STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARIE FERGUSON, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3174-E PERB Decision No. 2547 January 30, 2018

Appearances: Marie Ferguson, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Georgelle C. Cuevas, Attorney, for Berkeley Unified School District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION[1]

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on Marie Ferguson's appeal from the dismissal of her unfair practice charge by PERB's Office of the General Counsel (attached). As amended, the charge alleged that the Berkeley Unified School District (District) violated the Educational Employment Relations Act (EERA)[2] by refusing to provide Ferguson a reasonable accommodation for her disability and terminating her employment in retaliation for her protected activity.

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[1] PERB Regulation 32320, subdivision (d) provides, in pertinent part: "Effective July 1, 2013, a majority of the Board members issuing a decision or order pursuant to an appeal filed under Section 32635 [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 Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

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

The Board has reviewed the case file in its entirety and has fully considered the relevant issues and contentions on appeal. Based on this review, the Board finds the warning and dismissal letters accurately describe the allegations included in the unfair practice charge, as amended. The warning and dismissal letters are well reasoned and in accordance with applicable law. We therefore deny the appeal and adopt the warning and dismissal letters as the decision of the Board itself, as supplemented by the discussion below.

SUMMARY OF FACTUAL ALLEGATIONS[3]

Ferguson was employed by the District as a classified employee for 25 years, in a position exclusively represented by the Berkeley Council of Classified Employees (BCCE). At some point, she took a paid leave of absence due to a medical condition. On February 25, 2016, Ferguson's doctor authorized her to return to work with some restrictions. In March 2016, Ferguson met with Randy Perez, the District's Director of Classified Personnel as part of the interactive process to determine if the District could accommodate her disability. On March 31, 2016, Perez sent Ferguson a letter informing her that the District was unable to accommodate her request to be transferred to another supervisor, that Ferguson had exhausted all of her leave, and that she was being placed on a 39-month reemployment list.

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[3] On review of a dismissal without hearing, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*San Juan Unified School District* (1977) EERB Decision No. 12, p. 4 [Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board (EERB)]; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6; *California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) We may also consider information provided by the respondent, provided it is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M, adopting dismissal letter at p. 1; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994, pp. 12-13; *Riverside Unified School District* (1986) PERB Decision No. 562a, p. 8.)

Ferguson brought the matter to the attention of the District's Personnel Commission. The members of the Personnel Commission expressed various concerns about the District's treatment of Ferguson, and ultimately ordered that she be reinstated for 15 days "to re-engage in the interactive process." Before returning to work, Ferguson was required to undergo a fitness-for-duty examination. She did not return to work until November 8, 2016.

DISCUSSION

Ferguson's appeal raises a number of issues regarding the dismissal of her charge, but ultimately disputes the Office of the General Counsel's determination that she failed to state a prima face case of retaliation under *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*). *Novato* requires allegations that: (1) the employee engaged in protected activity; (2) the employer had knowledge of the employee's protected activity; (3) the employer took adverse action against the employee; and (4) the adverse action was taken because of the employee's protected activity.

Ferguson asserts that she engaged in protected activity by initiating the interactive process to obtain a reasonable accommodation for her disability.[4] The warning and dismissal letters explained that an employee has a right to a union representative in the interactive process (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C), but that PERB lacks jurisdiction over the interactive process itself. Ferguson did not argue, and the Office of

[4] In her charge and amended charges, Ferguson also alleged that she attended labor-management meetings in her capacity as a BCCE vice president. The Office of the General Counsel agreed that this was protected, but concluded that Ferguson did not allege a temporal nexus between this activity and the adverse actions taken against her, which is necessary to establish unlawful motive. Ferguson also claimed that she engaged in protected activity by filing a worker's compensation claim against the District. The Office of the General Counsel concluded that this was not protected activity. Ferguson's appeal does not dispute either of these conclusions, so they are not before us. (See PERB Reg. 32635, subd. (a)(1) [appeal must "[s]tate the specific issues of procedure, fact, law or rationale to which the appeal is taken"].)

the General Counsel did not consider, whether a request for a reasonable accommodation is protected by EERA.

