STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LOLITA D. COLEMAN, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3134-E PERB Decision No. 2516 February 23, 2017

Appearances: Lolita D. Coleman, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Marleen L. Sacks, Attorney, for Berkeley Unified School District.

Before Winslow, Banks and Gregersen, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lolita D. Coleman (Coleman) from the dismissal (attached) of her unfair practice charge by PERB's Office of the General Counsel. The charge, which was filed on June 24, 2015, and amended on May 4, 2016, alleged that Coleman's employer, the Berkeley Unified School District (District), violated the Educational Employment Relations Act (EERA)[2] by: (1) eliminating certain accommodations from Coleman's job duties in or about January 2014, and (2) preparing an unsatisfactory performance evaluation for Coleman

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

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

and, on or about April 24, 2015, notifying Coleman of the District's intent to issue the evaluation to Coleman, both in retaliation for Coleman's protected activity.

On May 25, 2016, the Office of the General Counsel dismissed all allegations in the amended charge as either untimely and/or for failure to state a prima facie case of an unfair practice. The Office of the General Counsel determined that Coleman's charge had sufficiently alleged her involvement in protected activity and employer knowledge thereof by asserting her rights under the Collective Bargaining Agreement (CBA) to union representation when receiving an unsatisfactory performance evaluation and/or by questioning whether the procedures under which the evaluation had been conducted were in conformity with the CBA. The Office of the General Counsel also determined that Coleman had sufficiently alleged the District took adverse action against her by informing her on or about April 24, 2015 that she would receive an unsatisfactory performance evaluation. However, the Office of the General Counsel determined that Coleman had not alleged sufficient facts to raise an inference of unlawful motive, i.e., of any connection between Coleman's protected activity and any adverse action alleged in the charge.

On appeal, Coleman argues that the Office of the General Counsel neglected to consider various factual allegations showing unlawful motive and that it improperly resolved disputed factual allegations and conflicting theories of law to dismiss the charge. The District argues that Coleman's appeal fails to identify any grounds for reversing the warning and dismissal letters and urges us to affirm the dismissal.

The Board has reviewed the entire case file and has fully considered the relevant issues and contentions raised by Coleman's appeal. The Office of the General Counsel's warning and dismissal letters accurately describe the factual allegations included in the unfair practice

charge, as amended, and the legal conclusions contained therein are well-reasoned and in accordance with applicable law.

Coleman's appeal raises no issues that were not already adequately addressed in the warning and dismissal letters or that warrant further consideration by the Board. Her appeal argues that the Office of the General Counsel erred by not considering the removal of job accommodations in 2014, either as a separate adverse action or as evidence of unlawful motive. However, the appeal offers no argument or authority to challenge the Office of the General Counsel's determination that, if considered as an adverse action, the removal of Coleman's job duties occurred outside the six-month limitations period for unfair practice allegations. Her reliance on *Sonoma County Superior Court* (2015) PERB Decision No. 2409-C is also misplaced, as that case held that the representational rights guaranteed to employees and employee organizations under the Trial Court Employment Protection and Governance Act (Trial Court Act)[3] include the right of an employee, upon request, to union representation during the interactive process required by state and federal reasonable accommodation laws. Coleman's charge did not allege that she was denied the right to representation during the interactive process.

To the extent Coleman argues that removal of her job accommodations in 2014 evidence unlawful motive as a departure from established procedures, the Office of the General Counsel correctly determined the only protected activity alleged in Coleman's charge was her assertion of collectively-bargained rights with respect to her performance evaluation sometime on or after April 24, 2015. Generally, employer actions that predate an employee's protected activity cannot serve as either adverse actions or as evidence of unlawful motive in a

[3] The Trial Court Act is codified at section 71600 et seq.

discrimination case, because they could not have been motivated by protected activity which had not yet occurred. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, adopting proposed dec. at p. 22, citing *Trustees of the California State University* (2004) PERB Decision No. 1697-H.)

