STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERMINE FREDRICA NELSON, Charging Party, v. JURUPA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5517-E PERB Decision No. 2309 March 8, 2013

Appearances: Richard D. Ackerman, Attorney, for Ermine Fredrica Nelson; Fagen, Friedman & Fulfrost by Kerrie Taylor, Attorney, for Jurupa Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Jurupa Unified School District (District), to a proposed decision (attached) of an administrative law judge (ALJ). The ALJ determined that the District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by informing employee Ermine Fredrica Nelson (Nelson) that her employment with the District had been terminated, thereby retaliating against Nelson for her participation in protected activity, viz., filing grievances.

The Board has reviewed the entire record in this case, including the hearing record, the ALJ's findings of fact and conclusions of law, the District's exceptions, and Nelson's response thereto. The ALJ's findings of fact are supported by the record and neither party excepts

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

thereto.[2] Accordingly, we adopt the ALJ's findings of fact as the findings of the Board itself, except as expressly noted below. We adopt as well the ALJ's conclusions of law insofar as they are consistent with our discussion below.

FACTUAL SUMMARY

We incorporate by reference the ALJ's procedural history and proposed findings of fact. (Proposed Decision (PD), at pp. 2-5.) We summarize them briefly below.

Nelson, a teacher, was initially employed by the District in 1998. In the early fall of 2009, she took a medical leave of absence.

In mid-January 2010, the District notified Nelson by letter that if she exhausted entitlement to medical leave and could not return to work, pursuant to Education Code 44978.1 the District might place her "on a 39-month re-employment list for your position as Teacher effective March 3, 2010." The letter stated also that: "[t]his action occurs automatically when an employee exhausts all entitlement to any form of paid leave of absence status (to include sick leave and 5 month differential leave.)." The letter further informed Nelson that during the 39-month period if she became able to resume her duties as verified by her physician, the District would offer her "employment in a position for which you are credentialed and qualified."

In early March 2010, the District's governing board took action to place Nelson on the 39-month reemployment list, notifying Nelson thereof by letter which repeated the information from the January letter regarding return to work during the 39-month period in the event she became able to resume her duties.

[2] PERB Regulation 32300(c) provides that "[a]n exception not specifically urged shall be waived." (PERB Regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

During August 2010, Nelson filed with the District various grievances and complaints. Nelson thereby challenged District actions as violating state and federal statutes as well as provisions of the collective bargaining agreement (CBA) between the District and National Education Association-Jurupa (Association), the exclusive representative of the certificated employee bargaining unit. The CBA contains a grievance procedure, which defines a grievant as "a unit member or group of unit members or the Association," and a complaint procedure as well.

In mid-September 2010, the District responded to Nelson's grievance and complaint filings. The response, a memo from the District superintendent, stated in pertinent part:

> After careful review, the District must reject your complaints/grievances on the grounds that you are no longer an employee of the District and lack standing to bring such complaints and grievances. Further, all or most of your complaints/grievances are untimely and/or have already been addressed (via grievance or complaint procedures).
>
> Pursuant to Education Code section 44978.1, your employment with the District was terminated on March 3, 2010, after you exhausted all current and accrued leaves and were medically unable to return to work.

In December 2010, Nelson initiated this proceeding by filing an unfair practice charge, which she thereafter amended in early April 2011. Later in April 2011, PERB's Office of the General Counsel partially dismissed Nelson's charge, but issued a complaint alleging that the District violated EERA by informing Nelson in mid-September 2010, that she had been terminated from District employment in March 2010, thus retaliating against Nelson because she filed grievances. In late April 2011, the District filed an answer with PERB, denying the essential allegations and raising affirmative defenses.

In early July 2011, the District sent Nelson a letter "to clarify [her] rights under Education Code 44978.1 following the correspondence you received from the Jurupa Unified

School District ('District') dated September 15, 2010 in response to your August 3, 2010 complaints/grievances." The District's July 2011 letter stated:

> You remain on the reemployment list. In the event you are medically able to return to work as a teacher, you will be returned to a classroom in compliance with Education Code section 44978.1. The District's September 15, 2010 correspondence to you did not change or otherwise impact your status on the medical 39-month reemployment list. You have been in the same employment status since March 3, 2010.

The District did not communicate further with Nelson regarding her employment status.

