STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LORI E. EDWARDS, ET AL., Charging Parties, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6088-E PERB Decision No. 2675 October 17, 2019

Appearances: Lori E. Edwards, on her own behalf; David Pickett and Victoria Pickett, on their own behalf; Law Offices of Donald R. Holben, by Donald Holben and Jack S. Fisher, Attorneys, for Kim Rosales; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Lake Elsinore Unified School District.

Before Banks, Shiners, and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions to a proposed decision (attached) by an administrative law judge (ALJ). In the underlying unfair practice charge and complaint, Charging Parties Lori Edwards (Edwards), Victoria Pickett, David Pickett (collectively "the Picketts"), and Kim Rosales (Rosales) alleged that their employer, Lake Elsinore Unified School District (District), violated the Educational Employment Relations Act (EERA)[1] by retaliating against them on the basis of their participation in protected activities.

In the proposed decision, the ALJ dismissed the complaint, concluding that Edwards and the Picketts failed to establish a prima facie case of retaliation, while Rosales' prima facie

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

case was negated by the District's affirmative defense. Specifically, the ALJ found that the District's refusal to place Edwards on a five-year evaluation cycle beginning in the 2015-2016 school year was not objectively adverse because the decision resulted from the District's inability to conduct a formal evaluation during the prior school year, and the decision in no way implied that Edwards's performance was deficient.

With respect to David Pickett, the ALJ concluded that the District's informal evaluation of him, without more, was not an adverse action. As part of this finding, the ALJ distinguished the facts from precedent, discussed *post*, in which an employer has subjected an employee to formal evaluations in consecutive years. With respect to Victoria Pickett, the ALJ concluded that the District's decision to permit students to purchase scented pencils as part of a fundraiser, despite its knowledge of Ms. Pickett's sensitivity to scents, was not an adverse action because the decision was not directed against her but applied to all staff generally.

Finally, with respect to Rosales, the ALJ found that although the record evidence established a prima facie case for retaliation based on the allegation that she was required to undergo formal evaluations in consecutive years, the District nonetheless successfully proved its affirmative defense that it would have proceeded in the same fashion regardless of her protected activity.

The Board has reviewed the entire record in this matter, including the parties' submissions on exceptions,[2] and finds the proposed decision well-reasoned, adequately

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[2] Edwards did not file exceptions on her own behalf. However, Victoria and David Pickett filed exceptions to nearly every aspect of the proposed decision, including those dealing with Edwards' complaint allegations. To the extent the Picketts' exceptions conform to the requirements of PERB Regulation 32300, they simply reassert arguments that the ALJ adequately addressed, and therefore do not provide a basis for reversal. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2633, pp. 6-7.) Similarly, Rosales' exceptions, in sum, simply assert that the District failed to carry its burden to prove that it would have

supported by the record, and in accordance with applicable law. Accordingly, the Board hereby adopts the proposed decision as the decision of the Board itself, as supplemented by the following discussion of Charging Parties' exceptions.[3]

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The relevant facts are adequately set forth in the proposed decision and are not repeated in detail here. Rather, we detail only those facts necessary to the resolution of those exceptions that merit further discussion.

The Charging Parties are longtime, certificated employees of the District and work as primary school teachers at Lakeland Village School (LVS). All four engaged in protected activities by participating in various prior PERB charges, as well as serving at various times as site representatives for the Lake Elsinore Teachers Association (LETA), the exclusive representative for their bargaining unit. The charge and complaint allege that the District took various adverse actions against Charging Parties during the 2015-2016 school year because of these protected activities.

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undertaken a second, consecutive evaluation regardless of her protected activities. After reviewing the extensive record in this case, we disagree with her assertion and believe the ALJ reached the correct conclusion.

[3] On November 8, 2018, Edwards filed a request to withdraw from this case pursuant to a settlement agreement reached between her and the District. On December 3, 2018, Edwards filed a "Motion to Review Settlement Agreement Due to EERA Violations and to Compel the [Respondent] to Lawful [sic] Comply with the Terms and Conditions of the Agreement."

Under EERA section 3541.5, subdivision (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." Because the Board has no power to enforce the disputed settlement agreement in this matter, we cannot act on Edwards' Motion. Further, in light of the concerns raised by the allegations in her Motion that the District breached the agreement and that some of the terms of the agreement violated her rights under EERA, the Board denies Edwards' request to withdraw from the charge in this case. (See *ABC Unified School District* (1991) PERB Decision No. 831b, p. 3 [the Board itself has discretion to grant or deny a withdrawal request].)

Edwards

As noted above, Edwards alleges that the principal of LVS, Nick Powers (Powers), denied her request to be placed on a five-year formal evaluation cycle. At the time of these events, Edwards was a kindergarten teacher, who taught half the day and assisted another teacher for the other half. Powers had planned to evaluate Edwards during the 2014-2015 school year—his first opportunity to do so since becoming principal in the beginning of the 2012-2013 school year—but was unable to do so because of Edwards' frequent absences in the winter and spring.[4] Consequently, Powers decided to evaluate Edwards sometime in the 2015-2016 school year.

However, rather than cooperate to schedule the evaluation, Edwards sent an e-mail to Powers in which she insisted that she be placed on a five year evaluation cycle. Pursuant to Education Code section 44664, subdivision (a)(3),

> Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis as follows: [¶] . . . [¶] 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, . . . 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.

Powers replied that he would consider placing Edwards on such a cycle and they could discuss the matter after he completed her formal evaluation for that school year. Shortly thereafter, Edwards filed this charge. According to Powers, he had informally observed Edwards on numerous occasions and believed she was an excellent teacher. However, he did not agree to

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[4] The proposed decision, which we adopt, lays out in extensive detail the difficulties Powers experienced in his attempts to schedule a formal evaluation.

Edwards' request to be placed on a five-year evaluation cycle because it was his practice never to grant such a request until he had completed at least one formal evaluation of the teacher.

Rosales

Rosales taught the first grade. During the 2014-2015 school year, Powers accompanied his supervisor, District Administrator Dr. Alain Guevara (Guevara), on a walkthrough of the school including Rosales' classroom, where they discovered that she was showing Disney's animated film, Dumbo, to her students. Guevara directed Powers to address the matter with Rosales. This was the second time Rosales received corrective instruction about the policy against using movies as a substitute for instruction. Later that year, Powers completed a formal evaluation of Rosales in which he rated her overall performance to be satisfactory, but also concluded that she needed improvement in certain areas. This was the first time Rosales ever received an evaluation with negative ratings. Rosales contacted LETA to challenge the negative aspects of the evaluation. After she and her union representative met with Powers to discuss the matter, Powers agreed to reissue the evaluation without the negative ratings.

Before the start of the 2015-2016 school year, Rosales met with Powers to discuss her teaching and the availability of additional supports and resources. At that meeting, Rosales volunteered to enter the Peer Assistance and Review (PAR) Program. Typically, school administrators refer a teacher to the PAR program after he or she receives an unsatisfactory evaluation. During the conversation, Powers also directed Rosales to refrain from using movies in the classroom unless she received prior approval from him.

On September 4, 2015, Powers notified Rosales that she would be evaluated again that school year and requested a time to discuss the matter and to schedule the formal observation. Rosales responded that she wanted her PAR collaborating teacher to take part in the evaluation

events with her. At some point shortly thereafter, Rosales sought assistance from Edwards and then reached the conclusion that the collective bargaining agreement and Education Code precluded a consecutive year evaluation. On November 9, 2015, Rosales e-mailed Powers stating that conclusion and further requesting to be put on a five-year evaluation cycle. Ultimately, despite Powers' efforts to schedule the observation, he was unable to complete a formal evaluation of Rosales that school year.

The Picketts

David Pickett teaches second grade at LVS. During the 2014-2015 school year, Powers evaluated Mr. Pickett and rated him as meeting the District's expectations. Among the evaluative subcategories, Powers indicated that Mr. Pickett needed to improve his performance in two areas. After Mr. Pickett complained about these two suboptimal ratings, Powers withdrew the evaluation and issued a new one with satisfactory notations in all subcategories. At the beginning of the following school year, Powers and a couple other administrators did a walkthrough of the school, including Mr. Pickett's classroom. Such conduct was not out of the ordinary, but it was the first time an administrator had conducted an unannounced visit to his classroom during the first week of school. Shortly thereafter, Powers met with Mr. Pickett and his representative, Edwards, to discuss pedagogical strategies for increasing student engagement. According to all present, the meeting became a little tense after Edwards raised the subject of Mr. Pickett's recent evaluation. At some point, Powers raised the possibility of evaluating Mr. Pickett again, but he stated that he had considered the idea and decided to reject it. Ultimately, no District official evaluated Mr. Pickett that school year.

Victoria Pickett suffers from asthma, the symptoms of which can be triggered by the presence of scents like perfume, air fresheners, etc. District officials, including Powers, were

aware of her condition and made various efforts over the years to accommodate her special needs. In October 2015, Powers approved the sale of scented pencils, "Smencils," as part of a fundraiser for the school. It did not occur to Powers that the Smencils could possibly exacerbate Ms. Pickett's asthma. However, Ms. Pickett was concerned about that possibility. She e-mailed Powers, who in turn spoke with other administrators before instructing Ms. Pickett to prohibit her students from using the Smencils in her classroom and advising her that the items did not give off scents when capped. Despite these protective efforts, a former student of Ms. Pickett approached her during recess and waved an uncapped Smencil under her nose,[5] which caused Ms. Pickett to have a respiratory reaction. Charging Parties allege that Powers' decision to approve the sale of these items constituted an adverse action against Ms. Pickett.

DISCUSSION

The complaint alleges that the District discriminated against the Charging Parties because of their protected conduct. To establish a prima facie case that an employer has discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8.)

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[5] There is no evidence that the student harbored any malice towards Ms. Pickett or acted at the District's direction.

<u>Edwards</u>

With respect to the complaint allegations concerning Edwards, the ALJ concluded that she failed to establish a prima facie case of discrimination because Powers' decision not to place her on a five-year cycle was not objectively adverse. PERB uses an objective test to decide whether an employer's action is adverse to an employee. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 28-29.) The question is "whether a reasonable person *under the same circumstances* would consider the action to have an adverse impact on the employee's employment." (*Jurupa Unified School District* (2013) PERB Decision No. 2309, p. 8 [emphasis added]; *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

In finding that the denial of Edwards' request to be placed on a five-year evaluation cycle was not adverse, the ALJ contrasted this case with the facts in *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa I*) and *Jurupa Unified School District* (2015) PERB Decision No. 2458 (*Jurupa II*). In those cases, the Board held that a decision to evaluate a permanent certificated employee in two consecutive school years was an adverse action because, under the circumstances, it signaled a performance deficiency. (*Jurupa I*, *supra*, PERB Decision No 2283, pp. 18-19; see also *San Diego Community College District* (2019) PERB Decision No. 2625, pp. 6-8 [discussing *Jurupa I* and *Jurupa II*] (*San Diego CCD*).)

Here, the ALJ concluded that no reasonable teacher would infer that the decision not to place Edwards on a five-year cycle reflected some deficiency in her qualities as a teacher. Specifically, it was undisputed that Powers never approved such requests unless and until he

had the opportunity to evaluate the teacher at least once.[6] Since Powers had no such opportunity with Edwards, his decision was consistent with his practice. (See *San Diego CCD*, *supra*, PERB Decision No. 2625, p. 9 [no adverse action where evidence established a practice of off-cycle evaluation before granting higher status to adjunct teachers].)

We agree that the facts of this case do not support Edwards' contention that she suffered an adverse action. In light of the record evidence, Edwards' request amounted to one for special treatment, i.e., Powers would have to suspend his normal practice in order to place her on a five-year evaluation cycle. Under these circumstances, the District's decision not to create an exception but instead to follow its existing practice does not amount to an adverse action.

Even if Powers' decision could be considered an objectively adverse action, we would still find that the District proved it would have denied Edwards' request regardless of her protected activities. Indeed, the same evidence of consistent practice that disproves the alleged adverse nature of the decision proves that it was not taken because of Edwards' efforts to vindicate her rights or those of her colleagues. Powers did not treat Edwards any differently than he treated other bargaining unit members. While Edwards may believe she was denied a five-year evaluation cycle because of her protected conduct, the record establishes that such conduct had nothing to do with the decision. On this additional basis, we affirm the proposed decision's dismissal of the complaint allegations involving Edwards. (See *San Diego CCD*,

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[6] After the close of the record, Edwards attempted to introduce evidence to establish that Powers sometimes agreed to place teachers on five-year evaluation cycles without having personally evaluated them before. The ALJ correctly rejected Edwards' proffered evidence since she did not file a motion to reopen the record. (*Oxnard Union High School District* (2018) PERB Decision No. 2617, p. 3.) On exceptions, Charging Parties again refer to these rejected exhibits without following the proper procedure for making them part of the evidentiary record, and thus we, like the ALJ, decline to admit or rely upon them.

supra, PERB Decision No. 2625, pp. 9-10 [concluding that the district would have evaluated charging party at the time it did regardless of his protected activities because he was part of a group of similarly situated instructors evaluated at the same time].)

