STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MARGARET REYES, Charging Party, v. SAN FRANCISCO UNIFIED SCHOOL DISTRICT, Respondent.	Case Nos. SF-CE-3278-E SF-CE-3294-E SF-CE-3295-E SF-CE-3297-E PERB Decision No. 2676 October 23, 2019

Appearances: Margaret Reyes, on her own behalf; William M. Quinn, Jr., Senior Deputy General Counsel, for San Francisco Unified School District.

Before Shiners, Krantz, and Paulson, Members.

DECISION[1]

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal from the attached dismissal issued by PERB's Office of the General Counsel (OGC). Margaret Reyes (Reyes) filed four unfair practice charges against her former employer, San Francisco Unified School District (District), alleging that the District violated the Educational Employment Relations Act (EERA)[2] by retaliating against her for her exercise of protected activity and interfering with her right to be represented by her exclusive

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

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

representative. OGC granted Reyes's request to consolidate her charges and ultimately dismissed the consolidated charge as untimely and for failing to state a prima facie case. OGC also found that certain of Reyes's claims are outside of PERB's jurisdiction. Reyes timely appealed OGC's dismissal.

Based on our review of Reyes's appeal and the case file in its entirety, we find that the warning and dismissal letters accurately describe the allegations included in the consolidated unfair practice charge, and are in accordance with applicable law. We therefore adopt the warning and dismissal letters as the decision of the Board itself and affirm the dismissal of the consolidated unfair practice charge.

ORDER

The amended unfair practice charges in Case Nos. SF-CE-3278-E, SF-CE-3294-E, SF-CE-3295-E, and SF-CE-3297-E are DISMISSED WITHOUT LEAVE TO AMEND.

Members Krantz and Paulson joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1139
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May 7, 2019

Margaret Reyes

Re: *Margaret Reyes v. San Francisco Unified School District*
Unfair Practice Charge Nos. SF-CE-3278-E, SF-CE-3294-E, SF-CE-3295-E & SF-CE-3297-E
DISMISSAL LETTER

Dear Ms. Reyes:

Margaret Reyes (Reyes or Charging Party) filed the above-referenced unfair practice charges with the Public Employment Relations Board (PERB or Board) on April 13, 2018, August 13, 2018, August 17, 2018, and August 23, 2018, respectively, alleging violations of the Educational Employment Relations Act (EERA or Act)[1] by the San Francisco Unified School District (District or Respondent).

The attached Warning Letters, dated April 9, 2019, advised Charging Party that the above-referenced charges did not state a prima facie case; that Charging Party should amend the charges if there were any factual inaccuracies or additional facts that would correct the deficiencies identified in those letter; and that if the charges were not amended to state a prima facie case or withdrawn by May 9, 2019, they would be dismissed.

On April 23, 2019, Charging Party filed an amended charge in Case No. SF-CE-3295-E and a request to consolidate all four of her cases against the District.[2] That request—which the District did not oppose—is hereby granted. (See PERB Regulation 32612(d).) The amended charge is hereafter referred to as the consolidated amended charge (CAC).[3]

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

[2] Reyes has also filed a charge against her exclusive representative, Case No. SF-CO-833-E.

[3] Charging Party filed an amended charge in Case No. SF-CE-3278-E on May 22, 2018; in Case No. SF-CE-3294-E on October 2, 2018 and February 5, 2019; and in Case No. SF-CE-3295-E on September 24, 2018.

Also on April 23, 2019, Charging Party filed a "Request for Judicial Notice," which consists entirely of legal argument with citations to authority. It is unnecessary to formally request notice of such authorities. The arguments and authority cited will be addressed below.

For the reasons that follow, neither the CAC nor the argument in the request for judicial notice corrects the deficiencies identified in the April 9, 2019 Warning Letters.

FACTS ALLEGED[4]

Reyes is employed by the District as a first grade teacher at Commodore Sloat Elementary School (Sloat). The District's classroom teachers are exclusively represented by United Educators of San Francisco (UESF). The District and UESF are parties to a collective bargaining agreement (CBA).

The CBA provides for a peer assistance and review (PAR) program, in which teachers may, under certain circumstances, be assigned a peer coach to help improve their teaching performance. Referrals to the PAR program are reviewed by a committee of five members appointed by UESF and four members appointed by the District. UESF President Lita Blanc (Blanc) and District Executive Director of Talent Management Greg John (John) serve as co-chairs of the committee. In the event the co-chairs cannot agree on a PAR referral, the District's superintendent makes the decision. This process appears in appendix F to the CBA, which was originally agreed to in 2008, and it conflicts with the process that appears in CBA article 39, which otherwise governs PAR.

In June 2005, Reyes filed a federal civil rights lawsuit against the District. That matter concluded in 2006.

In September 2011, Reyes filed a second federal lawsuit against the District. During the second lawsuit, Reyes and her medical records were evaluated by a psychiatrist. The psychiatrist prepared a 28-page report, which discusses, among other things, Reyes's opposition to being placed in the PAR program.

On April 13, 2012, the judge in Reyes's lawsuit entered a protective order regarding the confidentiality of Reyes's medical records. The order required the parties to destroy all copies of those records, except that counsel for each party was permitted to save one copy for purposes of maintaining a complete record of the litigation.

Fowzigiah Abdolcader (Abdolcader) is the principal at Sloat. During the 2016-2017 evaluation cycle, Abdolcader communicated with other District administrators and human resources staff regarding Reyes's evaluations.

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[4] The CAC omits some of the details alleged in prior charges. Except where necessary to provide context for the CAC's allegations, those details are omitted from this summary as well.

On August 13, 2017, UESF President Lita Blanc (Blanc), who serves as co-chair of the PAR committee along with John, informed Reyes that the District was threatening to issue Reyes a "90[-]day notice" unless she was referred to the PAR program.

On August 16, 2017, Blanc agreed with John's recommendation to refer Reyes to the PAR program.

On August 31, 2017, Reyes met with District Chief of Human Resources Daniel Menezes (Menezes) and District Chief of Labor Relations Carmelo Sgarlato (Sgarlato). In this meeting, Reyes asserted that John, while serving as the Sloat principal before Abdolcader, had retaliated against Reyes for filing lawsuits.

On September 5, 2017, Reyes submitted a formal complaint to the United States Department of Education, Office for Civil Rights, which referred the complaint to the Equal Employment Opportunity Commission (EEOC). The complaint stated, among other things, that Blanc had agreed to refer Reyes to PAR.

On September 29, 2017, an individual named Valerie Trahan (Trahan) requested from the District information regarding the PAR program, pursuant to the California Public Records Act (CPRA). The District responded that it did not have any responsive records.

On October 12, 2017, Menezes told Blanc that the District was considering issuing Reyes a "45[-]day notice" for insubordination, for Reyes's refusal to participate in PAR.

On November 2, 2017, Blanc rescinded her recommendation that Reyes be referred to PAR, explaining that Reyes's union representative had been prohibited from participating in an observation meeting in November 2016, and that Reyes had not been evaluated four times during the preceding school year, as required by the CBA between UESF and the District.

On November 3, 2017, John responded to Blanc that the allegations regarding the denial of union representation had been found unsubstantiated, and that the reason Reyes had not been evaluated a fourth time in the preceding school year was that Reyes had avoided scheduling her final evaluation.

As a result of the disagreement between Blanc and John about referring Reyes to PAR, the issue was decided by District Superintendent Vincent Matthews (Matthews). On November 6, 2017, Reyes learned that Matthews had agreed with John's recommendation that Reyes be referred to PAR.