With respect to her unsatisfactory performance evaluation, Coleman also argues that the Office of the General Counsel failed to consider relevant evidence of the District's unlawful motive. Coleman's appeal reiterates her argument from the amended charge that, the District violated the CBA, and thereby departed from established procedures, because either Coleman's supervisor conducted Coleman's performance evaluation without sufficient knowledge of Coleman's work and/or because a fellow bargaining unit member conducted Coleman's evaluation. However, as explained in the dismissal letter, Article 7.4.2 of the CBA requires the performance evaluation be conducted by "the first level of management above the unit member *or* by an administrator who is reasonably well informed about the work activity of the evaluated unit member." (Emphasis added.) The use of the disjunctive "or" indicates that the first-level manager need not himself or herself be reasonably well informed about the work activity of the evaluated unit member. Coleman's allegation that her recently appointed supervisor had logged "almost *zero observational time* to review [Coleman's] performance" before issuing the evaluation therefore does not, by itself, allege a departure from established procedures or support any of the other nexus factors recognized under PERB decisional law. (Coleman's emphasis.)

Coleman's allegation that a coworker conducted her performance evaluation likewise fails to support an inference of unlawful motive because, as explained above, the evaluation was complete before Coleman asserted her collectively-bargained right to union representation

when being confronted with the evaluation. Because any departure from established procedures in how the evaluation was conducted pre-dated Coleman's only instance of protected activity, it does not support an inference either that the negative evaluation or the manner in which it was conducted was because of Coleman's *subsequent* protected activity.

Accordingly, we affirm the dismissal of all allegations in the charge and adopt the warning and dismissal letters as the decision of the Board itself,

ORDER

The unfair practice charge in Case No. SF-CE-3134-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Gregersen joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027

May 25, 2016

Lolita D. Coleman

Re: *Lolita D. Coleman v. Berkeley Unified School District*
Unfair Practice Charge No. SF-CE-3134-E
DISMISSAL LETTER

Dear Ms. Coleman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 24, 2015. Lolita D. Coleman (Coleman or Charging Party) alleges that the Berkeley Unified School District (District or Respondent) violated section 3543.5 of the Educational Employment Relations Act (EERA or Act).[1]

Charging Party was informed in the attached Warning Letter dated April 12, 2016, that the above-referenced charge did not state a prima facie case. Charging Party was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, she should amend the charge. Charging Party was further advised that, unless she amended the charge to state a prima facie case or withdrew it on or before April 27, 2016, the charge would be dismissed.

An extension of time was granted, and a timely amended charge was filed on May 4, 2016.

FACTUAL SUMMARY

Facts Summarized in the Warning Letter[2]

Coleman has been employed by the District for 24 years. She is currently employed as an administrative assistant in the District's Risk Management Department. This position is in a bargaining unit exclusively represented by the Berkeley Council of Classified Employees (BCCE).

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

[2] This summary includes facts alleged in the original charge and provided under penalty of perjury in the District's July 27, 2015 position statement.

Coleman alleges that from September of 1991 through 2011, she "always" received positive performance evaluations. Since September 2012, she has had documented vision problems.

According to the District, Coleman has received the following discipline: (1) two verbal reprimands in January 2013; (2) two letters of reprimand in February 2013; (3) two letters of reprimand in March 2013; (4) an annual performance evaluation in April 2013 in which she was rated "Needs Improvement" in four out of five categories and "Unsatisfactory" in the remaining category; (5) a letter of reprimand in June 2013; (6) a 20-day suspension in October 2013; (7) a letter of reprimand in October 2013; (8) an unsatisfactory performance evaluation in December 2013; and (9) two letters of reprimand in December 2013.[3] At the time of these incidents, Pamela Goo (Goo) was Coleman's supervisor.

In January 2014, Goo resigned, and Coleman was instructed to report directly to Deputy Superintendent of Business Services Javetta Cleveland (Cleveland).