PROPOSED DECISION

The ALJ determined that while on the District's 39-month reemployment list, Nelson remained a "public school employee" within EERA. For this conclusion, the ALJ relied on Board precedent which construed Education Code section 44978.1 as establishing an extended unpaid leave. (*Santa Ana Educators Association* (*Felicijan & Hetman*) (2009) PERB Decision No. 2008 (*Santa Ana Educators*).) Thus, concluded the Board, when on the 39-month reemployment list pursuant to Education Code section 44978.1, individuals remain "public school employees" within EERA and remain as well members of the bargaining unit.

The ALJ likewise determined that the District's mid-September 2010 letter to Nelson stating that her employment had been terminated in March 2010, was sent in retaliation for Nelson's protected grievance activity. For this conclusion, the ALJ relied on the Board's four-part test for retaliation. (*Novato Unified School District* (1982) PERB Decision No. 210.) Applying this test, the ALJ concluded that: (1) Nelson exercised EERA rights by filing grievances in August 2010; (2) the District knew thereof; (3) the District's memo of mid-September informing Nelson unequivocally that her employment had been terminated the prior March was adverse; and (4) the District's animus was demonstrated by its departure from

its own practices which did not treat persons on the 39-month reemployment list as having been terminated, and by its shifting justifications for its mid-September 2010 memo to Nelson.

Finally, the ALJ determined that the District's July 2011 "clarification" of Nelson's status failed to nullify the coercive effect of the District's mid-September 2010 memo informing Nelson that she had been terminated. For this conclusion, the ALJ relied on the Board's decision in *Sacramento City Unified School District* (1985) PERB Decision No. 492 (*Sacramento*) which recognizes the possibility of such nullification, but only where the employer's retraction or apology is made in a manner that "completely nullified the coercive effects of the earlier statement." The ALJ concluded that the District's shifting justifications combined with the almost ten-month delay in providing the clarification precluded the July 2011 clarification from nullifying the coercive effects of the offending mid-September 2010 letter.

DISTRICT'S EXCEPTIONS

The District identifies fourteen separate portions of the ALJ's conclusions of law to which it excepts. Nonetheless, it argues only three points: (1) The employment status of persons placed on the 39-month reemployment list was uncertain, so the ALJ should not have concluded that the District retaliated against Nelson; (2) no evidence supports the ALJ's conclusion that Nelson was impacted adversely by the District's informing her she had been terminated; and (3) the District's clarification notice to Nelson of July 2011 sufficiently clarified Nelson's status that it nullified any coercive impact of the mid-September 2010 memo to Nelson that she had been terminated in March 2010. We consider these contentions in order.

1. Status of Persons Placed on the 39-Month Reemployment List

The District urges that the ALJ improperly presumed the status of persons on the 39-month reemployment list was clear, which, contends the District, it is not. Thus, urges the District, its communications to Nelson were its best effort to explain to Nelson her status under an unclear statutory construct in which the Legislature by using the term "reemployment list" had at least intimated that persons on the list no longer were to be considered employed. We are not persuaded.

We do not deem the status of individuals placed on the 39-month reemployment list pursuant to Education Code section 44978.1 to be unclear. In *Santa Ana Educators*, the Board held that placement on the reemployment list pursuant to Education Code section 44978.1 does not constitute a separation from service. The Board there wrote:

> Section 44978.1 provides that if an individual on the list becomes medically able to work during the 39-month period, 'the certificated employee shall be returned to employment in a position for which he or she is credentialed and qualified.' (Emphasis added.) Unlike the [parallel] sections for classified employees, section 44978.1 contains no language about vacant positions or a preference in reemployment over other applicants or candidates. In the only published court of appeal decision addressing section 44978.1,[3] Veguez v. Governing Bd. of the Long Beach Unified School Dist. (2005) 127 Cal.App.4th 406 [25 Cal.Rptr.3d 526], the court interpreted the above-quoted language to mean that reinstatement is not conditioned 'on the availability of a position.' (Id. at p. 423.) Rather, the court held that section 44978.1 guarantees a right to reinstatement during the 39-month period

[3] "Two non-precedential decisions have addressed the employment status of an individual on a section 44978.1 reemployment list. In an unpublished decision, the Second District Court of Appeal stated that placement of an employee on the section 44978.1 reemployment list was not a dismissal and thus the employee 'retained his status as permanent employee.' (Hockenberg v. Inglewood Unified School District (Apr. 6, 2005, B172453, pp. 29-30) [nonpub. opn.].) More recently, a superior court observed that '(n)othing in section 44978.1 indicates that an employee's placement on a reemployment list is a resignation or other separation from his or her employment.' (California Teachers Association v. Elk Grove Unified School District (Super. Ct. Sacramento County, 2008, 06CS01190, p. 19).)"

