

**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**



EMMA YVONNE ZINK,

Charging Party,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT,

Respondent.

Case Nos. LA-CE-6095-E
LA-CE-6207-E

PERB Decision No. 2683

November 20, 2019

Appearances: Mary E. Bain, Representative, for Emma Yvonne Zink; Paul, Plevin, Sullivan & Connaughton by J. Rod Betts, Attorney and Sandra T.M. Chong, Assistant General Counsel II, for San Diego Unified School District.

Before Banks, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Emma Yvonne Zink (Zink) to the attached proposed decision of an administrative law judge (ALJ). This decision, the third in a trilogy of Board decisions involving charges that Zink filed against San Diego Unified School District (District), resolves allegations in two complaints, arising from separate unfair practice charges.¹ The two complaints, which PERB consolidated for purposes of formal hearing and decision, alleged that the District violated the Educational Employment Relations Act (EERA)² by retaliating against Zink for protected activity. The ALJ dismissed all of the allegations in

¹ As detailed *post*, the trilogy's first two cases are *San Diego Unified School District* (2017) PERB Decision No. 2538 (*Zink I*) and *San Diego Unified School District* (2019) PERB Decision No. 2634 (*Zink II*).

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

both complaints. Zink filed timely exceptions, while the District filed no exceptions and urges us to affirm the proposed decision. Having reviewed the record and the parties' arguments in light of applicable law, we affirm the proposed decision and adopt it as the decision of the Board itself, subject to and as modified by the below discussion.

FACTUAL AND PROCEDURAL BACKGROUND³

PERB Case No. LA-CE-6095-E

In 1986, the District hired Zink as a math teacher at Point Loma High School. She taught there for two years before moving to La Jolla High School (LJHS), where she worked continuously until the administrative transfer at issue in this case. In fall 2014, LJHS principal Charles Podhorsky (Podhorsky) began receiving parent complaints about Zink's classroom management style, demeanor toward students, and grading policies. The District first placed Zink on administrative leave in October 2014, following a student complaint alleging Zink grabbed his arm and scratched him while trying to remove earphones from his ears.

Parents continued to complain about Zink while she was on leave. On November 3, 2014, they delivered a petition signed by approximately 49 parents alleging instances of physical, verbal, emotional, and psychological abuse, and asking that Zink not be allowed to return to LJHS. Podhorsky also learned of numerous e-mails and verbal complaints by parents criticizing Zink's teaching methodology and grading practices. Podhorsky independently confirmed some of the grading complaints. An unusually large number of parents had contacted the counseling office in the fall of 2014 requesting that their students be removed from Zink's classes. When Zink did not appear at an Open House during that same time period, a group of

³ The attached proposed decision details the facts and procedural history. We summarize the key material facts and procedural history here to provide context for our discussion of Zink's exceptions.

20 or 30 upset parents confronted Podhorsky with complaints about her. Parents threatened to contact the media to air their complaints and also threatened that students would stage a walk-out if Zink returned to the campus.

On September 2, 2015, while she was still on administrative leave, Podhorsky issued Zink a notice of proposed reassignment recommending her transfer from LJHS.⁴ Podhorsky considered the multiple student and parent complaints in reaching the decision that it would be best for the school community, as well as for Zink, if she transferred to a different school. Zink appealed the notice of proposed reassignment. In January 2016, Timothy Asfazadour (Asfazadour), the District's Chief Human Resources Officer, reversed Podhorsky's recommendation that Zink be transferred away from LJHS. He determined that the administrative transfer was not appropriate at that time because the District had not notified Zink of expectations for future behavior or given her a timeframe to meet those expectations prior to initiating the proposed action.⁵

Prior to Asfazadour's decision, on December 24, 2015, Zink filed PERB Case No. LA-CE-6095-E, the first of three unfair practice charges claiming the District retaliated against her for filing grievances and other complaints. That charge, as amended, alleged that the District retaliated against Zink by convening an investigative meeting with her, keeping her on paid administrative leave, preventing her from teaching summer school, and issuing her the

⁴ We use the terms "reassignment" and "transfer" interchangeably in this decision. The District dated the notice of proposed reassignment September 2, 2015, but the District apparently provided it to Zink on or about August 29, 2015. We have found no explanation in the record for this discrepancy. However, it does not impact the outcome.

⁵ Asfazadour did not intend for Zink to return to LJHS as a classroom teacher, but rather to a non-classroom tutoring position.

September 2015 notice of proposed reassignment. PERB's Office of the General Counsel (OGC) dismissed the charge, and Zink appealed the dismissal to the Board itself.

On September 7, 2017, the Board issued *Zink I, supra*, PERB Decision No. 2538, affirming in part and reversing in part OGC's dismissal, and remanding the case to OGC. On October 10, 2017, OGC issued a complaint in PERB Case No. LA-CE-6095-E. The complaint alleged that the District issued the September 2015 notice of proposed reassignment in retaliation for Zink pursuing grievances and lodging various complaints, including over grading procedures.

PERB Case No. LA-CE-6141-E

While PERB Case No. LA-CE-6095-E was on appeal to the Board, on June 23, 2015, Zink filed a second unfair practice, PERB Case No. LA-CE-6141-E. OGC issued a complaint on October 31, 2016. As relevant here, the complaint alleged that rather than returning Zink to an LJHS classroom after Asfazadour rescinded the first notice of proposed reassignment, the District retaliated against Zink for engaging in protected activity by (1) assigning her to a non-classroom tutoring position at LJHS; (2) placing her on a second administrative leave; and ultimately (3) reassigning her to Marshall Middle School (MMS).⁶

After a formal hearing, an ALJ issued a proposed decision on July 25, 2017. The ALJ first found, *inter alia*, that Zink did not establish a prima facie case of retaliation with respect to her reassignment to a non-classroom tutoring position. The ALJ next found that Zink did establish a prima facie case that her protected activity was one cause of the District's decision to place her on administrative leave and involuntarily transfer her to MMS. However, the ALJ

⁶ The complaint alleged that these adverse actions retaliated against Zink for protected activity that included sending letters, filing grievances, and filing the charge in PERB Case No. LA-CE-6095-E.

then found that the District met its burden to show that it would have taken the same actions even in the absence of protected activity. Zink filed exceptions to the Board itself.

On March 22, 2019, the Board issued its decision resolving the complaint covering Zink's second unfair practice charge, PERB Case No. 6141-E. (*Zink II, supra*, PERB Decision No. 2634.) The Board found merit in Zink's argument that the District took adverse action against her by involuntarily transferring her from a classroom teaching position to a non-classroom tutoring assignment. That finding, however, did not affect the outcome of the case, because the Board affirmed the ALJ's conclusion that Zink's protected conduct was not a "but for" cause of the District's adverse actions.

Zink II did not cover the allegations in the consolidated complaints at issue here, which are those arising from Zink's first and third charges. The first complaint at issue here alleged that the District unlawfully issued Zink the September 2015 notice of proposed reassignment—the allegation the Board remanded to OGC in *Zink I*. The other complaint at issue here covered multiple allegations in Zink's third charge, which we summarize immediately below. PERB Case No. LA-CE-6207-E

On January 24, 2017, while the Board was still considering Zink's appeal of OGC's decision to dismiss her first charge (PERB Case No. 6095-E), and prior to the ALJ's decision regarding her second charge (PERB Case No. 6141-E), Zink filed her third charge, PERB Case No. LA-CE-6207-E. On December 20, 2017, after the Board had issued *Zink I* and an ALJ had issued a proposed decision regarding Zink's second charge, OGC issued a complaint covering Zink's third charge (PERB Case No. 6207-E). The complaint alleged that the District retaliated against Zink for filing grievances, as well as for pursuing her first two PERB charges. The complaint initially covered three alleged acts of retaliation: (1) preventing Zink

from retrieving her personal belongings from her LJHS classroom, (2) issuing her written directives that we detail below, and (3) requiring her to attend certain courses. The ALJ later granted Zink's motion to amend the complaint to allege a fourth alleged act of retaliation, viz., placing her in an assignment without any duties.

On February 14, 2018, the ALJ consolidated the complaints in Zink's first and third charges for formal hearing. On the first day of the hearing, the ALJ received into evidence the entire hearing record in Zink's second charge (PERB Case No. 6141-E), including all exhibits admitted in that case, as well as the hearing transcripts. The parties stipulated that the hearing record of Zink's second charge could be considered for all purposes in this matter. On June 27, 2019, the ALJ issued a proposed decision entirely dismissing the consolidated complaints arising from Zink's first and third charges. Zink's exceptions followed.

