18, 2010, to meet with him if he was available or to at least sign the form, which Lukkarila failed to do. Then, according to Trujillo, his secretary called Lukkarila's classroom later that afternoon requesting that she come the office before she left for the day, but again, Lukkarila did not come to the office as requested. Trujillo stated that Lukkarila's two consecutive failures to follow his secretary's requests "borders on insubordination."

On March 22, 2010, Lukkarila sent an email message requesting that Trujillo's secretary inform him that she was requesting that a Union representative be present for their post-observation meeting the next day. By this time, Lukkarila was feeling uncomfortable interacting with Trujillo and felt the need for representation in meetings, even non-disciplinary ones. Trujillo did not object and union representative Vicky Castillo accompanied Lukkarila to the meeting and took notes.<sup>14</sup> The March 15, 2010 observation report rated Lukkarila "U" for unsatisfactory in two standards, "M" in two standards, and "N" in one standard. The thrust of the comments in the negatively rated categories was that Lukkarila did not actively engage all of the students in the room, but instead let a few (around 7 out of 18 ) students dominate the discussion. During the conference, Lukkarila inquired whether she could have the opportunity to be observed again, and Trujillo indicated that he would do so informally and take into account any improvement in her final evaluation.

On April 2, 2010, Lukkarila submitted to Trujillo two separate letters responding to the observation report and the March 19, 2010 letter regarding her alleged borderline insubordination. Lukkarila explained her view of the events surrounding his secretary's request to come to the office, disputing that she had received two summons to do so. She stated that because the phone call on March 18 was during class time and therefore within earshot of her students, she was uncomfortable explaining the reason why she could not make it to the office that day. In her letter regarding the observation, Lukkarila reported her views of her classroom activities during the observed lesson on March 15, 2010 and requested that Trujillo reconsider his "U" ratings. She further specifically described how she had employed several of his suggestions for improvement since the meeting.

### 3. The Final Evaluation

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<sup>14</sup> The notes of the March post-observation meeting were received in evidence, without objection, as Charging Party's Exhibit 23. Castillo did not testify.

Lukkarila was again accompanied by Union representative Castillo who served as a note-taker during the May 15, 2010 evaluation conference with Trujillo. The evaluation rated Lukkarila's performance overall as "Needs Improvement." She was rated "M" in two standards, and "N" in four standards. The thrust of the comments under the negatively rated standards was that Lukkarila relies primarily on lecture and does not engage and assess the progress of all students in the learning process. Trujillo repeatedly wrote that these deficiencies persisted despite his previous attempts to address them with her. Trujillo never observed Lukkarila's class after March 15, 2010 and before her final evaluation was completed in May 2010, however. When asked by Lukkarila's representative whether he had done so, Trujillo testified: "I can't be certain. I'm not sure. I don't remember." He also faulted her for failing to agree with his constructive feedback and instead defending her current practices. According to Lukkarila, Trujillo admitted during the evaluation conference that her written rebuttal to the March 15, 2010 observation report had not yet been attached to it.

### The Complaints

#### 1. The "Master Grievance"/Group Complaint and Elzig's Email to Employees

Sometime in late May or early June 2010, Lukkarila met with Richard Ackerman, an attorney who was representing a group of District employees with various employment concerns. She also met several times with the 25-35 member employee group. On or about June 21, 2010, Ackerman presented what was referred to in the record as a "Master Grievance" or group complaint at a regular meeting of the District Board of Education (BOE). It also circulated widely via email to District employees. The document outlined the specific employment concerns of both classified and certificated District employees. The employees were not identified by name. Lukkarila testified that some of her employment concerns were described at paragraph 10 of the document, which recounted retaliatory actions by administrators upon an employee's return from leave under the FMLA (Family and Medical

Leave Act). The document at paragraph 19 also specifically accused Elzig of retaliating against male employees who had not yielded to her sexual advances.

Elzig was concerned by the harassment allegations against her in the Master Grievance. In the days following its public distribution, she received numerous communications from people regarding those allegations and rumors began to swirl about the specific male employees to whom the document may have referred. She sought and received permission from District Superintendent Elliott Duchon to address the issue. On June 25, 2010, she sent an email message to all District employees for that purpose. Elzig testified that at the time she sent this email, she did not know that Lukkarila was affiliated with Ackerman or that her employment issues were documented in the Master Grievance.

Elzig's email began by describing her verbal and physical altercation with a BOE member several years earlier wherein the BOE member allegedly threatened that he would publicly "break" her. Elzig noted that Ackerman is the BOE member's attorney and opined with "absolute confidence" that it was not a coincidence that a small number of employees with employment issues had retained Ackerman to attack District personnel practices. She expressed that she was saddened that the employees involved in the Master Grievance had chosen to attack her on a personal level, while expressing thanks for the character shown by the people who had chosen to contact her directly. Elzig stated that "the issues outlined in the complaint are false," then specifically denied that she had either been unfaithful to her husband or engaged in inappropriate sexual conduct at work.

## 2. Lukkarila's Individual Complaints

On or around the same date that the Master Grievance was presented at the BOE meeting (June 21), Lukkarila filed her own individual written complaints in the District office under CBA Article V, Section 14, "Unit Member Complaint Resolution Procedure." This section of the CBA refers to District Board Policies (BP) 4110 and 4111, which are also

appended to the CBA in their entirety. Article V, Section 14 E., notes that in the event BP 4110 or BP 4111 are revised or rescinded, then the section is subject to “review and reopens.” The CBA instructs that employees who believe they have been the victims of sexual harassment should follow the procedures in BP 4110,<sup>15</sup> whereas employees who believe they have suffered other forms of harassment should follow the complaint procedures in BP 4111, “Individual Employee Procedure” (Procedure).

A complaint is defined under the Procedure as an allegation that a “statute, policy, regulation, procedure, or good practice” has been misinterpreted or inequitably applied. The Procedure includes an “informal level,” where the complainant should attempt informal resolution with the “appropriate administrator” before resorting to a “formal complaint.” The informal level also provides that “the complainant may request a written response *at the time of the informal conference.*” (Emphasis added.) If requested, this written response should be provided within 10 days.

The Procedure contains three formal levels. Level I requires submission of the complaint *in writing* to the immediate supervisor, and a written response by an administrator within 10 days of receipt.<sup>16</sup> Within 10 days of receiving a Level I determination, the complainant may “appeal to the appropriate Assistant Superintendent,” who shall provide a written decision within 10 days. The first two formal levels also provide that the handling administrator “may” meet with the complaining employee prior to rendering a decision.

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<sup>15</sup> No evidence was presented regarding the substance of Lukkarila’s sexual harassment complaint. She had some difficulty in filing it, because the requisite forms were unavailable. Lukkarila had to visit several District departments, each time explaining what she was looking for to different staff members, which she found quite embarrassing. Thereafter, she documented the difficulties she encountered in that regard in a letter to Superintendent Duchon on June 25, 2010. As the bulk of the evidence in the record is regarding Lukkarila’s individual complaint under BP 4111, that complaint is focused on hereafter in the proposed decision.

<sup>16</sup> Notably, the informal level does not mandate that a complaint be initiated in writing.

Within 10 days of receiving a Level II determination, the complainant may file “a written letter of appeal,” addressed to the BOE and presented by and through the Superintendent. The complainant may also request to address the BOE with representation in a closed session. “*If* the [BOE] grants such a request, all involved parties shall be notified and have the right to make presentations.” (Emphasis added.) The BOE shall issue a final and binding decision over the complaint no later than its second next regularly scheduled meeting.

Lukkarila alleged in her individual complaint filed under the Procedure that Trujillo violated CBA evaluation processes and anti-discrimination provisions and retaliated against her because she sought help from the Union during her 2009-2010 evaluation cycle. She requested an “informal investigation” into her allegations. On or about June 29, 2010, Lukkarila was contacted by Elzig’s secretary to schedule a meeting to discuss it.

On June 30, 2010, after reading Elzig’s email responding to the Master Grievance, Lukkarila became concerned about Elzig’s involvement in the investigation of her individual complaint. She wrote to Duchon expressing apprehension that the sentiments Elzig expressed in the email called into question whether Elzig could impartially investigate Lukkarila’s individual complaint filed on the same day as the Master Grievance went public. Lukkarila acknowledged that she had interviewed Ackerman and two other attorneys in the process of securing legal representation, and was concerned that this association with him also would taint Elzig’s perception of her individual complaint. Lukkarila requested that Duchon investigate her complaint personally and requested a meeting with him and her legal counsel.