From September 2014 through December 5, 2014, Coleman was on medical leave. When she returned, Cleveland directed Coleman not to perform "duties surrounding open enrollment," and not to process personnel action forms.

On January 9, 2015, Cleveland and Coleman exchanged several e-mail messages. Cleveland appears to have accused Coleman of altering another employee's work in a computer system. Coleman denied having done so, claiming, "I often step away from my computer terminal with the BM screen still open. It wouldn't surprise me if someone walked over and entered data while I was away from my desk."

On January 28, 2015, Coleman sent Cleveland an e-mail message questioning whether Belinda Stuckey (Stuckey) was responsible for directing Coleman's workload and evaluating her. According to Coleman, Stuckey is a "lateral employee."

On March 2, 2015, Coleman sent an e-mail message to Cleveland asking about how to "prevent illness in the Risk Management department" when "an individual comes to work ill and spreads their germs around due to close quarters." Cleveland did not respond.

On April 16, 2015, Cleveland sent Coleman an e-mail message stating, "Since it is a small space, is it possible to not wear perfumes in the office. It would be helpful to others in your department." In response, Coleman asserted that she is "not able to wear perfume" due to her own allergies.

On April 24, 2015, Cleveland sent Coleman the following e-mail message:

> Dear Lolita,

[3] The District's position statement includes a verification under penalty of perjury and a proof of service on Charging Party.

> I need to meet with you regarding your performance evaluation.
>
> "Pursuant to Article 7.4.5 of the BCCE contract, a unit member expected to receive a less than satisfactory evaluation will be informed in advance of a meeting with management to discuss the unit member's evaluation. Such unit member shall have the right to have a Union representative present a[t] such a meeting."
>
> This is to notify you that you will be receiving less than satisfactory ratings on your performance evaluation, and as such, you have a right to union representation at our meeting. I am reserving April 29th between 1pm and 4pm and April 30th between 9am and 4pm to meet with you. Please confirm your attendance for an hour during these two time slots to meet with me.

(Quotation marks in original.)

The collective bargaining agreement (CBA) between BCCE and the District includes the following provisions regarding performance evaluations:

> 7.3.2 Permanent unit members shall be evaluated between February 1 and May 1 of each school year, provided the unit member has been in permanent status in their current classification for at least four (4) months.
>
> 7.4.2 A unit member shall be evaluated by the first level of management above the unit member or by an administrator who is reasonably well informed about the work activity of the evaluated unit member. No unit member shall evaluate another unit member.

Coleman alleges that Stuckey was evaluating her performance and that Cleveland "is not qualified or informed of [Coleman's] job duties and description."

According to the District, after Coleman was notified that her performance evaluation would be unsatisfactory, she went on medical leave. As a result, Coleman has not yet received her evaluation.

Additional Facts in the Amended Charge

Regarding Coleman's performance evaluation, the amended charge alleges:

> Cleveland logged almost **zero observational time** to review my performance from February-May of 2015. This is deviating from Standard Policies and Procedures in the Berkeley Unified School District Evaluation Process. To continue, my notice that I would be receiving an Unsatisfactory Evaluation came 1 week before the May 1st Evaluation Timeline was to end.

> Further evidence of Unlawful Motivation is found in my evaluation itself. Untimely write ups from events 2 or more years [a]go were found in my evaluation. This is further evidence of Unlawful Motivation and Deviating from Standard Policies and Procedures. (PERB 2411)[4]

(Emphasis in original.)