DISCUSSION

In *Zink II*, the Board summarized the following principles governing allegations of reprisal and discrimination:

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 that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6 (*Novato*).) (Footnote omitted.)

When it appears that the employer'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 (*Martori Bros.*); *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 22.) Thus, in a "mixed motive" case in which the charging party has proven that discrimination or

retaliation contributed to the employer's decision, but the employer asserts that one or more other nondiscriminatory reasons also exist, the burden shifts to the employer to establish as an affirmative defense that it would have taken the same action(s) even absent any protected activity. (*NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402; *Martori Bros.*, *supra*, 29 Cal.3d at pp. 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) The employer must establish the "but for" affirmative defense by a preponderance of the evidence. (*McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304.) (Footnote omitted.)

(*Zink II*, *supra*, PERB Decision No. 2634, pp. 12-13.)

1. PERB Case No. 6095-E: The September 2015 Notice of Proposed Reassignment

Neither party excepts to the ALJ's conclusion that Zink established a prima facie case that her protected activity was one cause of the initial notice of proposed reassignment.⁷

Because neither party excepts to the prima facie case findings, they are not before us. (PERB Reg. 32300, subd. (c);⁸ *Zink II*, *supra*, PERB Decision No. 2634, p. 15.)

Zink takes issue with the ALJ's conclusion that the District met its affirmative burden of proof that Zink's protected activities were not the "but for" cause of its action. As in *Zink II*, where we found that Zink's protected conduct was not a "but for" cause of the District's eventual decision to transfer Zink, here we agree with the ALJ that Zink's protected conduct was similarly not a "but for" cause of the September 2015 notice of proposed reassignment. Indeed, parent and student complaints about Zink's work performance were, by far, the predominant motivation for the September 2015 notice. In fall 2014, Podhorsky began

⁷ The ALJ found nexus between Zink's protected activities and the notice of proposed reassignment, because the notice was close in time to Zink's protected activities and the District had not faithfully adhered to contractual procedures covering administrative transfers. Asfazadour cited such inconsistencies as a basis for later reversing the proposed reassignment.

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

receiving multiple complaints from parents about Zink's classroom management style, demeanor toward students, and grading policies. During LJHS's September 2014 Open House, which Zink did not attend, a group of 20 or 30 discontented parents confronted Podhorsky with complaints, including about Zink's grading practices, which were perceived as punitive and irrational. Podhorsky investigated some of those complaints, and Zink was placed on administrative leave following an October 2014 student complaint alleging that Zink grabbed his arm and scratched him. Parents followed with a petition seeking to remove Zink from her position at LJHS. After Asfazadour reversed Podhorsky's transfer recommendation, parents began discussing plans to stage walkouts, pickets, and media involvement, and parents also submitted a second petition alleging that Zink was guilty of poor performance, mistreatment of students, and other misconduct. The record persuades us that Podhorsky's September 2015 proposal to transfer Zink away from LJHS resulted mainly as a response to parental outcry, and that Podhorsky would have proposed that transfer even if Zink had engaged in no protected activity.

2. PERB Case No. 6207-E: The Events Subsequent to Zink's Transfer to MMS⁹

The ALJ found that Zink established a prima facie case that the District was at least partially motivated by retaliatory animus when it assigned her "to appear [at MMS] for a job every day that has no duties and therefore no purpose," but that the District proved its affirmative defense by showing that it would have taken the same actions even in the absence of protected activity. As to other directives that MMS principal Michelle Irwin issued to Zink in this timeframe, the ALJ found that the directives were not adverse actions. Zink excepts to these findings.

⁹ Neither party excepted to the dismissal of the allegation concerning retrieval of Zink's belongings, and accordingly we do not address it. (PERB Reg. 32300, subd. (c).)

We agree with the ALJ that requiring a teacher to report each day for a “do-nothing” assignment is an adverse action. We reverse the ALJ’s conclusions that certain written directives were not adverse actions, because we find them to be integrally related to the “do nothing” assignment. The written directives prohibited Zink from offering to cover classes for any MMS teachers, entering classrooms during instructional time, visiting with teachers during preparation time, and using the school’s instructional supplies or office equipment. The directives further required Zink to attend professional development courses in which teachers shared lessons plans, even though Zink did not have any lesson plans to share because she had no students. Zink also did not receive the required laptop computer until the third session of the courses.

In another context, non-punitive directives may not constitute adverse action. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12 [“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.”].) For example, sending an employee to professional development courses might in other instances be reasonably construed as beneficial, or at least not adverse. But here, we find the context highly relevant in determining whether a reasonable employee would see the directives as adverse. (Cf. *County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 11 [“[c]ontext is always relevant” in assessing motive].) A reasonable employee would see management’s directives as adverse, because they were part and parcel of the “do nothing” job assignment. Similarly, requiring Zink to attend professional

development courses in which she could not actively participate—because she had no classes—further reinforced her purgatory.¹⁰

The ALJ found that unlawful animus partially motivated the District to assign Zink a position with no duties. The ALJ made this finding based on timing evidence, coupled with the District’s misleading claim that it transferred Zink to MMS because of its strong math program, high performing students, and similar demographics to LJHS. (Proposed Decision, pp. 34-35.) We agree that this justification for assigning Zink to MMS, when the District had no intention of giving Zink a classroom, rings hollow. At the same time, the District has established that its primary motivation related to parental pressure, making this a mixed motive case. We find the same is true for the other actions we have found to be adverse. Thus, we must determine if the District would have taken all the same actions even if Zink had engaged in no protected activity. (*Zink II, supra*, PERB Decision No. 2634, pp. 15-16.)

We are not persuaded that Zink’s protected activities were a “but for” cause of the District’s adverse actions. Rather, the evidence demonstrates that the District had an overriding motivation that was separate from its unlawful animus: The District wanted to keep Zink out of a regular classroom assignment at MMS—and even keep her from having unsupervised contact with MMS students—because of the “unprecedented nature and volume of the complaints against Zink.”¹¹ (Proposed Decision, p. 37.) We reach substantially the

¹⁰ Although we find merit in Zink’s exceptions regarding the written directives and the professional development courses, reversing the ALJ as to these findings does not affect the outcome of the case because, as discussed *post*, the District proved that Zink’s protected conduct was not a “but for” cause of any adverse actions.

¹¹ As in *Zink II*, we make no finding as to the veracity of the underlying complaints, or whether they constituted just cause for adverse action, including whether it is allowable for a public school to defer to parent pressure in arriving at such decisions. (See *Zink II, supra*, PERB Case No. 2634, p. 16, fn. 12.) Presumably, these questions could be more adequately

same conclusion with respect to the other adverse actions, which were part and parcel of assigning Zink to a position with no duties.

ORDER

The complaints and underlying unfair practice charges in Case No. LA-CE-6095-E and Case No. LA-CE-6207-E are DISMISSED.

Members Banks and Paulson joined in this Decision.

addressed in another forum, and moreover, they are not before us on the facts or arguments presented.



**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**

EMMA YVONNE ZINK,

Charging Party,

v.

SAN DIEGO UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NOS. LA-CE-6095-E and
LA-CE-6207-E

PROPOSED DECISION
(June 27, 2019)

Appearances: Mary E. Bain, Representative, for Emma Yvonne Zink; Paul Plevin, Sullivan & Connaughton by J. Rod Betts, Attorney, and Sandra T.M. Chong, Assistant General Counsel II, for San Diego Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

In these consolidated cases, a teacher alleges that her public school employer proposed that she be transferred to another school and, after this involuntary transfer occurred, did not permit her to retrieve items from her former classroom, did not assign her any duties, issued written directives, and sent her to professional development classes in retaliation for her protected activities under the Educational Employment Relations Act (EERA).¹ The employer denies that it committed any unfair practices and contends that its actions were taken because of numerous student and parent complaints regarding the teacher and was therefore not motivated by the teacher's protected conduct.

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

PROCEDURAL HISTORY

1. Case Number LA-CE-6095-E

On December 24, 2015, Emma Yvonne Zink (Zink or Charging Party) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the San Diego Unified School District (District or Respondent) alleging retaliation because of her activities that were protected under EERA. PERB assigned the matter case number LA-CE-6095-E (hereafter, “Case No. 6095-E”). The charge was subsequently amended three times. The District filed position statements responding to the allegations after each filing by Zink. The charge, as amended, alleged that the District retaliated against Zink by convening an investigative meeting with her, keeping her on paid administrative leave, preventing her from teaching summer school, and issuing her a notice of proposed reassignment.

On October 31, 2016, the Office of the General Counsel (OGC) of PERB dismissed the charge. Zink appealed the dismissal to the Board itself.