> once the individual is cleared by his or her doctor to return to work. (Ibid.) This strongly resembles a return from a leave of absence pursuant to Education Code section 44973, which provides that a certificated employee returning from a leave of absence 'be reinstated in the position held by him at the time of the granting of the leave of absence.' Thus, based on the language of the statute itself, placing an individual on the 39-month reemployment list constitutes the beginning of an unpaid medical leave of absence rather than a termination of the individual's employment.
>
> The legislative history of Education Code section 44978.1 further sheds light on the unique nature of the section's 39-month reemployment list. Section 44978.1 was added to the Education Code in 1998 as part of S.B. 1019. (27B West's Ann. Ed. Code (2006 ed.) foll. sec. 44978.1, p. 557.) That bill sought to end the potential for abuse of sick leave by certificated employees. (Assem. Com. on Education, Analysis of Sen. Bill No. 1019 (1997-1998 Reg. Sess.) as amended January 20, 1998, p. 3.) Prior to S.B. 1019, 'each year an employee would be able to collect another 10 days of full-pay sick leave and another five months of differential pay, without ever returning to work.' (Id., at p. 2.) S.B. 1019 eliminated a certificated employee's ability to receive a new allotment of sick leave and differential pay each year by declaring that once those benefits have been exhausted in a single school year, an employee who remains medically unable to return to work because of the same injury or illness must be placed on a 39-month reemployment list. (Ibid.) Thus, it appears the Legislature intended section 44978.1 to create an unpaid leave status for such employees in lieu of earning new paid leave each school year when they continued to be absent due to the same injury or illness. Importantly, the legislative history contains nothing to indicate the Legislature intended placement on the 39-month reemployment list to end the employment relationship between the certificated employee and the school district.
>
> For the above reasons, we conclude that placement of an employee on a 39-month reemployment list pursuant to Education Code section 44978.1 does not constitute a separation from service. Thus, a person on that list remains an employee of the school district throughout the 39-month period.

(*Santa Ana Educators*, at pp. 8-10.) We reaffirm here our prior construction of Education Code section 44978.1.

2. No Evidence of Adverse Impact

The District next urges that informing Nelson in mid-September 2010 that she had been terminated from employment more than six months earlier when placed on the 39-month reemployment list was not adverse to Nelson, and that no evidence in the record establishes that the District action in so doing was adverse. We disagree.

In determining whether the employer's action is adverse to the employee, the Board applies an objective test. The question is: "whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." *(Newark Unified School District* (1991) PERB Decision No. 864.) We conclude that a reasonable person would so consider the mid-September 2010 notice received by Nelson.

Under the EERA, "public school employees" have the right to participate in the activities of employee organizations (EERA, § 3543), including, inter alia, the right to initiate and process grievances pursuant to the grievance procedure in a CBA applicable to their bargaining unit. (*North Sacramento School District* (1982) PERB Decision No. 264; *Jurupa Unified School District* (2012) PERB Decision No. 2283.) Denial of this right adversely impacts an employee seeking to vindicate rights negotiated by the employee's exclusive representative and described in the applicable CBA. Moreover, and without regard to filing of grievances, depriving a person of the status of employee, thus effectively stripping from the person those rights and benefits accruing to employees under the EERA and under the applicable CBA, is inherently adverse. Whether the deprivation is by discharge (*Regents of the University of California (Einheber)* (1997) PERB Decision No. 949-H), or by a notice that the employment relationship was already severed and thus no longer exists, is of little moment.

The ALJ determined that the mid-September 2010 memo to Nelson from the District's superintendent unequivocally stated that Nelson's employment had been terminated in March 2010, and that as a person no longer employed by the District Nelson had no right, and the District no duty, to process her grievances or complaints. We hold that this constitutes a classic adverse action.

3. The July 2011 Letter Clarified Nelson's Status and Nullified the Mid-September 2010 Memo

The District urges lastly that its letter to Nelson of July 2011, which confirmed her status on the 39-month reemployment list but did not confirm that she continued to be an employee of the District, was sufficient to clarify any misapprehension arising from, or in other words to nullify any coercive impact of, the mid-September 2010 memo informing Nelson that her employment had been terminated when in March 2010 she was placed on the 39-month reemployment list. We disagree.