Rosales

Rosales' exceptions are similarly without merit. Rosales is the only one of the Charging Parties to have established a prima facie case. The District's decision to evaluate her in consecutive years falls squarely within the ambit of *Jurupa I* and *II*, and thus constitutes an adverse action. Moreover, we find no reason to disturb the ALJ's finding that this is a mixed motive case, based on some evidence linking Powers' decision, in part, to Rosales' protected activity. However, we also agree with the ALJ that the District established its affirmative defense. While Rosales had a contractual right to volunteer for the PAR Program,[7] the District has persuaded us that Powers would have scheduled Rosales for consecutive evaluations even in the absence of such protected activity, based solely on concerns relating to Powers' performance. The ALJ correctly weighed the District's evidence in support of its affirmative defense against the evidence supporting Rosales' prima facie case and concluded that Powers would have followed the same course of action even absent any protected activity. (*Los Angeles Unified School District* (2019) PERB Decision No. 2647, p. 21 [discussing proof of an employer's affirmative defense].)

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[7] In finding Rosales engaged in protected activity by volunteering to participate in the PAR program, the attached proposed decision relies on *Jurupa I*, *supra*, PERB Decision No. 2283. In that case, a teacher engaged in protected activity by filing complaints under the collective bargaining agreement seeking to enforce the agreement's evaluation and non-discrimination provisions. (*Id.* at p. 16.) Here, Rosales was not attempting to enforce the collective bargaining agreement but merely exercising a right provided to her under the agreement. Thus, *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, in which an employee engaged in protected activity by exercising her right under the agreement to report workplace safety issues, provides more apt support for the proposed decision's finding. (*Id.* at p. 18.)

The Picketts

The Picketts' cases hardly merit a mention. As the ALJ correctly determined, Mr. Pickett was not subjected to a second, consecutive evaluation, and none of the conduct he complained of (an informal walkthrough of his classroom during the first week of school and a routine, constructive conversation with his principal) amounted to anything approaching an adverse action. Similarly, the record is clear that the District did not approve the sale of novelty pencils as a fundraiser to interfere with Ms. Pickett's ability to breathe. Ms. Pickett did not and cannot prove that the District subjected her to an adverse action under any rational interpretation of the law. Therefore, the ALJ correctly determined that neither of the Picketts demonstrated a prima facie case of discrimination.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-6088-E are DISMISSED.

Members Shiners and Krantz joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LORI E. EDWARDS, DAVID PICKETT, VICTORIA PICKETT, and KIM ROSALES, Charging Parties, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-6088-E PROPOSED DECISION (March 30, 2018)

Appearances: Lori E. Edwards on behalf of herself, David Pickett, and Victoria Pickett; Donald R. Holben & Associates by Andrew A. Rosenberry, Attorney, for Kimberly Rosales; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Lake Elsinore Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

Several public school teachers, all of them union representatives, allege in this case that they suffered retaliation by their public school employer because of their exercise of rights under the Educational Employment Relations Act (EERA).[1] The employer denies any statutory violation.

PROCEDURAL HISTORY

On November 11, 2015, Charging Parties Lori E. Edwards, David Pickett, Victoria Pickett, and Kimberly Rosales filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Lake Elsinore Unified School District (District) alleging retaliation because of the their protected activities.

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[1] EERA is codified at Government Code section 3540 et seq.

On January 11, 2016, the District filed a position statement in response to the charge allegations.

On January 19, 2016, Charging Parties filed a first amended charge.

On February 5, 2016, the District filed a position statement in response to the first amended charge.

On February 12, 2016, PERB Office of the General Counsel issued a complaint (PERB complaint) alleging that that the District took various adverse actions against each of the Charging Parties in response to their EERA-protected activities.

On February 16, and 22, 2016, Charging Parties filed a second amended charge and third amended charge, respectively. PERB Office of the General Counsel considered these filings to be motions to amend the PERB complaint.

On March 3, 2016, the District filed its answer, denying all material allegations and asserting various affirmative defenses.

On March 21, 2016, the District filed opposition to Charging Parties' motions to amend the PERB complaint.

On April 1, 2016, Charging Parties filed two motions objecting to and urging rejection of the District's opposition to its motions to amend the PERB complaint.

On April 8, 2016, the parties participated in an informal settlement conference with a PERB agent, but the case did not settle.

On April 11, 2016, PERB Office of the General Counsel dismissed, with prejudice, Charging Parties' motions objecting to and urging rejection of the District's opposition to the motions to amend the PERB complaint.

On May 17, 2016, PERB Office of the General Counsel issued a letter refusing to join in Charging Parties' verbal request to appeal the April 11, 2016 dismissal of Charging Parties' motions pursuant to PERB Regulation 32200.[2]

In May and June 2016, both parties filed several other motions as discussed below.

A prehearing conference had been scheduled for May 27, 2016, but was cancelled due to multiple scheduling conflicts. I informed the parties via e-mail on May 26, 2016, that I would issue a written ruling on all outstanding motions in the case by the end of July 2016.

On July 29, 2016, I issued a written ruling denying: (1) Charging Parties' motions to amend the PERB complaint filed on February 16, and 22, 2016; (2) Charging Parties' "Motion to Revoke the Respondent's Response to Charging Parties' Motions…and Grant Sanctions" filed on May 5, 2016; (3) Respondent's Cross-Motion for "Attorneys' Fees in the Amount of $1440.00" filed on May 17, 2016; and (4) Respondent's "Motion for Bifurcation/Severance of Issues" regarding Ms. Rosales's claims filed on June 3, 2016.

Seven days of formal hearing were held between October 3-11, 2016.

After extensions of time were requested and granted, the parties filed closing briefs by March 3, 2017.[3] At that time the matter was submitted for proposed decision.

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[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[3] Several exhibits that were not introduced into the record during the hearing were attached to the brief filed by Ms. Edwards. Ms. Edwards did not request to reopen the record to include additional evidence, nor did she explain her reasons for failing to introduce the documents during the hearing. Because the District was not provided with the opportunity to examine witnesses over these documents or to object to their introduction, they have not been considered herein.

FINDINGS OF FACT

Jurisdiction

The District admits that it is a public school employer within the meaning of EERA section 3540.1, subdivision (k), and therefore within PERB's jurisdiction. Charging Parties are public school employees within the meaning of EERA section 3540.1, subdivision (j).

Background and Undisputed Facts

All of the Charging Parties are permanent employees of the District and work as kindergarten, first, and second grade teachers at Lakeland Village School (LVS). Teachers are exclusively represented in their employment relations with the District by the Lake Elsinore Teachers Association (LETA). At the time of the hearing, in October 2016, Ms. Edwards had been employed by the District for 13 years. Mr. Pickett had been employed by the District for 30 years. Ms. Pickett had been employed by the District for 19 years, and Ms. Rosales had been employed by the District for 26 years. Nick Powers had been Principal of LVS since July 2012. Valerie Roark was Co-Principal of LVS through the end of the 2014-2015 school year, when she retired. After Ms. Roark retired, at the start of the 2015-2016 school year, Cristy Popp and Felipe Flores began working as administrators at LVS. Each of them held the title, "Dean of Students."

On the first day of hearing in this matter, the District and the Charging Parties stipulated that the following facts alleged in the PERB complaint regarding Charging Parties' protected activities are true and within the knowledge of the District, and thus, are established:[4]

> 4. Kim Rosales exercised rights guaranteed by the Educational Employment Relations Act as follows:

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[4] All of the text quoted below is copied verbatim from the PERB complaint, including the brackets and the text within.

(a) At all times relevant herein, Ms. Rosales served as an elected LETA site representative at LVS.

(b) Since 2010 and continuing, she actively participated in union activities by "engaging in elections, representing bargaining unit members' rights at the site rep council meetings, investigating grievance issues, filing complaints with the [D]istrict, meetings with principal (Nick Powers) regarding bargaining unit members' employer employee relations, basic statutory employment rights, and PERB hearings."

(c) On or about May 20 through June 5, 2015, Ms. Rosales testified at a PERB hearing in *Lori E. Edwards v. Lake Elsinore Unified School District*, PERB Case No. LA-CE-5908-E.

7. Victoria Pickett exercised rights guaranteed by the Educational Employment Relations Act as follows:

(a) Since September 1, 2011 and continuing, Ms. Pickett served as an elected LETA alternative site representative at LVS.

(b) Since 2010 and continuing, she has been an active union participant by "engaging in elections, representing bargaining unit members' rights at the site rep council meetings, investigating grievance issues, filing complaints with the [D]istrict, and PERB hearings."

(c) On or about May 20 through June 5, 2015, Ms. Pickett testified at a PERB hearing in *Lori E. Edwards v. Lake Elsinore Unified School District*, PERB Case No. LA-CE-5908-E.

10. David Pickett exercised rights guaranteed by the Educational Employment Relations Act as follows:

(a) Since September 1, 2011 and continuing, Mr. Pickett served as an elected LETA alternative site representative at LVS.

(b) Since 2010 and continuing, he has been an active union participant by "engaging in elections, representing bargaining unit members' rights at the site rep council meetings, investigating grievance issues, filing complaints with the [D]istrict, regarding bargaining unit members' employer employee relations, basic statutory employment rights, and a witness in a PERB hearing. [sic]"

(c) In or about May 20 through June 5, 2015, Mr. Pickett testified at a PERB hearing in *Lori E. Edwards v. Lake Elsinore Unified School District*, PERB Case No. LA-CE-5908-E.

14. Lori Edwards exercised rights guaranteed by the Educational Employment Relations Act as follows:

(a) Since August 10, 2008 and continuing, Ms. Edwards served as an elected LETA site representative at LVS.

(b) Since 2008 and continuing, Ms. Edwards was also an active participant in union activities by "engaging in elections, representing bargaining unit members' rights at the site rep council meetings, investigating grievance issues, filing complaints with the [D]istrict, meetings with principal (Nick Powers) regarding bargaining unit members' employer employee relations, basic statutory employment rights, and PERB hearings."

(c) In March 2014, Ms. Edwards filed *Lori E. Edwards v. Lake Elsinore Unified School District*, PERB Case No. LA-CE-5908-E; a PERB complaint was issued on November 6, 2014; she participated in a PERB informal settlement conference on January 22, 2015; and she participated in a formal hearing on May 20-22, and June 5, 2015.

<u>Victoria Pickett</u>

1. <u>2012-2013 and 2013-2014 School Years</u>

Ms. Pickett has respiratory allergies and asthma. Scented items are sometimes a trigger for those conditions. The District has an Administrative Regulation (AR) addressing policies for indoor air quality (AR 3514). A portion of this AR is regarding common irritants on school properties (sec. 11). It reads:

> Staff and students shall be asked to refrain from bringing common irritants such as furred or feathered animals, stuffed toys that may collect dust mites, scented candles, incense or air fresheners and from using perfume or cologne, scented lotion or hair spray, nail polish or nail polish remover, or other personal care products that are not fragrance-free in classrooms or other enclosed areas or buildings.

AR 4032 covers procedures for employees to request accommodations for medical issues and contains an appeal procedure if an employee is not satisfied with the District's response. AR 4032 cites the Americans With Disabilities Act (ADA) (42 U.S.C., § 12101 et seq.) and the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.), among other laws, as the basis for the procedures. Kip Meyer, District Assistant Superintendent of Student and Instructional Support Services,[5] testified that not all accommodation issues are handled at the District level. Some issues can be handled locally between the site administrator and the employee needing accommodation. If the issue cannot be resolved locally, then a meeting may be held between the employee, site administrator, and District administrators. Both methods are considered part of the "interactive process" for determining a reasonable accommodation under the ADA.

In January 2013, Ms. Pickett informed Mr. Powers of her medical conditions by providing a doctor's note, which stated:

> Victoria Pickett has been under my care for the treatment of respiratory allergies since 1994.
>
> She has been able to keep her respiratory symptoms under good control most of the time. Exacerbations have been triggered by pollutants and by odors. Examples of needless exposure to odiferous irritants include perfumes, de-odorizing restroom sprays and plug-ins. These should not be used in the staff restrooms or the handicapped restrooms.
>
> Her symptoms are sensitive to air quality and temperature. Her classroom should be well ventilated and at 70 degrees.
>
> Please confer with her on her needs to stay well at work.

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[5] Dr. Meyer held the position of Assistant Superintendent of Personnel Support Services between 2006 and 2016.

In May 2013, Ms. Pickett gave another doctor's note to Mr. Powers. This note said Ms. Pickett had been recently treated for asthma and that her symptoms are made worse by being in a certain conference room at school, so that room should be avoided. Ms. Pickett testified that Mr. Powers did not hold a meeting with her in response to either doctor's note and he did not make any announcements to staff about avoiding bring scented items to school. She did not describe any discussions they had when she gave him those notes, nor did she say that she asked Mr. Powers to make such an announcement. In April 2014, Ms. Pickett e-mailed

Mr. Powers about a scented air freshener in the school office triggering her asthma symptoms and asked for it to be removed. Mr. Powers then confirmed that the item had been removed from the area. In May 2014, Mr. Powers moved the location of teacher interviews in which Ms. Pickett was participating to the library because she could not safely be in the conference room adjacent to his office. Ms. Roark testified about taking a number of actions in response to Ms. Pickett raising concerns about her medical condition, from ensuring that Ms. Pickett did not have to attend meetings in a particular conference room to removing scented lotion from a restroom.