On September 7, 2017, the Board issued *San Diego Unified School District (2017) PERB Decision No. 2538 (Zink I)*, affirming in part, and reversing in part, the OGC’s dismissal of the charge, and remanding the case to the OGC for further processing consistent with its decision.²

On October 10, 2017, the OGC issued a complaint alleging that, beginning in October 2014, Zink engaged in EERA-protected activities by filing grievances and

² The Board affirmed the OGC’s dismissal of all claims occurring before May 25, 2015, as being outside the statutory limitations period and therefore untimely. (*Zink I, supra*, PERB Decision No. 2538, p. 15.)

“other protected complaints,” and the District took adverse action against her because of those protected activities by issuing to her “a notice of involuntary reassignment” on or about August 29, 2015.

On October 30, 2017, the District filed its answer to the complaint. It admitted that Zink engaged in the protected activities alleged in the complaint, denied all material allegations that it violated EERA, and raised various affirmative defenses.

On November 8, 2017, the parties participated in an informal settlement conference with a Board agent but the matter was not resolved. The case was then assigned to PERB’s administrative law division for formal hearing.

2. Case Number LA-CE-6207-E

On January 24, 2017, while the Board was still considering her appeal in Case No. 6095-E, Zink filed another unfair practice charge against the District. PERB assigned this matter case number LA-CE-6207-E (hereafter, “Case No. 6207-E”). Zink amended the charge once on November 22, 2017. The District filed position statements responding to the allegations after each of Zink’s filings. As amended, this charge in part alleged that the District had retaliated against Zink by placing her in a “fabricated” middle school teaching assignment that had no actual teaching or other duties, issuing written directives, and sending her to professional development classes.

On December 19, 2017, the OGC issued a partial dismissal in the case. The OGC dismissed an allegation involving the involuntary transfer of Zink from her High School teaching position to one at a Middle School as this allegation was being addressed in a third

pending unfair practice charge, case number LA-CE-6141-E (hereafter, “Case No. 6141-E”).³ The OGC also dismissed allegations involving a principal’s request to meet with Zink, actions of unidentified staff members at the high school regarding a missing text book, actions of the leader of professional development classes, and interference with Zink’s ability to be nominated for Teacher of the Year. Zink did not appeal the partial dismissal.

On December 20, 2017, the OGC issued a complaint alleging that Zink engaged in protected activity by filing and pursuing multiple grievances and unfair practice charges between June and November 2016, and that the District retaliated against her for that activity by preventing her from retrieving her personal belongings from her previous high school classroom, issuing written directives, and requiring her to take “remedial training.”

On January 10, 2018, the District filed an answer to the complaint, admitting that Zink’s activities were protected by EERA and certain facts underlying the alleged adverse actions, denying all material violations of the statute, and asserting various affirmative defenses.

On January 22, 2018, Zink filed a motion to amend the complaint to add the allegation regarding Zink being placed in a “fabricated” middle school teaching assignment without any duties. The District filed an opposition to the motion to amend the complaint on February 23, 2018.

³ Case No. 6141-E was filed on June 23, 2016. A complaint issued by the OGC on October 31, 2016, and formal hearing was held before Administrative Law Judge (ALJ) Kent Morizawa on March 13, 14, and 15, 2017. A proposed decision issued in that case on July 25, 2017, to which exceptions were filed. The Board issued its decision in Case No. 6141-E on March 22, 2019. (*San Diego Unified School District* (2019) PERB Decision No. 2634 (*Zink II*)). It will be discussed at length in later sections of this proposed decision.

3. The Consolidated Hearing

On February 14, 2018, a prehearing conference was held. Case Nos. 6095-E and 6207-E were ordered to be consolidated for formal hearing.

On March 27, 2018, I issued a written ruling granting Zink's motion to amend the complaint in Case No. 6207-E to include the allegation regarding Zink having been assigned to sit in an empty middle school classroom during working hours and not perform any teaching or other duties during the 2016-2017 and 2017-2018 school years.

On August 14, 2018, a telephonic prehearing conference was held for the purpose of ruling on motions to quash subpoenas.

On August 22, 23, 24, and September 10, 2018, the consolidated hearing took place. On the first day of the consolidated hearing, the entire hearing record of Case No. 6141-E, including three days of transcript and exhibits, was received in evidence. The parties stipulated that the hearing record of Case No. 6141-E would be considered for all purposes as if it had been produced during the course of the consolidated hearing. On the final day of the consolidated hearing, Zink made an unopposed request to further amend the complaint in Case No. 6207-E to strike the word, "remedial," from paragraph 4, subdivision (c), referring to the training courses that Zink was required to attend, and replace it with the words "professional development." The request was granted.

On December 21, 2018, the record was closed and the case was considered submitted for proposed decision upon receipt of the parties' closing briefs.

FINDINGS OF FACT

The Parties and the Exclusive Representative

Zink is a public school employee within the meaning of EERA section 3540.1, subdivision (j), and the District is a public school employer as defined in subdivision (k). Zink is employed by the District as a teacher, which is a position included in a certificated bargaining unit that is exclusively represented by the San Diego Education Association (SDEA or Union). SDEA and the District were at all relevant times parties to a collective bargaining agreement (CBA) with a term of July 1, 2014 through June 30, 2017. SDEA is not a party or representative in this matter.

I. The Board's Findings of Fact in Case No. 6141-E

The three unfair practice cases pursued by Zink are integral parts of a connected narrative, which is the reason that the parties ultimately agreed that the entire hearing record from Case No. 6141-E would be incorporated into the consolidated record. Since the Board has since fully considered that case and rendered a decision, it is appropriate to set forth the Board's verbatim recitation of the factual findings in *Zink II, supra*, PERB Decision No. 2634, pp. 3-12. These are included in their entirety in the indented text that follows.

Background

The District hired Zink in 1986 as a math teacher at Point Loma High School. She worked there for two years before moving to La Jolla High School (LJHS), where she worked continuously until the administrative transfer at issue in this case. Parents in La Jolla are active in school affairs and have set up the La Jolla Cluster Association, which is a group of parents from the five District schools in La Jolla. LJHS also has an

active Parent Teacher Association (PTA) and its own Foundation that raises money for LJHS. Zink lives in La Jolla. Her commute to LJHS was 10 minutes each day.

Zink's most recent evaluation was in the 2013-2014 school year. She has not been evaluated since then. Charles Podhorsky (Podhorsky) has been the principal of LJHS since February 2014. Zink never received a classroom observation from Podhorsky or written notes on any deficiencies and how to improve them. Her grading practices are set forth in the course syllabus, which Podhorsky approves.

Zink's colleagues voted her Teacher of the Year in the 2014-2015 school year.

Complaints Against Zink

Article 14.12 of the CBA sets forth the procedure for handling complaints against teachers. Complaints must be brought promptly to the teacher's attention, and the identity of the complainant must be disclosed to the teacher. The teacher's supervisor is required to attempt to resolve the complaint informally by asking the complainant to contact the teacher directly to resolve the problem. If that does not resolve the issue, the supervisor can schedule a meeting between the complainant and the teacher, if all parties agree. If the issue remains unresolved, the complainant may contact the appropriate division head to request direct intervention and then submit a complaint to the District's Board of Education to request a formal hearing.

In Fall 2014, Podhorsky began receiving parent complaints about Zink regarding her classroom management style, demeanor toward students, and grading policies. He offered to set up meetings with the parents and Zink to discuss their concerns.^[4] As the number of complaints continued to rise, he e-mailed Zink on September 28, 2014, to

⁴ The record is unclear if these meetings took place. [Note: this text appeared at footnote 3 in the Board's decision in *Zink II*, supra, PERB Decision No. 2634 at p. 4.]

schedule a time to meet with her to discuss her homework and grading policies.

However, as discussed below, the District placed Zink on leave before this meeting could take place.

On October 6, 2014, a student in Zink's class filed a complaint against Zink alleging she grabbed his arm and scratched him while trying to remove earphones from his ears. The incident was reported to the District's Human Resources Services Division (HR), and the District placed Zink on paid administrative leave pending an investigation by Jose Gonzales (Gonzales), the Interim Human Resources Officer.

