STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SONDRA DAVIS, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5557-E PERB Decision No. 2390 August 26, 2014

Appearances: QWT Consultancy by Jimmie LaVerne Thompson, Consultant, for Sondra Davis; Office of the General Counsel by Richard Ettensohn, Assistant General Counsel, for Los Angeles 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 Sondra Davis (Davis) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The ALJ concluded that Davis had not established a prima facie case of retaliation under the Educational Employment Relations Act (EERA)[1], and that even if she had, the Los Angeles Unified School District (District or LAUSD) had met its burden of establishing that it would have terminated her employment and taken other adverse actions for reasons other than her protected conduct.

We have reviewed the entire record in this matter including the proposed decision, the hearing record, Davis' exceptions and the District's response thereto. The ALJ's proposed decision is well-reasoned, adequately supported by the record and in accordance with

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

applicable law. Accordingly, the Board adopts the ALJ's proposed decision as the decision of the Board itself subject to our discussion below of Davis' exceptions.

PROCEDURAL HISTORY

On April 29, 2011, Davis filed an unfair practice charge against the District alleging an unspecified violation of EERA[2] and several other state and federal laws: viz. the California Labor and Education Codes and the Federal Americans with Disabilities Act (ADA). On May 31, 2011, the District filed its initial position statement. On March 16, 2012, Davis filed her first amended charge. On April 2, 2012, the District filed its response. On April 6, 2012, PERB's Office of the General Counsel dismissed Davis' charges concerning the California Labor and Education Codes and the Federal ADA and issued a complaint alleging that the District violated EERA section 3543.5(a) by taking adverse employment actions against Davis because of her exercise of EERA protected rights.

On April 18, 2012, the District filed its answer denying the allegations that Davis engaged in conduct protected by EERA and denying that it took the adverse employment actions against Davis because she engaged in protected conduct. The District also alleged seven (7) affirmative defenses. Informal conferences were held on May 29, July 24 and August 23, 2012, but the matter was not settled. On August 29, 2012, the District moved to amend its answer to add three more affirmative defenses, which motion was ultimately granted. A formal hearing was held on October 22-24, 2012.

On February 28, 2013, the ALJ issued his proposed decision. On April 15, 2013, Davis filed her statement of exceptions. On May 3, 2013, the District filed its response to Davis'

[2] *Los Banos Unified School District* (2007) PERB Decision No. 1935 (where charging party fails to allege that any specific section of the Government Code has been violated, a Board agent, upon a review of the charge, may determine under what section the charge should be analyzed).

exceptions. On May 9, 2013, PERB's Appeals Assistant notified the parties that the filings were complete and the matter was placed on the Board's docket.

FACTS

Sojourner Truth is a District school site. Sojourner Truth's first floor houses a classroom for Central High School and its second floor houses a classroom for Tri-C Community Day School (Tri-C): a special education program. Janet Seary (Seary) is the principal for both Central High School and Tri-C. Davis began working as a special education assistant for Tri-C in 2004. In July of 2010, Hiawatha Givens (Givens) became the new special education teacher at Tri-C. (Proposed Dec., pp. 2-3.)

On August 5, 2010, Seary directed Davis to watch the front door of Sojourner Truth every morning from 7:45 a.m. to 8:30 a.m. to insure that only staff, students and parents entered the building. Davis objected to the assignment on the grounds that she felt it placed her life in danger. Seary then told Davis she could perform the assignment from behind the locked door. (Proposed Dec., p. 4.)

Early in the 2010-2011 school year, several issues arose between Davis and Givens. Givens testified that Davis refused to follow instructions, was argumentative with him, undermined his authority in the classroom and that Davis interacted poorly with the students. The differences between Davis and Givens became the subject of several meetings with Assistant Principal Janine Antoine (Antoine) during the 2010-2011 school year. During the Fall semester, Givens began documenting his interactions with Davis via memoranda, which he sent to Antoine. In November of 2010, Davis scheduled a parent conference for one of Givens' students without notifying Givens who was subsequently unable to be away from his classroom to meet with the parent. (Proposed Dec., pp. 4-6.)

Concurrently, several incidents occurred between Davis and Tri-C students. On November 9, 2010, Davis confronted a student who yelled profanities at Davis and threatened to slap her after she directed the student to pick up a piece of paper he had dropped. On December 6, 2010, two students confronted Davis, cursed at her, threatened to assault her and, according to Davis, attempted to set her on fire by spraying flammable liquid at her feet while attempting to light the liquid. (Proposed Dec., pp. 6-7.)