2. 2014-2015 School Year

There is a substitute teacher, Teacher X,[6] who is known for wearing a lot of perfume to cover her smoking habit. Teacher X was allowed to substitute in Ms. Pickett's classroom in late May 2015. Ms. Pickett found out about Teacher X being assigned to her room while she was home sick on a Wednesday morning. She learned about this from Mr. Pickett who was present that day at school. Ms. Pickett e-mailed Mr. Powers and Ms. Roark right away, asking

[6] The teacher's name will not be used here to protect privacy.

them to remove Teacher X from her classroom for fear that the lingering odors may trigger an asthma attack upon her return to work on Friday. Mr. Powers responded to Ms. Pickett that it was too late to move Teacher X to another room that day, but they would do so the next day. Teacher X was in fact reassigned the following day. As a result of Teacher X having been in her classroom, Ms. Pickett could not return to it that Friday and had to call out sick again on the following Monday. Ms. Pickett let the administrators know that it was because of Teacher X having been in her room. Mr. Powers responded to Ms. Pickett, stating that if she thought she had been made sick by an exposure at work, she had the right to file a Workers Compensation claim. Ms. Pickett did not do so.

On June 3, 2015, Ms. Pickett e-mailed Mr. Powers saying that she thought there was "a string of items that ought to be dealt with by having an ADA meeting." She identified those items as including, keeping her safe when allergens are added to her classroom or common areas (in spite of the AR's prohibition); yearly summer cleaning of her classroom carpet (which needs to occur early so there is time to air out her room before she returns); her necessary avoidance of the conference room near his office; and the size of her classroom for easy wheelchair access.[7] Mr. Powers responded to her e-mail noting that he would schedule her carpet cleaning to be done early with the custodial staff. He also stated his intention to schedule an interactive process meeting. He asked Ms. Pickett to bring a physician's letter that stated the nature of the disability/impairment; whether the disability/impairment limits a major life activity and in what ways; and "verification of what proposed accommodation may be appropriate." No interactive process meeting was held after this e-mail exchange.

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[7] Interactive process meetings were held previously with District officials on the wheelchair issue.

3. 2015-2016 School Year

a. The "Smencils" Fundraiser

On October 1, 2015, Ms. Edwards e-mailed Mr. Powers, copying Ms. Pickett, requesting that Mr. Powers make an announcement to staff regarding the need to follow the District's AR related to indoor air quality. Mr. Powers responded to Ms. Edwards asking if there was a specific person he could speak with first, because he preferred to begin by addressing issues with individuals. The record does not reflect whether Ms. Edwards responded to Mr. Powers.

Sometime in the beginning of October 2015, there was a schoolwide announcement that the school would be selling a kind of scented pencils called "Smencils" as a fundraising activity. Mr. Powers testified that the idea for the fundraiser came from sixth grade teacher Jennifer Maurer and he approved it. On October 8, 2015, Ms. Pickett e-mailed Mr. Powers saying the sale of scented items on school grounds concerned her, as it may impact her health. The next day, Mr. Powers responded to Ms. Pickett in relevant part as follows:

> I do appreciate your concern regarding the scents of the pencils. I would like to offer some information and a suggestions [sic] to help alleviate your concerns. 1. Inform your students, in the event they purchase a Smencil, that they are not to remove it from the sealed/capped case they come in. This could be expressed to both students in your class and in Drama Club. 2. Share this information with your grade level team as well, in the event a student(s) from another class should be in your room for any reason. 3. Ms. Maurer will keep the supply she is selling in her classroom and the office will not be housing or storing the items, therefore you will be able to access the office without worry of Smencil scents.

Mr. Powers testified that when Ms. Maurer suggested selling Smencils, it never occurred to him that they might cause a problem for Ms. Pickett's respiratory conditions. He was familiar with Smencils because his wife, who is a teacher in another school district, sold

them at her school with great success. When Smencils are stored inside of their plastic case with the cap secured, no scent is detectable. Mr. Powers explained that the decision to store the product in Ms. Maurer's classroom rather than in the office was made to help alleviate the risk for Ms. Pickett. Mr. Powers also contacted then-Certificated Director of Personnel Support Services Tracy Sepulveda with Ms. Pickett's concern over the sale of Smencils.[8] Ms. Sepulveda testified that when he explained how Smencils were stored, she did not think there would be any problem for Ms. Pickett.

On October 16, 2015, Ms. Pickett e-mailed Mr. Powers stating that a sibling of one of her students had brought a Smencil into her classroom, which she ordered removed. She also noted that a former student of hers brought a Smencil for her to smell while she was collecting her class from the recess line. Ms. Pickett stated in the e-mail, "[Ms. Edwards] was there and watched the incident." Ms. Pickett did not describe in the e-mail that any distressing symptoms had occurred as a result of the student asking her to smell the Smencil. In their testimony, both Ms. Edwards and Ms. Pickett testified that as a result of this latter incident, Ms. Pickett was so overcome by an asthma attack that Ms. Popp had to come in and cover Ms. Pickett's class. Ms. Pickett described that the student waved the Smencil under her nose. She said she had to use her rescue inhaler and that Ms. Edwards called the office to ask for someone to cover. Ms. Edwards said Ms. Pickett was "gasping for air and in tears."

Ms. Popp, however, denied that she had any knowledge of that event or that she ever had to cover Ms. Pickett's classroom because Ms. Pickett was having an asthma attack. Ms. Popp denied that she was even aware before the hearing that Ms. Pickett suffers from asthma. Ms. Popp was only aware that Ms. Pickett has allergies to strong smells. Ms. Popp

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[8] Part of Ms. Sepulveda's duties was handling ADA issues.

testified to responding to a radio call for coverage for Ms. Pickett on only one occasion. Ms. Popp covered Ms. Pickett's class for around eight to ten minutes. When Ms. Pickett returned to her classroom, Ms. Pickett stated that she had to use a restroom that was far away because the nearest one had a strong perfume smell. Ms. Popp asked Ms. Pickett if she was okay and ready to continue teaching, and Ms. Pickett said she was fine.

Mr. Powers responded to Ms. Pickett's latest e-mail on October 19, 2015. He said that the sale of Smencils was going to be suspended during the school day. Mr. Powers testified that this was done to try to further alleviate Ms. Pickett's concerns. On October 30, 2015, Ms. Pickett received an e-mail from Ms. Maurer to all staff discussing the sale of Smencils at the Fall Festival, which is an after-school event. Also around this time, office staff called in two of Ms. Pickett's students to give them Smencils as a reward. Ms. Pickett did not raise these issues with Mr. Powers because she did not think he would do anything about it. Ms. Pickett did not file a Workers Compensation claim related to the October 16, 2015, or any other incident related to Smencils. Ms. Pickett has also never utilized the appeal process in AR 4032.

b. Interactions With the Deans of Students Involving Teacher X

Ms. Edwards testified about an incident where she witnessed Ms. Pickett having an asthma attack in the school office on a day when Teacher X was on campus. Ms. Edwards said that Ms. Popp and Mr. Flores were in the office and she told them that Ms. Pickett was having breathing difficulty but "both of them just ignored it and just walked away." Ms. Pickett did not testify about this event. Mr. Flores denied having such a conversation with Ms. Edwards or that he ever witnessed Ms. Pickett having an asthma attack in the office on a day when Teacher X was on campus. He actually had never been informed before the hearing that

Ms. Pickett has asthma. He did recall speaking with Ms. Pickett one day in the teacher's lounge about Teacher X wearing a lot of perfume and her saying that "the smell was a lot for her." Mr. Flores asked Ms. Pickett if there was something he could do, and testified about the exchange as follows:

> She didn't want to make a big deal about it. I offered to talk to the person and open a door to the lounge, and she said she didn't want a big deal. She said, no, thank you, I don't want to make a big deal about it.

Mr. Flores did not observe that Ms. Pickett was in any distress. Ms. Popp was not present. Ms. Pickett did not confirm or deny Mr. Flores's account.

Ms. Popp also denied that Ms. Edwards ever told her that Ms. Pickett was having an asthma attack. She recalled an event when Ms. Pickett was outside the office when Ms. Popp arrived to work. When she went inside someone told her that Ms. Pickett had complained about Teacher X's strong perfume. Ms. Popp could see Ms. Pickett and Ms. Edwards through a window as they were talking outside. Ms. Pickett did not appear to be in any distress. She did not talk to either of them. As she was walking into her own office, Ms. Edwards came inside but she did not hear what Ms. Edwards was saying to anyone.

<u>Evaluation Procedures</u>

1. <u>The Collective Bargaining Agreement</u>

LETA and the District are parties to a collective bargaining agreement (CBA) that was in effect at all times that are relevant to the case. Article 9 covers evaluation procedures. The following sections of Article 9 are germane to many of the issues presented here:

> Section 9.1.1 [in relevant part]
> Each unit member will be notified within 20 working days of the start of their work year who shall be their evaluator.

Section 9.2
The evaluator shall base the evaluation on the standards listed in Appendix 6d,[9] instructional goals and objectives, and information gathered through observation conferences with unit member, and first hand knowledge of total performance. Instructional Goals and Objectives are to be completed by each bargaining unit member within 40 days of the start of the bargaining unit members' work year[.]

Section 9.14
Employees who successfully pass their probationary period shall become permanent employees. Permanent unit members shall be evaluated at least once every two (2) years[10] and at least every five (5) years for personnel with permanent status who have been employed at least ten (10) years with the school district, are highly qualified, 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.* The evaluation *shall be completed thirty (30) days prior to the unit members' last contracted day of the evaluation year.*

Section 9.14.1
Any permanent unit member receiving an evaluation report which includes a Needs Improvement or Unsatisfactory in the *overall* evaluation shall be evaluated the following year.

Section 9.15
The evaluator shall meet with the unit member within forty (40) working days from the start of the bargaining unit member's work year to provide a copy of the evaluation criteria, and provide examples of yearly objectives.

Section 9.16
The evaluation shall include at least one (1) formal observation.

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[9] The standards in Appendix 6d are: (1) Engaging and Supporting all Students in Learning; (2) Creating and Maintaining Effective Environments for Student Learning; (3) Understanding and Organizing Subject Matter for Student Learning; (4) Planning Instruction and Designing Learning Experiences for All Students; (5) Assessing Student Learning; (6) Developing as a Professional Educator; and (7) Student Progress Towards the Attainment of Academic Standards.

[10] Unlike permanent employees, probationary employees are evaluated annually. (Section 9.13.)

Section 9.16.2
The formal written observation shall be mutually arranged at least two (2) working days in advance of the formal observation. The formal observation shall be preceded by a pre-conference to discuss the observation lesson. At that time, a discussion of the observation lesson will take place.

Section 9.16.4
Informal observations may take place at any time and need not be pre-conferenced or written.

Section 9.18
When a deficiency is noted on the *observation form* which may result in an "*unsatisfactory*" rating in the unit member's *final evaluation report*, a follow-up observation shall be arranged between the evaluator and the unit member before the evaluation is written.

Section 9.19
Prior to thirty (30) working days before the end of a bargaining unit member's work year, an evaluation conference will be held to discuss the results of the evaluation. The evaluator will provide the unit member with a copy of the evaluation.

Section 9.21
All evaluation reports shall include a notation as to the overall evaluation.[11] Needs Improvement and Unsatisfactory evaluations must be based on a minimum of two (2) mutually arranged formal written observations.

Section 9.23
Informal Observation – Walkthrough
The District and Association agree that informal observations (walkthroughs) may occur at all sites to gather global documentation for District Program Compliance (including but not limited to, PID and ELL programs). Data collected to

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[11] The "Bargaining Unit Members Evaluation Form" records an employee's overall performance as being either: Unsatisfactory (U), Needs Improvement (N), Meets District Standards (M), or Exceeds District Standards (E). Additionally, the employee is scored in the seven standards discussed above in footnote 9, as well as in an eighth standard, "Adjunct Duties." Each standard contains between two and six subcategories in which the employee is scored with a U, N, M, or E, for a total of 34 subcategory ratings. Evaluator comments with "specific suggestions for improvement" are required for U and N ratings. Comments are encouraged for M and E ratings.

> document program compliance during such informal observations shall not include information that can be used to identify the unit member being observed. Information gathered by informal observers *other than the unit member's evaluator* shall not be applied to the unit member's evaluation. Any data collected by the unit member's evaluator during an informal observation *that may have a negative impact on the unit member's evaluation shall be informally shared with the unit member within five (5) working days.* A summary of the school wide data collected during informal observations shall be presented to all unit members at the site.

(Underscore in original; italics added.)