Parents continued to complain about Zink after she was on leave. On November 3, 2014, parents delivered a petition to remove Zink from LJHS. Parents of current and former LJHS students had signed the petition. It requested that Zink not be allowed to return to LJHS, and it claimed as follows:

Since hearing of Mrs. Zink's dismissal, we have chronicled a list of abuses that Mrs. Zink has levied on our children. They include but are not limited to: physical abuse, verbal abuse, emotional and psychological abuse; all of which are well documented in school files.^[5]

Many of the parents who signed the petition were active in LJHS's PTA and Foundation. Podhorsky testified he believed the allegations in the petition to be true based on the identity of the parents who signed. However, he did not conduct an investigation to verify the complaints. Although Podhorsky sent the petition to his superiors in the District, the record does not contain any evidence that the District investigated all of the allegations in the petition.

⁵ The petition did not detail the alleged instances of abuse. [Note: this text appeared at footnote 4 in the Board's decision in *Zink II*, supra, PERB Decision No. 2634 at p. 5.)

On April 14, 2015, Gonzales issued his findings regarding the investigation into the earphone incident in October 2014. He concluded Zink “used extremely poor judgment when she reached for [the student’s] earphones and earphones cord and pulled the left earphone out of [the student’s] ear” and that she should not engage in self-help in trying to enforce the school’s policies regarding prohibited electronic devices. Gonzales recommended that a written warning issue.^[6]

After Gonzales issued these findings, he and Zink discussed her return to work. The District proposed placing Zink at an alternative education program site where she would provide tutoring and assistance to students. However, that assignment turned out to be unavailable, and the District instead offered to permit Zink to apply for a position in the Information Technology Department working with staff to develop an online math program for District students. Zink objected to the assignment and ultimately remained at LJHS.

Reassignment to a Non-Classroom Tutoring Position

Article 12.7 of the CBA sets forth the procedure for involuntary transfers. The site administrator may initiate a transfer based on the negative impact of the teacher’s behavior/actions, if the transfer is in the best interests of the District, school, students, and the teacher. The site administrator’s belief must be supported by evidence. If the site administrator believes there is evidence to support a transfer, he or she must meet with the teacher to discuss the behavior/actions, their negative impact, and the possible consequences of continuing the behavior. During the meeting, the site administrator must

⁶ The record does not reflect whether the District ever issued a written warning. [Note: this text appeared at footnote 7 in the Board’s decision in *Zink II*, supra, PERB Decision No. 2634 at p. 5.]

notify the teacher of the possibility of a transfer, the expectations for future behavior, and a time frame to meet those expectations. Throughout the process, the site administrator must create a written record of the conferences and interventions.

On September 2, 2015, Podhorsky issued a letter to Zink recommending her transfer from LJHS. His reason for the transfer was as follows:

The school received repeated complaints about your teaching methodology from the parents of students in your classes. It is in your best interests, and in the best interests of the District and its pupils, that you be transferred to a different work site.

Zink met with Podhorsky on October 14, 2015, to discuss his recommendation. The meeting did not change his recommendation, and Zink appealed the decision to Timothy Asfazadour (Asfazadour), the District's Chief Human Resources Officer.

On January 14, 2016, Asfazadour met with Zink and reversed Podhorsky's recommendation that Zink be transferred out of LJHS. He determined that the administrative transfer was not appropriate at that time because the District had not notified Zink of expectations for future behavior or given her a timeframe to meet those expectations prior to initiating the administrative transfer. Accordingly, the District gave Zink a number of expectations to follow upon her return to LJHS. Additionally, Asfazadour notified Zink that although she was returning to LJHS, he was reassigning her from a classroom teaching position to that of a small group individual math tutor. Asfazadour testified he reassigned Zink to small group instruction because he wanted her return to be successful, and he believed putting her in a classroom would cause an uproar in the campus community that would be antithetical to her success.

Second Administrative Leave

Natascha Vossen (Vossen) was a parent of an LJHS student. She testified she became alarmed when she heard parents of LJHS students discussing plans to stage walkouts, pickets, and media involvement in response to Zink's return to campus. In an attempt to prevent parents from taking such drastic action, on January 20, 2016, Vossen created a petition asking the District not to allow Zink to return to LJHS. Vossen created the petition on the Wufoo website, and it came to be known as the "Wufoo petition." The petition asked individuals for their name, e-mail address, relationship to Zink, and any comments they wished to add. No one at the District had any involvement in creating the petition.

On January 21, 2016, Vossen attended a La Jolla Cluster Association meeting. Podhorsky and Mitzi Merino (Merino), the District's Area 5 Superintendent, both attended. Vossen was upset she could not get the parents to calm down regarding Zink's return to LJHS. She informed Podhorsky and Merino that she had created the Wufoo petition because she was trying to prevent parents from taking more drastic actions.

The following week, several parent leaders met with Podhorsky and Merino at Vossen's home. Present were Vossen, the Foundation President, the PTA President, and several members of the PTA and the Foundation. The parents made it known to Podhorsky and Merino that they were contemplating walkouts, picketing, and contacting the media in response to Zink's return to LJHS. Following the meeting, Vossen e-mailed the Wufoo petition to Podhorsky and Merino. Podhorsky testified he was unaware of any complaints similar to those in the Wufoo petition being documented in Zink's personnel file and was otherwise unaware of any documents that would support the allegations in the petition. Podhorsky forwarded Vossen's e-mail to Carolanne Buguey (Buguey), the

District's Human Resources Officer, who determined it was necessary to initiate an investigation into the allegations.

On February 1, 2016, Buguey and Erin Houston (Houston), a Labor Relations Specialist at the District, met with Zink. At that meeting, Houston handed Zink the Wufoo petition, a legal brief that referenced Zink's classroom conduct in unflattering terms, and a November 16, 2014 e-mail from a parent complaining about Zink to Merino and District Superintendent Cindy Marten. At the time, the Wufoo petition had 252 entries in favor of removing Zink from LJHS, and many of those entries included supporting comments. However, there were no names or other identifying information attached to the entries or the comments. Zink made it clear to the District she would not respond to the comments in the Wufoo petition because they were anonymous and because she believed the District's reliance on them violated the CBA.

Following the meeting with Buguey and Houston, Zink received a letter from Buguey dated February 1, 2016, that placed her on paid administrative leave pending an investigation into the allegations in the Wufoo petition. The letter directed Zink not to report to work or appear on the LJHS campus or any other campus until notified otherwise by District HR. The letter went on to state:

You are not to discuss the matters of this investigation with any staff member. Should you choose not to follow this directive, we will consider this misconduct, hindering a fair and thorough investigation. Nothing in this letter is intended to restrict your ability to communicate with your union representative or legal counsel about these allegations or any other matter.

Buguey testified she placed these restrictions on Zink so she would not "stir up staff members to submit petition comments, additional comments on the Wufoo petition" that

“may look differently than other comments that [were] already submitted.” She also testified she was concerned that Zink might contact parents and students, which could further inflame the situation.

On April 13, 2016, Buguey contacted Vossen and asked her to verify the comments in the Wufoo petition. Vossen’s verification process consisted of e-mailing people who had first person accounts of Zink’s teaching and requesting permission to send their information to the District. As to those who granted such permission, Vossen sent their names and their comments from the Wufoo petition to Buguey, who followed up with them. Buguey took the comments in the petition at face value and did not use school records to verify whether the students identified as having been in Zink’s class actually had her as a teacher.

On May 3, 2016, Buguey sent Zink a letter with an attachment containing the names and comments of 47 individuals who had agreed to make their identities known to Zink. The letter invited Zink to respond to the comments if she chose to do so.

On May 10, 2016, Zink e-mailed Buguey restating her position that she would not respond to the comments in the Wufoo petition based on her belief that the District’s reliance on them did not comply with the CBA.

On June 3, 2016, Buguey issued a letter to Zink stating she had concluded her investigation and determined that the 47 individuals “appear to have bona fide concerns and in good faith expressed their honest and true feelings.” The letter further stated she was closing the investigation of the Wufoo petition and Podhorsky would contact her to discuss next steps regarding her placement the following school year. Buguey testified she concluded the 47 individuals’ concerns were made in good faith based on the fact that

each entry was unique and yet there was a pattern throughout the comments regarding Zink's mistreatment of students. As part of her investigation, Buguey did not review Zink's personnel file or interview her colleagues.

Administrative Transfer

On June 13, 2016, Podhorsky issued a letter stating he was recommending Zink be transferred to a different work site the following school year. The letter stated:

The reason for the transfer is due to the written complaints and concerns in a document called 'Wufoo' petition received by the District in late January 2016, when students, parents, and community members found out about and objected to your intended return to [LJHS] on February 1, 2016. Therefore, it is in your best interests and the best interests of students and the school that you be administratively transferred to another work location.