In *Sacramento*, the Board recognized a doctrine employed by the National Labor Relations Board (NLRB) under which an honestly given retraction can erase the effects of a prior coercive statement if the employer retraction was made in a manner that "completely nullified the coercive effects of the earlier statement." (*Sacramento*, PD, at p. 28-29, citing *Bartley Co. v. NLRB* (6th Cir 1969) 410 F.2d 517; *Redcor Corp.* (1967) 166 NLRB 1013.)[4] In *Sacramento*, the Board considered a retraction made within minutes after a coercive admonition against engaging in protected conduct. Finding the supervisor did not even acknowledge the remark he supposedly was retracting, the Board concluded the supposed retraction was ineffective to nullify the coercive earlier statement.

[4] Like California courts, PERB relies on National Labor Relations Act precedent to construe analogous provisions of California labor relations statutes. (*Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617.)

The ALJ here, for similar reasons, found the retraction unpersuasive. So do we. The alleged "retraction" was inadequate and untimely. The notice to Nelson of July 2011 did not address the coercive aspects of the mid-September 2010 memo, to wit, that Nelson was no longer an employee of the District and had no standing to initiate grievances or complaints. Moreover, to be effective any retraction would have to have been tendered within a few days, at most, of the mid-September 2010 memo. Waiting to retract until Nelson filed her charge at PERB, and until PERB itself issued a complaint, suggests that the retraction was motivated solely by a desire to avoid an adverse determination in this case. We hold that the District's July 2011 "retraction" was both inadequate and untimely, and thus not made "in a manner that completely nullified the coercive effects of the earlier statement."[5]

CONCLUSION

We affirm the ALJ's conclusion that the District retaliated against Nelson because of her protected conduct, viz., filing grievances and complaints in August 2010, by issuing to her in mid-September 2010 a memo informing her that her employment with the District had been terminated in March 2010 and that as a consequence thereof she lacked standing to file grievances and complaints. We likewise affirm the ALJ's proposed remedy, including the cease and desists order, the posting order and the order for rescission of the mid-September 2010 memo.

[5] We clarify that either defect, contents or timeliness, would have been sufficient by itself to disqualify the purported retraction from nullifying the coercive impact on Nelson of the mid-September 2010 memo.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that Jurupa Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5(a). The District violated EERA by informing Ermine Fredrica Nelson (Nelson) that her employment with the District had been terminated effective March 3, 2010 in retaliation for her participation in protected activity.

Pursuant to EERA section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against Nelson by inaccurately informing her that her employment with the District had been terminated.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Within ten (10) working days following the date this decision is no longer subject to appeal, rescind the September 15, 2010 letter issued to Nelson.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the Office of the General Counsel of the Public Employment Relations Board or the General Counsel's designee. The District shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Nelson.

Chair Martinez and Member Banks joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-5517-E, *Ermine Fredrica Nelson v. Jurupa Unified School District*, in which all parties had the right to participate, it has been found that the Jurupa Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by informing Ermine Fredrica Nelson (Nelson) that her employment with the District had been terminated in retaliation for her participation in protected activity.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against Nelson by inaccurately informing her that her employment with the District had been terminated.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Rescind the September 15, 2010 letter issued to Nelson.

Dated: _____ JURUPA UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ERMINE FREDRICA NELSON, Charging Party, v. JURUPA UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5517-E PROPOSED DECISION (3/16/2012)

Appearances: Richard Ackerman, Attorney, for Ermine Fredrica Nelson; Fagen Friedman & Fulfrost, LLP, by Kerrie Taylor, Attorney, for Jurupa Unified School District.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, it is alleged that a public school district employer retaliated against one of its teachers by either terminating or stating that it had terminated that teacher's employment. The employer denies a violation.

On December 3, 2010, Charging Party Ermine Fredrica Nelson filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Respondent, Jurupa Unified School District (District), alleging multiple violations of the Educational Employment Relations Act (EERA).[1] On April 11, 2011, Nelson filed an amended charge. On April 18, 2011, the PERB Office of the General dismissed all of the allegations in the charge except the claim that the District violated EERA section 3543.5(a) by informing Nelson that she had been terminated from her position at the District.[2] On that claim, the General Counsel's Office issued a complaint. On April 29, 2011, the District filed an answer to the

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

[2] No exceptions were filed to the partial dismissal.

complaint, admitting only that it is a public school employer within the meaning of EERA section 3540.1(k), and denying all other allegations. The District also asserted multiple affirmative defenses. An informal conference was scheduled to discuss settlement but Nelson did not appear.