The amended charge also alleges, under the heading "OTHER ITEMS TO ADD TO ANALYSIS":

> After Supervisor[] Goo resigned (January of 2014) from Berkeley Unified School District my accommodations regarding the computer monitors and the checking of my work were REMOVED by Javetta Cleveland. These actions I feel were discriminatory and intended to negatively alter the terms and conditions of employment. Also during the time period previous to my return to work I had filed a Workers Compensation Claim against the District. My reasonable accommodations request was denied during this relevant time period. (PERB Decision Number 2409C)

DISCUSSION

Retaliation

As explained in the Warning Letter, to state a prima facie case that the District discriminated or retaliated against Coleman in violation of EERA section 3543.5(a), the charge must allege that: (1) Coleman exercised rights under EERA; (2) the District had knowledge of the exercise of those rights; (3) the District took adverse action against the employee; and (4) the District took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

The Warning Letter concluded that Coleman adequately alleged that she engaged in protected activity, that Cleveland had knowledge of her protected activity, and that the District took adverse action against her by informing her she would be receiving an unsatisfactory performance evaluation.[5] However, it concluded that the charge did not include sufficient evidence that the District took adverse action against Coleman because of her protected activity, other than suspicious timing. In particular, the Warning Letter determined that

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[4] This appears to refer to *Berkeley Unified School District* (2015) PERB Decision No. 2411 (*Berkeley*).

[5] The Warning Letter considered, but rejected, Coleman's allegations that the removal of certain job duties and Cleveland's "harassment" were adverse actions. The amended charge includes no additional information that would demonstrate that these actions were adverse under an objective standard. Therefore, they are dismissed for the reasons explained in the Warning Letter.

Coleman had not alleged sufficient facts to establish that the District's actions violated sections 7.3.2 and 7.4.2 of the CBA. The Warning Letter also determined that the conflict between Coleman's present unsatisfactory evaluation and her positive performance evaluations from 1991 through 2011 was not evidence of unlawful motive. This was because, according to the District, between 2011 and 2015, Coleman received two negative performance evaluations, multiple verbal and written reprimands, and a 20-day suspension.

The amended charge proffers additional evidence of unlawful motive, claiming that the District departed from established procedures when Cleveland "logged almost zero observational time to review my performance from February-May of 2015." Coleman has not alleged a policy from which the District departed. CBA section 7.3.2 requires that the employee be "evaluated" between February and May of each year. It does not require that direct observation of the employee take place during that time period.

The amended charge also alleges that Coleman's evaluation included "[u]ntimely write ups from events 2 or more years [a]go."[6] However, the amended charge does not allege any District policy that prohibits an evaluation from referring to events that occurred more than two years before. The conclusory allegation that this deviated from "Standard Policies and Procedures" is not sufficient to state a prima facie case. As the Board noted in *Berkeley*, *supra*, PERB Decision No. 2411, which is cited in the amended charge, "ordinarily it is for the charging party to establish what the employer's procedures and standards are before accusing the employer with departing from them." (See also *Los Angeles Unified School District* (2014) PERB Decision No. 2390 [finding that charging party "failed to establish what the District's policy was"].)

Because the amended charge does not include additional evidence that the District took adverse action against Coleman because of her protected activity, this allegation is hereby dismissed.

Failure to Provide Reasonable Accommodations

The amended charge alleges, for the first time, that after Cleveland became Coleman's supervisor, she removed certain "accommodations" and denied Coleman's request for "reasonable accommodations." These events appear to have occurred sometime between January 2014 and December 5, 2014.

As noted in the Warning Letter, PERB is prohibited from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." (Gov. Code, § 3541.5, subd. (a)(1).) The limitations period for new allegations contained in an amended charge extends back six months from the filing date of the *amended charge*. (*County of Santa Barbara* (2012) PERB Decision No. 2279-M.) "An

[6] It is not clear when Coleman actually received her evaluation, because, according to the District, she went on medical leave after she was notified her evaluation would be unsatisfactory.

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

In this case, the new allegations included in the amended charge do not relate back to the original charge, because they do not clarify facts alleged in the original charge or add a new legal theory based on facts already alleged. The amended charge was not filed until May 4, 2016. Accordingly, these allegations are untimely. Even if they did relate back to the original charge, they would still be untimely, because they occurred more than six months before the original charge was filed on June 24, 2015. Therefore, these allegations are hereby dismissed.