2. District and Site Practices

Dr. Meyer testified that when he was Assistant Superintendent of Personnel Support Services, his staff was responsible for compiling a list of teachers who were due for evaluation in every school year at each school site. The list for each school site was then distributed to the site administrator. Dr. Meyer personally reviewed each certificated evaluation before they were placed in the employee's personnel file. Dr. Meyer testified that the District sometimes chooses to evaluate permanent teachers in consecutive years if there is a performance concern, even if the overall rating for the teacher is Meets District Standards. At times he would contact a site administrator asking if a consecutive year evaluation should be done, if he noticed performance concerns had been highlighted in the evaluation. Performance concerns are reflected by N or U ratings within the subcategories, and/or by written commentary suggesting the need for improvement. Sometimes the site administrator would contact him asking to evaluate again. He testified that, in his experience, a consecutive evaluation for a permanent employee has happened only around 10 times. The District introduced several documentary examples where permanent teachers had been evaluated in consecutive years after receiving an overall Meets District Standards rating.

Dr. Meyer and LETA President Bill Cavanaugh also testified that the District has routinely "pushed" a teacher's scheduled evaluation to the following year where a teacher has been absent for an extended period of time during the scheduled evaluation period.[12] Several documentary examples of this practice were also introduced.

Mr. Powers testified that he notifies teachers via a group e-mail or individual e-mails near the beginning of the school year when they are due for evaluation during that year. The e-mail notes the administrator who will be the teacher's evaluator. Mr. Powers does not grant requests for a five year evaluation cycle unless he has personally performed an evaluation of the teacher making the request. In 2015-2016, Mr. Powers notified teacher Deanna Cook that she was due for evaluation by Ms. Popp. Ms. Cook responded that she thought there had been an agreement to place her on a five year plan. Mr. Powers had performed Ms. Cook's previous evaluation in 2013-2014. Mr. Powers told Ms. Popp to approve Ms. Cook's request.

Mr. Powers testified that he has yet to give an overall rating of Exceeds District Standards on a teacher's summative evaluation. Mr. Powers generally does not schedule formal observations of teachers on Wednesdays, because grade level "PLC" meetings,[13] where

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[12] Mr. Cavanaugh was subpoenaed to testify for the District in this case. Mr. Cavanaugh has also testified as a witness for the District in other PERB cases involving the Charging Parties and for the District in an arbitration involving Ms. Edwards. The District introduced an e-mail exchange between Mr. Cavanaugh and Ms. Edwards where Ms. Edwards expressed her vehement disagreement with certain positions taken by him and other LETA leadership regarding interpretation of the CBA. Mr. Cavanaugh testified that the reason he testified in PERB Case No. LA-CE-6082-E involving the Charging Parties was because he believed that the position taken by the Charging Parties in that case, if successful, would have been detrimental to the unit as a whole. Charging Parties argue that Mr. Cavanaugh is biased against them and therefore his testimony should be disregarded. I decline to do that. I found Mr. Cavanaugh to be a credible witness who answered the questions posed to him directly and without hesitation. He testified consistently during his direct and cross examinations. His disagreement with the Charging Parties' contract interpretations does not show that he is biased.

[13] The acronym was not defined in the record.

teachers collaborate over instruction, are held on that day. Permanent teachers' evaluations are due at least 30 days before the end of the school year, however, personnel services often wants them to be submitted a week before that.

David Pickett

1. 2014-2015 School Year

At some point in or around March 2015, Ms. Edwards notified Mr. Pickett that she would be requesting that he testify at a PERB hearing during the month of May in Case No. LA-CE-5908-E. This prompted him to "mention" to an office secretary, sometime in March or early April, that he would need coverage for his classroom during the hearing, but he was still unsure of the exact dates of his appearance at the hearing at that time. There is no indication in the record that Mr. Pickett had any discussion with Mr. Powers about that topic in March or April 2015.

Mr. Pickett teaches second grade. The 2014-2015 school year was an evaluation year for Mr. Pickett. Mr. Powers was his evaluator. Mr. Pickett testified that during his 30-year employment with the District, he has only been evaluated once every two years. The formal observation was held on March 23, 2015. Mr. Powers and Mr. Pickett met to talk about it on March 26, 2015. Mr. Powers had prepared a written observation report consisting of five paragraphs describing the observed lesson. In four of those paragraphs, Mr. Powers made a suggestion on how to improve teaching techniques relating to what had been observed. For example, after noting that six to eight students had not participated in a "sing-a-long" activity, Mr. Powers stated, "[o]ne suggestion would be to have students work in groups prior to the choral sing[-]a[-]long."

Mr. Pickett received his 2014-2015 evaluation form on or about April 13, 2015. The overall ranking was Meets District Standards. Out of 34 subcategories, he received 32 M rankings and two N rankings. The N marks centered on the areas of student engagement and professional growth. Mr. Powers's written comments in these areas were, "should seek to incorporate more interactive strategies for student collaboration and engagement[,]" and "continue to follow through on professional growth opportunities." This was the first time that Mr. Pickett had ever received an N on any subcategory in his summative evaluation. Three written comments were also included in subcategories rated M, for example, under number 31, "the teacher works with colleagues to improve professional practice," Powers noted that Mr. Pickett "[w]orks in a collaborative manner with the 2nd Grade team."

Mr. Pickett wrote a written response to the evaluation, noting his belief that several sections of the CBA evaluation article had not been followed, including sections 9.15, 9.16.2, and 9.23. According to Mr. Pickett, the N ratings he had received in two subcategories were inappropriate because he had not been warned in advance that there was any need for improvement, and consequently there was no time for him to remediate those concerns before the summative evaluation. He also refused to sign his evaluation. He testified that while he is always open to training opportunities, he did not understand the reference being made in that regard because he attended all mandatory training at the beginning of the school year.

Mr. Powers testified that after both Mr. Pickett and Dr. Meyer raised concerns to him about the evaluation, he decided to destroy it and issue a new one. The new evaluation, dated April 29, 2015, contained all M ratings in the subcategories. The overall rating was still Meets District Standards. The comments in the subcategories that had been rated N were slightly expanded, while the other three comments remained unchanged. The comment referencing

seeking out professional growth opportunities added training related to Common Core instruction. Regarding student engagement, the comment stated,

> A recommendation is for Mr. Pickett to seek to incorporate more interactive strategies for student collaboration and engagement, to promote inquiry, discussion, and language development throughout his instruction. This would promote problem solving and think critically [sic] as Common Core instruction requires.

2. <u>2015-2016 School Year</u>

Approximately four days into the new school year, Mr. Powers and a couple of other administrators entered Mr. Pickett's classroom, stayed for around five minutes, and left without speaking to Mr. Pickett. Mr. Pickett testified that this was the first time administrators had ever come into his classroom during the first week of school. However, Mr. Powers and Ms. Roark testified about doing frequent informal walkthroughs of every LVS classroom at least twice per month, and especially at the beginning of the school year. Mr. Pickett acknowledged during cross examination that Mr. Powers informally walks through and observes his classroom less than once per month, and that he has seen Mr. Powers do that in other classrooms as well.

The day before the administrators' classroom visit, Mr. Pickett had been addressing a group of teachers in the teachers' lounge about pre-designating a Kaiser physician as the employee's medical provider for worker's compensation issues. Mr. Powers was in the lounge and overheard the conversation. Mr. Powers asked Mr. Pickett to send him information about the topic, which Mr. Pickett later did via e-mail. Mr. Powers testified that the reason he asked Mr. Pickett to send him information was because his own medical plan is Kaiser and he was unaware of that option.

The same day as the administrator's classroom visit, Mr. Powers ran into Mr. Pickett crossing the quad. Mr. Powers told Mr. Pickett he wanted to set a meeting to discuss ways "to support" Mr. Pickett in the coming year. The word "support" held an undesirable connotation for Mr. Pickett, as he took it to be referring to the negative comments in his destroyed 2014-2015 evaluation. This was the first time that an administrator had offered him support after receiving an overall rating of Meets District Standards in his evaluation. Mr. Pickett e-mailed Mr. Powers asking for clarification on the reasons for the requested meeting. Mr. Powers responded that it was to discuss ways for Mr. Powers to offer support in the area of student collaboration and engagement. Mr. Pickett replied to that e-mail stating that he was glad to discuss ways to improve his classroom skills and would "even be open to suggestions for District trainings, or conferences that might be useful." Mr. Pickett testified that he stated those things to Mr. Powers just to "cover himself."

A meeting was held on September 8, 2015, between Mr. Powers and Mr. Pickett. Ms. Edwards also attended, acting as Mr. Pickett's representative. According to Ms. Edwards, Mr. Powers was "aggressive and hostile" during the meeting, and she had to pull him aside to say that she was not there as a teacher, but as a union representative, and that he needed to "calm down" and let her represent Mr. Pickett. Ms. Edwards also asked several times for a copy of Mr. Pickett's last evaluation, but Mr. Powers did not furnish it, saying she should get it from Mr. Pickett. Mr. Pickett described the atmosphere of the meeting as "tense and argumentative." Mr. Pickett stated that Mr. Powers discussed interactive strategies that Mr. Powers wanted him to use in the classroom, and that starting the evaluation process again "was mentioned." Mr. Powers admitted that the meeting was "a little tense." According to Mr. Powers, Ms. Edwards said they believed the purpose of the meeting was to discuss Mr.

Pickett's previous evaluation, which Mr. Powers denied. He testified that he only intended to discuss support and professional development opportunities with Mr. Pickett and it was Ms. Edwards who raised the issue of evaluation. Mr. Powers admitted that he said during the meeting that he had briefly considered evaluating Mr. Pickett again during the 2015-2016 school year, but had "decided against it."

Mr. Powers testified that Mr. Pickett was not included on the list compiled by personnel services of employees to be evaluated in 2015-2016. Mr. Powers also did not add Mr. Pickett's name to the list. Dr. Meyer said, "I think so," when he was asked whether he had discussed with or recommend to Mr. Powers that Mr. Pickett be evaluated that year. Mr. Pickett admitted that he never received an e-mail from Mr. Powers informing him that he was to be evaluated in 2015-2016, nor was he told that information verbally. There was no attempt by Mr. Powers to schedule a time for a formal observation of Mr. Pickett's classroom during the 2015-2016 school year and none occurred. Mr. Pickett never received an evaluation document for that year. After the September 8, 2015 meeting and a follow-up e-mail from Mr. Powers on September 13, 2015, summarizing the meeting, Mr. Powers had no further communication with Mr. Pickett about interactive strategies or training opportunities during the remainder of the school year.

<u>Lori Edwards</u>

1. <u>2014-2015 School Year</u>

    a. <u>Evaluation</u>

Ms. Edwards is a Kindergarten teacher. Her instructional day ends earlier than the other grades. Ms. Edwards was due for evaluation in the 2014-2015 school year. Ms. Edwards was notified that Mr. Powers was going to be her evaluator. Mr. Powers had never evaluated

her before. Her immediately previous evaluation had been performed by Ms. Roark in 2012-2013. Mr. Powers contacted Ms. Edwards on November 3, 2014, requesting to schedule a time for her formal observation. Ms. Edwards asked that it be scheduled after the holidays and said she only required him to give her a day or two advanced notice. Mr. Powers agreed, and said that he would schedule a time with her after Christmas. In addition to Ms. Edwards, Mr. Powers personally needed to evaluate approximately ten other teachers that year.

School resumed after winter break on January 12, 2015. Between that date and April 22, 2015, Ms. Edwards was absent from work for a total of 32 days.[14] In January and February, Ms. Edwards missed eight working days. In March and April 2015, Ms. Edwards

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[14] During cross-examination, Ms. Edwards testified about her attendance during this period as follows:

> Q Okay. But you were absent pretty frequently between January and April, is that correct, of 2015?
> A I don't consider that I was absent. I consider that the District would not allow me to work.
> MR. ROBBINS: Okay. I'm going to move to strike as being non-responsive. If you weren't at school, you're absent.
> ADMINISTRATIVE LAW JUDGE RACHO: Answer the question.
> THE WITNESS: I don't agree that if you're not in school you're absent.
> ADMINISTRATIVE LAW JUDGE RACHO: It doesn't matter whether you agree or disagree. Answer the question.
> THE WITNESS: Could you repeat that.
> MR. ROBBINS: Yes.
> BY MR. ROBBINS:
> Q Between January and April of 2015, you were absent pretty frequently, correct?
> MR. PICKETT: Vague and -- Objection.
> THE WITNESS: *I don't know*.

(Emphasis added.) During re-direct examination over the same topic, Ms. Edwards gave this testimony:

missed a total of 24 working days. Additionally, spring break was March 27 to April 5, 2015. During March and April, most of her absences were related to her request for an accommodation for a medical condition, as will be described in more detail below. As noted previously, permanent teacher evaluations are due no later than 30 working days before the end of the contractual year. The end of the contractual year was June 5, 2015. Thus, evaluations needed to be completed around the same time that Ms. Edwards returned to work in April.