On January 24, 2012, PERB held a formal hearing. On February 29, 2012, the District filed its closing brief according to the schedule agreed-upon by the parties. Nelson did not file a closing brief. The record is now closed and the matter is submitted to PERB for a decision.

FINDINGS OF FACT

The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k). Nelson was hired by the District as a teacher in 1998 and was therefore a public school employee within the meaning of EERA section 3540.1(j). At the time of the incidents described in the PERB complaint, Nelson was on the District's 39-month reemployment list.

The Teachers Association and the Negotiated Grievance Procedure

The National Education Association of Jurupa (Association) is an employee organization that represents the interests of teachers at the District. At all relevant times, the District and the Association were signatories to a collective bargaining agreement (CBA) containing a grievance procedure that culminates in binding arbitration. The District also has a separate "complaint procedure" to resolve complaints not involving the CBA.

CBA Article XXI, section 1(A) describes a grievance as an allegation that the District violated terms of the CBA. Section 1(B) defines a "grievant" as "a unit member or group of unit members or the Association[.]"

District Assistant Superintendent of Personnel Services, Tamara Elzig testified that only "active" employees may file grievances. Elzig defines "active" employees as those who either have a current job assignment with the District or are using medical leave. Elzig testified that individuals on the 39-month reemployment list are considered "inactive" employees and lack standing to file grievances under the CBA.

Nelson's Leave of Absence From the District

In or around September 2009, Nelson requested to be placed on medical leave supported by a letter from her physician. The District granted Nelson's request.

On January 21, 2010, the District sent Nelson a letter stating in relevant part:

> The purpose of this letter is to notify you that in accordance with Education Code Section 44978.1 (see attached), you may be placed on a 39-month re-employment list for your position as Teacher effective March 3, 2010. This action occurs automatically when an employee exhausts all entitlement to any form of paid leave of absence status (to include sick leave and 5 month differential leave).

The District's letter included the text of Education Code section 44978.1.[3] The District further informed Nelson that: "If, at anytime [sic] during the 39-months you are physically able to resume your duties (with appropriate written verification from a doctor) as a Teacher, please

[3] Education Code section 44978.1 states in relevant part:

> When a certificated employee has exhausted all available sick leave, including accumulated sick leave, and continues to be absent on account of illness or accident for a period beyond the five-month period provided pursuant to Section 44977, and the employee is not medically able to resume the duties of his or her position, the employee shall, if not placed in another position, be placed on a reemployment list for a period of 24 months if the employee is on probationary status, or for a period of 39 months if the employee is on permanent status. When the employee is medically able, during the 24- or 39-month period, the certificated employee shall be returned to employment in a position for which he or she is credentialed and qualified.

contact the Personnel Department and you will be offered employment in a position for which you are credentialed and qualified."

After not hearing that Nelson was able to return to a job assignment, on March 1, 2010, the Board of Education (District Board) placed Nelson on the 39-month reemployment list, effective March 3, 2010.

On March 2, 2010, the District issued Nelson another letter stating in relevant part:

> The purpose of this letter is to notify you that in accordance with Education Code Section 44978.1, you have been placed on a 39-month reemployment list for the position of Teacher effective March 3, 2010. This action occurs automatically when an employee exhausts all entitlement to any form of paid leave of absence status.
>
> If, at any time during the 39-month period, you are physically able to resume your duties as a Teacher, please contact the Personnel Department and you will be offered employment in a position for which you are credentialed and qualified.

On or around August 3, 2010, Nelson filed a series of grievances and other complaints with the District. Each grievance or complaint was filed on a form labeled "Jurupa Jurupa Unified School District, Riverside, California Complaint Form, Level I." Some of the grievances or complaints listed specific sections of the CBA at issue. On other forms, Nelson did not identify a CBA section and instead raised other types of claims such as violations of State and/or federal statutes.