Right to Appeal

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

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

The Board's address is:

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

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required

contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

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

Final Date

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

Sincerely,

J. FELIX DE LA TORRE
General Counsel

By _____
Joseph Eckhart
Regional Attorney

Attachment

cc: Gilbert A. Castro, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
Fax: (510) 622-1027

April 12, 2016

Lolita D. Coleman

Re: *Lolita D. Coleman v. Berkeley Unified School District*
Unfair Practice Charge No. SF-CE-3134-E
WARNING LETTER

Dear Ms. Coleman:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on June 24, 2015. Lolita D. Coleman (Coleman or Charging Party) alleges that the Berkeley Unified School District (District or Respondent) violated section 3543.5 of the Educational Employment Relations Act (EERA or Act).[1]

FACTS AS ALLEGED

Coleman has been employed by the District for 24 years. She is currently employed as an administrative assistant in the District's Risk Management Department. This position is in a bargaining unit exclusively represented by the Berkeley Council of Classified Employees (BCCE).

Coleman alleges that from September of 1991 through 2011, she "always" received positive performance evaluations. Since September 2012, she has had documented vision problems.

According to the District, Coleman has received the following discipline: (1) two verbal reprimands in January 2013; (2) two letters of reprimand in February 2013; (3) two letters of reprimand in March 2013; (4) an annual performance evaluation in April 2013 in which she was rated "Needs Improvement" in four out of five categories and "Unsatisfactory" in the remaining category; (5) a letter of reprimand in June 2013; (6) a 20-day suspension in October 2013; (7) a letter of reprimand in October 2013; (8) an unsatisfactory performance evaluation in December 2013; and (9) two letters of reprimand in December 2013.[2] At the time of these incidents, Pamela Goo (Goo) was Coleman's supervisor.

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

[2] The District's position statement includes a verification under penalty of perjury and a proof of service on Charging Party.

In January 2014, Goo resigned, and Coleman was instructed to report directly to Deputy Superintendent of Business Services Javetta Cleveland (Cleveland).

From September 2014 through December 5, 2014, Coleman was on medical leave. When she returned, Cleveland directed Coleman not to perform "duties surrounding open enrollment," and not to process personnel action forms.

On January 9, 2015, Cleveland and Coleman exchanged several e-mail messages. Cleveland appears to have accused Coleman of altering another employee's work in a computer system. Coleman denied having done so, claiming, "I often step away from my computer terminal with the BM screen still open. It wouldn't surprise me if someone walked over and entered data while I was away from my desk."

On January 28, 2015, Coleman sent Cleveland an e-mail message questioning whether Belinda Stuckey (Stuckey) was responsible for directing Coleman's workload and evaluating her. According to Coleman, Stuckey is a "lateral employee."

On March 2, 2015, Coleman sent an e-mail message to Cleveland asking about how to "prevent illness in the Risk Management department" when "an individual comes to work ill and spreads their germs around due to close quarters." Cleveland did not respond.

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On April 24, 2015, Cleveland sent Coleman the following e-mail message:

> Dear Lolita,
>
> I need to meet with you regarding your performance evaluation.
>
> "Pursuant to Article 7.4.5 of the BCCE contract, a unit member expected to receive a less than satisfactory evaluation will be informed in advance of a meeting with management to discuss the unit member's evaluation. Such unit member shall have the right to have a Union representative present a[t] such a meeting."
>
> This is to notify you that you will be receiving less than satisfactory ratings on your performance evaluation, and as such, you have a right to union representation at our meeting. I am reserving April 29th between 1pm and 4pm and April 30th between 9am and 4pm to meet with you. Please confirm your attendance for an hour during these two time slots to meet with me.

(Quotation marks in original.)

The collective bargaining agreement (CBA) between BCCE and the District includes the following provisions regarding performance evaluations:

> 7.3.2 Permanent unit members shall be evaluated between February 1 and May 1 of each school year, provided the unit member has been in permanent status in their current classification for at least four (4) months.
>
> 7.4.2 A unit member shall be evaluated by the first level of management above the unit member or by an administrator who is reasonably well informed about the work activity of the evaluated unit member. No unit member shall evaluate another unit member.