The Fair Employment and Housing Act (FEHA)[5] expressly requires employers to provide reasonable accommodation for disabilities, and prohibits employers from retaliating against employees who request a reasonable accommodation. (FEHA, § 12940, subd. (m).)[6]

PERB has consistently held that it does not have jurisdiction over claims or matters that are covered by other employment-related statutes such as workers compensation laws or the Americans with Disabilities Act. (*Salinas City Elementary School District* (1996) PERB Decision No. 1131, adopting warning letter at p. 7; see also *City & County of San Francisco* (2011) PERB Decision No. 2222 [no jurisdiction to enforce rights contained in other statutes such as the Education Code]; *Union of American Physicians & Dentists* (*Menaster*) (2007) PERB Decision No. 1918-S [no jurisdiction over the Whistleblower Protection Act, sexual harassment claims or unemployment insurance claims]; *State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S, p. 4 [PERB does not enforce other independent statutory schemes]; *Wygant v. Victor Valley Joint Union High School District* (1985) 168 Cal.App.3d 319, 323.)

The Board has long recognized that filing individual complaints with agencies such as Department of Fair Employment and Housing is not protected activity within PERB's jurisdiction, because those agencies "often have rules and regulations in place to prevent unlawful retaliation for filing complaints" under other employment statutes not administered

[5] FEHA is codified at section 12900 et seq.

[6] This provision makes it unlawful for an employer either to "fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee" or to "retaliate or otherwise discriminate against a person for requesting accommodation under this subdivision, regardless of whether the request was granted." (FEHA, § 12940, subd. (m).)

by PERB. (*Fontana Unified School District* (2010) PERB Decision No. 2147, warning letter, p. 4; *City of Long Beach* (2008) PERB Decision No. 1977-M; but see *Jurupa Unified School District* (2012) PERB Decision No. 2283 ["Joining with another employee or employees to enforce external law regarding workplace rights, is itself group activity protected by EERA"].) Consequently, we conclude that invoking the interactive process pursuant to Ferguson's rights under FEHA is not protected activity under EERA.[7]

Because we conclude that Ferguson did not engage in protected activity when she demanded reasonable accommodation, we need not address whether she alleged the remaining elements of a prima facie case of retaliation.[8]

Conclusion

Because Ferguson's request for reasonable accommodation was not protected activity under EERA, she failed to allege a prima facie case under *Novato, supra*, PERB Decision No. 210. Therefore, we affirm the dismissal of the charge and adopt the Office of the General Counsel's warning and dismissal letters as the decision of the Board itself.

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[7] *Sonoma County Superior Court, supra*, PERB Decision No. 2409-C, upon which Ferguson relies, does not compel a contrary conclusion. We held in that case that an employee has a right under the Trial Court Employment Protection and Governance Act (codified at § 71600 et seq.) to receive the assistance of a union representative during an interactive process meeting. We did not hold, as Ferguson contends, that the interactive process itself is within PERB's jurisdiction, or that an individual employee's initiation of the interactive process is a protected activity. As we recently confirmed, we have no jurisdiction to rule on whether an employer has provided a reasonable accommodation. (*Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, pp. 31-32.)

[8] We therefore deny as moot Ferguson's request that we consider, as additional evidence of unlawful motive, information contained in an unfair practice charge filed by BCCE. We note that, contrary to Ferguson's assertion that BCCE did not receive a case number for that charge, it was assigned Case No. SF-CE-3201-E, and dismissed by the Office of the General Counsel on July 28, 2017. BCCE did not appeal the dismissal.

ORDER

The unfair practice charge in Case No. SF-CE-3174-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Gregersen and Member Banks joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (916) 322-3198
Fax: (510) 622-1027

December 20, 2016

Marie Ferguson

Re: *Marie Ferguson v. Berkeley Unified School District*
Unfair Practice Charge No. SF-CE-3174-E
DISMISSAL LETTER

Dear Ms. Ferguson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 8, 2016. Marie Ferguson (Ms. Ferguson or Charging Party) alleges that the Berkeley Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by retaliating against her.

The District filed an initial verified position statement on May 9, 2016.[2] Charging Party filed a First Amended Charge on May 12. The District filed a second verified position statement on June 8. Charging Party filed a Second Amended Charge on July 19. The District filed a third verified position statement on August 6.

Charging Party was informed in the attached Warning Letter dated October 17, 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, the charge should be amended. Charging Party was further advised that, unless the charge was amended to state a prima facie case or withdrawn prior to November 4, the charge would be dismissed.

On October 26, Charging Party filed a Third Amended Charge. The District filed a fourth verified position statement on November 15, and an amended fourth verified position statement on November 16. Because the Third Amended Charge does not cure the deficiencies discussed in the Warning Letter, and does not state a prima facie case, the charge is hereby dismissed based on the facts and reasons set forth herein and in the October 17 Warning Letter.

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[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] All subsequent dates herein are to the 2016 calendar year unless otherwise stated.