On December 8, 2010, Seary called Davis and Antoine into a meeting to discuss the numerous reports that Givens had sent Antoine about Davis's failure to follow his directions and Davis's work performance. Seary warned Davis that failure to correct her behavior could result in discipline. Also on December 8, 2010, Seary received a memorandum from Antoine regarding the November 9, 2010, incident between Davis and the student and an e-mail from District Special Education Coordinator Veronica Njoku (Njoku) regarding an incident where Davis had scheduled a conference between a parent and Givens, but had failed to notify Givens. (Proposed Dec., pp. 7-8.)

On or about January 20, 2011, Davis was injured at work when a chair she was sitting on broke. Davis' injury made it painful for her to stand for long periods of time or to walk up and down stairs. Upon the advice of her union, the Service Employees International Union, Local 99 (SEIU), Davis subsequently saw a doctor who placed limitations on her ability to walk or climb stairs. Sometime on or after February 9, 2011, the District considered Davis completely disabled because the District was unable to accommodate Davis' work place restrictions. (Proposed Dec., pp. 8-9.)

On or about March 3, 2011, Seary sent Davis a "Notice of Unsatisfactory Service" with a recommendation for dismissal. On March 30, 2011, Davis filed a response disputing the allegations in the notice and requesting an administrative review meeting. On May 11, 2011,

Davis was dismissed from employment. On May 23, 2011, Davis appealed her dismissal to the District Personnel Commission. On April 7, 2012, a hearing officer recommended that Davis' dismissal be rescinded and that she be placed on suspension without pay. (Proposed Dec., p. 9, Respondent's Exhibits 22 and 27.)

PROPOSED DECISION

The ALJ applied PERB's four-part test to determine whether an employer has discriminated or retaliated against an employee in violation of EERA section 3543.5(a): (1) the employee exercised rights protected under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

The ALJ determined that Davis exercised rights protected under EERA when she expressed safety concerns on August 5, 2010, over her assignment to monitor the front door of Sojourner Truth; when Davis reported to the District Police Department a threat that a student had made to her on December 6, 2010; and when Davis sought SEIU assistance on February 7, 2011, regarding the injury she suffered when her chair broke. Additionally, the ALJ determined that two more of Davis' activities were protected.[3]

[3] Though not alleged in the PERB complaint, Davis' report of a student threat on November 9, 2010, and attendance by a representative of Davis' union at the December 8, 2010, meeting with Seary were also deemed protected conduct by the ALJ under *Lake Elsinore Unified School District* (2012) PERB Decision No. 2241 (analogizing unalleged protected activities as further bases for a retaliation claim to unalleged violations, the Board has considered the following factors: (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged issue has been fully litigated; and (4) the parties have had an opportunity to examine and cross-examine on the issue).

In addition, the Board has considered events that fall outside of the statutory limitations period, but that shed light on alleged violations as relevant background information. (*San Diego Unified School District* (1991) PERB Decision No. 885.)

Regarding employer knowledge, the ALJ noted that Seary and Antoine both testified that they were aware of Davis' safety complaints and of the presence of a union representative at the December 8, 2010 meeting with Davis. However, the ALJ determined that District administrators were not aware that Davis had requested assistance from SEIU regarding her injuries from the broken chair.

The ALJ determined that the District had taken three adverse actions against Davis: (1) the December 8, 2010, meeting wherein Seary raised the possibility that Davis could be disciplined; (2) the March 3, 2011, notice of unsatisfactory service; and (3) Davis' dismissal from employment.

Regarding nexus, the ALJ determined that the adverse actions occurred in temporal proximity to Davis' protected activities, but he found no other nexus factors. The ALJ considered, and found the evidence insufficient to establish, that the District: (1) conducted an inadequate investigation of Given's complaints about Davis' work performance; (2) failed to follow its own procedures in giving Davis notice on December 8, 2010, that failure to improve her work performance could result in discipline; (3) demonstrated animus toward Davis by assigning her to work outside of her classification; (4) failed to inform her that her conduct could result in discipline; and (5) terminated Davis to avoid suspending students, which would impact the District's funding for Sojourner Truth. In addition, as part of the nexus analysis, the ALJ rejected Davis' assertion that the District's witnesses were not credible.

The ALJ determined that Davis had failed to meet her burden of proving a nexus between her protected activities and the District's adverse actions. The ALJ concluded, therefore, that Davis had failed to establish a prima facie case of retaliation. Additionally, the ALJ determined that the District established its affirmative defense that retaliation was not the motive for the District's actions taken against Davis. The ALJ found that Davis had a history

of inappropriate confrontations with both Givens and students and that the District was dissatisfied with Davis' work performance since at least August of 2010. The ALJ therefore dismissed Davis' charge.