Coleman alleges that Stuckey was evaluating her performance and that Cleveland "is not qualified or informed of [Coleman's] job duties and description."

According to the District, after Coleman was notified that her performance evaluation would be unsatisfactory, she went on medical leave. As a result, Coleman has not yet received her evaluation.

DISCUSSION

I. The Charging Party's Burden

An unfair practice charge must include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." (PERB Regulation 32615(a)(5).) A charging party should allege with specificity the particular facts giving rise to a violation. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249a-M.) The charging party may do this by alleging sufficient facts describing the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture*) (1994) PERB Decision No. 1071-S (*Dept. of Food and Agriculture*), citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Such allegations should focus on the elements of the prima facie case.

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

In evaluating whether a charge states a prima facie case, the Board agent must assume that the facts alleged by the charging party are true. (*Temple City Unified School District* (1990) PERB Decision No. 843.) Speculation and legal conclusions, however, are not factual

allegations, and they are not sufficient to state a prima facie case. (*Dept. of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) In addition, while the Board agent may not resolve factual disputes in favor of the respondent, the Board agent may rely on undisputed facts provided by the respondent under penalty of perjury. (*Chula Vista Elementary School District* (2003) PERB Decision No. 1557.)

II. Prima Facie Case

The charge alleges that Coleman, since returning to work in December 2014, has received "harassment" from Cleveland, and that her unsatisfactory performance evaluation is "clear discriminatory conduct." Because the charge alleges that the District violated EERA section 3543.5, the charge will be analyzed under the theory that the District discriminated or retaliated against Coleman for her exercise of rights under EERA, in violation of section 3543.5, subdivision (a).[3]

To state a prima facie case that the District discriminated or retaliated against Coleman in violation of EERA section 3543.5(a), the charge must allege that: (1) Coleman exercised rights under EERA; (2) the District had knowledge of the exercise of those rights; (3) the District took adverse action against the employee; and (4) the District took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

A. Exercise of Rights Under EERA and Employer Knowledge

EERA gives employees the right "to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations." (Gov. Code, § 3543, subd. (a).)

In order to be protected, an individual's activity must be the "logical continuation of group activity." (*Regents of the University of California* (2010) PERB Decision No. 2153-H (*Regents*).) Protected activity includes asserting rights grounded in a collective bargaining agreement (*Jurupa Unified School District* (2015) PERB Decision No. 2420), filing grievances pursuant to a contractual grievance process (*Trustees of the California State University* (2008) PERB Decision No. 1970-H), and joining with other employees "seeking to enforce workplace rights through administrative or judicial means." (*Jurupa Unified School District* (2012) PERB Decision No. 2283.) However, internal complaints, "undertaken alone and for [the employee's] sole benefit" are not protected. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) "[W]hen an employee's communication with the employer is for

[3] The other subdivisions of section 3543.5, (b) through (e), protect the rights of employee organizations, not employees. Coleman therefore lacks standing to allege a violation of those subdivisions. (See *Oxnard Union High School District* (2012) PERB Decision No. 2265.)

his/her own benefit, the conduct is not protected." (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S (*CDCR*).)

The charge alleges that Coleman was on medical leave from September through December 2014. It is not alleged whether this medical leave was based on a right grounded in the CBA. Therefore, it is unclear whether this activity was protected. (*Jurupa Unified School District*, *supra*, PERB Decision No. 2420.)

The charge also alleges that Coleman questioned whether Stuckey—"a lateral employee," and, presumably, a unit member—was responsible for supervising and evaluating her. This is arguably an assertion of a right grounded in the CBA, which prohibits one unit member from evaluating another. (*Jurupa Unified School District*, *supra*, PERB Decision No. 2420.) Therefore, the charge adequately alleges that Coleman engaged in protected activity. In addition, because Coleman posed her question to Cleveland, the charge also adequately alleges employer knowledge of the protected activity.