On August 13, 2010, after some discussion over the issues had occurred between the District and a Union attorney over the summer, Duchon wrote a letter responding to what he termed as Lukkarila’s “Complaint.” At this point, the 2010-2011 school year was under way. Duchon stated, “My initial investigation has revealed no evidence of...a [violation of policy] under Board Policy 4110 or 4111.” Nonetheless, Duchon agreed to remove the 2009-2010

final evaluation, the January and March 2010 observation reports, and the March 19, 2010 letter from Lukkarila's site and personnel files.<sup>17</sup> Duchon informed her that she would be evaluated again in the upcoming 2010-2011 school year, which he believed was "especially appropriate" because Trujillo would not be serving as principal at Patriot that year so a different administrator would be able to evaluate her teaching skills. Duchon testified that he was not aware that 2010-2011 would represent the third consecutive evaluation year for Lukkarila.

On August 27, 2010, Lukkarila responded in writing to Duchon's letter disagreeing with his conclusions, providing additional evidence of harassment by Trujillo, and protesting the decision that she would be evaluated again in 2010-2011.<sup>18</sup> Lukkarila additionally requested disciplinary action against be taken against Trujillo, an apology from Elzig, and a year of paid leave. She also contended that the District had failed to provide a timely written response under the Procedure.

On September 2, 2010, Lukkarila wrote a letter responding to notification from Patriot's acting principal, Roberta Pace, about her upcoming Element Conference over the year's evaluation procedures. Lukkarila informed Pace about her ongoing complaint and that she was appealing Duchon's resolution of it. Lukkarila noted that until a final decision was reached over her complaint she did not want to go forward with the evaluation process. The Element Conference was ultimately held, however. Thereafter, Pace completed two observations and a final evaluation of Lukkarila for the 2010-2011 school year. Lukkarila's performance was rated overall as "Meets Standards."

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<sup>17</sup> These documents were, in fact, removed from Lukkarila's files.

<sup>18</sup> Lukkarila stated that Trujillo had, at least twice, physically blocked her entry into staff meetings and forced her to shake his hand.

On September 8, 2010, Lukkarila wrote to Pace and copied Duchon on the correspondence. Lukkarila was distressed that she was being compelled into another year of evaluation and stated that, "I am formally appealing my complaint to the [BOE]...." She noted that she would submit her June 21, 2010 complaint letter and all subsequent letters for the BOE's review and would be requesting to address the BOE with representation in closed session.

On September 15, 2010, Duchon wrote a letter to Lukkarila, noting that the parties had been involved in discussions over a possible resolution of the issues in the complaint until July 28, 2010. He noted that since she had requested an "informal investigation" and had cancelled the scheduled informal conference, the District was not obligated to respond in writing within 10 days, thus disputing her contention that the District had not complied with Procedure timelines. Duchon stated that although Lukkarila had submitted her Complaint for informal review, since she repeatedly expressed dissatisfaction with his findings, he considered her September 8, 2010 letter a "Level III appeal to the [BOE] with a request to address the [BOE] with representation." Lukkarila was informed that the complaint would be submitted to the BOE at the meeting on September 20, 2010, and that if the BOE granted her request to appear in closed session, it would occur at a subsequent meeting.

Lukkarila was surprised that Duchon decided to treat her September 8, 2010 letter addressed to Pace as her Level III appeal to the BOE. She wrote to Duchon on September 19, 2010, and delivered the letter to his office that day, protesting that decision and stating that she intended to submit, through Duchon's office, her appeal to the BOE by September 27, 2010. Lukkarila contended that she needed adequate time to prepare the submission. Duchon testified that he received Lukkarila's letter, but could not confirm precisely when.<sup>19</sup>

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<sup>19</sup> Duchon confirmed in writing, however, that he received Lukkarila's letter on September 20, 2010.

On September 20, 2010, Duchon presented Lukkarila's complaint to the BOE. Elzig testified that there was no need to remove the complaint from the BOE's meeting agenda, because Lukkarila's desire to present it herself was inconsequential since the BOE had all available complaint documents for review and retained discretion whether to grant a closed-session hearing. She also testified that employees submitting such complaints for appeal do not usually write a formal letter addressed to the BOE. Duchon testified that it is always the practice for all documentation connected with a complaint in a Level III appeal under the Procedure to be submitted to the BOE, and thus it was likely done in this instance. He was present at the September 20, 2010 BOE meeting wherein it considered Lukkarila's appeal in a closed session. Elzig was also present. They noted that the BOE has all documentation available, but there is no oversight on what the BOE actually reviews.

On September 21, 2010, Lukkarila was informed by letter that the BOE had upheld the denial of her complaint at Level II, had further denied her request to address the Board in closed session, and thus the appeal process was concluded.

Elzig's and Duchon's testimony regarding the investigation of Lukkarila's individual complaint was at times equivocal. Duchon testified initially that he delegated the investigation to Trujillo, Elzig, and District legal counsel. Later, he said it was delegated to Elzig and legal counsel. He also said that the investigation consisted of him speaking with Trujillo and Elzig about the allegations coupled with Trujillo's agreement that Lukkarila's evaluation could be removed if she was evaluated again during the next school year.<sup>20</sup>

Duchon noted that he does not usually investigate complaints himself because he is "an ultimate hearing level" under the Procedure. He later noted that he was not following Lukkarila's investigation on a "day-to-day" basis. During examination by Lukkarila's

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<sup>20</sup> See TR Vol. II, p. 25, ln. 19-24.

representative he stated that he believed that a conference or meeting took place over the issues between Lukkarila and Elzig, and perhaps District legal counsel. Later, he stated that such a meeting was attempted or scheduled and cancelled by Lukkarila. When asked several times whether he removed Elzig from the investigation because of Lukkarila's stated concerns, he testified consistently that he did not. Duchon characterized what Lukkarila filed on June 21, 2010 as requesting an "informal investigation." After he issued his August 13, 2010 response and Lukkarila expressed further dissatisfaction with his handling of it, he believed at that point it was elevated to complaint status at a formal level, which was the reason it was then referred to the BOE for final determination.

Like Duchon, Elzig repeatedly noted that Lukkarila had requested an informal investigation in her letter of June 21, 2010. Elzig stated that although the District processed it under BP 4111, it was not actually a BP 4111 complaint. Elzig opined that while the Procedure has an informal level, it has nothing termed an "informal investigation." According to Elzig, Duchon was the lead investigator over Lukkarila's allegations and he delegated some investigatory responsibility to District legal counsel. Elzig stated that she "removed herself from the investigation and Superintendent Duchon took over" as soon as Lukkarila complained about Elzig's role in it.<sup>21</sup> Elzig also believed that Duchon was not required to tender his August 13, 2010 written response because Lukkarila had never requested one.

#### District's Investigation Over Student Complaints in Fall 2010

While Lukkarila was still in the midst of processing her individual complaint, Elzig informed her by letter that a meeting was scheduled to discuss recent concerns about her possible misconduct. The meeting was scheduled for September 29, 2010 and she was advised to bring a representative with her.

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<sup>21</sup> See TR Vol. IV, p. 151, ln. 16-21.

On September 21, 2010, Lukkarila was informed by Elzig that it involved alleged misconduct by her occurring during the week of August 30 and on September 8, 2010. She was accused of calling a student a “bitch” and of pulling another female student’s pony tail with “such force that her head and upper torso were raised from a slouched position to straight up in her chair.” Lukkarila was advised that disciplinary action could result and was again advised to have representation. She was later informed that District legal counsel would also attend the meeting.

Lukkarila requested in writing to reschedule the meeting on September 29, 2010 so that she could secure her own legal representation. In a separate communication she requested to meet after October 10, 2010 and stated that her attorney would schedule the meeting with the District.

On October 11, 2010, Pace went to Lukkarila’s classroom during the middle of a teaching period to accompany her to a meeting with Elzig and Pace over the alleged misconduct involving students. Lukkarila had no advanced notice that she was going to meet that day and therefore had taken no steps to secure a Union or other representative. Elzig testified that the reason for deciding to meet at that time was because they had received no communication from Lukkarila’s legal counsel regarding scheduling and Lukkarila had previously stated that she would be available to meet after October 10. It was Elzig’s desire to put the matter to rest and not let more time elapse without speaking to Lukkarila about it.