EXCEPTIONS[4]

Davis' first exception regards Seary's directive that Davis monitor the front door of Sojourner Truth from 7:45 a.m. to 8:30 a.m. every morning. Davis argues that her work performance should not be evaluated on the basis of security related duties that are outside her job classification.

Davis' second exception refers to an event that occurred on November 9, 2010, where a student threatened to slap Davis and, subsequently, Davis entered into a confrontation with the same student. This incident was the subject of a memorandum sent by Antoine to Seary, almost one month later, on December 8, 2010, the same day Davis met with Seary and Antoine to discuss her work performance issues. Davis maintains that the timing of this memorandum demonstrates that the District was purposefully gathering information to justify disciplining her. Davis also asserts that Antoine's failure to report the incident to the District police violated the District's policy regarding such incidents and that Antoine's conduct was unlawfully motivated by the District's desire of minimizing student absences through suspensions that would affect the District's program funding.

Davis' third exception refers to a December 6, 2010, incident where she claims two students attempted to set her on fire. According to Davis, this incident is further evidence that the District covered-up and did not report bad student behavior in violation of District policy. Davis also maintains that she engaged in protected activity and self-representation by reporting

[4] Davis' exceptions are neither numbered nor clearly identified as individual exceptions. We number and parse them into discrete segments for the sake of our discussion.

the November 9 and December 6, 2010, incidents to law enforcement and she did so "with the Districts [*sic*] involvement and full-knowledge." (Charging Party's Exceptions, p. 8.)

In her fourth exception, Davis objects to the ALJ's finding that:

> Seary informed Davis that failure to correct her behavior could lead to discipline. Davis asked for written proof of the accusations made against her. At some point, LAUSD provided her with a copy of the parent's written complaint. No discipline was issued at the December 8, 2010 meeting.

(Proposed Dec., p. 8.) Davis denies that she received adequate notice at the December 8, 2010, meeting with Seary and Antoine that discipline was imminent or that the issues discussed at the meeting were to be used to level charges against her. Davis also denies receiving any written allegations from Seary.

In her fifth exception, Davis claims that the testimony of one of her witnesses corroborates her testimony regarding her fall from a broken chair. Davis does not cite to any specific point in the transcript of hearing or the proposed decision.

In her sixth exception, Davis claims that the findings of the District personnel commission hearing officer support her contention that she never received any warning from Seary or Antoine that her failure to improve her work performance would result in discipline and that Seary and Antoine never provided Davis with expectations for her performance improvement.

Davis also includes in her exceptions a section entitled "Additional Offer of Proof" wherein Davis alleges that: (1) Seary provided inconsistent testimony; (2) there was no record of prior discipline of Davis; and (3) the ALJ failed to mention the testimony of one of Davis' witnesses which she claims corroborated Davis' own testimony regarding her workplace injury.

In its opposition to Davis' exceptions, the District maintains that Davis' appeal should be dismissed based on her failure to comply with PERB Regulation 32300.[5] Alternatively, the District urges the Board to dismiss Davis' appeal, because she completely failed to address or refute the ALJ's nexus analysis.

DISCUSSION

Davis fails clearly to state specific issues of procedure, fact, law or rationale to which each exception is taken (*State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S) and, except for one instance, fails to identify the page or part of the decision to which each exception is taken. (*California State Employees Association (O'Connell)* (1989) PERB Decision No. 726-H.) Davis failed to comply with the technical

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[5] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32300 provides:

> (a) A party may file with the Board itself an original and five copies of a statement of exceptions to a Board agent's proposed decision issued pursuant to Section 32215, and supporting brief, within 20 days following the date of service of the decision or as provided in section 32310. The statement of exceptions and briefs shall be filed with the Board itself in the headquarters office. . . . The statement of exceptions or brief shall:
>
> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.
>
> (b) Reference shall be made in the statement of exceptions only to matters contained in the record of the case.
>
> (c) An exception not specifically urged shall be waived.

requirements of PERB Regulation 32300. While that may be a sufficient basis to dismiss Davis' appeal, Davis provides at least minimally adequate notice of the issues she seeks to raise on appeal. Therefore, we consider Davis' exceptions.