On September 15, 2010, District Superintendent Elliot Duchon issued Nelson a memorandum in response to her August 3, 2010 filings. In the memorandum, Duchon stated in relevant part:

> After careful review, the District must reject your complaints/grievances on the grounds that you are no longer an employee of the District and lack standing to bring such complaints and grievances. Further, most or all of your

> complaints/grievances are untimely and/or have already been addressed (via grievance or complaint procedures).
>
> Pursuant to Education Code section 44978.1, your employment with the District was terminated on March 3, 2010, after you exhausted all current and accrued leaves and were medically unable to return to work.

On July 7, 2011, the District sent Nelson a letter "to clarify [her] rights under Education Code 44978.1 following the correspondence you received from the Jurupa Unified School District ("District") dated September 15, 2010 in response to your August 3, 2010 complaints/grievances." The District stated:

> You remain on the reemployment list. In the event you are medically able to return to work as a teacher, you will be returned to a classroom in compliance with Education Code 44978.1. The District's September 15, 2010 correspondence to you did not change or otherwise impact your status on the medical 39-month reemployment list. You have been in the same employment status since March 3, 2010.

The letter includes a proof of service indicating that one of Elzig's staff sent the letter to Nelson's current address. Nelson does not recall receiving the letter. Other than in documents relating to this case, the District has not communicated with Nelson further.

ISSUES

1. Is Nelson a "public school employee" within the meaning of EERA section 3540.1(j), while on the District's 39-month reemployment list?

2. Was the District's September 15, 2010 letter sent in retaliation for Nelson's grievance activity?

CONCLUSIONS OF LAW

1. Nelson's Employment Status

In its answer to the PERB complaint, the District denied that Nelson is an employee within the meaning of EERA section 3540.1(j) because, at the time of her actions in this case, she was on the District's 39-month reemployment list. This issue was addressed by the Board in *Santa Ana Educators Association (Felicijan & Hetman)* (2009) PERB Decision No. 2008 (*Santa Ana Educators*). In that case, the Board held that "placement of an employee on a 39-month reemployment list pursuant to Education Code section 44978.1 does not constitute a separation from service. Thus, a person on that list remains an employee of the school district throughout the 39-month period." (*Ibid.*) The Board reasoned that Education Code section 44978.1, unlike other forms of absence under the Education Code, provides an unconditional right for certificated employees to return to a job assignment. The Board likened the 39-month reemployment list for certificated employees to a right to extended unpaid leave. (*Ibid.*) The Board also found that the charging parties remained members of the bargaining unit represented by the respondent union and that the respondent owed charging parties a duty of fair representation. (*Ibid.*)

In this case, it is undisputed that Nelson is on the District's 39-month reemployment list. Thus, she remains an employee of the District within the meaning of EERA section 3540.1(j) and a unit member represented by the Association.

2. Discrimination/Retaliation

Nelson alleges that the September 15, 2010 letter was sent in retaliation for her grievance activity. To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of

those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) Once the charging party demonstrates a prima facie case, the burden shifts to the employer to demonstrate that it would have taken the same actions regardless of the protected activity. (*Oakland Unified School District* (2007) PERB Decision No. 1880, citing *Novato*, *supra*, PERB Decision No. 210.)

Exercise of Protected Rights With the District's Knowledge

PERB has previously found that filing grievances to enforce contractual rights constitutes protected activity. (*Ventura County Community College District* (1999) PERB Decision No. 1323, other citations omitted.) In this case, on August 3, 2010, Nelson filed a series of complaints about the District's conduct. At least some of these complaints complied with the grievance procedure in the CBA and could therefore be considered as grievances. On September 15, 2010, the District acknowledged receiving her complaints and processed them under both the CBA grievance procedure and the District's other complaint resolution procedure. This is sufficient to demonstrate that Nelson participated in protected activity with the District's knowledge.[4]

Adverse Action

The PERB complaint alleges in paragraph 5:

> On or about September 15, 2010, Respondent, acting through its agent Elliot Duchon, took adverse action against Ms. Nelson by informing her that she had been terminated from her position as of March 3, 2010.

[4] Even if these complaints did not constitute actual grievances, as contended in the District's answer to the PERB complaint, the fact that the District considered the complaints to be grievances and processed them accordingly is sufficient to meet the first two elements of the retaliation analysis. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714 [holding that employer liable for retaliation if it takes action against an employee based upon even a mistaken belief that she engaged in protected activity].)