The District had arranged for a Union site representative to attend the meeting with Lukkarila. Lukkarila did not have an opportunity to speak with the Union representative beforehand, but also did not request to do so. The meeting was brief. Lukkarila denied the allegations and stated that she would never engage in such conduct with students. Lukkarila was not shown any student statements and was not informed that any parents had complained regarding these events. Attitudes during the meeting were cordial and professional. Elzig

testified that she considered the matter closed at that point. Elzig told Lukkarila that she would receive a written Summary of Meeting but that it was not disciplinary and no disciplinary action would result. Future written documentation from Elzig (letter dated September 1, 2011) also confirmed that no disciplinary action was contemplated. Lukkarila received the Summary of Meeting document on or about October 14, 2010.

The District's December 20, 2010 position statement filed by its legal counsel in response to the original charge in Case No. LA-CE-5510-E was received in evidence as Charging Party's exhibit 63.1. Neither Elzig nor Duchon testified to reviewing it before it was filed with PERB. The District stated through its position statement that Lukkarila was issued a "mild form employee discipline" in the Summary of Meeting document and described the October 11, 2010 meeting as disciplinary. It was also noted in the position statement that: "There were allegations of misconduct on Ms. Lukkarila's part that were substantiated through a District investigation." Student statements were also attached to the position statement as an exhibit.

District witnesses were not precisely aligned in their opinions of whether student complaints fall within the domain of the "Public Complaint Procedure" outlined in CBA Article V, Section 13. This section of the CBA does not specifically define who may file a complaint under the public complaint procedure. It mandates, among other things, that a complaint against a unit member's job performance should be shared with the unit member "as soon as possible." Meetings between the complainant and unit member are discretionary and determined by the administrator handling the issue. Complaints not resolved by informal means must be stated in writing and provided to the superintendent or designee.

Elzig and Pace testified consistently that students are not considered members of the public, and therefore Section 13 does not apply to their complaints. They also both testified that there is no defined timeframe for showing student statements connected to such

complaints to the teacher, and depending on the circumstances, they may never be shared with the teacher. In contrast, when asked whether Section 13 could apply to student complaints, Duchon testified, "Under some circumstances, but a student complaint has standing on its own." Duchon also did not definitively exclude students from being considered members of the public, but noted that the Section 13 procedure did not necessarily apply to the particular situation at issue here.<sup>22</sup>

#### Paid Special Leave Request

Lukkarila maintained her alliance with the group of employees represented by Ackerman during the 2010-2011 school year and participated in group litigation with them against the District in the Riverside Superior Court. In addition to her PERB charge, Lukkarila also individually filed during that year administrative claims against the District under other federal and state statutory schemes. On August 16, 2011, after the start of the 2011-2012 school year, Lukkarila wrote to Duchon via email requesting a paid special leave of absence for the first semester. She had already been out using sick leave for nine days at that point and was close to exhausting her allotment for the year. She cited among her reasons for the request the filing of her individual complaint under the Procedure, the group litigation, PERB charges and other individual administrative claims.

Special leave is defined at CBA Article XI, Section 14. If a leave request does not fall within the definition of other leave provisions (sick leave, bereavement leave, etc.) then it is considered a request for special leave. Approval of these requests is subject to the discretion of the superintendent or designee and may be granted without pay, with use of sick leave, or with pay less what a substitute would cost. Elzig testified without contradiction that the

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<sup>22</sup> A side letter memorandum of understanding executed between the District and NEA-Jurupa in April 2010 acknowledged that parent and community member complaints fall within the public complaint procedure. This document was silent regarding student complaints.

District has never granted a paid special leave request for the reasons that Lukkarila requested, and never for the period of time that she was requesting. Elzig also testified without contradiction that such requests with pay have typically been granted under catastrophic circumstances, such as the death of a child or spouse, and with pay less than the cost of substitute for a day or two to extend a honeymoon. Special leave has never been granted because an employee is involved in litigation against the District.

Duchon responded to Lukkarila's request by letter dated August 18, 2011. He notified her that he did not believe a special leave with pay was warranted. He also stated that she should let him know if she wanted an unpaid leave, or if she believed she was entitled to leave on another contractual basis.

Between August 18 and October 12, 2011, Lukkarila and District representatives exchanged a number of written communications regarding Lukkarila's complaints about District representatives failing to answer her questions or acknowledge receipt of her emails. These communications also discussed issues related to Lukkarila's concern that she had been assigned to teach a section of economics, a class that she had not previously taught, issues related to her use of sick leave and providing doctor's notes, and concerns regarding a payroll dispute.<sup>23</sup> During this time period, Lukkarila requested in writing to take an unpaid special leave for the first semester of the 2011-2012 school year. The District approved that request by letter dated September 16, 2011.

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<sup>23</sup> Although some evidence was received regarding the payroll and sick leave issues, Lukkarila did not move to amend the complaint in Case No. LA-CE-5659-E to include additional allegations, and the issues were not adequately addressed in the parties' post-hearing briefs. The parties were reminded on the record that the complaints issued in Case No. LA-CE-5510-E and Case No. LA-CE-5659-E exclusively provided the issues to be decided in the hearing. Thus, these issues shall not be considered here. (See *County of Riverside* (2010) PERB Decision No. 2097-M, p. 7.)

## ISSUES

### Case No. LA-CE-5510-E

1. Are allegations in the complaint occurring before May 12, 2010 timely filed?
2. Did the District retaliate against Lukkarila for her protected conduct by:
  - a. Issuing a warning regarding insubordination on March 19, 2010;
  - b. Issuing a negative observation report on or about March 15, 2010;
  - c. Issuing a negative final performance evaluation on or about May 15, 2010;
  - d. Directing a consecutive year of performance evaluation in 2010-2011;
  - e. Investigating alleged misconduct in September and October 2010;
  - f. Imposing disciplinary action through a Summary of Meeting memorandum following an investigatory meeting on or about October 11, 2010?
3. Did Elzig's email to all employees on June 25, 2010 interfere with protected employee rights?

### Case No. LA-CE-5659-E

Did the District retaliate against Lukkarila for her protected conduct by denying her request for paid special leave in September 2011?

## CONCLUSIONS OF LAW

### Timeliness – Case No. LA-CE-5510-E

Case No. LA-CE-5510-E was filed on November 12, 2010. 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.” Thus, unless a tolling exception applies, allegations of unfair practices occurring before May 12, 2010 are untimely.

In *Jurupa, supra*, PERB Decision No. 2283, p. 13, the Board concluded that the Procedure qualified as “a non-binding bi-lateral Procedure contained in the collective

agreement covering Lukkarila's employment." Citing *Long Beach Community College District* (2009) PERB Decision No. 2002 (*Long Beach*), the Board concluded that as alleged Lukkarila's utilization of the Procedure to file her individual complaints served to equitably toll the limitations period because: (1) the Procedure is contained in the CBA between NEA-Jurupa and the District; (2) Lukkarila's complaint filed under the Procedure sought to resolve three alleged adverse actions by Trujillo underlying the instant charge; (3) Lukkarila reasonably and in good faith processed her complaint under the Procedure; and (4) tolling does not frustrate the intent of limitations period because the District has not suffered surprise or prejudice. (*Jurupa, supra*, pp. 13-14.) The Board noted that Lukkarila carries the burden of proving at hearing all of the allegations in the complaint, "including those concerning equitable tolling."<sup>24</sup> (*Id.*, p. 14.)

Despite ambivalent testimony by Elzig and Duchon about whether Lukkarila's June 21, 2010 letter requesting an informal investigation under BP 4111 was considered a complaint under the Procedure, the District's responses thereto, whether formal (written) or informal (attempts at settlement through July 28, 2010) clearly establish that the complaint was processed in good faith under BP 4111 through at least September 20, 2010. The allegations against Trujillo in the complaint mirror those in the unfair practice charge regarding his retaliation against her for seeking assistance from the exclusive representative. Although the

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<sup>24</sup> Recently, the Board clarified the allocation of the burden of proof regarding the timeliness of charge allegations and in doing so partially overruled *Long Beach, supra*, PERB Decision No. 2002. The applicable four-part test set forth above was not disturbed, however. Regarding evidentiary burdens, the Board determined that a charging party must allege sufficient facts during the investigation stage upon which the PERB General Counsel's Office may determine timeliness in order to exercise PERB's statutory authority to issue a complaint. Once a complaint has issued, however, the respondent must affirmatively allege that a charge is untimely in its answer, or waive that argument. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.) Notably here, the District did not raise untimeliness in its answer nor argue that theory in its brief. However, irrespective of the change in the law well after the hearing record in this matter was closed, as discussed in detail below, the record here demonstrates that the charge allegations are timely.