Additional Facts

In the Third Amended Charge, Ms. Ferguson largely reiterates factual allegations made in her previous charges. In addition, she provides a quotation from a PERB decision (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C) to the effect that a successful interactive process (i.e., to determine reasonable accommodations for a disability) may mean the difference between full employment and unemployment.

Ms. Ferguson further alleges that the meeting minutes of the Berkeley Personnel Commission dated June 13 demonstrate a causal nexus because the minutes "note lack of clarity and notice to me about my leave." A member of the committee apparently commented that it looked like Ms. Ferguson had been terminated from employment in order to bring in a Spanish speaking person.

As of October 21, Ms.Ferguson has not been returned to work.

Discussion

1. PERB's Jurisdiction

As discussed in the Warning Letter, PERB lacks jurisdiction over claims covered under the Americans with Disabilities Act (ADA) and other statutes governing the accommodation of disabilities in employment. (*Salinas City Elementary School District* (1996) PERB Decision No. 1131.) The focus of Ms. Ferguson's charge is that the interactive process she engaged in with her employer was not satisfactory and did not lead to a result she found satisfactory. The substance of an interactive process meeting, however, is not a matter within PERB's jurisdiction.

As noted in the Warning Letter, *Sonoma County Superior Court*, *supra*, PERB Decision No. 2409-C concluded that an employee had a right to a union representative, if requested, at an interactive process meeting. Here, there is no allegation that Ms. Ferguson requested and was denied representation, so this case is inapplicable.

2. Retaliation

As stated in the Warning Letter, 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 <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

Ms. Ferguson does not allege that she was retaliated against because of activities protected under EERA. She alleges that "I feel I am being discriminated against," but she does not articulate any basis for such discrimination. She alleges she served as a vice president for her

employee organization, Berkeley Council of Classified Employees (BCCE) but she does not allege that the District took adverse action against her *because of* this activity. Because Ms. Ferguson does not identify any dates for her protected activity, she cannot establish (and does not allege) a temporal nexus between any protected activity and an adverse action.

Ms. Ferguson contends that statements made at a personnel Commission meeting demonstrate nexus. As noted above, there is no showing or allegation that an adverse action was taken by the District because of Ms. Ferguson's activity protected by EERA. The statements made at the Personnel Commission meeting appear to be part of a larger discussion concerning applicable Merit Rules of the employer. Various Personnel Commission members discussed Ms. Ferguson's situation, and concluded that she should be reinstated for 15 days to re-engage in the interactive process concerning her disability accommodations. It cannot be determined how the decision to reinstate Ms. Ferguson is evidence of nexus. To the extent these statements can be viewed as retaliating against Ms. Ferguson because she does not speak Spanish, this matter is not within PERB's jurisdiction. (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S.)

Right to Appeal

Pursuant to PERB Regulations,[3] 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

[3] PERB's Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. The text of PERB's Regulations may be found at www.perb.ca.gov.

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 _____
Laura Z. Davis
Supervising Attorney

Attachment

cc: Marleen Sacks, Attorney

PUBLIC EMPLOYMENT RELATIONS BOARD

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October 17, 2016

Marie Ferguson

Re: *Marie Ferguson v. Berkeley Unified School District*
Unfair Practice Charge No. SF-CE-3174-E
WARNING LETTER

Dear Ms. Ferguson:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 8, 2016. Marie Ferguson (Ms. Ferguson or Charging Party) alleges that the Berkeley Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by retaliating against her.

The District filed an initial verified position statement on May 9, 2016.[2] Charging Party filed a First Amended Charge on May 12. The District filed a second verified position statement on June 8. Charging Party filed a Second Amended Charge on July 19. The District filed a third verified position statement on August 6.

Summary of Facts

Where allegations contained in the District's verified position statements do not conflict with the allegations in the charge, they have been included herein. Nothing in PERB case law requires a Board agent to ignore undisputed facts provided by the Respondent and consider only the facts provided by the Charging Party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

Ms. Ferguson has been employed by the District for 25 years, in a position within the classified bargaining unit exclusively represented by Berkeley Council of Classified Employees (BCCE). Since 2009 she has been the BCCE Vice President.

Ms. Ferguson was out of work due to a medical condition for an unspecified period of time, presumably in 2016. On February 25, her doctor released her to return to work on the

[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] All subsequent dates herein are to the 2016 calendar year unless otherwise stated.

condition she not return to a "hostile work environment," which, in the doctor's opinion, meant she should work at a different work site and with different personnel. On March 14 and 16 she met with the District's Director of Classified Personnel, Randy Perez, who stated he could not accommodate her injuries. On March 22, Ms. Ferguson's doctor sent a further letter concerning his opinion that she should not return to the same work environment due to emotional stress.