On November 8, 2017, Blanc sent Reyes information from the District regarding the ages and ethnicities of PAR participants from 2010 through 2017. The information showed that teachers older than 40 and belonging to certain racial and ethnic minorities are overrepresented in the program. According to the charge, Reyes is also older than 40.

On December 26, 2017, Trahan sent a letter to the District's governing board expressing several concerns about the District's PAR program. Reyes forwarded Trahan's letter to other District officials.

On February 6, 2018, Reyes asked Matthews and the District's governing board to place an item on its agenda to discuss the PAR program. The District did not do so.

On February 27, 2018, District Assistant Superintendent Richard Curci (Curci) sent Reyes written memorialization of a verbal reprimand for her refusal to participate in PAR. Curci directed Reyes to schedule a meeting with her PAR coach by March 2, 2018.

On March 6, 2018, Curci sent Reyes a written reprimand for refusing to participate in PAR.

On March 8, 2018, Reyes responded to Curci that she would not participate in PAR.

On March 12, 2018, Curci issued Reyes a notice of a proposed 15-day suspension, for her refusal to participate in PAR. The notice referred to Reyes's efforts to challenge the PAR process, including her appeals to the Office for Civil Rights and to the office of Congresswoman Nancy Pelosi. The notice informed Reyes that she had the right to a pre-disciplinary hearing pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*) on March 14, 2018. The notice did not cite any statutory authority for suspending Reyes.

UESF objected that such short notice of the *Skelly* hearing was a violation of past practice and possibly a violation of *Skelly* itself. The meeting was rescheduled for March 16 and then for March 23, 2018.

On March 20, 2018, Reyes sent an e-mail message to several union representatives and District officials, explaining why she believed the PAR process was in violation of the Education Code and the CBA.

On March 22, 2018, Reyes filed a petition for writ of mandate in superior court, seeking to enjoin the District from proceeding with the suspension.

On March 23, 2018, the *Skelly* hearing was held, with Assistant Superintendent Ana de Arce (de Arce) serving as hearing officer. De Arce was John's supervisor when John served as principal at Sloat. De Arce recommended that the District proceed with the suspension.

On March 26, 2018, Menezes notified Reyes that she would be suspended from April 2, 2018 through April 20, 2018, and that upon her return, she should schedule meetings with her PAR coach. According to Reyes, Menezes lacks an administrative credential.

On March 27, 2018, UESF filed a grievance asserting that Reyes's suspension violated CBA provisions requiring that a suspension without pay be preceded by two written reprimands, except where "written reprimands normally would not result in corrective conduct."

On March 28, 2018, UESF representative Susan Solomon (Solomon) sent Reyes an e-mail message stating that UESF did not believe the March 23, 2018 meeting was a valid *Skelly* hearing. Reyes forwarded Solomon's statement to the District's governing board and to Sgarlato, and questioned whether Menezes had been granted authority by the governing board to suspend Reyes.

On March 31, 2018, Reyes filed a complaint regarding PAR with the San Francisco District Attorney's Office.

On April 3, 2018, Reyes submitted a complaint to the District's Office of Equity alleging discrimination and retaliation. The complaint was referred to Menezes.

On April 5, 2018, Reyes sent an e-mail message to District Labor Relations Director Carrie Slaughter (Slaughter), regarding concerns about the PAR program. According to the charge, Slaughter previously served as a PAR coach, but did not, contrary to language in the CBA, return to classroom teaching afterward.

On April 9, 2018, Reyes received an e-mail message with a link to a notice of unprofessional conduct and unsatisfactory performance (NUCUP), principally based on her continued refusal to participate in PAR. The NUCUP gave Reyes 90 days to improve her performance and 45 days to improve her conduct. The e-mail message was nominally from Menezes, but it showed that it was "sent by johnr@sfusd.edu," which is John's e-mail address.

On April 10, 2018, Slaughter denied UESF's grievance regarding the suspension. She concluded that because Reyes had repeatedly and unambiguously refused to participate in PAR, the District was justified in proceeding to suspension without a second written reprimand.

On April 19, 2018, UESF requested expedited arbitration of its grievance regarding Reyes's suspension. The District did not agree to the request. As of the date of the CAC, arbitration is still pending.

On April 24, 2018, Reyes addressed the District's governing board regarding her concerns about the PAR program.

On April 29, 2018, Reyes contacted the state Attorney General's whistleblower hotline regarding the PAR program.

On April 30, 2018, Menezes issued Reyes a notice of a second 15-day suspension for her continued refusal to participate in PAR. The notice of suspension did not refer to *Skelly* rights, but only to Reyes's right to request a hearing under the CBA.

On May 15, 2018, following a hearing, Enikia Ford Morthel recommended that the District proceed with the second suspension of Reyes. The suspension began on May 16, 2018, and ran until the end of the school year.

On May 18, 2018, Reyes proposed that the District agree to mediation. The District refused.

UESF filed a grievance challenging the second suspension, which Slaughter denied. UESF advanced the grievance to arbitration, where it is currently pending.

On July 30, 2018, Reyes amended her petition for writ of mandate to include the two 15-day suspensions she received. The District demurred to the petition, but the court overruled the demurrer.

On August 14, 2018, Abdolcader sent Reyes an e-mail message setting forth Abdolcader's expectations for Reyes's lesson and curriculum planning for the upcoming school year. Abdolcader reminded Reyes of the importance of planning lessons in accordance with District and state standards. Abdolcader directed Reyes to provide her, by Friday afternoon of each week, her lesson plans for the following week. Abdolcader further directed Reyes to provide her, by August 24, 2018, a "detailed curriculum map" for the school year and her long term lesson plans for the first six weeks of school. Abdolcader acknowledged that "this is a great deal of work, but it is essential to assuring student learning and success."

On August 21, 2018, UESF sent Abdolcader an e-mail message objecting to the memorandum.

On August 22, 2018, Menezes sent Reyes a copy of a report prepared by a private law firm, which had been hired to conduct an independent investigation of Reyes's claims of retaliation and discrimination. The report found insufficient evidence to support Reyes's claims, but it did not include evidence submitted by Reyes. According to the report, John stated that Reyes's litigation history was "common knowledge" and that Reyes was a divisive person.

On September 18, 2018, Abdolcader accused Reyes of taking photographs of a paraeducator and a student on September 12, 2018. Reyes disputes this accusation because she was not present during school hours on the day in question.

On September 24, 2018, Reyes received notice that the District's governing board would be meeting in closed session the following day to consider dismissal charges against her. Reyes responded by demanding that the matter be heard in open session.

On September 26, 2018, John Reclosado (Reclosado), a District employee, personally served Reyes with a notice of intent to dismiss and statement of charges. Reyes was also suspended without pay. The notice included a letter from a witness regarding the September 18, 2018 incident, the letter did not identify Reyes by name.

On October 15, 2018, David George (George) conducted a hearing concerning Reyes's suspension. The CAC alleges that George is among the District officials with access to the psychiatric evaluation report prepared during her second federal lawsuit against the District.

On December 10, 2018, Stacy Willoughby (Willoughby) submitted a CPRA request for information related to the District's PAR program. The District denied that it had responsive documents.

Reyes requested a hearing with the Office of Administrative Hearings (OAH) to challenge her dismissal. OAH scheduled a three-week hearing to begin on April 2, 2019.

On February 1, 2019, the District filed supplemental disclosures for the OAH hearing, pursuant to Education Code section 44944.05. The psychiatric evaluation report from Reyes's second federal lawsuit was included among several hundred pages of documents the District disclosed.