Procedure is substantively set forth in a District-adopted policy, it is incorporated into the negotiated agreement between NEA-Jurupa and the District, with a specific provision allowing reopeners to the CBA if BP 4111 is modified or repealed. Lukkarila continued to communicate her dissatisfaction with the resolution of her complaint up to and including the date she filed her unfair practice charge; thus, there is no surprise or prejudice to the District resulting from a stale claim. For these reasons, it is found that since Lukkarila utilized the Procedure from June 21 through September 20, 2010, (92 days) the limitations period is extended back by an equivalent period of time until February 9, 2010. All of the allegations in Case No. LA-CE-5510-E are timely.

Retaliation – Case Nos. LA-CE-5510-E and LA-CE-5659-E

Both of Lukkarila's unfair practice charges allege retaliation for her EERA-protected conduct. To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District (1982) PERB Decision No. 210, pp. 6-8 (Novato).*)

1. Protected Activity 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 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.) 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.)

A. Requests for Union Assistance

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.) Here, the record established and the District admitted in its answer that Lukkarila informed Trujillo on February 22, 2010 that she was contacting the Union regarding their discussions over her requests to modify the January 2010 observation report.<sup>25</sup> Admitting allegations in a pleading conclusively removes those issues from controversy. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, proposed decision, p. 15, citing *Pinewood Investors v. City of Oxnard* (1982) 133 Cal.App.3d 1030, 1035; other citations omitted.)

The record also showed and the District admitted in its answer that “on or about March 18, 2010, the District received correspondence from [Union] attorney Marianne Reinhold on behalf of [Lukkarila] regarding a classroom observation.” Additionally, Lukkarila requested that a union representative accompany her to the post-observation meeting held on March 23, 2010. Trujillo recalled that a Union representative was with Lukkarila during their meeting. The record also established and the District admitted in its answer that Lukkarila was accompanied by a Union representative during her final evaluation conference (May 15, 2010) for the 2009-2010 school year. The District admitted in its answer and its witnesses testified

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<sup>25</sup> All references to the answer in this section are to that filed in Case No. LA-CE-5510-E.

that Lukkarila copied a Union attorney on her individual complaint and that they attempted to settle those issues through the Union attorney up to and including July 28, 2010.<sup>26</sup>

B. Group Activity/Master Grievance

“Joining with another employee or employees to enforce external law regarding workplace rights, is itself group activity protected by EERA against employer interference and retaliation.” (*Jurupa, supra*, PERB Decision No. 2283, p.15, citations omitted.) In addition, PERB has found that public distribution of materials critical of an employer’s management may be protected if they provide “comments on matters which were of legitimate concern to the teachers as employees.” (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224, p. 7; see also *California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1091.)

Lukkarila banded with other employees in an attempt to garner public attention and support for their collective employment concerns over leave provisions, discipline procedures, and other personnel matters. Under the above authorities, her participation in the Master Grievance was protected by EERA. Her later involvement in a group lawsuit against the District over alleged violations of laws governing employment conditions was also protected under EERA. (*Jurupa, supra*, PERB Decision No. 2283, p. 28 [protected activity includes “with one or more other employees, seeking to enforce workplace rights through administrative or judicial means”].)

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<sup>26</sup> The complaint in Case No. LA-CE-5510-E alleged that Lukkarila *requested* Union representation for the October 11, 2010 meeting. This was not demonstrated by the record. She previously informed the District that she was retaining legal counsel to attend that meeting with her, but she did not specify that it was to be a Union attorney or that she was otherwise seeking help from the Union over that issue. The record showed that the District, on its own, arranged for Lukkarila to have Union representation during an investigatory meeting on October 11, 2010.

Elzig credibly testified that she could not identify Lukkarila as one of the employees involved in the Master Grievance by reading the document. This testimony was believable because the issues that Lukkarila identified as hers within the document related only to FMLA leave. There is no evidence that Lukkarila had previously raised that issue with Elzig or other District administrators at the time the Master Grievance was presented, so there was no logical reason to connect it to Lukkarila.

Although Lukkarila admitted in the letter dated June 30, 2010 to interviewing Ackerman as one of three attorneys she was considering to represent her, Lukkarila did not acknowledge at that time that she was actually aligned with the employee group represented by Ackerman, was part of the Master Grievance, or that she had retained Ackerman to represent her. Elzig testified that she became aware of Lukkarila's participation in the employee group litigation in superior court in or around November 2010. Lukkarila's named involvement in the group litigation would reasonably alert the District that Lukkarila had likely been a participant in the Master Grievance. However, the record does not clearly demonstrate that the District knew that fact until sometime in November 2010. Thus, the District cannot have been motivated by Lukkarila's participation in the Master Grievance for any of the alleged adverse actions in Case No. LA-CE-5510-E, because they all occurred prior to that time period.

C. Individual Complaint

“[S]eeking individually to enforce provision of a collectively-bargained agreement is a ‘logical continuation of group activity’ and protected under EERA.” (*Jurupa, supra*, PERB Decision No. 2283, p. 16, citations omitted.) Bargaining parties may negotiate to incorporate substantive statutory or constitutional rights in their contracts, and PERB does not distinguish between an individual attempt to enforce rights which are only embodied in the collective agreement, versus those that are also sourced in external law. (*Ibid.*) Whereas an individual employee pursuing an individual remedy for a claim of racial discrimination, for example, is

not considered protected activity under EERA (*Los Angeles Unified School District* (1985) PERB Decision No. 550), an employee seeking individually to enforce contractual provisions prohibiting discrimination is protected conduct. (*Jurupa, supra*, pp. 16-17, fn. 12, citing *Interboro Contractors, Inc.* (1966) 157 NLRB 1295; *King Soopers, Inc.* (1976) 222 NLRB 1011; other citations omitted.) Here, Lukkarila's complaint filed pursuant to the Procedure meets that standard.

The District admitted in its answer that Lukkarila filed a letter requesting an "informal investigation" under BP 4111 on or about June 21, 2010.<sup>27</sup> As previously discussed, although the substantive terms of BP 4111 were established through a District-adopted policy, the CBA specifically instructs unit employees to utilize that procedure to file a complaint, BP 4111 is appended in its entirety to the CBA, and the collective agreement is subject to reopeners if BP 4111 is repealed or amended. Thus, the parties negotiated over the terms of the Procedure, and an employee's utilization of it is an attempt to enforce contractual rights. It is inconsequential that the phrase "informal investigation" is not specifically embodied within BP 4111. It is clear that the District processed Lukkarila's written submission as a complaint filed under the Procedure. Notably, Duchon referred to it as a "Complaint" in his August 13, 2010 written response.

D. Filing an Unfair Practice Charge

The record demonstrates and the District admitted in its answer that Lukkarila, "engaged in protected activity by '[1] filing PERB Case No. LA-CE-5510-E on November 12, 2010; [2] filing an amended charge in PERB Case No. LA-CE-5510-E on June 21, 2011; and

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<sup>27</sup> The answer referred to here is that filed by the District in Case No. LA-CE-5510-E.

(3) filing with PERB an October 13, 2011 appeal of dismissal in PERB Case [No.] LA-CE-5510-E.”<sup>28</sup>

2. Adverse Actions

The third element of a prima facie case is whether the respondent took adverse action against the charging party. In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District, supra*, PERB Decision No. 689.) In a later decision, the Board explained that the test that must be satisfied is whether a reasonable person in the same circumstances, not the employee, would consider the action to have an adverse impact on employment. (*Newark Unified School District (1991)* PERB Decision No. 864, pp. 11-12 (*Newark*.)

A. March 19, 2010 Insubordination Warning Letter

The District argues in its brief that the District did not consider Trujillo’s March 19, 2010 memorandum to be disciplinary, and that Trujillo did not indicate a firm intent to discipline Lukkarila but was merely informing her of his expectations, which PERB has found is not adverse. However, Trujillo does not merely inform Lukkarila that he expects her to come promptly to the office when summoned by his secretary, but warns that her conduct has already pushed the boundaries of what is expected of her.

The test described above does not limit adverse actions to the issuance of discipline, and because the test is an objective one, the label placed on the action by the employer is irrelevant. Letters of warning are adverse to employment. (*The Regents of the University of California (1998)* PERB Decision No. 1255-H.) Here, a reasonable employee in the same

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<sup>28</sup> The answer referred to here is that filed in Case No. LA-CE-5659-E.

circumstance would find that warning letter and its implication of unsatisfactory conduct to have an adverse effect on her employment.