On March 31, Perez wrote Ms. Ferguson a letter in which he stated the District's position that her need to be transferred to another supervisor was not a disability under applicable law. Because Ms. Ferguson had exhausted all leave time, she was placed on a 39-month rehire list pursuant to the Education Code.

Ms. Ferguson asserts that, at that time, there were three vacancies she was eligible to be placed in: at Malcolm X Elementary, at John Muir Elementary, and at LeConte Elementary. Previously, in June 2015, she had interviewed at John Muir Elementary but had been told she was not a good fit.

Ms. Ferguson alleges that she engaged in protected activity by, on an unspecified date, filing a worker's compensation claim that was approved and accepted. She further alleges that, in March 2016, a Worker's Compensation judge placed a sanction on the District. Ms. Ferguson alleges she was retaliated against because she received three copies of a subpoena that was served on the District. In addition, she attended labor management meetings as the BCCE Vice President.

On June 13, a Special Personnel Commission voted to reinstate her employment with the District due to not following its merit rules and the Education Code. The District did not ask for a fitness-for-duty exam until after the Commission voted to reinstate her employment.

Ms. Ferguson alleges that the District failed to offer a good faith interactive process for reasonable accommodations, did not follow two of its "merit rules" regarding seniority and violated EERA section 3543.5, subdivision (a).

Discussion

1. PERB's Jurisdiction

The EERA does not extend a remedy against all acts of perceived unfairness or discrimination against public employees. Rather, PERB's jurisdiction is limited to resolving claims of unfair practices, as defined, which violate the Acts enforced by PERB. (See, e.g., *Los Angeles Unified School District* (1984) PERB Decision No. 448.) PERB lacks jurisdiction to enforce other statutory schemes and laws (*State of California (Department of Personnel Administration)* (2009) PERB Decision No. 2018-S) or personnel commission rules (*Torrance Unified School District* (2009) PERB Decision No. 2007). Claims covered under Workers' Compensation law or the Americans With Disabilities Act (ADA) are also not within PERB's jurisdiction. (*Salinas City Elementary School District* (1996) PERB Decision No. 1131.)

Ms. Ferguson alleges a violation of "Merit Rules." According to the District, these are the District's Personnel Commission rules. These rules are not part of EERA. Therefore, to the extent that Ms. Ferguson seeks to enforce the "Merit Rules" it does not appear that PERB has any jurisdiction to do so.

Ms. Ferguson also alleges that the District failed to engage in an "interactive process" concerning her "disability." There are both state and Federal laws governing disability accommodations (see, e.g., the Americans with Disabilities Act [42 U.S.C. §§ 12101 et seq.] and the California Fair Employment and Housing Act [Gov. Code, §§ 12900 et seq.]), but PERB has no jurisdiction over these laws.[3]

2. Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the

[3] PERB has held that an employee may be entitled to union representation during an interactive process meeting, however no facts are alleged here to show that Ms. Ferguson was deprived of her representation rights. (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C.)

employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

Protected Activity/Employer Knowledge

It appears that Ms. Ferguson engaged in protected activity by serving as the BCCE Vice President. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M.) It is assumed, although not alleged, that the District was aware of this. However, the filing of a Worker's Compensation claim is not protected activity. (*State of California*, *Department of General Services* (1994) PERB Decision No. 1037-S.)

Adverse Action

It appears that Ms. Ferguson was out of work between March 31, when she was placed on the 39-month rehire list, and June 13, when she was reinstated to her position. This would likely be an adverse action. (*Los Angeles Unified School District* (2012) PERB Decision No. 2244.) However, Ms. Ferguson alleges a violation only as to the District's alleged failure to engage in the interactive process. If true, the District's failure to engage in an interactive process is likely adverse to the employee's employment under and objective standard.

Nexus

Ms. Ferguson does not identify any connection between a particular protected activity and an adverse action. Thus, temporal proximity is not established. There are also insufficient facts to establish any of the factors demonstrating nexus. Ms. Ferguson does allege that her reinstatement was based on a failure of the District to follow rules, and that the employer did not obtain a fitness-for-duty exam until after her reinstatement, but she does not allege any facts to show that employer departed from its usual standards and practices. Accordingly, no nexus is alleged or shown.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

[4] 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

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 **November 4, 2016**,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Z. Davis
Supervising Attorney

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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.*)

[5] 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.)