In advance of the hearing, Reyes sent a series of questions to OAH concerning the scope of its jurisdiction. OAH responded that it could not provide legal advice to Reyes. As a result, on March 29, 2019, Reyes rescinded her request for a hearing.

DISCUSSION

I. Retaliation

The CAC alleges that the District retaliated against Reyes for engaging in protected activity. As explained in the Warning Letters in Case Nos. SF-CE-3278-E and SF-CE-3295-E, to state a prima facie case that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must allege facts establishing that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

The Warning Letter in Case No. SF-CE-3278-E considered the allegation that the District retaliated against Reyes by referring her to PAR, suspending her, reprimanding her, and issuing the NUCUP for refusing to participate in PAR. It concluded that the allegation regarding the PAR referral was untimely; the CAC does not dispute that conclusion.[5] It also concluded that Reyes engaged in protected activity by challenging her referral to PAR, but that there were no factual allegations to suggest that the District took adverse action against her because of those activities, as opposed to her admitted refusal to participate in PAR.

The Warning Letter in Case No. SF-CE-3295-E considered the allegation that Abdolcader retaliated against Reyes by observing her classroom and imposing additional requirements for

[5] As explained in the Warning Letter, Reyes knew of that referral no later than September 5, 2017, more than six months before the charge in Case No. SF-CE-3278-E was filed (on April 13, 2018). The Warning Letter also rejected the assertion that equitable tolling should apply. The CAC asks that equitable tolling apply "where necessary." It does not, however, allege any facts that would establish the criteria for applying the equitable tolling doctrine to this allegation.

curriculum planning. It concluded that Reyes engaged in protected activity by challenging the PAR program, but that her federal civil rights lawsuits were not protected. It further concluded that the charge did not allege Abdolcader's knowledge of Reyes's protected activity or any evidence that Abdolcader was motivated to take adverse action because of it.

The CAC fails to cure these deficiencies. With respect to Abdolcader, the CAC includes no allegation that she was aware of Reyes's protected activity. Therefore, the allegations that Abdolcader retaliated against Reyes fail to state a prima facie case.

With respect to the remaining allegations, the CAC cites a number of facts in an attempt to demonstrate the District's unlawful motive. None are availing.

First, the CAC argues that the District departed from Education Code section 44664, subdivision (b), which states in part that "[i]f any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district." The CAC argues that the District violated this provision because it did not evaluate Reyes's performance during the 2017-2018 school year, but rather referred her to PAR. However, Education Code section 44664, subdivision (c), specifically contemplates a referral to PAR for teachers who receive an unsatisfactory evaluation.[6]

The CAC also argues that the District departed from Education Code section 44938 and *Tarquin v. Commission on Professional Competence* (1978) 84 Cal.App.3d 251 by issuing the NUCUP without having evaluated Reyes during the 2017-2018 year. Neither of those authorities imposes such a requirement.

The CAC also suggests that the passage of 11 months between the previous school year and the issuance of the NUCUP indicates unlawful motive, i.e., it undermines the legitimacy of the District's claim about Reyes's performance. But the charge allegations establish that the

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[6] Education Code section 44664, subdivision (c), states:

> Any evaluation performed pursuant to this article which contains an unsatisfactory rating of an employee's performance in the area of teaching methods or instruction may include the requirement that the certificated employee shall, as determined necessary by the employing authority, participate in a program designed to improve appropriate areas of the employee's performance and to further pupil achievement and the instructional objectives of the employing authority. If a district participates in the Peer Assistance and Review Program for Teachers established pursuant to Article 4.5 (commencing with Section 44500), any certificated employee who receives an unsatisfactory rating on an evaluation performed pursuant to this section shall participate in the Peer Assistance and Review Program for Teachers.

District expressed concerns about Reyes's performance before she engaged in the protected activity of challenging her PAR referral. Specifically, Reyes learned in August 2017 that the District was threatening to issue a 90-day notice unless Reyes were referred to PAR.

The CAC argues that the District's decision to refer Reyes to PAR despite Blanc's disagreement is evidence of unlawful motive, because the provision for doing so is contained in appendix F to the CBA, not article 39, which governs PAR. This is not evidence of unlawful motive, because any conflict between appendix F and article 39 existed before Reyes engaged in the protected activity of challenging her PAR referral. (*Jurupa Unified School District* (2015) PERB Decision No. 2420.)

The CAC argues that the District's CPRA responses to Trahan and Willoughby are evidence of unlawful motive, because the District did in fact possess the relevant information. However, those CPRA responses were made to individuals other than Reyes, and are entirely unrelated to the adverse action taken against Reyes. They are not evidence of unlawful motive. (*Regents of the University of California* (2012) PERB Decision No. 2302-H [departure from established procedures that is unrelated to adverse action does not establish unlawful motive].)

The CAC also argues that the District's handling of her grievances is evidence of unlawful motive. The CAC cites *North Sacramento School District* (1982) PERB Decision No. 264 for the proposition that "[t]he District's conduct in processing the grievance may be evidence of unlawful motive." The facts of that case, however, are inapposite. There, the employer took an "obstructionist" approach to the employee's grievance, disputing that he had satisfied basic procedural requirements. Here, by contrast, the District denied Reyes's grievances on their merits. The mere fact that they are still awaiting arbitration does not suggest unlawful motive.

The CAC argues that John's comments about Reyes being a divisive person and about her litigation history show unlawful motive. There is no indication that these comments concern Reyes's protected activity. As noted above and fully explained in the Warning Letter in Case No. SF-CE-3295-E, Reyes's federal lawsuits were not activity protected by EERA.

The CAC argues that the investigative report's omission of "explanations of key complaints" by Reyes is evidence of unlawful motive. However, it is not clear—and the CAC does not explain—why this action by the independent investigator shows an unlawful motive. Critically, it is not alleged that the investigator had any role in taking any of the underlying adverse actions against Reyes.

The CAC argues that by including the letter from the witness about the September 18, 2018 incident (in which Reyes was accused of taking a photograph), which did not identify Reyes by name, the District evidenced unlawful motive. It is not clear why the letter's failure to identify Reyes by name is evidence of unlawful motive.

Finally, the CAC argues that the District maintained a "secret file" on Reyes, which included the psychiatric report from her second federal lawsuit. The CAC cites *Novato, supra*, PERB Decision No. 210, which found evidence of unlawful motive in the employer's maintenance of a secret file that the employee was not allowed to inspect, contrary to Education Code section

44031(a). This case is unlike *Novato*. The protective order in the federal lawsuit expressly permitted both parties to keep a copy of the confidential records. Thus, the District has not kept a secret file that Reyes was unaware of.[7]

In the request for judicial notice, Reyes argues that her refusal to participate in the PAR program was protected activity. The Warning Letter in Case No SF-CE-3278-E considered but rejected this argument, as follows:

> To the extent the charge alleges that Reyes had a right to refuse to participate in PAR because of her disputes about the fairness and legality of the process, this allegation must fail. With exceptions not applicable here, EERA does not protect an individual's refusal to perform required job duties. (*Los Angeles Unified School District* (2005) PERB Decision No. 1791.)