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

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

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.) In *Fallbrook Union Elementary School District* (2011) PERB Decision No. 2171, the Board found that "[t]here is no more adverse action than termination." Similarly, the Board has found that removing a teacher's name from a list of active substitute teachers was an adverse action because it foreclosed any possibility for that teacher to receive substitute assignments. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.) Accordingly, the District may have committed an adverse action if it either terminated Nelson's employment or otherwise took action to preclude her from employment opportunities for which she was eligible.

In this case, however, the record shows that Nelson is on the District's 39-month reemployment list. Placement on the list means Nelson remains a District employee. (*Santa Ana Educators*, *supra*, PERB Decision No. 2008.) Other than the District's September 15, 2010 letter, Nelson has not provided any evidence disputing this fact. Nelson has not demonstrated, for example, that the District removed her from its 39-month reemployment list or that it began any employee termination proceedings. Thus, the District's

September 15, 2010 letter notwithstanding, Nelson has not established that the District actually terminated her employment. (See *Santa Ana Educators*, *supra*, PERB Decision No. 2008.)

Irrespective of whether the District *actually* terminated Nelson's employment, the District may nevertheless have committed an adverse action by *notifying* Nelson that her employment had ended. As expected, not much case law exists addressing this unusual set of facts. PERB has found, however, that when an employer gives "unequivocal notice" of its intent to impose a negative employment action, "the notice itself constituted an adverse action." (*County of Merced* (2008) PERB Decision No. 1975-M.) In that case, an employer's unequivocal notice that an employee had to vacate an employer-owned residence was an adverse action. (See also *Monterey County Office of Education* (1991) PERB Decision No. 913 [notice of intent to dismiss was an adverse action].) The Board in *County of Merced* also found that notice that an employer would "begin the Intent to Terminate process" was not sufficiently definite to demonstrate an adverse action. (See also *State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S.) In other cases, the Board found that an employer's statements that were unrelated to employment were not adverse actions. (*Los Rios Community College District* (1994) PERB Decision No. 1048; *State of California (Department of Corrections and Rehabilitation)* (2009) PERB Decision No. 2024-S.)

In this case, the District's September 15, 2010 letter stated that Nelson was "no longer an employee of the District[,]" and that her "employment with the District was terminated on March 3, 2010, after [she] exhausted all current and accrued leaves and [was] medically unable to return to work." Unlike the statements regarding termination in *County of Merced*, the District in this case unequivocally told Nelson that it had terminated her employment. Any person would consider such statements, made by the highest-ranking administrator at the

District, to be adverse to employment. (*Newark Unified School District*, *supra*, PERB Decision No. 864.)

On July 7, 2011, the District sent Nelson a letter to "clarify" its September 15, 2010 letter.[5] PERB has held that an "honestly given retraction" pacifies an otherwise illegal statement if it "was made in a manner that completely nullified the coercive effects of the earlier statement." (*Sacramento City Unified School District* (1985) PERB Decision No. 492.) In *Carlsbad Unified School District* (1989) PERB Decision No. 778 (*Carlsbad*), an employee relations director informed his secretary that she could not serve on the union's bargaining team. Immediately, upon discovery of the director's statement, the superintendent informed the secretary that she could serve on the negotiating team. The Board found only "de minimus" harm to rights and therefore found no violation.

The District's July 7, 2011 letter did not completely nullify the adverse effects of Duchon's September 15, 2010 letter. Although Elzig stated that Nelson remained on the District's 39-month reemployment list, nothing explained Nelson's employment had not been terminated. This fact could only be inferred if Nelson understood the relationship between Education Code section 44798.1 and its impact on the definition of an employee. In addition, unlike in *Carlsbad*, *supra*, PERB Decision No. 778, the July 7, 2011 letter was sent almost 10 months after its earlier statements. The length of time it took to correct its positions is significant. Moreover, the District took a number of contradictory positions on the matter. The District initially denied that Nelson was an employee. Then, Elzig testified that Nelson

[5] Nelson does not recall receiving the July 7, 2011 letter. Evidence Code section 641 states: "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail." PERB recognized this presumption in *Fallbrook Public Utility District* (2011) PERB Decision No. 2229-M. In this case, it is undisputed that the letter in question was properly addressed and mailed by the District. A proof of service to Nelson's current address was included with the letter. This is sufficient to establish a presumption that Nelson received the letter.

was an "inactive" employee. In its closing brief, the District argued that Nelson was not an employee for purposes of the CBA. The District's inconclusive statements in the July 7, 2011 letter, coupled with its inconsistent positions on that matter, do not constitute a retraction.