Mr. Powers testified that because he and Ms. Edwards had not been able to agree to a mutually available time to perform her formal observation, there was not enough time for him to complete her evaluation by the deadline. Mr. Powers advised personnel services that he was unable to complete Ms. Edwards's evaluation. He was then instructed by officials from that office to push Ms. Edwards's evaluation to the following school year.

b. Accommodation Request

Ms. Edwards has arthritis in her thumbs, which causes pain when typing. A doctor's note dated January 30, 2015 stated that she should have restricted computer mouse use and requested a touchscreen instead of a keyboard. An interactive process meeting was held on February 10, 2015. Ms. Edwards, Mr. Powers, LETA representative Juan Caballero,[15] District "Risk Manager" Geneva Krag,[16] and Ms. Sepulveda were present at the meeting. According to

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> Q When you requested of Mr. Powers that you be observed after the holidays, at that time, did you realize that you were going to be out in January, February and March for so long?
> [¶…¶]
> THE WITNESS: No. And I wasn't out that many days that I couldn't have been evaluated in January, February or March.

[15] Mr. Caballero did not testify.

[16] Ms. Krag was retired from the District at the time of the hearing and did not testify. Her title may not be exact, but it is clear that she was a District official.

Ms. Sepulveda, several potential accommodations were discussed, including a different kind of lock on Ms. Edwards's door, an electric pencil sharpener, and the use of an iPad.

In late-February 2015, in an e-mail exchange, Ms. Edwards communicated with Mr. Powers about difficulties she was still having with using her computer because of the arthritis in her thumbs. The District had provided her with a roller mouse to try to alleviate the problem, but Ms. Edwards found that it actually caused her to move her hands even more than the previous equipment. Mr. Powers then suggested that Ms. Edwards try an iPad for upcoming student testing, and Ms. Edwards agreed, stating, "I will try it. Does it have a stand[?]" Mr. Powers followed up to see how the iPad was working, and Ms. Edwards responded that the screen was too small and stated that her doctor had suggested a "full size" touchscreen. Mr. Powers then responded that he had forwarded that information to Ms. Krag and Ms. Sepulveda.

A second interactive process meeting was held on March 24, 2015. All of the same individuals attended, except Ms. Rosales, rather than Mr. Caballero, acted as Ms. Edwards's LETA representative. Ms. Edwards testified that, in the previous meeting (February 10), there was an agreement reached that she would be furnished with a touchscreen computer monitor. Ms. Edwards testified as follows about Mr. Powers's assertion to the contrary during the March 24 meeting:

> Mr. Powers told a lie and said that there was no agreement by Geneva Krag that I would get a touchscreen, that I would be getting an iPad to test my students and do my work on because an iPad was a touchscreen. And so, he lied in the meeting.

Ms. Edwards further testified that when she protested that it had already been agreed upon that she would get a touchscreen computer, Ms. Sepulveda said that one would be ordered for her. At that point, Mr. Powers "just kind of sunk back in his seat," and was "as aggressive as he

normally is when there is representation for a member in the room[.]" Ms. Rosales gave very limited testimony about the meeting. When asked whether Mr. Powers was in agreement with the touchscreen proposal, she stated without elaboration, "No, he was not." Mr. Powers and Ms. Sepulveda denied that Mr. Powers expressed any disagreement about Ms. Edwards's receiving a touchscreen computer monitor at the March 24, 2015 meeting, or that his demeanor was aggressive.

2. 2015-2016 School Year

On September 4, 2015, Mr. Powers notified Ms. Edwards by e-mail that she was to be evaluated in the coming year and requested to meet with her to discuss her Goals and Objectives and schedule a time for the formal observation. Ms. Edwards replied the same day, stating that she would like to be placed on a five year evaluation cycle. To that, Mr. Powers responded, "We can discuss…the five year cycle during the summation conference."

Charging Parties filed the instant unfair practice charge on November 23, 2015. In January 2016, Ms. Edwards e-mailed Mr. Powers stating that she and the other Charging Parties cannot be evaluated consecutively. Mr. Powers responded to Ms. Edwards in mid-February, noting that she had not had her own evaluation the previous year and it was therefore still due. Ms. Edwards then replied that "the District forfeited their right to a two year evaluation when they failed to follow the law (Ed Code 44662)." Ms. Edwards contended that under the CBA and the Education Code, since her evaluation was not performed at the two-year mark, the District's "only other alternative…is the five year plan." Mr. Powers testified that, ultimately, he decided to give up on evaluating Ms. Edwards during the 2015-2016 school year because of the charges filed in this case, stating that he did not want to "muddy those waters." Mr. Powers noted that, since coming to LVS, he has had the opportunity to

informally observe Ms. Edwards's teaching 100 or more times. He described her as "an excellent teacher," and stated that had he been able to complete her evaluation, he most likely would have granted her request for a five year evaluation cycle.

Kimberly Rosales

1. 2012-2013 and 2013-2014 School Years

Ms. Rosales teaches first grade. Ms. Rosales was evaluated by Mr. Powers in the 2012-2013 school year. At that time, she received an overall rating of Meets District Standards. Mr. Powers gave Ms. Rosales an E rating in 14 of 34 subcategories, including the subcategory, "using instructional time effectively." The rest of the subcategories were rated M. Mr. Powers testified that she had a very good formal observation. He remembered a well-planned and well-paced lesson, and noted that she had been working with a peer-to-peer coach that year.

As mentioned earlier, when they were Co-Principals, Ms. Roark and Mr. Powers both did regular informal walkthroughs of every classroom, regardless of whether the teacher was due for evaluation. Mr. Powers testified about having concerns after his informal observations of Ms. Rosales's classroom in 2013-2014, particularly in the area of planning and scheduling. Mr. Powers had discussions with Ms. Rosales about these concerns on three or four occasions that year. Ms. Rosales did not dispute this assertion.

2. 2014-2015 School Year

Ms. Rosales was again due for evaluation in the 2014-2015 school year. Mr. Powers was her evaluator. Mr. Powers and Ms. Roark testified about an incident when they were doing classroom walkthroughs with their supervisor, District administrator Alain Guevara, when they entered Ms. Rosales's classroom and she was playing the movie Dumbo (Walt Disney Productions 1941). Dumbo is not a part of the approved first grade curriculum.

According to Ms. Roark, Ms. Rosales seemed nervous and said that the movie was related to a bullying lesson. Upon leaving, Dr. Guevara told Ms. Roark and Mr. Powers to address the issue with Ms. Rosales. Mr. Powers and Ms. Roark met with Ms. Rosales after school that day. According to Ms. Roark, Ms. Rosales hung her head and said "I know I'm not supposed to show movies." Ms. Rosales did not dispute Ms. Roark's testimony on this point and she admitted to showing a portion of Dumbo during class time during her own testimony.

This was the second time the issue of playing Disney movies in class had been brought to the attention of the site administrators and Ms. Rosales. The first time was when a parent complained about this practice and wanted the student to be removed from Ms. Rosales's classroom because the parent felt that the student was not being sufficiently challenged. Mr. Powers investigated the parent complaint by speaking separately with both the parent and Ms. Rosales about it. When Ms. Rosales was questioned during cross examination about whether Mr. Powers talked to her about showing the movie Finding Nemo (Pixar Animation Studios 2003), Ms. Rosales said, "No." When asked whether she showed that movie during class time, she said, "I don't believe I did, but I may have." During re-direct examination, Ms. Rosales's memory improved on this topic. She testified as follows:

> And then when we were doing Finding Nemo, we were talking about the different sea animals. And it was on a Friday afternoon, and it was kind of, it was a fun Friday kind of a thing. It was hot, and it was tied to our ocean theme. And so it was loosely tied to curriculum, but on a Friday afternoon and hot. Yeah, it was loose. I admit it.
>
> Q Did you have a discussion with Mr. Powers about you showing the Finding Nemo video?
>
> A Yes, I did.

In March 2015, Ms. Edwards asked Ms. Rosales to testify at a PERB hearing in May

2015. Ms. Rosales testified that she told the "site administrator" that she would need coverage in her classroom during the hearing, but she did not say when that was or with whom she spoke. Mr. Powers testified that he learned Ms. Rosales would be testifying at PERB on May 7 or 8, 2015.

Mr. Powers contacted Ms. Rosales in April 2015 to schedule the formal observation. It was set up for April 13, 2015. Ms. Rosales sent an e-mail to Mr. Powers with her lesson plan attached the night before the observation, but they never met beforehand to discuss the lesson.

Mr. Powers provided both the formal observation report and final evaluation form to Ms. Rosales on the same day that he performed the formal observation—April 13, 2015. The observation report consisted of seven paragraphs describing the observed lesson. Two of those paragraphs contained a suggestion for how to keep students on task and with a consistent schedule. The final evaluation contained an overall rating of Meets District Standards. The box for "Probationary" status was incorrectly checked.[17] Out of 34 subcategories, Mr. Powers rated Ms. Rosales with an N in four subcategories and a U in the subcategory, "uses instructional time effectively." Regarding the latter subcategory, Ms. Rosales had received an E rating in her previous evaluation. The negatively rated subcategories included written comments. The rest of the subcategories were rated M and did not contain written comments. Mr. Powers testified that although Ms. Roark was also doing informal observations of Ms. Rosales's classroom during the 2014-2015 school year, the information on the evaluation was limited to things that he had personally observed.[18] This was the first time Ms. Rosales had received N or U marks on a final evaluation.

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[17] Mr. Powers testified that it was a typographical error.

[18] Ms. Roark testified about concerns that she had during 2014-2015 school year after informal observations of Ms. Rosales's classroom, which she shared with Mr. Powers. These

Ms. Rosales contacted LETA President Mr. Cavanaugh for help with her evaluation process. Mr. Cavanaugh testified that in addition to Ms. Rosales's evaluation, he had general concerns about teachers' evaluations being "overbroad" with too many areas for teachers to work on in just one or two years. He believes that if it looks like a principal is being too negative, the evaluation process damages teacher-principal relationships. Mr. Cavanaugh confirmed that if a teacher was rated E in a particular subcategory, that area would not be one of the teachers' Goals and Objectives for the next evaluation cycle. Going from an E to a U in the same subcategory from one evaluation to the next could indicate an irregularity in the process, or at least should trigger a second observation before the U was given.
Mr. Cavanaugh first talked to the District superintendent, and later to Mr. Powers, about these concerns. Mr. Powers told him it "was in the works" regarding changing Ms. Rosales's evaluation.

Ms. Rosales e-mailed Mr. Powers requesting a meeting with LETA representation to discuss the evaluation. A meeting was held on or about April 27, 2015. Mr. Caballero accompanied Ms. Rosales as her representative. Mr. Powers told Ms. Rosales he wanted her to have a successful upcoming school year and to look for growth opportunities over the summer. Mr. Powers also presented her with a new evaluation with M markings in all subcategories. There were still written comments in the subcategories that had been formerly rated N and U. Mr. Powers did not destroy the first evaluation in Ms. Rosales's presence, but her understanding was that it had been rescinded and replaced by the new one, which would be the official version for her personnel file.

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concerns were mostly related to classroom management, where, as one example, she had observed students wrestling on the rug while Ms. Rosales was at her computer not attending to the class.

Dr. Meyer testified that he considered the first evaluation that issued to Ms. Rosales to have been non-compliant with the CBA evaluation article in several respects, and so he instructed Mr. Powers to redo it. Mr. Powers similarly testified that Dr. Meyer told him issue a new evaluation because he had not allowed Ms. Rosales enough time to remediate the negative ratings on her summative evaluation. Mr. Powers testified that he had general difficulty that year getting all of the teacher evaluations timely completed.

3. <u>2015-2016 School Year</u>

Ms. Rosales was not on the list from personnel services of teachers to be evaluated during the 2015-2016 school year. Mr. Powers told Dr. Meyer that he wanted to add Ms. Rosales to the list, because he wanted to make sure that Ms. Rosales was improving in the areas that he highlighted with written comments on both the destroyed and reissued versions of her previous evaluation. Dr. Meyer approved the request. Dr. Meyer testified that in his view the CBA permits consecutive evaluations, even where a permanent unit member has received an overall Meets District Standards rating, if there are documented performance concerns by N or U ratings in subcategories or in written commentary. He said that it would not be "the best practice" for a teacher to have to wait two years to remediate those performance issues.

On August 19, 2015, Mr. Powers e-mailed Ms. Rosales asking to set up a meeting to "discuss support for this year." A meeting took place on August 26. Mr. Cavanaugh was present as Ms. Rosales's representative. Some events of the meeting are disputed. It is undisputed that Ms. Rosales volunteered to participate in the Peer Assistance and Review (PAR) program.[19] Ms. Rosales noted that she was transitioning to a new first grade

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[19] CBA Article 24 covers the PAR program. Teachers are referred to PAR by administration when they have received an overall Unsatisfactory evaluation. Teachers may also volunteer to participate in the program. Dr. Meyer testified that volunteers are rare.

curriculum, from “intervention” first grade to regular first grade, and stated that she was “trying to do too much.” Mr. Powers considered that by Ms. Rosales volunteering to do this, she was acknowledging her performance decline and was in agreement that she needed to improve. Both Mr. Powers and Dr. Meyer testified that they considered a teacher voluntarily participating in PAR to provide adequate basis for evaluating the teacher annually.