The request for judicial notice cites *NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822. That case is unavailing. There, the United States Supreme Court held that an employee's refusal to drive what he believed was an unsafe truck was an assertion of his right under the applicable CBA to "be free of the obligation to drive unsafe trucks," and that asserting such a right is "concerted activity" under the National Labor Relations Act. (*Id.* at p. 839.) But the Supreme Court specifically noted that whether the activity was "protected" was a separate question:

> The fact that an activity is concerted, however, does not necessarily mean that an employee can engage in the activity with impunity. . . . Furthermore, if an employer does not wish to tolerate certain methods by which employees invoke their collectively bargained rights, he is free to negotiate a provision in his collective-bargaining agreement that limits the availability of such methods. No-strike provisions, for instance, are a common

[7] The CAC elsewhere argues that the District violated the protective order by disclosing the psychiatric report. It is not clear that the District has done so. Education Code section 44944.05 requires disclosures *between the parties* in a dismissal proceeding. Nothing in that section, and nothing in the District's statement accompanying the disclosures, suggests that the District made the disclosures to anyone other than Reyes.

Moreover, Education Code section 44944.05 requires the disclosure of "[a] copy of all documents, electronically stored information, and tangible items that the disclosing party has in its possession, custody, or control *relating to* the allegations made in the charges and the parties' claims or defenses, unless the use would be solely for impeachment." (Emphasis added.) Thus, the mere fact that the District disclosed the psychiatric report—among hundreds of other pages of documents—to Reyes, under the broad disclosure requirements of section 44944.05, does not necessarily suggest that the District intended to disclose it in the OAH hearing or otherwise violate the protective order.

> mechanism by which employers and employees agree that the latter will not invoke their rights by refusing to work.

(*Id.* at p. 837.)

Thus, even if Reyes's refusal to participate in PAR amounted to an assertion of a contractual right, this would not establish that the refusal was protected. And PERB has held that the refusal to perform mandatory duties is not protected. (*Modesto City Schools* (1983) PERB Decision No. 291.) Nor are such refusals protected when they are unauthorized or disapproved of by the exclusive representative. (*El Dorado Union High School District* (1985) PERB Decision No. 537.) Here, UESF disagreed with referring to Reyes to PAR and it filed grievances on Reyes's behalf, but there is no evidence that it authorized or approved of her refusal to participate in PAR, after the District had ordered her to do so. As a result, Reyes's refusal to participate in PAR was not protected.

For these reasons, the allegations that the District retaliated against Reyes for engaging in protected activity are hereby dismissed.

II. Domination

The CAC continues to allege that the District violated EERA section 3543.5(d), which makes it unlawful for an employer to "[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another." As explained in the Warning Letters in Case Nos. SF-CE-3278-E and SF-CE-3294-E, individual employees do not have standing to allege violations of this provision. (*Jurupa Unified School District* (2012) PERB Decision No. 2283.) Therefore, these allegations are hereby dismissed.

III. Allegations Not Addressed in the CAC

The Warning Letters addressed the following additional allegations: (1) that Abdolcader denied Reyes's request for union representation (SF-CE-3295-E); (2) that the District interfered with Reyes's right to consult a representative before participating in PAR (SF-CE-3297-E); and (3) that the District violated the Education Code, the Ralph M. Brown Act (Brown Act),[8] the federal court protective order, and federal law, and that a District employee committed perjury on a proof of service (SF-CE-3294-E).

The CAC does not address any of these allegations. They are hereby dismissed. (See *Los Angeles Community College District* (2000) PERB Decision No. 1377 [allegation considered in a warning letter but not addressed in an amended charge will be dismissed].)

[8] The Brown Act is codified at Government Code section 54950 et seq.

Right to Appeal

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

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

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-9425

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

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for

filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

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

Sincerely,

J. FELIX DE LA TORRE
General Counsel

By _____
Joseph Eckhart
Senior Regional Attorney

Attachment

cc: William M. Quinn Jr., Senior Deputy General Counsel

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
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April 9, 2019

Margaret Reyes

Re: *Margaret Reyes v. San Francisco Unified School District*
Unfair Practice Charge No. SF-CE-3278-E
WARNING LETTER

Dear Ms. Reyes:

Margaret Reyes (Reyes or Charging Party) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on April 13, 2018, and amended it on May 22, 2018. The charge alleges that the San Francisco Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by referring Reyes to the peer assistance and review (PAR) program and disciplining her for refusing to participate in the program.

For the reasons explained below, the charge does not state a prima facie case. If the charge is not amended or withdrawn by May 9, 2019, it will be dismissed.

FACTS AS ALLEGED

Reyes is employed by the District as a first grade teacher at Commodore Sloat Elementary School (Sloat). The District's classroom teachers are exclusively represented by United Educators of San Francisco (UESF). The District and UESF are parties to a collective bargaining agreement (CBA).

On April 30, 2014, Reyes sent an e-mail message to Sloat Principal Greg John (John), in which she accused John of creating a hostile environment at the school and failing to provide adequate support to Reyes's special education students.

In April 2016, John was quoted in media reports as saying that a coyote had been observed on the Sloat playground. The San Francisco Animal Care and Control Department conducted an investigation, however, and determined that the reports were false. John told both UESF representative Liz Conley (Conley) and Reyes that he believed Reyes had prompted the investigation. Although Reyes denied responsibility, she acknowledged telling colleagues that she doubted the veracity of the story, because she would have seen the coyote from her

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

classroom. John directed Reyes not to speak with community members or the media regarding the matter.

On April 6 or 7, 2016, John conducted an observation of Reyes's classroom and gave her a "poor" summary evaluation.

On July 7, 2016, Reyes sent an e-mail message to District Assistant Superintendent Richard Curci (Curci) to complain that John had posted a video on social media showing Reyes's classroom, which had been vandalized. Until seeing this video, Reyes had been unaware of the vandalism.

For the 2016-2017 school year, Fowzigiah Abdolcader (Abdolcader) became the principal at Sloat. At some point, John became the District's executive director of talent management and the co-chair of the PAR committee.

During the 2016-2017 evaluation cycle, Abdolcader communicated with other District administrators and human resources staff regarding Reyes's evaluations.

On December 2, 2016, Abdolcader sent an e-mail message accusing Reyes of leaving her students unattended with a non-credentialed staff member. Reyes responded by disputing the accusation. Reyes sent copies of her message to Curci and UESF President Lita Blanc (Blanc).

On December 9, 2016, Reyes complained to Curci that Abdolcader had denied her request for union representation on multiple occasions.

On December 12, 2016, Reyes complained to Curci about John's frequent visits to the Sloat campus.

On January 18, 2017, Reyes met with Curci to complain that Abdolcader's evaluations were "excessive, retaliatory and unfair."

On April 17, 2017, Reyes sent an e-mail message to Abdolcader inquiring about an investigation of an incident involving a student. The message's subject heading was "Highly Confidential – Do Not Forward – Incident during lunch today." Abdolcader responded by asking, "Is there a reason for this subject heading?"

On August 13, 2017, Blanc, who serves as co-chair of the PAR committee along with John, informed Reyes that the District was threatening to issue Reyes a "90[-]day notice" unless she was referred to PAR.[2]

[2] The CBA provides that under certain circumstances, a teacher may be referred to the PAR program, in which case he or she is assigned a peer coach. Referrals are reviewed by a panel of District administrators, teachers, and union officials.

On August 31, 2017, Reyes met with District Chief of Human Resources Daniel Menezes (Menezes) and District Chief of Labor Relations Carmelo Sgarlato (Sgarlato). In this meeting, Reyes asserted that John had retaliated against Reyes for filing lawsuits.

On September 5, 2017, Reyes submitted a formal complaint to the United States Department of Education, Office for Civil Rights, which referred the complaint to the Equal Employment Opportunity Commission (EEOC). The complaint stated, among other things, that Blanc had agreed to refer Reyes to PAR.