Podhorsky testified he made the decision to transfer Zink based on the comments in the Wufoo petition and his belief that some prominent parents at LJHS would organize picketing, walkouts, and media involvement if Zink were to return to campus, which would be a major disruption. Furthermore, he did not think Zink could be successful at LJHS in that kind of hostile environment.

Zink met with Podhorsky to discuss his recommendation that she be transferred. The meeting did not change Podhorsky's recommendation, and Zink appealed the decision to Asfazadour. On August 9, 2016, Asfazadour met with Zink for an administrative transfer appeal meeting. Following the meeting, Asfazadour issued a letter to Zink on August 17, 2016, upholding Podhorsky's recommendation that Zink be transferred out of LJHS. The letter stated:

After careful consideration, I believe it is in the best interests of the students, school, District, and you to

administratively transfer you to a different school. Please report to Marshall Middle School on August 29, 2016.

Asfazadour testified he decided to transfer Zink to Marshall Middle School (MMS) as a math teacher because the school had a very strong math program, and he believed she could be successful at the school. MMS has high performing students and is a highly rated school in the District. Asfazadour testified his decision to transfer Zink to MMS was based on information from Podhorsky, information from HR staff working on the investigation of the Wufoo petition, and information Zink provided. Asfazadour further testified that he determined the Wufoo petition to be a true, honest representation of comments of the individuals who made them. He did not consult Zink's personnel file as part of his decision.

Zink's transfer to MMS increased her commute time each day to 60 minutes.

Zink's Alleged Protected Activity

On December 24, 2015, Zink filed an unfair practice charge against the District (PERB Case No. LA-CE-6095-E).

On February 15, 2016, Zink filed a grievance based on the District's reliance on the anonymous complaints in the Wufoo petition to place her on administrative leave. Accompanying the grievance was a letter of the same date outlining what Zink believed to be the District's violations of the CBA.

On April 11, May 24, and June 13, 2016, Zink sent letters to the District stating that her treatment while on administrative leave violated the CBA.

On June 17, 2016, Zink filed a grievance challenging Podhorsky's recommendation that she be administratively transferred from LJHS. Accompanying the

grievance was a letter of the same date outlining what Zink believed to be the District's violations of the CBA.

II. The Consolidated Cases

A. Case No. 6095-E – the Proposed Administrative Transfer in September 2015

Asfazadour, Podhorsky, and Zink all testified again during the consolidated hearing about events that are germane to Case No. 6095-E, that were also part of the record of Case No. 6141-E, and which were directly quoted from the Board's decision in *Zink II* at pages 6-10, *ante*. Some of this new testimony augmented information in the previous record as follows.

Regarding his decision to notify Zink in September 2015 that she would be transferred away from LJHS, Podhorsky testified that in addition to the November 2014 petition by approximately 49 parents seeking that Zink not be permitted to return to LJHS, he was also informed of numerous e-mails and verbal complaints by parents complaining of Zink's teaching methodology and grading practices.⁷ He confirmed some of the grading complaints by looking at Zink's gradebook and observing that the students of the complainants had "zero after zero after zero" on their homework assignments. An unusually large number of parents had contacted the counseling office in the fall of 2014 requesting that their students be removed from Zink's classes. Zink provided a medical note excusing her from attending Open House during that same time period. When Zink did not appear at Open House, Podhorsky

⁷ Among the complaints were that Zink would give zero credit on assignments for reasons that the parents considered unjustified, such as, failing to write "HW" at the top of the page, the student's name being in the wrong place, or a missing or out-of-position staple. Zink generally denied at the hearing that these were her grading practices or that she had ever given zero credit under such circumstances, but admitted that she would take away credit if a student failed to copy the question on the homework. She never told Podhorsky that the allegations in the parents' complaints were untrue.

encountered a group of 20 or 30 upset parents with complaints about Zink. He had a follow-up conversation about Zink with at least one of these parents after that night. There were threats of parents contacting the media to air their complaints and of students walking out of school in protest of Zink's return to the campus.

Podhorsky considered all of these things in reaching the decision that it would be best for the school community and for Zink if she were transferred to different environment. He did not feel the need to independently verify each of the complaints because of his firsthand experience in talking with many upset parents at Open House, his observation of Zink's gradebook with numerous zero-credit grades, and because receiving so many similar complaints from different sources gave them credence. He was familiar with the complainants, found them to be reasonable people, and therefore believed their complaints to be true.

As previously discussed, in January 2016, Asfazadour reversed Podhorsky's decision to transfer Zink away from LJHS. The District was prepared to allow Zink to return to work at the campus in early 2016 in a small group instruction type of assignment. Asfazadour explained that he did not approve the transfer at that time because he believed the District had a responsibility to follow the CBA, namely by allowing the employee an opportunity to change behavior so the employee can stay at his or her school site. In this instance, he did not believe that Zink had been given that opportunity, which he thought contradicted the CBA. However, Zink ultimately did not get a chance to prove that she could change her behavior. As soon as it became widely known at LJHS that Zink was returning to teach, parents organized an even more robust opposition to her in the form of the Wufoo petition and renewed threats of

protests, walkouts, and media contact.⁸ On February 1, 2016, the day Zink was supposed to start her new assignment at LJHS, she was again placed on paid administrative leave while the District investigated the Wufoo petition complaints. She was provided with a copy of the Wufoo petition during this meeting.⁹

Zink remained on paid administrative leave until she was informed in mid-August 2016 that she was to be transferred to Thurgood Marshall Middle School (MMS) for the upcoming school year. Asfazadour described administrative transfers as “non-disciplinary” actions under the CBA that are usually precipitated by a “personality issue” and used to avoid the disruption of the learning environment of a school. Asfazadour was asked to explain why, since he had denied Podhorsky’s transfer request months earlier, as Zink had not had the opportunity to improve as required by the CBA, he would approve it in this instance when she still had not had such an opportunity. Asfazadour stated:

There was enough feedback from people that made it impossible for us to return her to the school to have the opportunity to change her behavior. [I]t was such a bad situation, highly unusual, for anyone to be so noteworthy that the superintendent, the chief of staff, other school communities were aware of the situation.

[¶...¶]

And we—I made a decision that it wasn’t in anyone’s best interest for her to return to the school.

⁸ There were also some positive comments about Zink in the Wufoo petition. Zink’s former colleague at LJHS, Kenneth Davis, testified about the complimentary entry he wrote about Zink in the Wufoo petition.

⁹ Later, in May 2016, Zink was provided with the names of the 47 complainants in the Wufoo petition who consented to having their information shared with her. The District invited Zink to supplement her earlier written response if desired. The record does not reflect that she did so.

Zink's Protected Activity and the District's Knowledge of it

The District admitted that Zink engaged in the EERA-protected activities listed in the complaint in Case No. 6095-E. These were, beginning in October 2014, filing unspecified grievances and “other protected complaints.” Podhorsky at first could not recall whether Zink had made any complaints about his “management style” before he notified her of his intent to administratively transfer her assignment in early September 2015. He vaguely recalled some written complaints by Zink during the relevant time period, including his own correspondence with the Office of Internal Audit in November 2014 responding to a complaint Zink had made over grading procedures. A grievance response authored by Podhorsky dated June 3, 2015, was entered into evidence after his testimony was completed.

B. Case No. 6207-E – Events After the Transfer to MMS

Case No. 6207-E involves events after Zink was forced to leave LJHS, beginning with an allegation that she was “prevented” from retrieving her personal belongings from her former LJHS classroom by Asfazadour.

The Retrieval of Zink's Personal Items from LJHS

CBA Article 12.9, “Rights of Transferred Unit Members,” provides at section 12.9.2, “Preparation for Moving,” that “Release time should be provided for unit member(s) being transferred. One (1) day of duty free preparation/orientation time should be provided at the receiving school.” On August 23, 2016, in response to an e-mail message from Zink's representative, Mary Bain (Bain), regarding Zink being scheduled to report to her new assignment at MMS the next day, Asfazadour wrote in part,

Ms. Zink,

[I]t is my understanding that you were permitted to return to La Jolla High School at an earlier date to retrieve your personal

items. You are not assigned to La Jolla High School and should not report to the campus unless approved by the school principal.

Asfazadour testified that he assumed that Zink had contacted Podhorsky at some point to pick up items from her former classroom. He was unaware of there being any problem regarding this issue after this date. Zink testified that she never contacted Podhorsky to arrange a time to pick up her belongings. The record also does not show that Zink ever requested that Asfazadour intervene in the situation. Zink filed a grievance on or about August 29, 2016, alleging a violation of CBA Article 12.9, including the section quoted above. The grievance was settled by the District paying Zink \$75.00 for damage to a chair. Podhorsky and District counsel Sandra Chong were involved in the resolution of the grievance.