According to Ms. Rosales, the meeting turned unpleasant at some point and felt disciplinary. Mr. Powers was loud, berated her, demanded she go to training and turn in lesson plans, and slammed his hand down on the table. According to Mr. Powers, the purpose of the meeting was to follow up on his concerns from the previous year regarding Ms. Rosales’s performance in the areas of student engagement, planning, organization, lesson pacing, and showing videos. In contrast to Ms. Rosales’s description, he described the tone of the meeting as cordial, professional, and comfortable. Mr. Powers said that Ms. Rosales acknowledged some of her performance issues and seemed “willing and appreciative” of the plans they discussed. Mr. Powers instructed Ms. Rosales not to show videos during class time without prior approval. When Ms. Rosales asked if that was a schoolwide policy, Mr. Powers clarified that it only applied to her. Mr. Cavanaugh described the tenor of the discussion as “going in a pretty positive direction.” Mr. Cavanaugh testified that Mr. Powers did not become angry, yell, or slam a fist on the table during the meeting. Ms. Rosales did not tell Mr. Cavanaugh, either during or after the meeting, that Mr. Powers used intimidating body language or that she felt intimidated.

In late August and the first few days of September 2015, Ms. Rosales was copied on e-mails between Ms. Edwards and Mr. Powers, where Ms. Edwards was raising an employment

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Improved performance is the goal for voluntary or referred PAR participants. PAR participants are paired with a collaborating teacher for consultation and advice.

concern and alleging contract violations. On September 4, 2015, Mr. Powers e-mailed Ms. Rosales to inform her that she would be evaluated again this year and requested a time to discuss her Goals and Objectives and to schedule the formal observation. Ms. Rosales was having some issues with her District e-mail account around this time. She did not immediately respond to Mr. Powers. He sent her a few more e-mails requesting to schedule evaluation events between late-September and early October. On October 16, 2015, Ms. Rosales sent Mr. Powers a responsive e-mail noting that she wanted her PAR collaborating teacher to take part with her in the evaluation events. At some point shortly thereafter, Ms. Rosales sought assistance from Ms. Edwards and then reached the conclusion that the CBA and Education Code precluded a consecutive year evaluation. On November 9, 2015, Ms. Rosales e-mailed Mr. Powers stating that conclusion and further requesting to be put on a five year evaluation cycle. Ms. Edwards was also copied. Ms. Rosales testified that she did not ask Ms. Edwards for help sooner because she was trying to work things out amicably. In her view, there has been animosity between Ms. Edwards and Mr. Powers. Ms. Edwards has never hesitated to confront Mr. Powers over perceived contract violations and her style can be "abrupt." She also went to Ms. Edwards because Mr. Cavanaugh was of the opinion that the District had the right to perform a consecutive evaluation.

Somewhat at odds with the approach taken in attempting to schedule Ms. Edwards's evaluation during the same time period, and also after Mr. Powers was aware of the instant charges, he continued to press for scheduling the formal observation with Ms. Rosales throughout the fall of 2015 and spring of 2016. Ms. Rosales reiterated her view that the contract and Education Code precludes her consecutive year evaluation in an e-mail to

Mr. Powers dated February 19, 2016. Ultimately, Mr. Powers never conducted a formal observation of Ms. Rosales and did not complete an evaluation for her in 2015-2016.

ISSUES[20]

1. Whether the District took adverse action against Ms. Pickett because of her protected activities by authorizing the sale of Smencils at LVS, despite knowing that exposure to Smencils was a "problem" for Ms. Pickett's health.

2. Whether the District took adverse action against Mr. Pickett because of his protected activities by "conducting an informal classroom observation of Mr. Pickett during the first week of school and subjecting Mr. Pickett to a consecutive formal evaluation process for the 2015-2016 [school year] by requesting he attend a performance evaluation meeting."

3. Whether the District took adverse action against Ms. Edwards because of her protected activities by refusing her request to be placed on the five year evaluation program set forth in CBA Article 9.14.

4. Whether the District took adverse action against Ms. Rosales because of her protected activities by "demanding that Ms. Rosales participate in the formal evaluation process for the 2015-2016 school year and by advising that additional formal classroom observations are necessary despite that Ms. Rosales already received a positive performance evaluation for the 2014-2015 school year on April 28, 2015."

CONCLUSIONS OF LAW

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show by a preponderance of evidence that (1) the employee exercised rights under EERA, (2) the

[20] The quoted text below is from the PERB complaint.

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*).)

The test for determining whether an action taken by a respondent against an employee is adverse to the employment interests of that employee is an objective one, and therefore does not rely on the employee's subjective reactions to it. (*Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 12.) As explained by the Board:

> The test which must be satisfied 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, pp. 11-12.)

A causal connection between the employee's protected activity and the respondent's adverse action is the critical final element of the charging party's prima facie case. Evidence of a respondent's unlawful motive can be shown by either direct or circumstantial evidence. When considering circumstantial evidence of unlawful motive, PERB looks to the timing of the protected conduct relative to the adverse action to provide an inference that the action occurred because of the employee's exercise of statutory rights. (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096, p. 11. (*CTA/NEA (Tsai)*)) But close timing by itself is not determinative for finding a violation. (*Moreland Elementary School District* (1982) PERB Decision No. 227, p. 13.)

Additionally, PERB examines other factors, at least one of which must be present, to demonstrate the requisite nexus between protected conduct and adverse action. These factors include: (1) the employer's disparate treatment of the employee (*State of California*

(Department of Transportation) (1984) PERB Decision No. 459-S, p. 6 (*State of CA*);[21] (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104, p. 20); (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, p. 15); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 19; (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, p. 10) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786, pp. 13-14); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, pp. 15-16;); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District* (1982) PERB Decision No. 264, p. 22).

If the charging party produces sufficient evidence demonstrating a prima facie case, and therefore establishes an inference of unlawful motivation, the burden shifts to the respondent to prove that it had an alternative, non-discriminatory reason for the challenged action. The respondent's burden includes proving that it, in fact, 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 (*Palo Verde*).)

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[21] That case was decided under the Ralph C. Dills Act (Gov. Code, § 3512 et seq.) When interpreting EERA, it is appropriate for PERB to derive guidance from court and administrative decisions interpreting the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.) and parallel provisions of California labor relations statutes. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12-13.)

Turning to the facts here, it is undisputed that each of the Charging Parties engaged in numerous protected activities under EERA during the relevant time periods by serving as union representatives, in that capacity engaging with management over employment issues, and participating in PERB processes. Further, the District has admitted knowledge of all of those activities by the Charging Parties. Thus, the first two elements of the prima facie case for retaliation under the *Novato* standard are met for each of them. It must be now be determined whether any of the Charging Parties suffered actions that can be considered objectively adverse to their employment interests, and if so, whether those actions were taken by the employer because of the Charging Parties' protected conduct.

Adverse Action

1. Victoria Pickett

As previously stated, the test for whether there has been an adverse action is whether a reasonable person in similar circumstances would consider that the action taken by the employer had a negative impact on the employee's employment interests. Thus, the Board has held that the subjective reactions of an employee to an employer's action are irrelevant to the Board's determination of whether the action was adverse to employment. (*Woodland Joint Unified School District* (1990) PERB Decision No. 808a, p. 5 (*Woodland*).) Actual, not merely speculative, harm to the employment relationship is required to demonstrate adverse action. (*County of Tehama* (2010) PERB Decision No. 2122-M, p. 8.)

Changes in working assignments can be found adverse when the change results in less favorable working conditions, such as a longer commute, less security, and lack of climate control. (*Fresno County Office of Education* (2004) PERB Decision No. 1674, pp. 13-14 (*Fresno COE*).) In that case, two union officers were involuntarily reassigned to new schools.

Among the factors that contributed to the Board's finding that the reassignment was adverse to the employees' employment interests were poor environmental conditions in the new work locations, such as, "inadequate heat in the winter and cooling in the summer, and with swarming flies and wasps." (*Ibid.*) Similarly, in *Regents of the University of California* (1998) PERB Decision No. 1263-H (*UCSD*), an involuntary reassignment that resulted in negative health impacts for the employee was considered adverse. In that case, the employee was an animal technician working in research laboratories of the employer who had a known allergy to rabbits and severe asthma condition, which had been previously accommodated by the employer by his assignment to a facility that did not house rabbits. (*Id.*, adopting proposed dec. at p. 15.) After engaging in concerted activity, the employee was involuntarily assigned to new laboratory where he had to care for rabbits on a daily basis. As a result, he had a severe asthmatic reaction and then was medically separated from employment because he could not perform the functions of his job. (*Id.*, adopting proposed dec. at p. 27.) The Board agreed with the Administrative Law Judge (ALJ) that being involuntarily transferred from a work location that did not require him to work with rabbits to one that did was adverse to his employment interests. (*Id.*, adopting proposed dec. at p. 52.)

A different result occurred in In *Los Angeles Community College District* (2011) PERB Decision No. 2219. There, a counselor at a community college alleged that her transfer to a new office space left her feeling "lonely, isolated, [and] punished." (*Id.*, adopting proposed dec. at p. 4.) The ALJ concluded and the Board agreed that, in the absence of other evidence showing that the new office was "a bad place to work," the employee's subjective feelings regarding the new space did not meet the standard of showing the employer's decision to move her office was adverse to her employment. (*Id.*, adopting proposed dec. at p. 6.)

As a threshold matter, there is some factual dispute here regarding the nature and extent of Ms. Pickett's reaction to Smencils. The District points to the testimony of Ms. Popp, denying that she was called to cover Ms. Pickett's class due to a Smencil-induced asthma attack or for any reason other than the one occasion where Ms. Pickett was using a remote restroom because of a strong perfume smell in the nearer one. Ms. Edwards's and Ms. Pickett's testimony was less believable on this point than the District's witnesses and therefore I do not credit them. I found Ms. Edwards to be especially prone to exaggeration throughout her testimony, as illustrated by her account of Mr. Powers's statements during her own interactive process meetings.[22] It is very unlikely that, if Ms. Pickett had had an asthmatic reaction due to a student waving a Smencil under her nose, which caused her to have to use her rescue inhaler and summon classroom coverage, she would have failed to mention such serious events in her e-mail to Mr. Powers complaining on the topic that same day. However, an apparent embellishment regarding the severity of the trouble that the sale of Smencils caused

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[22] Ms. Edwards's testimony that Mr. Powers lied about an agreement having been reached over providing a touchscreen monitor during the first interactive process meeting was especially unbelievable in light of documentary evidence to the contrary. The e-mail exchanges between them on the subject *after* that first meeting clearly show that Mr. Powers suggested that Ms. Edwards try an iPad, since the new mouse was not working out for her, and Ms. Edwards readily agreed to try an iPad instead of the mouse. If there already had been an agreement to provide a touchscreen monitor at the time of that e-mail exchange, I have no doubt that Ms. Edwards would have brought it up. Thus, her testimony about Mr. Powers lying about such an agreement in the second interactive process meeting does not have the ring of truth. Ms. Edwards was also often argumentative during cross examination, even after she was ordered to answer the question posed to her. Her testimony was sometimes inconsistent between direct and cross examination. In assessing the credibility of witnesses, PERB looks for "selective memory on cross examination; evasive, exaggerated, or inconsistent testimony; inherently unbelievable testimony" as bases for finding a witness to be not credible. (*Palo Verde, supra*, PERB Decision No. 2337, p. 29, fn. 16; citations omitted.) For these reasons, where there is a material factual dispute between the District and Ms. Edwards, the District is credited.

Ms. Pickett is not the most significant problem with this claim. The real problem is that the District did not take any action *against* Ms. Pickett.

Mr. Powers provided unrefuted testimony that the proposal for the Smencil fundraiser came from fellow teacher Ms. Maurer and he approved it without giving any thought at all to Ms. Pickett. While this may be hard for Ms. Pickett to accept, given that her history of respiratory allergies and asthma were well documented and known to Mr. Powers, there is no reason to doubt Mr. Powers's assertion. While Ms. Pickett's medical condition is naturally top of mind for her at all times, it does not automatically follow that Mr. Powers would have been immediately keyed in to the possibility of an issue for her by the introduction of scented pencils on campus. The record does not demonstrate that Ms. Pickett was a motivating factor in Mr. Powers's decision to approve Ms. Maurer's proposal to introduce Smencils on campus.

The important factual distinction between this situation and those in the *Fresno COE* and *UCSD* cases is that in those cases the employer took action specifically against the employees involved by changing their particular assignments. In contrast here, Ms. Pickett was not the target of any action by the District. Instead, she was merely present, the same as every other teacher at LVS was, during the period of time that Smencils were being sold. Indeed, in my review of PERB's retaliation case law, whether the alleged adverse action involved was the issuance of discipline, a negative assessment of performance, or an involuntary change in assignment with less favorable working conditions, I cannot find an example where the employer took an action that generally affected all employees at a site, but was found to be an adverse action as to just one of them. This situation, while unfortunate for Ms. Pickett, simply does not fall neatly under the umbrella of an EERA claim.