On September 8, 2017, Menezes informed Reyes that John would "recuse himself from any conversations or deliberations concerning your PAR participation."

On September 14, 2017, Abdolcader described Reyes as "harsh" and "offensive" in response to Reyes's request for clarification regarding a situation with a student.

On October 12, 2017, Menezes told Blanc that the District was considering issuing Reyes a "45[-]day notice" for insubordination, for Reyes's refusal to participate in PAR.

On November 2, 2017, Blanc rescinded her recommendation that Reyes be referred to PAR, explaining that Reyes's union representative had been prohibited from participating in an observation meeting in November 2016, and that Reyes had not been evaluated four times during the preceding school year, as required by the CBA between UESF and the District.

According to the CBA, the disagreement between Blanc and John as to the PAR referral was to be resolved by District Superintendent Vincent Matthews (Matthews).

On November 3, 2017, John responded to Blanc that the allegations regarding the denial of union representation had been found unsubstantiated, and that the reason Reyes had not been evaluated a fourth time in the preceding school year was that Reyes had avoided scheduling her final evaluation.

On November 6, 2017, Reyes learned that Matthews had agreed with John's recommendation that Reyes be referred to PAR.

On November 8, 2017, Blanc sent Reyes information from the District regarding the ages and ethnicities of PAR participants from 2010 through 2017. The information showed that teachers older than 40 and belonging to racial and ethnic minorities are overrepresented in the program. According to the charge, Reyes is also older than 40.

On December 26, 2017, an individual identifying herself as a "California Citizen" sent a letter to the District's governing board expressing several concerns about the District's PAR program.

On February 4, 2018, Reyes complained to Curci about construction work in her classroom, displacement of her students, and the possibility of exposure to asbestos. Curci did not respond.

On February 6, 2018, Reyes asked Matthews and the District's governing board to place an item on its agenda to discuss the PAR program, including Reyes's allegations that the program discriminates on the basis of age and race.

On February 15, 2018, Reyes received a decision denying a grievance she filed over a sick day she contends she was erroneously charged. The grievance decision was written by an individual who lacks an administrative credential.

On February 17, 2018, John made two posts on social media. The first stated, "Remember that you are butt [*sic*] dust and into dust you shall return." The second spoke negatively of an unidentified "professional connection" of John's who lacked "the basics of every day decency."

On February 20, 2018, Reyes requested that Abdolcader provide her with a summary of a meeting that was held regarding a student. Abdolcader pointed out that Reyes had also attended the meeting, and suggested that she consult her own notes.

On February 27, 2018, Curci sent Reyes written memorialization of a verbal reprimand for her refusal to participate in PAR. Curci directed Reyes to schedule a meeting with her PAR coach by March 2, 2018.

In early March 2018, Reyes sent an e-mail message to Matthews regarding John's treatment of the coyote incident, as well as a social media post of his mocking Catholics.

On March 6, 2018, Curci sent Reyes a written reprimand for refusing to participate in PAR.

On March 8, 2018, Reyes responded to Curci that she would not participate in PAR.

On March 8, 2018, Reyes sent an e-mail message to Abdolcader requesting a copy of Sloat's proposed budget. Abdolcader responded, "Is this for UBC?"—which appears to be a reference to a union activity. Reyes responded, "Huh? I thought you weren't supposed to ask me what the UBC does?" Abdolcader clarified, "I am asking you if you need it for a UBC meeting. It is not to ask you what UBC does." Abdolcader also admonished Reyes for unprofessionalism. Reyes responded by accusing Abdolcader of "feign[ing] concern" over Reyes's professionalism as part of a pattern of "continued hostility" toward Reyes.

On March 12, 2018, Curci issued Reyes a notice of a proposed 15-day suspension, due to Reyes's refusal to participate in PAR. The notice referred to Reyes's efforts to challenge the PAR process, including her appeals to the Office for Civil Rights and to the office of Congresswoman Nancy Pelosi. The notice informed Reyes that she had the right to a pre-disciplinary hearing pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*) on March 14, 2018.

UESF objected that such short notice of the *Skelly* hearing was a violation of past practice and possibly a violation of *Skelly* itself. The meeting was rescheduled for March 16 and then for March 23, 2018.

On March 20, 2018, Reyes sent an e-mail message to several union representatives and District officials, explaining why she believed the PAR process was in violation of the Education Code and the CBA.

On March 22, 2018, Reyes filed a petition for writ of mandate in superior court, seeking to enjoin the District from proceeding with the suspension.

On March 23, 2018, the *Skelly* hearing was held, with Assistant Superintendent Ana de Arce (de Arce) serving as hearing officer. De Arce was John's supervisor when John served as principal at Sloat. De Arce recommended that the District proceed with the suspension.

On March 26, 2018, Menezes notified Reyes that she would be suspended from April 2, 2018 through April 20, 2018, and that upon her return, she should schedule meetings with her PAR coach. According to Reyes, Menezes lacks an administrative credential.

On March 28, 2018, UESF representative Susan Solomon (Solomon) sent Reyes an e-mail message stating that UESF did not believe the March 23, 2018 meeting was a valid Skelly hearing. Reyes forwarded Solomon's statement to the District's governing board and to Sgarlato, and questioned whether Menezes had been granted authority by the governing board to suspend Reyes.

On April 5, 2018, Reyes sent an e-mail message to District Labor Relations Director Carrie Slaughter (Slaughter), regarding concerns about the PAR program. According to the charge, Slaughter previously served as a PAR coach, but did not, contrary to language in the CBA, return to classroom teaching afterward.

On April 9, 2018, Reyes received an e-mail message with a link to a notice of unprofessional conduct and unsatisfactory performance (NUCUP), principally based on her continued refusal to participate in PAR. The NUCUP gave Reyes 90 days to improve her performance and 45 days to improve her conduct. The e-mail message was nominally from Menezes, but it showed that it was "sent by johnr@sfusd.edu," which is John's e-mail address.

On April 24, 2018, Reyes addressed the District's governing board regarding her concerns about the PAR program.

On April 29, 2018, Reyes contacted the state Attorney General's whistleblower hotline regarding the PAR program.

DISCUSSION

I. Standard for Assessing an Unfair Practice Charge

A Board agent must issue a complaint when an unfair practice charge states a prima facie case, that is, when he or she determines "that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations." (*Eastside Union School District* (1984) PERB Decision No. 466, p. 7.) Part of

establishing a prima facie case is demonstrating that the charge was timely filed within the statute of limitations. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) A charge that fails to state a prima facie case must be dismissed. (PERB Regulation 32630.)

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

When evaluating whether a charge states a prima facie case, the Board agent must assume that the charging party's factual allegations are true. (*Temple City Unified School District* (1990) PERB Decision No. 843.) Speculation and legal conclusions, however, are not factual allegations, and they are not sufficient to state a prima facie case. (*Dept. of Food and Agriculture, supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

II. Analysis of Prima Facie Case

A. Retaliation

The charge alleges that the District retaliated against Reyes by referring her to PAR and by reprimanding her, suspending her, and issuing the NUCUP for refusing to participate in PAR. These allegations do not state a prima facie case.

Initially, the allegation that the District retaliated against Reyes by referring her to PAR appears to be untimely. EERA section 3541.5(a)(1) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) The charge alleges that Reyes learned on August 13, 2017, that the District would issue her a "90[-]day notice" if she was not referred to PAR. She also learned by September 5, 2017 that UESF had agreed to refer her. The charge was not filed until April 13, 2018, at least seven months and eight days after Reyes was clearly informed that she was required to participate in PAR.