Nexus

The final element of a retaliation case is establishing a causal connection between the employer's adverse action and the charging party's protected conduct. The temporal proximity between these two events is an important factor for establishing that nexus (*North Sacramento School District* (1982) PERB Decision No. 264), but is not sufficient to demonstrate a causal connection. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North*

Sacramento School District, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

In at least one sense, it is undisputed that the District issued the September 15, 2010 letter *because of* Nelson's grievances; the District's letter responded to the grievances. That does not necessarily mean that the District's motives were unlawful.

Regarding timing, the September 15, 2010 letter was issued less than two months from Nelson's August 3, 2010 grievances, which has been found to be sufficiently close in time to support a causal connection. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019.)

Furthermore, the District's letter provided the first of multiple differing justifications for denying Nelson's grievances. In the letter, the District informed Nelson that she could not file grievances because she was no longer a District employee. Then, at the hearing, Elzig acknowledged that Nelson was an employee, but she was "inactive," making her ineligible to file grievances. In its closing brief, the District argued that Nelson remains an employee for the purposes of EERA only and that she is not an employee according to the CBA. All of these explanations are unsupported. As explained above, certificated personnel on a 39-month reemployment list are both employees and unit members. (*Santa Ana Educators*, *supra*, PERB Decision No. 2008.) And, under the CBA, any unit member may file a grievance. Nothing in the provided sections of the CBA suggests a definition of either "employee" or "unit member" that is contrary to the *Santa Ana Educators* definitions. The District's statements are therefore inconsistent with its own practices, which is evidence that the District had an unlawful motive. (*Santa Clara Unified School District*, *supra*, PERB Decision No. 104.) Moreover, PERB has found that shifting justifications and the failure to follow existing procedures to be circumstantial evidence of unlawful animus towards protected activity. (*Los Angeles Unified*

School District (1992) PERB Decision No. 957.) The District's fluctuating positions on this issue, each without basis, demonstrate animosity towards Nelson's use of the grievance process.[6] And because all of the other elements of a retaliation claim are met, Nelson has established a prima facie case.[7]

REMEDY

It has been found that the District issued the September 15, 2010 letter in retaliation for Nelson's August 3, 2010 grievance activity. By this conduct, the District interfered with Nelson's protected rights in violation of EERA section 3543.5(a). It is appropriate to order the District to cease and desist from such conduct.

It is also appropriate to order the District to restore the status quo ante. (*Baker Valley Unified School District* (2008) PERB Decision No. 1993 (*Baker Valley*).) Accordingly, the District is ordered to rescind the September 15, 2010 letter. It is noted that nothing in this order affects Nelson's actual employment status at the District.

It is also appropriate that the District be ordered to post a notice incorporating the terms of this order at all locations where notices to certificated employees are customarily posted. Posting such a notice, signed by an authorized agent of the District, will provide employees with notice that the District acted in an unlawful manner, is being required to cease and desist from such activity, and will comply with the order. It effectuates the purpose of EERA that

[6] The PERB complaint does not allege that the District violated EERA by failing to process Nelson's August 3, 2010 grievances and/or complaints. Therefore, this issue will not be addressed.

[7] The District does not argue that it would have sent the September 15, 2010 letter even if Nelson did not file any grievances. Because it is undisputed that the letter responded to those grievances, it is doubtful such a showing could be made. Therefore, the District has not rebutted the prima facie case.

employees be informed of the resolution of this controversy and the District's willingness to comply with the ordered remedy. (*Baker Valley*, *supra*, PERB Decision No. 1993.)

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Jurupa Unified School District (District) violated the Educational Employment Relations Act (Act), Government Code section 3543.5(a). The District violated the Act by informing Ermine Fredrica Nelson that her employment with the District had been terminated effective March 3, 2010 in retaliation for her participation in protected activity.

Pursuant to section 3541.5(c) of the Government Code, it hereby is ORDERED that the District, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against Ermine Fredrica Nelson by inaccurately informing her that her employment with the District had been terminated.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:

1. Within ten (10) working days following the date this Decision is no longer subject to appeal, rescind the September 15, 2010 letter issued to Nelson.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to certificated employees in the District customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Nelson.

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 Board itself within 20 days of service of this Decision. The Board's address is:

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

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 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.)

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).)

Eric J. Cu
Administrative Law Judge