B. Adverse Action

The test for whether an action is adverse is "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Newark Unified School District* (1991) PERB Decision No. 864.) This is an objective test; the Board does not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) The harm alleged must be "actual and not merely speculative." (*County of Tehama* (2010) PERB Decision No. 2122-M.)

The charge alleges that upon returning from her medical leave, Coleman was directed not to perform "duties surrounding open enrollment," and not to process personnel action forms. As a threshold matter, the charge does not adequately allege facts establishing that the charge was filed within six months of this action. According to the charge, Coleman returned from medical leave on December 5, 2014. The charge, which was not filed until June 24, 2015, does not allege the date when Coleman was notified that she was not to perform these duties. Therefore, the charge does not establish that this allegation was timely filed. (*Los Angeles Unified School District*, *supra*, PERB Decision No. 1929.)

Even assuming this allegation is timely, it is not clear that it was an adverse action. Changes in job duties may be adverse actions if they result in a loss of pay or overtime opportunities (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2140-H (*San Marcos*)) or less favorable working conditions (*Chico Unified School District* (2015) PERB Decision No. 2463). Such a change may also be an adverse action "when a reasonable person would consider the duties of the new position to be a step down from those of the previous position." (*Trustees of the California State University* (2009) PERB Decision No. 2038-H.) Here, the charge does not include any facts establishing that Coleman's assignment was an objectively adverse action because it resulted in a "step down" from her previous duties, a loss of pay or overtime opportunities, or less favorable working conditions. Therefore, it does not appear that the direction not to perform open enrollment duties or process personnel action forms was an adverse action.

The charge also alleges that Coleman received "harassment" from Cleveland, in the form of the January 9, 2015 and April 16, 2015 e-mail messages. The Board has held that critical comments that do not result in a reprimand or other discipline are not considered an adverse action. (*San Marcos*, *supra*, PERB Decision No. 2140-H.) Here, Cleveland's e-mail messages questioned Coleman about altering another employee's work and about wearing perfume in the office. Coleman responded to these messages, respectively, by denying that she had altered the work and by denying that she wore perfume. There is no allegation that Cleveland pursued either matter further as a disciplinary matter. Therefore, the charge does not allege that the "harassment" was an adverse action.

The charge also alleges that Cleveland informed Coleman that she was receiving a less than satisfactory performance evaluation and had a right to a union representative. A negative performance evaluation is itself an adverse action. (*California State University, Long Beach* (1987) PERB Decision No. 641-H.) An adverse action occurs when there has been "unequivocal notice of the employer's intent to impose" the adverse action. (*County of Merced* (2008) PERB Decision No. 1975-M.) Although, according to the District, Coleman has not yet received her evaluation, it appears she has received unequivocal notice that it will be less than satisfactory. Therefore, the charge adequately alleges that Coleman suffered an adverse action.

C. Employer Motive

The employer's unlawful motive is the nexus between the charging party's protected activities and the adverse action. A nexus must be established by either direct or circumstantial evidence. (*Omnitrans* (2010) PERB Decision No. 2121-M.) When relying on circumstantial evidence, the charge must include allegations of: (1) close temporal proximity between the protected activity and the adverse action; and (2) some other facts indicating an unlawful motive, such as a departure from established procedures, disparate treatment, failing to provide an explanation, or providing inconsistent or contradictory justifications. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381.)

1. Limitation on Job Duties

Even assuming that the allegation regarding the limitation on Coleman's job duties was timely filed, that her medical leave was protected activity, and that the limitation on her job duties was an adverse action, the charge does not allege any facts, other than close temporal proximity, establishing an unlawful motive. Coleman does not allege, for instance, that the District failed to provide an explanation of its action or departed from established procedures. Therefore, the allegation that this limitation was placed on Coleman because of her protected activity does not state a prima facie case.