In the amended charge, Reyes requests that the doctrine of equitable tolling apply to her untimely allegations. As applied by PERB, this doctrine tolls the statute of limitations while parties utilize a non-binding dispute resolution procedure if: (1) the procedure is contained in a written agreement negotiated by the parties; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in

good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent. (*Long Beach Community College District* (2009) PERB Decision No. 2002, p. 15.) Reyes protested her referral to PAR in several forums. But the only one of these that might be considered a negotiated dispute resolution procedure was the procedure by which Matthews resolved the dispute between Blanc and John about the PAR referral. And even assuming that this procedure satisfied the criteria for equitable tolling, the procedure only took four days—from November 2, 2017 through November 6, 2017. This still leaves the charge untimely by more than one month.

Although the District took additional adverse actions after Reyes refused to participate in PAR, the charge fails to establish a prima facie case that these actions were retaliatory on the basis of activity protected by EERA. To state a prima facie case that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must allege facts establishing that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

The charge alleges that Reyes engaged in several activities protected by EERA to protest her referral to PAR, including contacting various District officials, its governing board, and enlisting the assistance of UESF. There are, however, no factual allegations to suggest that these activities—as opposed to Reyes's admitted refusal to participate in PAR—motivated the District to take these adverse actions against her, as opposed to her admitted refusal to participate in PAR. As noted, Reyes had been clearly informed that the District would pursue discipline unless she participated in PAR. Under these circumstances, the charge fails to establish unlawful motive. (*Alameda County Medical Center* (2004) PERB Decision No. 1707-M [no prima facie case where employee had been previously disciplined for the same misconduct].)[3]

Therefore, the charge fails to establish a prima facie case of retaliation.

B. Domination

The amended charge alleges that the District violated EERA section 3543.5(d). That section makes it unlawful for an employer to "[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another." Individual employees, however, lack standing to allege violations of this provision. (*Jurupa Unified*

[3] To the extent the charge alleges that Reyes had a right to refuse to participate in PAR because of her disputes about the fairness and legality of the process, this allegation must fail. With exceptions not applicable here, EERA does not protect an individual's refusal to perform required job duties. (*Los Angeles Unified School District* (2005) PERB Decision No. 1791.)

School District (2012) PERB Decision No. 2283.) Therefore, Reyes, as an individual, may not pursue a violation of EERA section 3543.5(d).

C. Other Violations

The charge and amended charge also allege various violations of the Education Code, the CBA, and constitutionally-based *Skelly* rights. Although these violations may help establish the unlawful motive element of a prima facie case of retaliation in an appropriate case, they cannot independently state a prima facie case of a violation of EERA. (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548 [PERB lacks jurisdiction over the Education Code]; EERA, § 3541.5(b) [PERB may not enforce agreements between the parties]; *Los Angeles Unified School District* (1990) PERB Decision No. 835 [PERB lacks jurisdiction to enforce *Skelly* requirements].)

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before May 9, 2019,[4] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Senior Regional Attorney

JE

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

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 9, 2019

Margaret Reyes

Re: *Margaret Reyes v. San Francisco Unified School District*
Unfair Practice Charge No. SF-CE-3294-E
WARNING LETTER

Dear Ms. Reyes:

Margaret Reyes filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on August 13, 2018, and amended it on October 2, 2018 and February 5, 2019. The charge and its amendments allege that the San Francisco Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act),[1] the Education Code, the Ralph M. Brown Act (Brown Act),[2] a federal court protective order, and federal law, and that a District employee committed perjury.

For the reasons explained below, the charge does not state a prima facie case. If the charge is not amended or withdrawn by May 9, 2019, it will be dismissed.

FACTS AS ALLEGED

Reyes is employed by the District as a first grade teacher at Commodore Sloat Elementary School (Sloat). The District's classroom teachers are exclusively represented by United Educators of San Francisco (UESF). The District and UESF are parties to a collective bargaining agreement (CBA).

On April 13, 2012, a federal judge issued a protective order in a lawsuit filed by Reyes against the District. Among other things, the order prohibited the District from disclosing Reyes's medical records or other evidence of her medical history to anyone except its attorneys and other designated individuals.

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

[2] The Brown Act is codified at Government Code section 54950 et seq.

In 2017, Reyes was referred to the District's peer assistance and review (PAR) program. Her initial efforts to challenge that referral are the subject of a separate unfair practice charge, Case No. SF-CE-3278-E.[3]
On August 8, 2018, District Chief of Human Resources Daniel Menezes (Menezes) informed Reyes that her prior referral to PAR was still in effect, and directed her to schedule a meeting regarding the PAR process by August 17, 2018.

The following day, August 9, 2018, Reyes sent an e-mail message to District Superintendent Vincent Matthews (Matthews) stating that the CBA provisions governing PAR conflict with the Education Code, and that the PAR program discriminates on the basis of age.

On September 18, 2018, Sloat Principal Fowzigiah Abdolcader (Abdolcader) accused Reyes of taking photographs of a paraeducator and a student on September 12, 2018. Reyes disputes this accusation.

On September 24, 2018, Reyes received notice that the District's governing board would be meeting in closed session the following day to consider dismissal charges against her. Reyes responded by demanding that the matter be heard in open session.

On September 26, 2018, John Reclosado (Reclosado), a District employee, personally served Reyes with a notice of intent to dismiss and statement of charges. The proof of service attached to the document identifies Reclosado as an employee of First Legal Services. Reyes contacted First Legal Services, who stated that Reclosado is not its employee. The statement of charges included, among other things, the accusation from September 12, 2018.

On February 1, 2019, the District filed "supplemental disclosures" relating to its dismissal action against Reyes. These disclosures include student information and private information about Reyes.

DISCUSSION

I. Standard for Assessing an Unfair Practice Charge

A Board agent must issue a complaint when an unfair practice charge states a prima facie case, that is, when he or she determines "that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations." (*Eastside Union School District* (1984) PERB Decision No. 466, p. 7.) Part of establishing a prima facie case is demonstrating that the charge was timely filed within the statute of limitations. (*Tehachapi Unified School District* (1993) PERB Decision No. 1024; *State of California (Department of Insurance)* (1997) PERB Decision No. 1197-S.) A charge that fails to state a prima facie case must be dismissed. (PERB Regulation 32630.)

[3] Reyes has also filed two other related charges, Case Nos. SF-CE-3295-E and SF-CE-3297-E.

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

When evaluating whether a charge states a prima facie case, the Board agent must assume that the charging party's factual allegations are true. (*Temple City Unified School District* (1990) PERB Decision No. 843.) Speculation and legal conclusions, however, are not factual allegations, and they are not sufficient to state a prima facie case. (*Dept. of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

II. Analysis of Prima Facie Case

A. Domination

The charge alleges that by continuing to refer Reyes to PAR despite UESF's opposition, the District violated EERA section 3543.5(d). That section makes it unlawful for an employer to "[d]ominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another." Individual employees, however, lack standing to allege violations of this provision. (*Jurupa Unified School District* (2012) PERB Decision No. 2283.) Therefore, Reyes, as an individual, may not pursue a violation of EERA section 3543.5(d).