B. March 15, 2010 Observation Report

The observation report that Trujillo prepared after he attended Lukkarila's class lesson on March 15, 2010 rated her performance as unsatisfactory in two categories and as needing improvement in another. A negative assessment of an employee's performance is adverse to employment. (*Woodland Joint Unified School District (1987) PERB Decision No. 628.*) The District does not dispute in its brief that the March 15, 2010 observation report was an adverse action.

C. 2009-2010 Final Evaluation

Although Lukkarila's final evaluation did not contain any unsatisfactory ratings on the individual standards, Trujillo still rated her performance overall for the 2009-2010 school year as needing improvement, which is considered a negative assessment. The District does not contest in its brief that this action was adverse to Lukkarila's employment.

D. Consecutive Year of Evaluation in 2010-2011

In *Jurupa, supra*, PERB Decision No. 2283, the Board held that it is an adverse action to compel a teacher with permanent employment status to be evaluated for consecutive school years, because that is akin to treating a tenured teacher as a probationary one, and therefore it implies deficient performance. The Board noted that under the Education Code, probationary teachers are evaluated annually, whereas permanent teachers are evaluated less frequently, either biannually or even less often under some circumstances. It is only when a permanent teacher receives an unsatisfactory evaluation under both the Education Code and CBA Article

IX, Section 3.A., that a permanent teacher should be returned to a yearly evaluation cycle.<sup>29</sup>

Thus, the Board concluded that:

[A]s to a permanent employee subject normally to biannual evaluation under collectively-bargained procedures tracking Education Code sections 446604 [sic] et seq., a directive that the employee undergo a consecutive annual evaluation is the functional equivalent of an unsatisfactory evaluation, and thus adverse.

(*Jurupa, supra*, p. 16.)

The District argues that its decision to evaluate Lukkarila again in 2010-2011 was not adverse, because the 2009-2010 evaluation was removed from her personnel file in an attempt to settle Lukkarila's complaint filed pursuant to the Procedure. The District argues that action resulted in her last evaluation on file being 2008-2009, so she was then due for evaluation again in 2010-2011 per the CBA. The District notes that if Lukkarila's "teaching skills were/are what she asserts them to be, participation in an evaluation would provide her with an opportunity to 'shine' as an educator."

The District also argues that the Board's analysis of Education Code evaluation procedures was flawed because it did not take into account other reasons which may necessitate a consecutive evaluation year, such as an extended leave of absence during the evaluation cycle. The District argues that such actions are permitted under the CBA and Education Code section 44664(a) without any commentary on the teacher's performance. These arguments are rejected.

First, Education Code section 44664(a) makes no reference to a permanent employee's leave time during the evaluation period being taken into account to order a consecutive

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<sup>29</sup> See Education Code section 44664(b), "If any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district."; Article IX, Section 3.A., "Upon receipt of an unsatisfactory evaluation the [permanent status] employee shall immediately be returned to the yearly evaluation cycle."

evaluation year, and thus lends no support to the District's criticism of the Board's analysis, nor does it provide it authority to evaluate employees recently on leave more often than proscribed under the Education Code and the contract.<sup>30</sup> Second, no negative connotation attaches to a gap between evaluation years, because the Education Code permits more seasoned teachers to be evaluated less frequently than newer teachers. Finally, the fact that the District decided to remove the *evidence* of the 2009-2010 evaluation does not mitigate that the evaluation was actually performed. Notably, although he testified that he was not aware that 2010-2011 was going to be the *third* consecutive year that Lukkarila was evaluated, that was indeed the case. Duchon's decision to evaluate Lukkarila in 2010-2011 was an adverse action because it treated her as if she was a probationary rather than a permanent employee, and implied that her performance was unsatisfactory.

E. Investigation of Alleged Misconduct in September and October 2010

The initiation of an investigation into a teacher's alleged "discourteous treatment" of students is objectively adverse to employment. (*State of California (Department of Youth*

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<sup>30</sup> Education Code section 44664(a) provides in its entirety:

Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis as follows:

At least once each school year for probationary personnel.

At least every other year for personnel with permanent status.

At least every five years for personnel with permanent status who have been employed at least 10 years with the school district, are highly qualified, if those personnel occupy positions that are required to be filled by a highly qualified professional by the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301, et seq.), as defined in 20 U.S.C. Sec. 7801, and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee being evaluated agree. The certificated employee or the evaluator may withdraw consent at any time.

*Authority*) (2000) PERB Decision No. 1403-S, proposed decision, p. 32.) Here, Lukkarila was similarly investigated for allegedly calling a student a profane name and having rough physical contact with another student. The District does not dispute in its brief that the initiation of the investigation was an adverse action.

F. Summary of Meeting Memorandum

The Summary of Meeting document merely described what was discussed in the October 11, 2010 investigatory meeting. Consistent with Elzig's verbal statements, it neither threatened future disciplinary action nor concluded that Lukkarila's conduct had been unacceptable. Memoranda that merely set forth performance expectations, do not criticize performance or threaten future disciplinary action, and which are not placed in a personnel file have not been considered to be adverse. (*State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S; *State of California (Department of Transportation)* (2005) PERB Decision No. 1735-S.)

Lukkarila's view of the Summary of Meeting document understandably changed upon receipt of the District's position statement in response to Case No. LA-CE-5510-E. There, the District described the Summary of Meeting document as a low-level form of discipline, described the meeting as disciplinary, and also stated that the investigation had resulted in substantiation of the allegations of misconduct against her. Thus, a reasonable employee under the circumstances would find that document to be adverse to employment.

G. Paid Special Leave Request

Lukkarila has provided no authority, and there appears to be none, suggesting that that employees are entitled to paid leaves of absence because they are actively suing their employers. It is noted that the District granted Lukkarila's request for unpaid special leave. Lukkarila testified to being uncomfortable and fearful of returning to work while her unfair practice case and other legal claims were pending against the District. She also testified

regarding the stress she had experienced in 2009-2010 while being evaluated by Trujillo, which was exacerbated by the unsatisfactory resolution of the complaint under the Procedure. Thus, it is not difficult to understand why Lukkarila would subjectively view the District's denial of her paid special leave request as adverse to her interests.<sup>31</sup> However, the standard that must be satisfied is objective, and does not rely on the subjective feelings of the employee. (*Newark, supra*, PERB Decision No. 864.) It is not reasonable to expect that an employee will be paid by an employer to stay home and perform no work in order for the employee to feel comfortable while pursuing her legal claims against the employer. Such a policy would unjustly incentivize litigation. Thus, it cannot be found that the District's refusal of paid special leave was an adverse action.

### 3. 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.) 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,

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<sup>31</sup> Lukkarila's opening statement implied that she had been constructively discharged from employment. However, she never moved to amend the complaint in Case No. LA-CE-5659-E to include such a theory, and that issue was not fully litigated. Accordingly, it will not be considered herein. (*County of Riverside, supra*, PERB Decision No. 2097-M, p. 7.)

quoting *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M.)

A. March 19, 2010 Insubordination Warning Letter

The timing of events here is suspect. The letter from the Union attorney that harshly criticized Trujillo's handling of the January 2010 observation process and accused him of retaliating against Lukkarila because she sought Union help was sent to the District and Trujillo the day before Trujillo issued his insubordination warning letter. It also occurred within one month of when Lukkarila informed him that she was seeking the Union's input regarding her written comments to his revised January observation. As in that previous instance, as soon as Trujillo became aware of the Union's involvement in an employment matter, he took an adverse action against Lukkarila.<sup>32</sup> Moreover, Trujillo's testimony regarding his cursory review and lack of understanding over the content of the Union attorney's letter was unconvincing.

A cursory investigation of alleged misconduct may demonstrate nexus. (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560.) For example, Trujillo issued this letter to Lukkarila without even bothering to inquire about her version of the events. According to Lukkarila, the letter contained several factual inaccuracies. Her testimony regarding her contacts with Trujillo's secretary was credible and was not rebutted by the District.

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<sup>32</sup> The February 22, 2010 events regarding Trujillo's abrupt refusal to modify the January 2010 observation report were not amended into the complaint nor addressed as separate adverse actions in the parties' briefs, and therefore will not be considered as an unalleged violation. (*County of Riverside, supra*, PERB Decision No. 2097-M, p. 7 [unalleged violations must, among other requirements, have been fully litigated and the respondent must have adequate notice and opportunity to defend].) However, it is still appropriate to consider these events as background evidence of the employer's motive. (See, e.g., *Garden Grove Unified School District* (2009) PERB Decision No. 2086 [even untimely events may be considered as background evidence of unlawful motivation].)