The Allegation that Zink was Placed in a “Fabricated” Middle School Teaching Assignment
Assignment in the 2016-2017 School Year

Asfazadour testified that the District’s Instructional Leadership Team (ILT)¹⁰ selected MMS for Zink’s new assignment because it had a robust math program, strong levels of parental engagement, and similarly high performing students as those in LJHS, which led the ILT to believe that Zink could be successful there. Asfazadour met with the ILT over this issue and provided input. While the ILT and Human Resources are involved in the selection of the school site for an administrative transfer, the principal of the site is the person responsible for placing a transferred employee in a position according to the needs of the school. Asfazadour admitted that the District was aware that MMS was fully staffed with math teachers, or “over-allocated,” but stated because Zink held a multiple subject teaching

¹⁰ The ILT is composed of the superintendent, area superintendents, chief of staff, and department heads. Human Resources works with the ILT on administrative transfers. It does not appear from the record that Asfazadour was a member of the ILT.

credential and could therefore potentially teach other subjects, it was up to the principal to determine how to best utilize Zink at the site.

Michelle Irwin (Irwin) is the principal of MMS. Irwin was contacted by Houston from Human Resources in the fall of 2015 and informed that Zink was to be administratively transferred to her school after the Thanksgiving holiday. Irwin testified that she was quite upset about the situation as she was dealing with several teachers on campus with their own deficiencies and felt that she was being forced to take on another problem. Irwin complained to Houston and Asfazadour about the lack of documentation supporting the District's decision to transfer Zink. When Zink was not transferred to her school after Thanksgiving she assumed the situation was resolved. However, months later, Irwin was again informed that Zink would be placed at her school for the upcoming 2016-2017 school year. Irwin remembered being told by someone from Human Resources that Zink "should not be alone with students." Irwin was also told that Zink was a bad teacher with poor practices who had scratched a student. Asfazadour did not recall saying that Zink should not be alone with students, but he did recall saying that Zink "should not be the teacher of record."

Irwin met with Zink on the first day of school, August 29, 2016. Irwin told Zink that she did not have a teaching assignment for her as all of her teaching positions were currently filled. They discussed Zink's teaching experience and some of the issues at LJHS. Zink was provided an office with a desk top computer and a phone. The room had previously been used for storage. Zink testified that she sat in the room during the school day for the entire year but did not have any regular assigned duties other than to appear at work. She attended monthly staff meetings and after school events like Back to School Night and Open House. Irwin did

not explicitly direct Zink to attend after school events, but since all teachers do, it was not unusual for Zink also to do so.

Assignment in the 2017-2018 School Year

Human Resources official Acacia Thede (Thede)¹¹ called Irwin before the beginning of the 2017-2018 school year and said that the District wanted Zink to have some kind of an assignment for that year. Irwin thought that a good fit for Zink, given that Zink was not to be alone with students, would be for Zink to provide support and co-teach with another teacher several sections of study skills classes. These classes involve extra instructional time to assist special education students with their general education course work and are therefore considered special education courses. Irwin, who is not a credentialing specialist, checked first with Thede to verify whether Zink's credential permitted this kind of assignment. Irwin was told that the assignment did not pose any problem. Asfazadour described his special training to evaluate teachers' credentials and explained that the District had correctly concluded that since Zink was not to be the teacher of record in a special education class, her credential permitted her to support students in such a class as a co-teacher. Irwin testified as follows about what she had in mind for Zink's assignment:

My idea for the 2017-18 school year was to have Mrs. Zink go into these classrooms and support the teacher by allowing Ms. Zink to work with students in small groups, whether it's on homework, math homework, but just to provide extra assistance to the teacher. These classes ranged from anywhere between 12 to 17 students. And so -- And these are students who need the extra support. They had no other support in the room other than the teacher. And so I thought it would be great for Ms. Zink to be assisting them and possibly they could do small -- She and the other teacher could do small group work.

¹¹ Thede did not testify in the consolidated hearing.

Zink does not believe her credential allows her to teach in study skills classes whether or not there is special education teacher present.¹² Zink has no special training or experience in evaluating teaching credentials. Zink told Irwin that she was uncomfortable with the assignment and was not going to be able to work with the students in those classes. Irwin listened to Zink's concerns, but did not take any immediate action to change Zink's assignment. Zink then attended the study skills courses but did not interact with students. One of the study skills teachers complained to Irwin that it was "awkward" to have an adult in the classroom that just sat there and did not engage with students. On a walk through, Irwin observed Zink sitting in the back of a study skills classroom by herself with an open checkbook. Irwin thought Zink was balancing it. Zink denied that she was balancing her checkbook but admitted to having it open.

Before Back to School Night, Zink showed Irwin a letter that Zink said she intended to distribute to parents to inform them that she was not properly credentialed for the study skills assignment and therefore was unable to teach their students. Irwin contacted Thede and asked what to do. Irwin was very concerned that if Zink distributed that letter during Back to School Night, parents would be alarmed and contact the superintendent to complain. Thede told Irwin that it was okay to remove Zink from the study skills assignment and return her to doing nothing. Irwin followed that advice.

Written Directives

About one week after Irwin and Zink's meeting on the first day of school in late-August 2016, several things came to Irwin's attention that she determined needed to be addressed with Zink. First, Irwin saw Zink using a combination photocopier/facsimile (fax)

¹² Zink also made this claim to the San Diego County Office of Education. Zink was informed by letter from that entity that the assignment was valid for her credential.

machine in the office. Since Zink had no official duties, Irwin could not think of a reason why she would need to be using the machine.¹³ Irwin wanted to make sure Zink understood that school resources were not to be used for personal business.

Second, a teacher came to Irwin describing a conversation she had had with Zink, wherein Zink allegedly offered to cover the teacher's class if the teacher ever wanted to go on a coffee run to Starbucks.¹⁴ The teacher wanted to know if that was okay; Irwin told her that it was not. Given that Irwin believed the District did not want to Zink to be alone with students, Irwin felt that she needed to communicate to Zink that Zink could not cover classes for other teachers.¹⁵

Finally, a different teacher told Irwin that Zink had entered her classroom during instructional time to chat.¹⁶ Irwin wanted to make sure that Zink understood that she could not disturb a classroom during instructional time. Irwin wrote a memorandum directing Zink not to engage in all of the above-discussed conduct and placed it in Zink's mailbox. Zink was upset by this, because Irwin had not talked to her first and she believed the document was disciplinary. Zink met with Irwin to complain about Irwin's handling of the issue. Zink told Irwin that she did not enter anyone's class during instructional time.¹⁷ This gave Irwin pause.

¹³ In contrast, Zink testified that she was faxing a grievance to the District and that Irwin specifically had given her permission to do so.

¹⁴ This teacher did not testify in the consolidated hearing.

¹⁵ Zink denies that she offered to cover anyone's classes for Starbucks runs, but admits that she offered to teachers in the break room that she could cover their classes if needed.

¹⁶ This teacher also did not testify in the consolidated hearing. Zink testified that she spoke to this teacher during a "passing period," not instructional time.

¹⁷ Notably, neither Zink nor Irwin testified that Zink raised during their discussion the fact that Irwin had allegedly given Zink permission to use the fax machine. Irwin testified

Irwin testified that she regretted having rushed to issue written directives to Zink before meeting with Zink to get Zink's side of the story. Irwin said that she had acted out of character in this regard. Irwin candidly admitted that she believes her own judgment was clouded by the information she had learned about Zink from the District and by the fact that she had never before dealt with an involuntarily transferred employee. Irwin was also nervous because of some tense conversations with Zink and numerous e-mails from Zink and Bain that were copied to high ranking officials of the District. Irwin explained that she was "walking on eggshells" during this time period and was concerned about missteps in handling Zink's employment issues.

Irwin destroyed the original memorandum and re-wrote and issued a document to Zink that she hoped did not read as being disciplinary, but would still convey the expectations she meant to communicate to Zink in the first place. The revised memorandum stated in part:

When we met on August 29, 2016, I did not review the following expectations with you. Please adhere to these directives.

[O]ur instructional supplies (*including copy paper, staples, etc.*) are to be used for instructional or district purposes only and not for personal use. Please refrain from using any copier, fax machine, printer and any instructional materials for personal use.

While I appreciate that you have offered to cover teachers' classes, I cannot permit you to cover any classes for any [MMS] teacher. Please refrain from offering your support to the teaching staff.