The bulk of the evidence presented by Ms. Pickett was regarding the alleged inadequacy of the District's response to her raising medical concerns over the sale of Smencils and her exposure to other allergens and irritants in years past. Ms. Pickett pointed out several instances where Mr. Powers either failed to hold an interactive process meeting or did not make announcements to staff as she wished he would. There was also conflicting evidence between Ms. Edwards, Mr. Flores, and Ms. Popp regarding their alleged inadequate handling of an instance of respiratory distress caused by Ms. Pickett's contact with Teacher X. The District's witnesses provided more plausible testimony on this event and are credited over Ms. Edwards for the reasons previously discussed. The fact that the District's failure to handle Ms. Pickett's reporting of medical issues to her satisfaction made up the majority of the evidence further illustrates that PERB is not the appropriate venue for this type of claim. The adequacy of the District's response to an employee requesting an accommodation in working conditions because of a medical condition is the province of agencies or other entities that enforce the ADA and FEHA. PERB lacks jurisdiction over the enforcement of statutory schemes other than the collective bargaining laws over which it has been given specific authority. (*City & County of San Francisco* (2011) PERB Decision No. 2222-M, adopting warning ltr., p. 3 [PERB lacks jurisdiction over or enforcement power of the ADA and other independent statutory schemes].)

Because Ms. Pickett has not met her burden of showing that the District took adverse action against her, she has failed to state a prima facie case of retaliation and her claims in this matter must therefore be dismissed.

2. <u>David Pickett</u>

The PERB complaint alleges that the District took two adverse actions against Mr. Pickett. First, by conducting an informal observation of his classroom that occurred during the first week of school in 2015, and next by requiring him to attend a "performance evaluation meeting," which subjected him to a consecutive year evaluation process for 2015-2016.

PERB has addressed the issue of whether the frequency of evaluations for permanent teachers indicates an adverse action in two cases involving the same parties. In the first case, *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa I*), the Board concluded because the Education Code requires evaluation of a permanent certificated employee "at least once every other year,"[23] and only when an employee receives an unsatisfactory evaluation must the employee be annually assessed, that requiring a consecutive year evaluation where there was not a previous negative one "signals a performance deficiency requiring remediation[.]" (*Id.* at pp. 18-19.) The Board considered that to be the functional equivalent of a negative evaluation and thus adverse. (*Ibid.*) The Board then partially reversed the dismissal of the charge and remanded the case to the PERB Office of the General Counsel to issue a complaint. (*Id.* at p. 32.) After a hearing on the merits, the employer took exception before the Board to the finding of the ALJ that the consecutive year evaluation in that matter was an adverse action under the holding of *Jurupa I.*

The Board in *Jurupa Unified School District* (2015) PERB Decision No. 2458 (*Jurupa II*), rejected the employer's argument and upheld its previous conclusion regarding the adverse nature of an off-cycle evaluation, noting that "the default evaluation cycle for permanent

[23] Education Code section 44664, subdivision (a)(2).

certificated employees who are performing satisfactorily is every two years[,]" under both the Education Code and the parties' contract. (*Id.* at pp. 17-18.) The Board found it significant that the Education Code enforces a more frequent evaluation cycle only where an employee has received a negative evaluation (Educ. Code, § 44664, subd. (b)) and concluded that when Education Code sections 44664 (a)(2) and (b) were read together, these provisions establish a default cycle of every other year for the evaluation of satisfactorily performing permanent teachers. (*Jurupa II*, *supra*, PERB Decision No. 2458, pp. 15-16.) The Board further concluded that a more frequent evaluation cycle than that allowed under the Education Code was a matter reserved for collective bargaining. (*Id.* at p. 16.) Thus, the Board found that to require an employee who was performing satisfactorily to undergo more frequent evaluations than the default cycle was an adverse action. (*Ibid.*)

In *Golden Gate Bridge Highway & Transportation District* (2011) PERB Decision No. 2209-M (*Golden Gate*), the Board declined to find a heated exchange between an employee and manager during a non-disciplinary meeting to constitute an adverse action where there was no evidence that the meeting later resulted in any impact on employment conditions. (*Id.*, adopting warning ltr. at p. 5.) The determination of whether an alleged action is adverse is made on a case-by-case basis on the facts presented. (*Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M, p. 9 (*SEIU-Gutierrez*).) In *SEIU-Gutierrez*, an investigation into employee misconduct was not considered adverse action, because the "investigation" in that case consisted only of one phone call to the investigated employee, after which the matter was completely dropped later that same day. (*Id.* at pp. 7-8.)

Turning to the facts here, one alleged action by the District cannot be reasonably deemed an adverse action, and the other was not demonstrated by the weight of the evidence.

Regarding the five-minute informal observation of Mr. Pickett's classroom during the first week of school by administrators, no reasonable employee would find such an action to be adverse to his employment interests. Despite Mr. Pickett's bare assertion that administrators had never before observed his classroom during the hectic first week of school, there is ample evidence in the record that such informal observations are routine and commonplace. Such visits are also expressly allowed under the CBA evaluation article, whether or not an employee is due for formal evaluation. If Mr. Pickett was perturbed by the timing of the classroom visit and subjectively considered it to be adverse to him that is of no consequence to the analysis. (See *Woodland*, *supra*, PERB Decision No. 808a, p. 5.) Actual, not merely speculative, harm is required for a showing of adverse action. (*County of Tehama*, *supra*, PERB Decision No. 2122-M, p. 8.) There are simply no facts demonstrating any impact by the informal observation, let alone a negative one, on Mr. Pickett's employment interests.

Addressing the next allegation, because Mr. Pickett was evaluated in the 2014-2015 school year and received an overall rating of Meets District Standards, if he had been subjected to a consecutive evaluation the following year, that likely would have been an adverse action under the holdings of *Jurupa I* and *Jurupa II.* However, the record does not demonstrate that Mr. Pickett was subjected to a formal evaluation process for the 2015-2016 school year.

There is no evidence that Mr. Pickett's name appeared on the list of employees due for evaluation that year from personnel services. Mr. Powers also did not request permission from District administrators to add his name to the list. Mr. Pickett admitted that he was never notified by Mr. Powers that he was due for evaluation, as required under the CBA, nor was he formally observed. No summative evaluation was completed for him for 2015-2016. This allegation appears to rest entirely on the meeting held between Mr. Powers, Mr. Pickett, and

Ms. Edwards on September 8, 2015, in support of the notion that Mr. Pickett was "subjected" to a formal evaluation process. But the events of this meeting are insufficient to prove that Mr. Pickett was required to participate in a formal evaluation. Mr. Powers's terse statement during the meeting that he had considered evaluating Mr. Pickett again, but had decided against it, does not reasonably constitute a decision that was adverse to Mr. Pickett's employment interests. Similar to the situation in *SEIU-Gutierrez*, even if adverse action had been momentarily contemplated by the employer, the matter was promptly dropped without any negative consequence for Mr. Pickett. Mr. Powers admitted that the tone of the meeting became tense. However, Mr. Pickett also admitted that he and Mr. Powers never discussed again the issues raised in the meeting regarding his attending training on Common Core curriculum. Thus, like the facts in the *Golden Gate* case, a heated exchange during a non-disciplinary meeting without any further impact on employment conditions also does not amount to adverse action in this matter.

Because Mr. Pickett has not met his burden of showing that the District took any action against him that can be considered objectively adverse to his employment, he has failed to state a prima facie case of retaliation. Accordingly, Mr. Pickett's claims in this matter must be dismissed.

3. Lori Edwards

The issue presented in Ms. Edward's claim in this case is whether an employer's refusal to agree to a teacher's request for a five year evaluation cycle is an adverse action. This specific issue was not decided by the Board in *Jurupa I* or *Jurupa II*.[24] In my review of

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[24] In *Jurupa II, supra*, PERB Decision No. 2458, the issue of a five year evaluation was addressed in a limited way by the Board declining to consider the charging party's request to modify the remedy to include an order for a five year evaluation cycle because that issue had

PERB's case law, I did not find any case where the Board has considered such a theory. For the reasons that follow, I do not believe that the District's actions toward Ms. Edwards in this instance can be considered objectively adverse to her employment.

A discussion over the background events in 2014-2015 is necessary for a full understanding of the conclusion reached here. Ms. Edwards believes that Mr. Powers could have and should have finished her evaluation in 2014-2015, and lays blame on the District for her lengthy absence in March and April because she thinks it did not timely handle her request for a medical accommodation. But what "could have" happened is irrelevant. It is undisputed that Ms. Edwards asked for her formal observation to occur after the holiday break period. It is undisputed that Ms. Edwards was then not present at work for 32 days after winter break and before evaluations were due, and that some of those days off (at least eight days in January and February, and some in March) were for reasons unrelated to ADA processes. It is undisputed that spring break also fell during this time period, and that Ms. Edwards's has a shorter instructional day than teachers in other grades. All of these facts necessarily limited the amount of time available to schedule the formal observation. It is also undisputed that Mr. Powers personally had many other teachers' evaluations to complete during this same stretch of time, that he did not schedule formal observations on Wednesdays because of ongoing site events, and that he was having difficulty getting all evaluations timely scheduled and completed. Thus, there were many factors that contributed to the District's failure to timely complete Ms. Edwards's evaluation in the 2014-2015 school year, some of them caused by Ms. Edwards, some by Mr. Powers, and some that were not caused by anyone in particular.

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not been litigated during the hearing. (*Id.* at p. 8.) The Board did not otherwise analyze the issue presented here regarding whether the failure to agree to a request for five year cycle is an adverse employment action.

But whether there was fault, by either party, in the failure to complete the evaluation on time is not important. The only relevant fact is the evaluation did not occur.

Ms. Edwards also believes that because administrators failed to complete her evaluation as scheduled, they have forfeited their right to evaluate her other than on a five year plan. Ms. Edwards's beliefs in this regard have no legal support. In Charging Parties' closing brief, Ms. Edwards states, "By operation of law Ms. Edwards could never be evaluated on a three (3) year evaluation cycle. (EC §§ 44644; 44924; 35160) (Articles 9.1; 9.14)." It should be noted that nothing in the express statutory or contractual language cited by Ms. Edwards suggests that the District "forfeits" its right to evaluate Ms. Edwards in a situation where, due to unforeseen circumstances, an evaluation is not timely finished. As discussed further below, this language also does not reasonably imply that an automatic five year cycle is created where evaluation timelines are delayed. Pushing an evaluation to the following year when it was never started or completed during the scheduled year also does not logically mean that the employee is being placed on a "three year cycle." It merely signals that the evaluation was not completed on time and therefore it still needs to be done. Again, the relevant fact here is that the evaluation did not happen.

Even though the Board did not address in *Jurupa I* or *Jurupa II* whether a refusal to grant a five year evaluation cycle can be deemed adverse, the rationale from those cases is informative to deciding the issue. The underpinning of the finding of adverse action by the Board where a permanent employee, who had been previously rated satisfactory, is evaluated in consecutive years is that such action either treats a permanent employee like a probationary one and/or signals a performance deficit. (*Jurupa I*, *supra*, PERB Decision No. 2283, pp. 18-19; *Jurupa II*, *supra*, PERB Decision No. 2458, pp. 15-16.) This is so because the Board

interpreted subdivisions (a)(1) and (a)(2) of Education Code section 44664, when read together, as creating a default cycle of every other year for permanent employees' evaluations; thus, a *more frequent* cycle than the default implies deficient performance. (*Ibid.*) The same cannot be said of a refusal to grant a request for a *less frequent* cycle than the two year default cycle.

The language chosen by the Legislature in Education Code section 44664, subdivision (a)(3), regarding five year evaluation terms requires, among other things, *agreement* between a teacher and an administrator and notes that such *agreement* may be unilaterally withdrawn by either party at any time. This same language is also mirrored in the CBA evaluation article at section 9.14. Since either party may exercise complete discretion over the decision to withdraw, there can be no "default" five year cycle. Unlike with employees on an annual evaluation cycle, there is no reasonable inference that employees on a two year cycle have performance deficiencies. Therefore, management exercising its discretion by declining to agree to a five year evaluation plan does not necessarily signal any subpar performance by the employee.

And especially under these facts, no deficient performance is implied by the timing of Mr. Powers's refusal. Mr. Powers refused to consider Ms. Edwards's request until *after* he had completed the evaluation that was due. Mr. Powers informed Ms. Edwards that they could discuss her request for a five year cycle at the summation conference. The conference never happened, of course, because Ms. Edwards refused to cooperate with her evaluation process in 2015-2016. Mr. Powers testified without contradiction that it is not his practice to approve a request for a five year plan unless he has personally evaluated an employee previously. This was also consistent with the way he handled Ms. Cook's request for a five year plan in 2015-

2016, as he had performed that teacher's evaluation himself in 2013-2014. Mr. Powers had never before conducted an evaluation of Ms. Edwards.

In Mr. Powers's own words, Ms. Edwards "is an excellent teacher." Mr. Powers also testified to his willingness to agree to Ms. Edwards's request *once* he has completed her required evaluation. Thus, it is likely that it would have happened had she simply completed her evaluation process.

Because Ms. Edwards has not met her burden of showing that the District took any action against her that can be considered objectively adverse to her employment, she has failed to state a prima facie case of retaliation. Accordingly, Ms. Edwards's claims in this matter must be dismissed.