B. Other Violations

The charge also alleges that the District violated the Brown Act, the Education Code, a federal court protective order, and federal law, and that Reclosado committed perjury by stating on the proof of service of Reyes's notice of dismissal that he was an employee of First Legal Services. None of these allegations fall within PERB's jurisdiction. (See *Lake Elsinore Unified School District* (2018) PERB Decision No. 2548 [Education Code]; *Standard School District* (2012) PERB Decision No. 2273 [Brown Act]; *San Bernardino City Unified School District* (2012) PERB Decision No. 2278 [federal law]; *State of California (Department of Corrections)* (2004) PERB Decision No. 1559a-S [Penal Code][4].)

CONCLUSION

[4] Perjury is prohibited by Penal Code section 118.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Third Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before May 9, 2019,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Senior Regional Attorney

JE

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

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April 9, 2019

Margaret Reyes

Re: *Margaret Reyes v. San Francisco Unified School District*
Unfair Practice Charge No. SF-CE-3295-E
WARNING LETTER

Dear Ms. Reyes:

Margaret Reyes (Reyes or Charging Party) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on August 17, 2018, and amended it on September 24, 2018. As amended, the charge alleges that the San Francisco Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by disciplining Reyes for refusing to participate in the peer assistance and review (PAR) program and denying her request for union representation.

For the reasons explained below, the charge does not state a prima facie case. If the charge is not amended or withdrawn by May 9, 2019, it will be dismissed.

FACTS AS ALLEGED

Reyes is employed by the District as a first grade teacher at Commodore Sloat Elementary School (Sloat). The District's classroom teachers are exclusively represented by United Educators of San Francisco (UESF). The District and UESF are parties to a collective bargaining agreement (CBA).

Section 16.10.1 of the CBA states:

> At the beginning of each of the two (2) semesters during the school year, each principal shall prepare and distribute a projected assessment calendar listing the names of the teachers to be observed and the month that they can anticipate being observed. This calendar may be revised by the principal if necessary and, if so, redistributed to the faculty.

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

Section 16.12.1 of the CBA states:

> Prior to making an observation which is part of an assessment sequence, the responsible administrator shall conduct an individual pre-observation conference with the teacher involved. This conference shall focus on the elements upon which the evaluation is to be based. There may be discussion of circumstances affecting the teacher's ability to be evaluated positively, such as, but not limited to: the educational capabilities of the learners, availability of support personnel, the appropriateness of the learning environment, and the job description of the teacher.

In 2011, Reyes filed a civil rights lawsuit against the District in federal court.

In 2017, Reyes was referred to the PAR program.[2] Her initial efforts to challenge that referral are the subject of a separate unfair practice charge, Case No. SF-CE-3278-E.[3]

On a date not alleged in the charge, Reyes forwarded to the District's governing board and unidentified District officials a "[w]histleblower letter" claiming that the PAR program discriminates against teachers on the basis of age.

On a date not alleged in the charge, Reyes appeared at a pre-disciplinary hearing pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*). The hearing concerned a 15-day suspension that began on May 15, 2018. At this hearing, UESF stated that the District was subjecting Reyes to "differential treatment," "scrutiniz[ing]" and "harass[ing]" her.

On August 14, 2018, Sloat Principal Fowzigiah Abdolcader (Abdolcader) sent Reyes an e-mail message setting forth Abdolcader's expectations for Reyes's lesson and curriculum planning for the upcoming school year. Abdolcader reminded Reyes of the importance of planning lessons in accordance with District and state standards. Abdolcader directed Reyes to provide her, by Friday afternoon of each week, her lesson plans for the following week. Abdolcader further directed Reyes to provide her, by August 24, 2018, a "detailed curriculum map" for the school year and her long term lesson plans for the first six weeks of school. Abdolcader acknowledged that "this is a great deal of work, but it is essential to assuring student learning and success."

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[2] The CBA provides that under certain circumstances, a teacher may be referred to the PAR program, in which case he or she is assigned a peer coach. Referrals are reviewed by a panel of District administrators, teachers, and union officials.

[3] Reyes has also filed two other related charges, Case Nos. SF-CE-3294-E and SF-CE-3297-E.

On September 11, 2018 and September 20, 2018, Abdolcader sent e-mail messages to Reyes regarding her observations of Reyes's classroom on September 11, 2018 and September 18, 2018, respectively. Reyes responded by disputing some of the statements in Abdolcader's messages. Before conducting these observations, Abdolcader had not distributed a projected assessment calendar or held a pre-observation conference with Reyes.

On September 18, 2018, Abdolcader accused Reyes of taking photographs of a paraeducator and a student on September 12, 2018. Reyes disputes this accusation because she was not present during school hours on the day in question. The charge states that Abdolcader denied Reyes's request for union representation.

DISCUSSION

I. Standard for Assessing an Unfair Practice Charge

A Board agent must issue a complaint when an unfair practice charge states a prima facie case, that is, when he or she determines "that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations." (*Eastside Union School District* (1984) PERB Decision No. 466, p. 7.) A charge that fails to state a prima facie case must be dismissed. (PERB Regulation 32630.)

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

When evaluating whether a charge states a prima facie case, the Board agent must assume that the charging party's factual allegations are true. (*Temple City Unified School District* (1990) PERB Decision No. 843.) Speculation and legal conclusions, however, are not factual allegations, and they are not sufficient to state a prima facie case. (*Dept. of Food and Agriculture, supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) Moreover, documents attached to the charge without explanation in the statement of the charge do not assist in establishing a prima facie case. (*Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 7, fn. 9.)

II. Analysis of Prima Facie Case

A. Retaliation

The charge appears to allege that the District retaliated against Reyes by requiring her to submit lesson and curriculum plans and conducting classroom observations.

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

1. Protected Activity

The charge alleges that the District has taken these actions because Reyes filed a civil rights lawsuit against the District and then opposed her referral to PAR. It appears that Reyes took these actions alone. Employees have a right "to represent themselves individually in their employment relations with the public school employer." (EERA, § 3543(a); *Walnut Valley Unified School District* (2016) PERB Decision No. 2495 (*Walnut Valley*).) Still, it is not clear that the civil rights lawsuit was an exercise of rights under EERA. The Board does not have jurisdiction over civil rights claims such as those arising under Title VII of the federal Civil Rights Act of 1964. (*Fontana Unified School District* (2010) PERB Decision No. 2147.) And filing such a lawsuit is specifically protected by Title VII. (42 U.S.C. § 2000e-3(a) ["It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter"].) However, her challenges to the PAR program are protected activity. (*Antelope Valley Union High School District* (2019) PERB Decision No. 2631.)

2. Employer Knowledge

The charge does not, however, adequately allege employer knowledge of Reyes's activities. To establish this element, it must be alleged that the decision maker responsible for the adverse action had knowledge of the employee's protected activity. (*Walnut Valley*, *supra*, PERB Decision No. 2495.) Here, the charge does not allege facts demonstrating that Abdolcader knew that Reyes had filed a lawsuit against the District in 2011 or had opposed her referral to PAR.

3. Adverse Action

With respect to whether the District took adverse action against Reyes, the Board applies an objective test to determine whether an action is adverse:

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

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added.) The harm alleged must be "actual and not merely speculative." (*County of Tehama* (2010) PERB Decision No. 2122-M.)

On the subject of classroom observations, the Board has held that a series of frequent, unannounced, and unexplained observations of a teacher's classroom—specifically, 40 over a period of 7 months—is an adverse action. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714 (*Simi Valley*).) Here, by contrast, Abdolcader is alleged to have observed Reyes's classroom twice in two weeks. This does not appear to rise to the level of an adverse action.