Moreover, Trujillo's response to what appeared to be a routine request over a simple issue also seems exaggerated and therefore is suspect. (*McFarland Unified School District* (1990) PERB Decision No. 786 (*McFarland*)). Thus, a prima facie case is met for this allegation.

B. March 15, 2010 Observation Report

The report of the observed March 15, 2010 lesson was issued to Lukkarila during a March 23, 2010 post-observation conference. Again, the timing between adverse action and protected activity is very close. It occurred within a month of Lukkarila first injecting the Union into her dealings with Trujillo, five days after the Union attorney wrote a letter on Lukkarila's behalf that was sharply critical of Trujillo's conduct, and one day after Trujillo was informed that Lukkarila intended to have a Union representative accompany her to the post-observation meeting. In addition to establishing temporal proximity between the protected conduct and the adverse act, there are numerous inconsistencies in Trujillo's rationale for evaluating Lukkarila in consecutive years.<sup>33</sup>

Trujillo made generally positive comments in his 2008-2009 final evaluation of Lukkarila. During his testimony, he distanced himself from some of those comments by stating that he was "absolutely not" referring to Lukkarila's classroom performance when he commented on his appreciation for her openness to feedback. A close reading of his comments in that section does not support his contention that he strictly limited that analysis to her participation in her data team.<sup>34</sup> Trujillo also distanced himself from his satisfactory rating of

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<sup>33</sup> An employer's inconsistent and contradictory justifications for its actions provide evidence of nexus. (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S.)

<sup>34</sup> For example, he begins by commenting that Lukkarila's evidence of growth and development as a professional educator is most evident from her data team contributions and then states "*as well as through her general classroom responsibilities.*" He also ends this section with comments completely unrelated to her data team involvement, discussing how

her overall performance, by stating that his recommendations indicated that her performance was actually deficient and that was “exclusively” the reason for which she was evaluated again in 2009-2010.<sup>35</sup> Yet he told Lukkarila that he simply had not seen her “enough” in 2008-2009 because she had been on maternity leave for a portion of that year. Interestingly, however, he completed the regular number of formal observations of Lukkarila during 2008-2009.<sup>36</sup>

Lukkarila credibly testified that immediately after class ended on March 15, 2010, Trujillo made very positive verbal comments about what he had observed in her classroom that day. Then, one week later, after he received the Union attorney’s letter, Trujillo’s assessment of Lukkarila’s teaching changed dramatically—rating her unsatisfactory in two categories and needing improvement in another.

A prima facie case is met for this allegation.

C. Final 2009-2010 Evaluation

Around six or seven weeks elapsed between Lukkarila’s last instance of Union representation activity and her final evaluation conference. This time period is still close enough to provide circumstantial evidence of unlawful motivation. Trujillo acknowledged in the conference that he had not attached Lukkarila’s rebuttal to his March observation report. A

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Lukkarila has *successfully* transitioned back to full-time employment after the birth of her child.

<sup>35</sup> Notably, he did not even recall doing so during his examination by Lukkarila’s representative, but had no trouble remembering that decision and the detailed reasons therefor during his examination by the District.

<sup>36</sup> Another example of inconsistency occurred during the hearing. Trujillo testified that he did not consult with any other administrators prior to reaching the conclusion that he should not modify his January 2010 observation report. This conflicts with Elzig’s testimony and does not align with his decision to suddenly include Elzig on his email communication with Lukkarila over that issue. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221 [inconsistent statements by the employer regarding its conduct may provide evidence of nexus].)

departure from established procedures provides evidence of nexus. (*Santa Clara Unified School District* (1979) PERB Decision No. 104 (*Santa Clara*).

Trujillo gave halting and ambiguous testimony when asked whether he observed Lukkarila's classroom after March 15, 2010.<sup>37</sup> He told Lukkarila in the March post-observation conference that he would do so, informally, and take into account any improvement in her final evaluation. Lukkarila credibly testified that Trujillo never observed her again that year, and yet he repeatedly emphasized in the final evaluation that she had failed to improve or implement his recommendations despite being given that opportunity. Again, Trujillo appears to be exaggerating or inflating his justifications. (*McFarland, supra*, PERB Decision No. 786.) A prima facie case is demonstrated regarding this allegation.

D. Consecutive Year of Evaluation in 2010-2011

In an attempt to "resolve" the issues raised in Lukkarila's complaint, Duchon informed Lukkarila in his letter dated August 13, 2010 of his decision to evaluate her performance again in 2010-2011. Duchon became aware of Lukkarila's utilization of Union representatives through the content of the complaint filed on June 21, 2010. Thereafter, a Union attorney represented Lukkarila during settlement negotiations with the District through July 28, 2010. Lukkarila also engaged in protected activity by individually filing and processing her complaint under the Procedure. Thus, the adverse action occurred sufficiently close in time to protected activities to demonstrate circumstantial evidence of unlawful motivation.

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<sup>37</sup> Trujillo often had difficulty recalling events when questioned by Lukkarila's representative, whereas he was able to recall much more and give very detailed responses about the same time periods during the District's examination. (Compare, e.g., TR Vol. I, p. 69, ln. 13-15, with Vol. I, p. 193, ln. 2-24.) In general, because of these types of inconsistencies in his testimony versus Lukkarila's generally consistent and believable testimony, where there are factual disputes, Lukkarila's testimony is credited over Trujillo's. (See *Regents of the University of California* (1984) PERB Decision No. 449-H; *State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S; see also *Santa Clara Unified School District* (1985) PERB Decision No. 500.)

There are also other nexus factors present. Duchon did not appear to have a firm grasp regarding to whom he delegated responsibility for conducting the investigation of the complaint, or whether he was actually the investigator, and his testimony in that regard did not align with Elzig's. He insisted that responsibility was delegated to Elzig, whereas Elzig believed that he was primarily responsible and that she completely removed herself from the investigation upon Lukkarila's expressed concerns over her involvement. Duchon also gave ambiguous testimony about what the investigation actually consisted of, describing it at one point as simply discussing the matter with Trujillo and Elzig and essentially coming to an agreement with Trujillo that the evaluation documents could be removed from Lukkarila's files as long as she was evaluated again. Notably absent was any indication that any District representative actually spoke with Lukkarila about the facts underlying her claims, notwithstanding the attempts at settlement through the Union attorney. It is not clear that there was any actual "investigation" conducted by the District, providing evidence of perfunctory handling of the complaint and thus a departure from established procedures. (*Santa Clara, supra*, PERB Decision No. 104.) Therefore, a prima facie case is shown for this allegation.

E. Investigation of Alleged Misconduct in September and October 2010

The timing here significantly overlapped with the final processing of the complaint under the Procedure. Elzig was the decision-maker in this adverse action and was aware of Lukkarila's previous Union representation connected to the complaint as well as Lukkarila's expressed concerns over Elzig's investigation bias. Thus, the close timing element of the nexus analysis is adequately demonstrated. Additionally, the District may have departed from established procedures, assuming that the CBA public complaint procedures apply to student

complaints.<sup>38</sup> Lukkarila was not provided with written student complaints until well after the investigation had concluded and she had alleged the investigation as an adverse action in her unfair practice charge. This is contrary to the public complaint procedure.

The other nexus factors are not directly connected to this misconduct investigation, but given the pattern of conduct are appropriate to consider.<sup>39</sup> (*Jurupa, supra*, PERB Decision No. 2283, p. 26, see fn. 19.) Elzig demonstrated animus against protected activity in her June 25, 2010 email to employees in response to the Master Grievance, which provides circumstantial evidence of unlawful motivation. (*Jurupa Community Services District (2007)* PERB Decision No. 1920-M; *Cupertino Union Elementary School District (1986)* PERB Decision No. 572.)

Elzig was also involved to some degree in the contemporaneous investigation and processing of the complaint under the Procedure. Lukkarila requested that Duchon not submit her September 8, 2010 letter to Pace as her Level III appeal to the BOE, because she wanted to prepare it herself and needed another week to do so. Elzig testified that this was inconsequential because the BOE would have all of the previously submitted complaint documents for consideration, so they disregarded Lukkarila's request and submitted her appeal to the BOE. This cavalier attitude toward due process rights provides insight to the general investigatory practices in the District, including the one at issue here regarding alleged misconduct by Lukkarila. What Elzig's response fails to take into account is that perhaps Lukkarila wished to provide additional information to the BOE regarding Duchon's cursory

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<sup>38</sup> It is unclear from the testimony of all District witnesses and from the language in this CBA section and side letter whether it applies to student complaints. Thus, for the purposes of establishing a prima facie case it is assumed that it does.