2. Evaluation

Coleman received notice of her less than satisfactory evaluation within three months of her protected activity. This is sufficient to establish close temporal proximity. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019.)

The charge does not, however, include other circumstantial evidence of unlawful motive. The charge states that from 1991 through 2011, Coleman always received positive performance evaluations. Where an employee has a "consistent, documented history of excellent work prior to receiving the negative evaluation," an inference of unlawful motive is present. (*Calaveras County Water District* (2009) PERB Decision No. 2039-M.) In this case, however, no such history is alleged, because the charge does not allege Coleman's history between 2011 and 2015. And, according to the District, during that time period Coleman received multiple verbal and written reprimands, a 20-day suspension, and two negative performance evaluations. As a result, there is no "consistent, documented history of excellent work" prior to Coleman's negative evaluation for 2015.

The charge also argues that the District has violated CBA section 7.3.2 and 7.4.2. A departure from established procedures and standards when dealing with the employee may be evidence of unlawful motive. (*Santa Clara Unified School District* (1979) PERB Decision No. 104.)[4]

Section 7.3.2 requires employees to be evaluated "between February 1 and May 1 of each school year, provided the unit member has been in permanent status in their current classification for at least four (4) months." The charge does not allege that Coleman was evaluated outside of the prescribed period of time, or that Coleman was in permanent status for less than four months at the time. Thus, no violation of section 7.3.2 is apparent from the charge.

The charge alleges that section 7.4.2 has been violated because Cleveland is not "qualified or informed of [Coleman's] job duties and description" and because Stuckey, another unit member, is actually evaluating Coleman.

With respect to the allegation regarding Cleveland, this does not appear to be a violation of section 7.4.2. The CBA requires the evaluation to be conducted "by the first level of management above the unit member *or* by an administrator who is reasonably well informed about the work activity of the evaluated unit member." (Emphasis added.) Thus, the administrator who performs the evaluation must be "reasonably well informed about the work activity of the evaluated unit member" only if that administrator is *not* the first level of management above the unit member. The charge does not allege that Cleveland is not the first level of management above Coleman. According to the District, Coleman has been reporting to Cleveland since January 2014. Therefore, the charge fails to allege that the District violated CBA section 7.4.2 by having Cleveland evaluate Coleman.

[4] It is unclear whether the charge intends to allege that these violations of the CBA independently violate EERA. PERB does not have jurisdiction to enforce collective bargaining agreements. (Gov. Code, § 3541.5, subd. (b) ["The board shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter"].)

With respect to the allegation regarding Stuckey, this allegation appears to be based on speculation. In light of the facts that Coleman has not yet received her performance evaluation, and that it was Cleveland who informed Coleman that the evaluation would be negative, there appears to be no basis for assuming that Stuckey actually performed the evaluation. As noted, speculation is not sufficient to state a prima facie case. (*Dept. of Food and Agriculture*, *supra*, PERB Decision No. 1071-S.)

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case.[5] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before April 27, 2016,[6] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Regional Attorney

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[5] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

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

PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 1031 18th Street, Sacramento, CA 95811-4124.

On February 23, 2017, I served **PERB Decision No. 2516** regarding *Lolita D. Coleman v. Berkeley Unified School District*; Case No. SF-CE-3134-E on the parties listed below by:

_X_ placing a true copy thereof enclosed in a sealed envelope for collection and delivery by the United States Postal Service or private delivery service following ordinary business practices with postage or other costs prepaid.

___ personal delivery.

___ facsimile transmission in accordance with the requirements of PERB Regulations 32090 and 32135(d).

___ electronic service (e-mail).

Lolita Coleman
6164 Baker Street
Oakland, CA 94608

Gilbert Castro
Atkinson, Andelson, Loya, Rudd & Romo
5075 Hopyard, #210
Pleasanton, CA 94588

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 23, 2017, at Sacramento, California.

Hanah E. Stuart
(Type or print name)

_____
(Signature)