Also, you are not to enter the MMS teachers' classrooms while teachers are teaching. You are not to interrupt the instructional

before Zink. Irwin was an extraordinarily forthcoming witness who never once hesitated to highlight her own imperfect conduct. I believe that had Irwin actually given Zink permission to use the fax machine, she would have testified to that fact, because it would have been germane to this issue. I also find it implausible that Zink would not have reminded Irwin during their discussion that Irwin had allowed her to use the fax machine. Therefore, I discredit Zink's testimony on this point.

process in any classroom at any time. Please extend your professional courtesy to all teachers if you want to speak to them during their prep times. Please do not assume the teacher(s) have the time to visit during their prep time.

(Emphasis in original.) There is no information in the record that this memorandum was placed in Zink's personnel file.

Professional Development Classes

It appears from the record that before 2016, Zink had not taught Middle School for many years.¹⁸ Asfazadour testified that Zink told him she was concerned about not having recent experience in Middle School. Zink did not remember discussing or communicating about that with him. Asfazadour told Irwin that since Zink had not taught at this grade level recently, she would benefit from taking professional development courses. The District offered "Capacity Builders" professional development courses that were taught offsite in both English and Math. Each course had five sessions. Irwin assigned Zink to attend both courses because she holds a multiple subject credential. An MMS department chair also attended the English professional development program. Irwin thought that it would be useful for Zink to become familiar with new instructional techniques and the curriculum despite not having assigned students in 2016-2017.

Zink did not enjoy the courses but completed them. They involved small group instruction where teachers shared lesson plans. Zink did not have any lesson plans to share because she had no students. A laptop computer was also required. Zink did not receive a laptop computer until the third session of the courses. As soon as Irwin was made aware that

¹⁸ Zink's testimony during cross-examination on this point was argumentative and vague. I had to admonish Zink at times about failing to directly answer questions posed to her and going beyond the scope of the question. She testified that she had taught Middle School level math during summer school in the past, probably at least more than five years before the time at issue.

Zink needed a laptop she secured one for Zink to use. Irwin received complaints about Zink's conduct during both courses from the instructional leaders of both courses. Zink admitted saying that she was being required to be there by the District during a roundtable introduction and that she discussed her grievances against the District in a small group, but not in a plenary session.

Zink's Protected Activity and the District's Knowledge of it

The District admitted in its answer to the complaint that all of Zink's alleged protected activities at paragraph 3 were in fact protected by EERA. They are:

- a. On June 17, 2016, filing a grievance against the District regarding a Notice of Proposed Reassignment dated June 13, 2016;
- b. On August 9, 2016, appealing the Notice of Proposed Reassignment per the appeal procedure provided for in the CBA;
- c. On June 22, 2016, filing Case No. 6141-E against the District with PERB;
- d. Regarding Case No. 6095-E, on July 5, 2016, filing a second amended charge; on August 22, 2016, filing a third amended charge; on November 29, 2016, appealing OGC's dismissal to the Board;
- e. On August 29, 2016, filing a grievance against the District regarding her being prevented from removing her items from her former classroom;
- f. On September 19, 2016, filing two grievances over her lack of duties at MMS and on September 26, 2016 attending a grievance meeting with management;
- g. On November 6, 2016, sending a letter to the District disputing a grievance response by Irwin dated September 27, 2016; and

h. On November 13, 2016, sending a letter to the District disputing a grievance response by Podhorsky dated October 3, 2016.

Asfazadour was directly involved in many of these protected activities. Irwin testified that Zink shared with her details about Zink's pending PERB charges and was directly involved with several of the grievances discussed above.

ISSUES

1. Did the District retaliate against Zink for her protected activity when it proposed an administrative transfer of assignment to another school in or around September 2015?

2. Did the District retaliate against Zink for her protected activity when it:

a. "Prevented" her from retrieving decades' worth of personal items from her former classroom;

b. Gave her no teaching or other duties during the 2016-2017 and 2017-2018 school years;

c. Issued written directives that she was not to (1) use instructional materials or District office equipment for personal use; (2) cover classes for other teachers; and (3) enter other teachers' classrooms during instructional time;

d. Required her to attend professional development courses for Middle School teachers?

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 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*)). 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.)

1. The September 2015 Proposed Administrative Transfer in Case No. 6095-E

a. Prima Facie Case of Retaliation

The prima facie case for Podhorsky's initial attempt to transfer Zink away from LJHS is established for the following reasons. The District admitted Zink's protected conduct in its answer. (*County of San Luis Obispo* (2015) PERB Decision No. 2427-M,¹⁹ p. 27 [facts that are admitted or not denied in a pleading are considered "judicial admissions," which are conclusive on the pleader and serve to remove a fact from controversy].) Although Podhorsky's recall of Zink's various protected complaints was somewhat hesitant, he did remember one specific example and the District does not dispute that he responded to Zink's grievances. Thus, the knowledge element is adequately demonstrated.

In *Zink I, supra*, PERB Decision No. 2538, p. 14, the Board concluded that the proposed notice of administrative transfer at issue here was an adverse action because it called upon Zink:

¹⁹ When considering a case under 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; see also *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

[T]o defend herself against the claim of unsatisfactory teaching methodology, requiring her to meet with various administrators to make her defense. [I]t would be readily seen by a similarly-situated certificated employee as an accusation of professional incompetence requiring a formal defense or, at minimum, likely affecting future employment decisions. (*Berkeley Unified School District* (2015) PERB Decision No. 2411, p. 22; *City of Long Beach* (2008) PERB Decision No. 1977-M, p. 13.)

Finally, the District's action was close in time to Zink's various protected activities and Asfazadour admitted that the District had not faithfully adhered to CBA procedures for administrative transfer, which was the reason he reversed Podhorsky's decision. These facts establish a nexus between the protected conduct and the adverse action. (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096, p. 11 [timing of action relative to protected conduct provides inference of unlawful motive]; *Santa Clara Unified School District* (1979) PERB Decision No. 104, p. 20 [the employer's departure from established policies and procedures when dealing with the employee may demonstrate that it was motivated by the employee's protected activity].) Since the prima facie case is met, the burden of proof shifts to the District to show that it had and acted for a non-discriminatory reason.

b. Burden Shift

In *Zink II, supra*, PERB Decision No. 2634, the Board upheld the ALJ's determination that although there was prima facie evidence that the District retaliated against Zink, nonetheless the "record is replete with evidence that the District would have taken these actions whether or not Zink had participated in protected activities." (*Id.* at p. 15.) The Board explained:

Beginning in November 2014, an active parent group led a sustained campaign to remove Zink from her position, making numerous allegations that could have warranted significant

discipline if proven, and which, at the very least, made a transfer a logical option for the District to implement, irrespective of any protected activity. Parents vigorously demanded Zink's removal from LJHS and threatened to call increasing community attention to their campaign and to cease or impede fundraising efforts on behalf of the school district if the District did not meet their demands. The District proved that it sought to defuse this situation, and would have done so even without any protected conduct. Although Zink contends "that it is highly questionable as to whether or not such outraged parents actually existed," we credit Podhorsky and Vossen, who both testified that they personally met with the Area Superintendent and parent leaders, who advised of parent plans to organize student walkouts, picket the school, and contact the media if the District brought Zink back to LJHS.

The record is clear that the District ceded to, and sought to defuse, parent and student concerns about Zink's classroom conduct, and would have done so even in the absence of Zink's protected activity.

(*Id.* at pp. 15-16.) The Board also noted at footnote 12 of the decision:

We take no position as to the veracity of the claims made in the Wufoo petition and whether those claims provided just cause for any adverse action. Zink may have had another forum available to raise such issues, and for that reason nothing in our decision today necessarily allows a California public school to wholly defer to allegedly unwarranted parent pressure in its treatment of teachers, particularly where such teachers are protected by contractual, statutory, and constitutional protections. In applying the *Novato* standard, we often compare the employer's proffered reasons with the parties' evidence regarding any alleged wrongdoing "to determine if the employer exaggerated or otherwise mischaracterized what occurred, thereby evidencing an unlawful motivation." (*Adelanto Elementary School District* (2019) PERB Decision No. 2630, p. 11.) Here, the record does not allow us to determine the strength of the allegations against Zink. In the absence of such evidence, there was still sufficient evidence of procedural irregularities by the District to find that Zink's protected activity contributed to the District's actions. However, there was also sufficient evidence that the District had other, stronger motivations, thereby leading us to conclude that Zink's protected conduct was not a but-for cause of the District's actions.

(*Id.* at p. 16.)