4. Kimberly Rosales

The PERB complaint alleges that the District took adverse action against Ms. Rosales by requiring her to be formally evaluated in 2015-2016, despite Ms. Rosales having received a positive performance evaluation the year before. As previously discussed at length, under the holdings of *Jurupa I* and *Jurupa II*, requiring a consecutive year evaluation of a permanent employee who had previously been rated as meeting required standards signals a performance deficiency and is therefore an adverse action. A threat to take adverse action can itself be an adverse action if the threat gives the employee "unequivocal notice that the employer has made a firm decision to take the threatened action." (*San Diego Unified School District* (2017) PERB Decision No. 2538, p. 7 (*San Diego*), quoting *Trustees of the California State University* (2009) PERB Decision No. 2038-H; EERA, § 3543.5, subd. (a) ["It is unlawful for a public school employer to… threaten to impose reprisals on employees"].)

It is undisputed that Ms. Rosales received a final performance evaluation in 2014-2015 from Mr. Powers with an overall rating of "Meets District Standards," despite it containing some written commentary with performance guidance. An overall rating of "Meets District Standards" is considered a satisfactory evaluation under the Board's *Jurupa* decisions. Even though Mr. Powers ultimately did not complete a formal evaluation of Ms. Rosales the following year in 2015-2016, he threatened to do so. Mr. Powers requested and received permission from Dr. Meyer to add Ms. Rosales to the list of employees to be evaluated. Mr. Powers informed Ms. Rosales that she would be required to participate in a formal evaluation and attempted for several months to schedule a Goals and Objectives meeting and her formal observation. These actions provided Ms. Rosales with "unequivocal notice" that the District had decided to evaluate her in consecutive years after she had received a satisfactory evaluation, which was an adverse action. (*San Diego*, *supra*, PERB Decision No. 2538, p. 7; *Jurupa I*, *supra*, PERB Decision No. 2238, pp. 18-19; *Jurupa II*, *supra*, PERB Decision No. 2458, pp. 15-16.) Thus, Ms. Rosales has met her burden of showing action by the District against her that was adverse to her employment interests.

Nexus

As discussed previously, the final, critical element of a Charging Party's prima facie case is to show that the employer's action was unlawfully motivated by the employee's protected activities. This can be done with either direct or circumstantial evidence. Here, both forms of evidence are present.

1. Direct Evidence

Where there is direct evidence, i.e., the respondent's words or actions reveal that its adverse action was taken in response to an employee's protected conduct, resort to circumstantial evidence of nexus is unnecessary. (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H, pp. 7-8 (*Davis*).) Where an employer stated in its disciplinary memorandum that it was being issued "in response to" an employee's letter, which the Board had determined was protected speech, the Board considered that direct evidence of unlawful motive. (*Alisal Union Elementary School District* (1998) PERB Decision No. 1248, p. 6.) Similarly, in *Davis*, some employees complained about not receiving premium pay for working extra shifts, and the employer said that "because of" those complaints, it had no choice but to lay off those employees. The Board found this to be direct evidence of a nexus between protected conduct and adverse action. (*Davis*, *supra*, PERB Decision No. 1590-H, pp. 7-8.) "[S]eeking individually to enforce provision of a collectively-bargained agreement is a 'logical continuation of group activity' and protected under EERA." (*Jurupa I*, *supra*, PERB Decision No. 2283, p. 16, citations omitted.)

Mr. Powers and Dr. Meyer testified that they ordered a consecutive year evaluation for Ms. Rosales, in part, because she volunteered to participate in PAR in 2015-2016. PAR procedures were negotiated between the District and LETA. Thus, under *Jurupa I*, Ms. Rosales engaged in protected activity by her decision to participate in the PAR program.[25]

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[25] PAR participation was not alleged in the PERB complaint as one of Ms. Rosales's protected activities. PERB determines whether to consider instances of protected activity that were not alleged in the complaint under the same standard that it applies to unalleged violations, which is as follows:

> The Board has authority to review unalleged violations where the following criteria are met: (1) adequate notice and opportunity to

Accordingly, Mr. Powers's and Dr. Meyer's testimony explaining that they decided to evaluate Ms. Rosales again, which has been deemed adverse action, because of her protected PAR participation, shows direct evidence of unlawful motivation.

2. Circumstantial Evidence[26]

The timing between Ms. Rosales's protected activities of PAR participation, raising employment concerns along with Ms. Edwards to Mr. Powers, and testimony in a PERB hearing all occurred within three months of the District's decision to take adverse action. This is sufficiently close in time to infer unlawful motivation. (*CTA/NEA (Tsai)*), *supra*, PERB Decision No. 2096, p. 11.)

There were also admitted irregularities in Ms. Rosales's previous performance evaluation in 2014-2015. Notably, Mr. Powers admitted that he did not hold a pre-observation conference with Ms. Rosales as required by CBA section 9.16.2. He also gave her a U rating

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> defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, pp. 8-9.) All of those criteria are met here. It is therefore appropriate to consider Ms. Rosales's PAR participation as an additional protected activity.

[26] I have reviewed all the nexus arguments that Ms. Rosales raised in her brief, but I only discuss substantively here the evidence of nexus that I find persuasive. I specifically do not credit Ms. Rosales's testimony about the August 26, 2015 meeting between her, Mr. Powers, and Mr. Cavanaugh, where Ms. Rosales asserted that Mr. Powers behaved aggressively. The other witnesses' accounts of the meeting were more plausible and, in general, Ms. Rosales was not as credible of a witness as either Mr. Powers or Mr. Cavanaugh. For example, her testimony about showing movies in class was evasive and changed between cross and redirect. Both Mr. Powers and Mr. Cavanaugh, on the other hand, provided consistently reliable and believable testimony. Additionally, although Ms. Rosales asserted that other LVS teachers show movies without consequence "all the time," no specific examples were shown that this is done with knowledge of administrators and no other teacher testified about the practice.

without a second observation having occurred, which may be contrary to section 9.18. Since the previous evaluation led to the decision to evaluate her again, departures from established procedures in that process may indicate unlawful motivation. (*Santa Clara Unified School District*, *supra*, PERB Decision No. 104, p. 20.)

Additionally, Mr. Powers treated Ms. Edwards, who was also on the evaluation list for 2015-2016, differently than Ms. Rosales. In Ms. Edwards's case, Mr. Powers testified that he did not press her about scheduling her formal observation because he was aware of the filing of the instant unfair practice charge and he did not want to "muddy those waters." Mr. Powers did not appear to feel as constrained where Ms. Rosales was concerned, having pressed for the scheduling of the formal observation for several months, and yet she was also pursuing the unfair practice charge. This shows disparate treatment of Ms. Rosales, which is further evidence of the District's unlawful motivation. (*State of CA*, *supra*, PERB Decision No. 459-S, p. 6.)

Ms. Rosales has demonstrated all of the elements of a prima facie case of retaliation. Accordingly, the burden of proof shifts to the District to show that it would have taken the same action against Ms. Rosales even in the absence of protected activity.

Burden Shift

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*, *supra*, 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 respondent "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.)

Where there is evidence that the respondent's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730.) The "but for" test is "an affirmative defense which the respondent must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) The Board in *Escondido Union Elementary School District* (2009) PERB Decision No. 2019 made the following points about the approach to the analysis in "mixed motive" cases:

> In *Novato*, *supra*, PERB adopted the *Wright Line*, *supra*, 251 NLRB 1083, "but for" test for mixed motive cases. In *Wright Line*, the NLRB made two important points regarding its "but for" test. First, the NLRB noted that placing the burden on the employer to prove that the non-discriminative reason actually motivated the adverse action "represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation." Second, the NLRB stated that the goal in a mixed motive case is "to analyze thoroughly and completely the justification for the [adverse action] presented by the employer.

(*Id.* at p. 21; footnotes omitted.)

In assessing the evidence, PERB's task is to determine whether the respondent's "true motivation for taking the adverse action was the employee's protected activity." (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3, citations omitted (*Regents*); see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C,

p. 23.) Further, PERB "weighs the respondent's justifications for the adverse action against the evidence of the respondent's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 14.) If PERB determines that a respondent's action was not taken for an unlawful reason, it has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 17.)

Even where there is direct evidence of unlawful motivation, a respondent may prove that the employee's protected activity was not the true motivation for its action, which is sufficient to defeat the prima facie case. (*Regents*, *supra*, PERB Decision No. 2302-H, p. 4.) In that case, although the employer specifically referenced the employee's protected conduct as part of its written grounds for termination, there was sufficient evidence of performance concerns that showed the employer would have taken the same course of action, regardless of the protected conduct. (*Id.*, adopting proposed dec., p. 33.)

A different result was reached in (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S (*Dept. of Corrections & Rehabilitation*).) There, a union steward was disciplined in direct response to so-called unacceptable conduct during a representational meeting, which the Board found protected. There was no other basis offered by the employer for the discipline. Thus, the Board found that the employer could not meet its burden to defeat the prima facie case where the "discipline is seen to arise from, and only from, [the employee's] protected conduct." (*Id.* at p. 14.)

In *Jurupa II*, *supra*, PERB Decision No. 2458, the employer was not able to justify a consecutive year evaluation of a permanent teacher where it was unable to present persuasive evidence that it had legitimate performance concerns about the teacher when it ordered the

consecutive evaluation. (*Id.*, adopting proposed dec., pp. 45-47.) The employer therefore did not meet its burden of showing that it acted for reasons unrelated to the employee's protected conduct. (*Ibid.*)

This is a mixed motive case. The District has admitted that it acted, in part, because of Ms. Rosales's protected PAR program participation, as Mr. Powers and Dr. Meyer view such participation as tacit acknowledgment of a performance deficit. However, even though there was direct evidence of the District's unlawful motivation, I cannot conclude that "but for" Ms. Rosales's protected activity the same action would not have been pursued.

Mr. Powers and Ms. Roark testified credibly to having concerns over Ms. Rosales's classroom management and use of instructional time in both the 2013-2014 and 2014-2015 school years. Ms. Rosales did not challenge Mr. Powers's assertion that, in 2013-2014, he shared those concerns with her on three or four occasions. The fact that a teacher was rated as excellent in a subcategory during the previous evaluation cycle, as Ms. Rosales was, does not preclude an assessment that performance had declined in the same area the following year. The important fact to note is that Mr. Powers shared his concerns with Ms. Rosales over her use of instructional time contemporaneous with his informal observations. Ms. Rosales also did not dispute Ms. Roark's testimony about specific classroom management issues she had witnessed in 2014-2015. Many of these same types of concerns were documented both in Ms. Rosales's initial rescinded and final performance evaluations for 2014-2015. Additionally, Ms. Rosales admitted to showing Disney movies, more than once, during instructional time and that Mr. Powers had also raised a concern about that with her more than once. This was also something that had been the subject of a parent complaint against her, which she admitted she had been informed of by Mr. Powers. Ms. Rosales's showing of a

Disney film during instructional time also had been witnessed and criticized by District official Dr. Guevara. Ms. Rosales did not dispute Ms. Roark's testimony that Ms. Rosales said when confronted about that incident, "I know I'm not supposed to show movies." Thus, there is ample evidence that the District had and communicated with Ms. Rosales about performance concerns before it ordered that she be evaluated again in 2015-2016.

In weighing the evidence of the District's unlawful motivation against the justifications it offered for deciding to evaluate her again, the District has shown that it had and acted because of performance concerns rather than to punish protected activity. Because the weight of the evidence supports the District's stated reasons for its action, there is no evidence that those reasons were a pretext for retaliation. This situation is therefore distinguished from that in *Jurupa II*, where the employer in that case was unable to show that it had communicated about having any performance concerns with the teacher before ordering a consecutive evaluation. (*Id*., adopting proposed dec., pp. 45-47.) These facts are also distinguishable from those in *Dept. of Corrections & Rehabilitation*, where the employer was unable to show any reason other than the union steward's protected conduct for issuing discipline. (*Id*., adopting proposed dec., p. 14.) Rather, this case is similar to *Regents*, where despite direct evidence of unlawful motivation, the employer was able to demonstrate that because of documented performance concerns, it would have taken the same action even if the employee had not engaged in protected conduct. (*Id.*, adopting proposed dec., p. 33.)

For all of the above-discussed reasons, the District has proved its defense and therefore defeated Ms. Rosales's showing of a prima facie case of retaliation. Accordingly, Ms. Rosales's claims in this matter must be dismissed.

Conclusion

Ms. Pickett, Mr. Pickett, and Ms. Edwards did not show by a preponderance of evidence that the District took any action against them that could be considered adverse to their employment interests under an objective standard. And although Ms. Rosales met her evidentiary burden of stating a prima facie case of retaliation, the District proved its defense that it had and acted for non-discriminatory reasons when it decided to pursue a consecutive year evaluation of her performance. Accordingly, all of the Charging Parties' claims in this matter fail.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. LA-CE-6088-E, *Lori E. Edwards, David Pickett, Victoria Pickett, and Kimberly Rosales v. Lake Elsinore Unified School District*, are hereby DISMISSED.

Right to Appeal

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

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

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

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

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