<sup>39</sup> Lukkarila argued that the way she was summoned to the meeting, during a teaching period and without advanced warning, was unusual and therefore a departure from procedures. While this may have never happened to Lukkarila before, Pace credibly testified that such meetings often have to be handled in this way. The evidence, therefore, does not demonstrate a departure from procedures by these facts.

investigation of the complaint, for example, or some other facts for the BOE to consider in their final decision under the Procedure. She was unable to do that. Considered together, these nexus factors provide evidence of a prima facie case for this allegation.

F. Summary of Meeting Memorandum

On September 19, 2010, Elzig issued the Summary of Meeting to Lukkarila, less than a month after the final decision was rendered on the complaint. Therefore, the adverse action occurred close in time to protected conduct.

Because Elzig issued the Summary of Meeting, the nexus analysis in the previous section is applicable here. Additionally, the District's justification for its actions in the position statement differs significantly from its verbal and written reassurances to Lukkarila and from Elzig's and Pace's testimony. Accordingly, a prima facie case is met for this allegation.

G. Paid Special Leave Request

As previously concluded, Lukkarila has not met her burden of proving that the District's denial of her request for paid special leave was an adverse action. However, even if it could be viewed as objectively adverse, Lukkarila has also not demonstrated that the District took this action because of her protected activity. Elzig testified without dispute that the District has never granted paid special leave for an entire semester, and also has never, even for one day, granted it because an employee was litigating against the District. Elzig also testified without contradiction regarding the reasons why the District has previously approved such requests by employees, which do not align with the reasons why Lukkarila requested this leave time. Thus, there is no evidence of disparate treatment or a departure from established procedures in the District's decision to deny Lukkarila's request for paid special leave. Because Lukkarila has failed to meet the burden of demonstrating a prima facie case for this allegation, it is hereby dismissed.

## The District's Burden

Once a charging party has established a prima facie case of retaliation by a preponderance of the evidence, the burden shifts to the respondent to prove: (1) that it had an alternative nondiscriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31, citing *Novato, supra*, PERB Decision No. 210; *Wright Line* (1980) 251 NLRB 1083; *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393.) Simply presenting a legitimate reason for acting is not enough to meet the burden. The employer "must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." (*Roure Bertrand Dupont, Inc.* (1984) 271 NLRB 443.)

In cases where an adverse action appears to have been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred "but for" the protected acts. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22.)

Here, a prima facie case has been met for all of the alleged adverse actions in Case No. LA-CE-5510-E. They are organized for discussion below by subject matter.

### 1. March 19, 2010 Insubordination Warning Letter

Exaggerated accusations of "insubordination" and bad attitude have been found to be pretextual where they were factually inaccurate and not adequately explained by other evidence. (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M.) The warning letter here contained inaccurate facts. The District does not proffer any explanation for the March 19, 2010 letter other than to say that it was a routine memorandum setting forth expectations of Lukkarila's conduct. Even assuming Trujillo's account was entirely accurate, the harsh tone of the document in response to a relatively minor incident is not adequately

explained. Thus, the District has failed to meet its burden of showing that it would have taken the same action even in the absence of protected activity.

2. March 15, 2010 Observation Report and 2009-2010 Final Evaluation

In *Riverside Unified School District* (1987) PERB Decision No. 639, the Board found that even if the charging party established a prima facie case for retaliation, the employer justifiably took adverse action because of the employee's persistent failure to perform his job duties, poor attendance, and disrespectful attitude. (*Id.*, proposed decision, p. 22.) In *City of Santa Monica* (2011) PERB Decision No. 2211-M, the Board found that the employer's action was justified by the employee's long history of complaints by others and the numerous past warnings about his performance deficiencies. (*Id.* at pp. 9, 17.) In contrast, in *Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista*), a school district asserted that its adverse action was justified because of a teacher's lack of "interpersonal skills." The Board concluded that this explanation was pretext for retaliation because there was no evidence of past performance problems and the employer never warned the employee that she could be subject to discipline or adverse action due to her job performance. (*Id.* at pp. 21-22.)

The District argues that Trujillo's observations of Lukkarila's teaching in 2009-2010 raised legitimate concerns over her performance which justified his negative ratings on the March observation report and final evaluation. For the reasons previously discussed, where factual disputes exist between Lukkarila's and Trujillo's testimony, her factual accounts are credited over his. Operating under that lens, Trujillo's performance ratings seem to be exaggerating Lukkarila's performance deficits.

Similar to *Chula Vista, supra*, PERB Decision No. 2221, Lukkarila was not warned throughout the positive observation and evaluation process in 2008-2009 that her performance was deficient. In fact, Lukkarila had never before had a poor performance evaluation or

observation during her entire tenure with the District. It was only after she sought assistance from the Union that Trujillo started to characterize her satisfactorily rated performance during the 2008-2009 school year as deficient, and then began issuing increasingly more negative ratings as the Union's involvement in Lukkarila's employment issues also increased during 2009-2010. Thus, Trujillo's negative assessment of her performance can only be explained as pretext for his hostility to her protected conduct. Accordingly, the District has not met its burden of demonstrating that the same actions would have resulted but for Lukkarila's protected activity.

3. Consecutive Year of Evaluation in 2010-2011

Although Duchon was the named decision-maker regarding the decision to evaluate Lukkarila for a third consecutive year in 2010-2011, he did not appear to know during the hearing that Lukkarila had already been evaluated during the previous two years. Nevertheless, Trujillo's involvement in this decision cannot be overlooked. Duchon admitted that Trujillo agreed to remove Lukkarila's 2009-2010 performance documentation from her files as long as Lukkarila was evaluated during the next school year. The District again argues that legitimate performance concerns justified the District's decision to evaluate Lukkarila in 2010-2011. As noted above, the District failed to establish any legitimate performance concerns warranting consecutive annual evaluations. Therefore, the District has not satisfied its burden of showing that it would have made the same decision in the absence of Lukkarila's protected conduct.

4. Investigation of Alleged Misconduct in September and October 2010 and Summary of Meeting Memorandum

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-making process. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259.)

The District argues that it had no discretion in deciding whether to investigate complaints by students alleging teacher misconduct of the character at issue here. Elzig and Pace also provided undisputed testimony of this practice. Pace was a credible witness who notably was not accused in the unfair practice charges of any retaliatory conduct or of harboring any union animus. She testified consistently about the course of the investigation of the students' complaints and about her communications with Elzig. Lukkarila did not argue and produced no evidence at the hearing that implies the District fabricated the students' complaints.

The nature of the student's complaints in this case would legitimately cause the District to investigate their veracity in order to protect the integrity of its educational program. Thus, the District has both provided a legitimate, non-discriminatory reason for its investigation and adequate proof that it acted because of the non-discriminatory reason. In this instance, the District's action was not motivated by Lukkarila's protected activity and the allegation is hereby dismissed.

Regarding the Summary of Meeting memorandum, the only persuasive indicator of unlawful motivation was the decidedly different characterization of the investigatory meeting and resulting documentation in the District's position statement, as compared to previous communications. Upon consideration of the entire record, however, this appears to be an anomaly. Elzig did not review the position statement before it was filed with PERB. Elzig consistently testified that she believed Lukkarila's account and did not find any evidence of improper conduct on her part. Elzig's written and verbal communications about the meeting and the outcome of the investigation also do not indicate that any discipline was intended, resulted, or will result in the future.

Finally, the Summary of Meeting document itself neither accuses Lukkarila of misconduct or threatens future discipline. There is no evidence that it was put in Lukkarila's

personnel file. It appears that the District issued the document to Lukkarila for the reasons stated in the meeting, namely, to document that the meeting occurred. Thus, the District has satisfied its burden and rebutted the prima facie case for allegation, and it is therefore dismissed.

Interference – Case No. LA-CE-5510-E

A prima facie case of interference is established by allegations that an employer's conduct tends to or does harm employee rights protected under EERA. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*); *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106.) Proof of unlawful intent is not required to establish an interference violation. (*Carlsbad*.)

In cases alleging that employer speech has interfered with employee rights, the Board has established that an employer is entitled to express its views over employment-related matters over which it has legitimate concerns in order to facilitate full and knowledgeable debate. (*Rio Hondo Community College District* (1980) PERB Decision No. 128.) However, employer speech which contains a threat of reprisal or force or promise of benefit will lose its protected status and provide "strong evidence of conduct which is prohibited by section 3543.5 of the EERA." (*Id.*, p. 20.) An objective analysis is employed to determine whether speech is coercive in light of all the surrounding circumstances. (*Los Angeles Unified School District* (1988) PERB Decision No. 659.) In defending against a charge of interference, the employer is permitted to demonstrate competing interests that are balanced against the degree of harm to employee rights in determining whether an unfair practice has occurred. (*Carlsbad, supra*, PERB Decision No. 89.)