Although the Board was primarily focused on the later Wufoo petition complaints as providing the non-discriminatory reason for the District's action in Case No. 6141-E (the actual involuntary transfer to MMS), it also noted that, beginning in November 2014, parent activists embarked on a "sustained campaign" to remove Zink from her position. Notably, this earlier parent action that influenced Podhorsky to propose the thwarted administrative transfer also involved threats of media contact and protest activities that would have been disruptive to the LJHS learning environment. Podhorsky credibly testified to meeting with parent complainants at Open House and his activities to follow-up on and verify some of the complaints. It is amply clear that Podhorsky would have proposed to transfer Zink away from the school to calm the situation regardless of Zink's grievances and other protected activities. For these reasons, the District has met its burden of showing that Zink's activities were not the but-for cause of its action. The claim is therefore dismissed.

2. Claims in Case No. 6207-E

In response to the allegations in this case, the District again admitted in its answer that Zink's activities were protected under EERA, removing these facts from dispute. (*County of San Luis Obispo, supra*, PERB Decision No. 2427-M, p. 27.) Irwin and Asfazadour, the alleged District agents responsible for taking the actions at issue, had knowledge of or direct involvement in Zink's protected conduct establishing the requisite employer knowledge of the employee's protected activity. The remaining *Novato* elements will be discussed separately below for each of the claims at issue.

a. Asfazadour Prevented Zink from Retrieving her Personal Belongings from LJHS

This claim fails for a lack of proof that Zink suffered any adverse action. In determining whether an employer's action is adverse, the Board uses an objective test and will

not rely upon the subjective reactions of the employee. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 24-25.) “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.” (*Id.* at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

The evidence does not show that Asfazadour impeded, interfered with, or prevented Zink from obtaining her personal items from her former LJHS classroom. After expressing his belief in the August 23, 2016 e-mail that Zink had already retrieved her items, he stated that she should not appear at LJHS without first obtaining permission from Podhorsky to do so. The record does not reflect that Asfazadour was thereafter involved in the matter. Asfazadour did not appear to handle Zink’s grievance over CBA Article 12.9, for instance. No reasonable person would interpret Asfazadour’s statements to mean that Zink was prohibited from contacting Podhorsky to arrange a time to retrieve her belongings. The fact that Zink never attempted to do so is inexplicable. There is simply no objective adverse action here. As such, this claim must be dismissed.

b. Assigning Zink No Teaching or Other Duties in 2016-2017 and 2017-2018

i. Adverse Action

Where experienced teachers are involuntarily transferred from a classroom teaching assignment to a non-classroom assignment, “no reasonable person would...find [that action] anything but adverse.” (*Zink II, supra*, PERB Decision No. 2634, p. 14, citing *Coachella Valley Unified School District* (2013) PERB Decision No. 2342, p. 18.) Although Zink had been on paid administrative leave immediately before the transfer to MMS in 2016, she had

decades of classroom teaching experience. To go from a regular teaching assignment to sitting alone in a room for hours with nothing to do can only be described as terrible. In 2017, after the brief stint as a co-teacher in study skills courses, Zink again found herself with the do-nothing assignment.²⁰ The District blames Zink's overt reluctance to perform the study skills assignment as the reason it had to again assign her no duties. However, the "why" of an action is not considered in the analysis of this element. The only consideration is whether a reasonable employee in the same situation would find the action to be adverse. It is objectively adverse to appear for a job every day that has no duties and therefore no purpose. The adverse action element is satisfied.

ii. Nexus

There is close timing between Zink's numerous ongoing protected activities and the "do-nothing" assignments. The record also makes plain that the District never had the intention to place Zink in a school where she would have a regular classroom teaching assignment. Asfazadour admitted that the District knew MMS was "over-allocated" and also that the District did not intend for Zink to be the teacher of record after the involuntary transfer. Furthermore, according to Irwin, the District mandated that Zink should not ever be alone with students. Although Asfazadour does not recall specifically saying that to Irwin, someone else from Human Resources must have because Irwin was a trustworthy witness. This makes the District's assertions that it chose MMS specifically because of its strong math program, high performing students, and similar demographics to LJHS ring hollow.

²⁰ The study skills assignment was not alleged as an adverse action. Zink never moved to further amend the complaint to include it, nor indicated on the record that she intended to pursue the claim. Thus, it does not satisfy the standard for considering an unalleged violation (see, *City of Roseville* (2016) PERB Decision No. 2505-M, p. 25) and I decline to contemplate it as such.

Asfazadour also seemed to be trying to obfuscate the District's true intent to keep Zink away from students when he stated that the ILT only chose the site, but it was up to Irwin to make the actual duty assignment. The District knew the site had no teacher openings. It seems it was chosen with that in mind, and not because the District wanted Zink to be a successful member of MMS's strong math department. An employer's inconsistent or contradictory justifications for its actions are indicators of unlawful motivation. (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S, p. 15) The District's unlawful motivation is demonstrated in light of these facts. This allegation therefore states a prima facie case.

c. Written Directives

Not all written employer directives are considered adverse actions. The Board found a disciplinary memorandum that also threatened future discipline and was entered into the employee's personnel file was an adverse action. (*Alisal Union Elementary School District* (1998) PERB Decision No. 1248, p. 5.) On the other hand, a summary of meeting memorandum given to an employee after the employer's investigatory interview of the employee was not an adverse action because it did not accuse the employee of misconduct, did not discipline or threaten to discipline her, and there was no evidence it was placed in her personnel file, or would otherwise be used to support any future disciplinary action. (*Jurupa Unified School District* (2015) PERB Decision No. 2458, adopting proposed dec., p. 36 (*Jurupa*).

The written document at issue here is similar to the one in *Jurupa* that was not considered adverse. Irwin's memorandum setting forth expectations and directives that Zink not use District property for personal use, cover classes for other teachers, or disturb other

teachers' instructional time does not accuse Zink of misconduct. Irwin did not, for example, note that she had observed Zink use District equipment for personal use or accuse Zink of actually disrupting instructional time. The memorandum also did not impose or threaten to impose discipline, and was not placed in Zink's personnel file. A similarly situated employee would not reasonably believe that these directives were a threat to her employment. Accordingly, Irwin's memorandum was not an adverse action. The allegation does not demonstrate a prima facie case and must be dismissed.

d. Assigned Professional Development Courses

Zink may not have found it worthwhile to attend the Capacity Builders professional development courses because she did not currently have students to teach and therefore no active lesson plans. She may also have felt uncomfortable working in small groups with other teachers who presumably did have an active teaching assignment, but these facts do not show an objective adverse action. Zink's brief focuses on the fact that the District had no legitimate reason to send her to the courses since she had no current students, but fails to make a cognizable argument that attending the courses was detrimental to Zink's employment. In any event, Irwin stated a plausible reason for sending Zink at that time, namely for her to be able to familiarize herself with new curriculum and learn new instructional techniques. This appears to be objectively beneficial rather than detrimental to one's employment. No reasonable employee in Zink's situation would find this to be an adverse action. Accordingly, this claim fails.

Burden Shift

The District asserted as a fourth affirmative defense in its answer that its actions were reasonable and undertaken in good faith. At the consolidated hearing, the District argued that

the Wufoo petition complaints were part of its defense to some allegations in Case No. 6207-E. The only remaining issue in the case is the District's lack of assigned duties for Zink. As discussed previously at length, the Board concluded in *Zink II, supra*, PERB Decision No. 2634 that the District was strongly motivated by its desire to diffuse the parental uproar regarding Zink and would have involuntarily transferred her away from LJHS whether or not Zink had pursued her many statutorily protected acts. The same holds true for its desire to keep Zink out of a regular classroom assignment at MMS. Given the robust involvement of parents in the District and the fact that they have formed a kind of parental network across different schools, it is quite likely that the same outrage would have followed Zink to MMS if the District had placed her in a regular teaching assignment there. District witnesses pointed out the unprecedented nature and volume of the complaints against Zink. I have no doubt that the scope of the community's response to Zink prompted the District's actions against her.

Zink is obviously in a difficult, perhaps intolerable position but, as pointed out in the ALJ's proposed decision in Case No. 6141-E, PERB's mandate is not to determine whether the District has acted at all times perfectly or fairly. Rather, PERB must determine whether the District took action to retaliate against an employee for her protected conduct. The evidence shows that the District was responding to dissatisfied parents and students, and would have acted in the same manner even if Zink had not participated in EERA-protected acts. Accordingly, the District has proven its defense that the lack of duties in Zink's MMS assignment was not in retaliation for Zink's protected conduct. The claim is dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this matter, the complaints and underlying unfair practice charges in Case Nos. LA-CE-6095-E and LA-CE-6207-E, *Emma Yvonne Zink v. San Diego 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) 327-9425
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, subs. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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