Nevertheless, Abdolcader's message setting forth additional expectations for Reyes's curriculum planning does appear to be an adverse action. Abdolcader recognized that this imposed "a great deal of work." (See *County of Riverside* (2009) PERB Decision No. 2090-M.)

4. Unlawful Motive

The charge also does not adequately allege that that the District took the actions against Reyes because of Reyes's activities of filing a federal lawsuit (assuming it was protected) and opposing her PAR referral, i.e., that Reyes's activities motivated the District to take action against her.

Unlawful motive may be established by either direct or circumstantial evidence. (*Omnitrans* (2010) PERB Decision No. 2121-M.) When relying on circumstantial evidence, the charge must include allegations of: (1) close timing between the protected activity and the adverse action; and (2) some other facts indicating an unlawful motive, such as disparate treatment, departure from established procedures, a cursory investigation, or providing either no explanation for the action or explanations that are contradictory. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 29-30.)

With respect to timing, it appears that at least several years passed between Reyes's federal lawsuit and the adverse actions alleged in this case. Such a lengthy passage of time does not provide evidence of unlawful motive. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086.) As for Reyes's opposition to the PAR program, the charge does not allege when she undertook that activity. As a result, it cannot be determined whether there is a sufficient temporal nexus between that activity and the actions taken against Reyes.

Putting timing aside, the charge also fails to allege any other evidence suggesting an unlawful motive. The charge alleges that UESF accused the District of subjecting Reyes to "differential treatment," "scrutiniz[ing]" and "harass[ing]" her. These statements are not factual allegations, but legal conclusions. Therefore, they do not establish unlawful motive. (*Dept. of Food and Agriculture*, *supra*, PERB Decision No. 1071-S.)

The charge also alleges that Abdolcader's observations violated Reyes's rights under sections 16.10.1 and 16.12.1. These provisions appear to govern observations related to the evaluation

process. Nothing in either provision prohibits a principal from observing a teacher's classroom outside the evaluation process. Therefore, Abdolcader's failure to abide by these sections of the CBA does not provide evidence of unlawful motive.

B. Denial of Union Representation

The amended charge alleges that Abdolcader denied Reyes's request for union representation.

An employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. (*Rio Hondo Community College District* (1982) PERB Decision No. 260.) To establish that this right applies, the charging party must allege facts establishing that: (a) the employee requested representation; (b) for an investigatory meeting; (c) which the employee reasonably believed might result in disciplinary action. (See *Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617 (*Redwoods*); *Fremont Union High School District* (1983) PERB Decision No. 301; see also *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (1974) 11 Cal.3d 382.)

Here, the charge is devoid of any factual allegations demonstrating that a meeting occurred between Reyes and Abdolcader, much less that the meeting was investigatory, that Reyes reasonably believed discipline might result, or that Reyes requested representation. Accordingly, the charge fails to state a prima facie case that Abdolcader unlawfully denied a request for union representation.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before May 9, 2019,[4] PERB will dismiss your charge.

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

If you have any questions, please call me at the above telephone number.

Sincerely,

Joseph Eckhart
Senior Regional Attorney

JE

PUBLIC EMPLOYMENT RELATIONS BOARD

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April 9, 2019

Margaret Reyes

Re: *Margaret Reyes v. San Francisco Unified School District*
Unfair Practice Charge No. SF-CE-3297-E
WARNING LETTER

Dear Ms. Reyes:

Margaret Reyes (Reyes or Charging Party) filed the above-referenced unfair practice charge with the Public Employment Relations Board (PERB or Board) on August 23, 2018. The charge alleges that the San Francisco Unified School District (District or Respondent) violated section the Educational Employment Relations Act (EERA or Act)[1] by issuing a memorandum concerning Reyes's refusal to participate in the peer assistance and review (PAR) program.

For the reasons explained below, the charge does not state a prima facie case. If the charge is not amended or withdrawn by May 9, 2019, it will be dismissed.

FACTS AS ALLEGED

Reyes is employed by the District as a first grade teacher at Commodore Sloat Elementary School (Sloat). The District's classroom teachers are exclusively represented by United Educators of San Francisco (UESF).

In 2017, Reyes was referred to the PAR program. Her initial efforts to challenge that referral are the subject of a separate unfair practice charge, Case No. SF-CE-3278-E.[2]

On August 20, 2018, District Chief of Human Resources Daniel Menezes (Menezes) sent a memorandum advising Reyes that she had failed to abide by directives to schedule a meeting with her PAR coach. Menezes noted that Reyes had said she was unable to schedule the meeting because she had not yet been able to contact UESF. Menezes stated, "You have had ample time to follow that instruction, with or without your union representatives. Your

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

[2] Reyes has also filed two other related charges, Case Nos. SF-CE-3294-E and SF-CE-3295-E.

repeated failure to follow my directions—and those of your supervisors—is both unprofessional and insubordinate." Menezes concluded by directing Reyes to schedule a meeting by August 23, 2018.

The same day, Reyes responded to Menezes that his directives violated Education Code sections 44112, 44113, and 44114.

DISCUSSION

I. Standard for Assessing an Unfair Practice Charge

A Board agent must issue a complaint when an unfair practice charge states a prima facie case, that is, when he or she determines "that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations." (*Eastside Union School District* (1984) PERB Decision No. 466, p. 7.) A charge that fails to state a prima facie case must be dismissed. (PERB Regulation 32630.)

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

When evaluating whether a charge states a prima facie case, the Board agent must assume that the charging party's factual allegations are true. (*Temple City Unified School District* (1990) PERB Decision No. 843.) Speculation and legal conclusions, however, are not factual allegations, and they are not sufficient to state a prima facie case. (*Dept. of Food and Agriculture*, *supra*, PERB Decision No. 1071-S; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

II. Analysis of Prima Facie Case

The charge alleges that the District's August 20, 2018 directive violated Education Code section 44113(a) and EERA section 3543.5(a).

PERB does not have jurisdiction to enforce the Education Code. (*Lake Elsinore Unified School District* (2018) PERB Decision No. 2548.) As a result, the alleged violation of Education Code section 44113(a) must be dismissed.

As for EERA section 3543.5(a), that provision makes it unlawful for an employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of

their exercise of rights guaranteed by [EERA]." The charge appears to claim that the District violated this section through the statement that Reyes had "had ample time to follow that instruction, with or without your union representatives," and the directive that she proceed with participating in PAR.

To the extent the charge claims that Reyes had a right to consult with a union representative before scheduling a meeting with her PAR coach, the charge fails to state a prima facie case. Employees have a right to union representation in various types of meetings with their employers. For instance, an employee required to attend an investigatory interview with the employer is entitled to union representation where the employee has a reasonable basis to believe discipline may result from the meeting. (*Rio Hondo Community College District* (1982) PERB Decision No. 260.) A right to union representation may also be found when an employer-initiated meeting occurs under "highly unusual circumstances." (*Redwoods Community College District v. Public Employment Relations Board* (1984) 159 Cal.App.3d 617.) And employees have broad rights to representation in meetings they request with their employer. (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C.)

But the Board has never recognized, and there is no authority suggesting, that an employee has a right to consult with a union representative before complying with a directive to schedule a meeting. And even when the employee has a right to representation in the meeting itself—which has not been established as to the PAR meetings—an employer is not required to delay the meeting so that a specific union representative can participate. (*Los Banos Unified School District* (2007) PERB Decision No. 1935.) Therefore, the charge does not state a prima facie case that the District interfered with Reyes's right to union representation.

CONCLUSION

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before May 9, 2019,[3] PERB will dismiss your charge.

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