As discussed previously, Lukkarila exercised protected rights when she and other employees collectively aired their employment concerns through their legal counsel's filing of the Master Grievance, and when she individually filed complaints utilizing the negotiated

Procedure. Elzig admitted to sending the June 25, 2010 email to all District employees with Duchon's permission. The Board found that Elzig's email was attributable to the District and that employees reading it would "understand the District to be hostile to their participation in activity protected by the EERA," which was sufficient to establish prima facie evidence of employer interference. (*Jurupa, supra*, PERB Decision No. 2283, p. 29.) Thus, any evidence of competing interests must now be balanced against the degree of harm to employee rights in order to determine whether an unfair practice occurred.

The reasons why Elzig felt the need to publicly challenge the salacious allegations of wrongdoing against her are reasonable and understandable. If she had limited her email response to disputing those particular allegations of sexual misconduct, it likely would have been a permissible expression of free speech. However, her comments were not so limited.

When the entire email is considered, it is reasonable to conclude that Elzig is linking the concerted activities of the employee group represented by Ackerman to the threat to publicly break her that was initiated by a BOE member. Since Elzig's position in the District necessarily puts her at the helm of investigating employee complaints, her expressions indicate impermissible bias against complaining employees. This would reasonably tend to discourage employees from exercising their protected right to collectively and individually complain about employment conditions. A complaining employee could also reasonably fear reprisals from Elzig because of her statements that essentially accuse them of conspiring with someone whom she has accused not only of verbally and physically assaulting her, but also threatening her own employment with the District.

Elzig also summarily concluded that the issues outlined in the Master Grievance were false, just a few days after it was disseminated, without distinguishing between the personal allegations against her and the majority unrelated employment concerns raised in the document. The few days that elapsed between these communications certainly did not provide

adequate time to investigate and conclude that all of the allegations in the Master Grievance were without merit. Thus, this statement indicates that the person in charge of investigating employee complaints may not take them very seriously. This also would reasonably tend to discourage employees from bothering to raise their concerns. The District offered no evidence of competing interests that would reasonably offset the harm to employee rights by Elzig's June 25, 2010 email. Therefore, the District unlawfully interfered with employee rights in violation of EERA.<sup>40</sup>

### Conclusion

The District retaliated against Lukkarila because of her protected activity when it: (1) issued a March 19, 2010 letter threatening her with insubordination; (2) issued a negatively rated March 15, 2010 observation report; (3) issued a negatively rated 2009-2010 final evaluation; and (4) ordered a consecutive evaluation year for 2010-2011. The District interfered with protected rights when it sent an email on June 25, 2010 to all District employees that criticized employees' collective protected activities. As previously discussed, all other allegations herein are dismissed.

### REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5(c) states:

The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

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<sup>40</sup> The District's briefs argue that Lukkarila did not actually suffer harm because she continued to utilize the Procedure after Elzig's email was published. This argument is misplaced. A finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. (*Clovis Unified School District* (1984) PERB Decision No. 389.)

In the present case, the District violated EERA by issuing to Lukkarila a letter threatening her with insubordination on March 19, 2010, a negative observation report and final evaluation in March and May 2010, and ordering a consecutive evaluation year for Lukkarila in 2010-2011. It is therefore appropriate to order the District to cease and desist from retaliating against employees for their protected conduct. An ordinary remedy for such violations is to restore the status quo ante by rescinding documentation connected to the violation. (*Baker Valley Unified School District* (2008) PERB Decision No. 1993 (*Baker Valley*)).) In this case, the District asserted in its answer to the complaint in Case No. LA-CE-5510-E that the March 19, 2010 letter and evaluation documents have already been removed from Lukkarila's site and personnel files. Thus, no further action is required as to those documents.

Regarding the 2010-2011 final evaluation and observation documents that issued as a result of the District's unlawful action, the District is hereby ordered to rescind those documents unless Lukkarila requests that they remain a part of her employment records. Lukkarila must inform the District within ten (10) days of a final decision in this matter if she desires that those documents not be rescinded. In addition, because of the unique facts in this case, the District is further ordered that it shall not order an evaluation year for Lukkarila unless and until she has returned to service in the District for at least one school year.

The District also violated EERA by sending an email to all District employees on June 25, 2010 that criticized employees' collective protected activities. It is therefore appropriate to order the District to cease and desist from conduct that interferes with or harms employee rights.

Finally, it is appropriate that the District be ordered to post a notice incorporating the terms of this order at all locations where notices to employees are customarily posted.

Recently, the Board updated its notice posting requirements stating:

[W]e hold today that where the offending party in unfair practice proceedings, whether it be an employer or employee organization, regularly communicates with public employees by email, intranet, websites or other electronic means, it shall be required to use those same media to post notice of the Board's decision and remedial order. Any posting of electronic means shall be *in addition to* the Board's traditional physical posting requirement.

(*City of Sacramento* (2013) PERB Decision No. 2351-M (*Sacramento*), p. 45, emphasis in original.) It is clear in this case that the District regularly communicates with employees via email, because Elzig sent her rebuttal to the Master Grievance to *all* District employees via email. Similar to the situation in *Sacramento*, because the communication that is found to have violated EERA was sent to all District employees, it is also appropriate in this case to depart from PERB's usual practice of limiting the remedial order, including the posting requirement, to employees in the affected bargaining unit. (See *Id.*, pp. 46-48, and the cases cited therein.) The posting requirement in this case shall therefore include those physical locations and electronic means customarily used by the District to communicate with all of its employees (*Id.*, p.48.)

Posting such a notice, signed by an authorized agent of the District, will provide employees with notice that the District acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the order. It effectuates the purpose of EERA that employees be informed of this controversy and the District's willingness to comply with the ordered remedy. (*Baker Valley, supra*, PERB Decision No. 1993.)

#### PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, it is found that the Jurupa Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a). The District violated EERA by issuing to Pamela Lukkarila (Lukkarila) a letter threatening her with

insubordination on March 19, 2010, a negative observation report and final evaluation on or about March 15 and May 15, 2010, and ordering a consecutive evaluation year for Lukkarila in 2010-2011 in retaliation for her EERA-protected conduct. The District also violated EERA section 3543.5(a) by sending an email to all District employees on June 25, 2010 that criticized employees' collective protected activities. All other allegations in the complaints in PERB Case No. LA-CE-5510-E and PERB Case No. LA-CE-5659-E are dismissed.

Pursuant to section 3541.5(c) of the Government Code, it is hereby ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activities;
2. Interfering with or harming employee rights protected by EERA.
3. Ordering an evaluation year for Lukkarila unless and until she has returned to service in the District for at least one year.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Rescind the observation and evaluation documents issued in connection with her 2010-2011 performance evaluation, unless Lukkarila informs the District within ten (10) days of final decision in this matter that she desires for those documents to remain a part of her employment records.
2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any

other material. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with its employees.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or to the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be served concurrently on Lukkarila.

#### 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, subs. (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).)



**NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD  
An Agency of the State of California**

After a hearing in Unfair Practice Case Nos. LA-CE-5510-E and LA-CE-5659-E, *Pamela Jean Lukkarila v. Jurupa Unified School District* in which all parties had the right to participate, it has been found that the Jurupa Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by issuing to Pamela Lukkarila (Lukkarila) a letter threatening insubordination on March 19, 2010, a negative observation report and final evaluation on or about March 15 and May 15, 2010, and ordering a consecutive evaluation year for Lukkarila in 2010-2011 in retaliation for her EERA-protected conduct. The District also violated EERA section 3543.5(a) by sending an email to all District employees on June 25, 2010 that criticized employees' collective protected activities.

As a result of this conduct, we have been ordered to post this Notice and we will:

**A. CEASE AND DESIST FROM:**

1. Retaliating against employees for protected activities.
2. Interfering with or harming employee rights protected by EERA.
3. Ordering an evaluation year for Lukkarila unless and until she has

returned to service in the District for at least one year.

**B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE EERA:**

1. Rescind the observation and evaluation documents issued in connection with her 2010-2011 performance evaluation, unless Lukkarila informs the District within ten (10) days of final decision in this matter that she desires for those documents to remain a part of her employment records.

Dated: \_\_\_\_\_

JURUPA UNIFIED SCHOOL DISTRICT

By: \_\_\_\_\_

Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.