Since the ALJ determined that Davis satisfied the first three elements of the *Novato* test, we need not consider any exception relating to additional protected conduct, employer knowledge or adverse actions. The relevant considerations are whether Davis' exceptions refute the ALJ's determination that there was no nexus between her protected activity and the District's adverse actions; or whether Davis' exceptions overcome the District's affirmative defense that it had a non-discriminatory reason for its actions and acted because of its non-discriminatory reason and not because of Davis' protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337.)

The substance of Davis' first exception was considered and rejected by the ALJ who found unpersuasive Davis' assertion that she was assigned work out of her classification because of her protected activities. The ALJ determined that:

> The job description for Davis's position lists [the] assisting teacher in a variety of capacities such as implementing lessons, directing activities, maintaining records, and supervising students. This is generally consistent with the clerical and student supervision duties Givens assigned to her. Furthermore, the job duties assigned to Davis [appear] to have been borne more out of necessity than animus for her protected activity.

(Proposed Dec., p. 16.) While not specifically mentioning the door-monitoring assignment, the ALJ found that the small staff at Sojourner Truth typically took on tasks that fell outside the strict parameters of each of their job descriptions out of necessity, and not out of animus for protected activities. Davis does not contend that Seary assigned her to monitor the door at Sojourner Truth out of animosity for her protected conduct, nor was there any indication that Davis engaged in protected conduct prior to expressing concern regarding the August 8, 2010,

door monitoring assignment. Nor did the charges brought by the District against Davis mention any interaction between Davis and Seary. The dismissal charges solely refer to alleged job performance issues and alleged insubordination that arose between Davis and Givens. The door monitoring assignment was not described in the dismissal charges as a basis for finding Davis' job performance deficient. Therefore, we conclude that this exception lacks merit.

Davis' second exception makes two arguments.[6] First, Davis' exception implies that Antoine was reluctant to impose student discipline in accordance with the District's discipline policy in order to minimize absences from student suspensions and therefore avoid a loss of program funding. This argument was specifically rejected by the ALJ who determined that there was no evidence submitted to support this assertion. Moreover, as the ALJ stated:

> Even if there was such evidence, it would only suggest that LAUSD's motive for dismissal was something other than retaliation for EERA-protected activity, something PERB lacks jurisdiction to address.

(Proposed Dec., p. 19.) We agree with the ALJ that there was no evidence submitted that the District disciplined Davis to avoid suspending Sojourner Truth students. Moreover, we agree that if such evidence existed it would not have provided a nexus between the District's adverse actions and any EERA-protected conduct by Davis.

In addition, Davis' second exception contends that the timing of Antoine's December 8, 2010, memorandum regarding the November 9, 2010, incident is suspicious. According to Davis, "(r)espondent purposely gathered information against Davis in this incident to justify its intent to discipline her." (Charging Party's Exceptions, p. 3.) However, Davis has not shown

[6] The District urges us to dismiss Davis' second exception because, by Davis' own admission, the incident referred to was not mentioned in the PERB complaint. However, the exception involves two exhibits which were introduced at hearing and were the subject of direct and cross examination. Therefore, the incident is properly before us.

that Antoine's memorandum represented a departure from standard District policy or that it involved disparate treatment. The memorandum was introduced at hearing and Davis took the opportunity to cross-examine Antoine about the memorandum. Yet no testimony was elicited regarding the timing of the memorandum or standard District procedures. On December 8, 2010, an e-mail was also sent, from Njoku to Antoine regarding a parent-teacher conference that Davis had scheduled in November of 2010 without notifying Givens. It is likely that both the Antoine memorandum and the Njoku e-mail were prepared to document instances of Davis' improper behavior and/or poor work performance for the December 8, 2010 meeting. Absent any evidence of retaliatory purpose or deviation from District policy, the timing of the memorandum and e-mail is unremarkable. We conclude that Davis' second exception lacks merit.

Davis' third exception seeks to again introduce evidence for her assertion that the District did not report student misconduct to avoid the loss of funding. As we stated in our discussion of Davis' second exception, no credible evidence was submitted that the District disciplined Davis to avoid suspending students, and even if such evidence had been submitted it would tend to prove that the District was motivated by reasons other than Davis' protected conduct.

In addition, the ALJ found that Davis was not a credible witness and rejected her version of the events regarding the incident where two students allegedly attempted to set her on fire. It is well-established that the Board will defer to ALJ credibility determinations absent evidence to support overturning such determinations. (*County of Santa Clara* (2012) PERB Decision No. 2267-M.) We find no basis to overturn the ALJ's determination regarding Davis' credibility or his finding regarding the December 6, 2010, fire-lighting incident. We conclude that Davis' third exception lacks merit.

Davis' fourth exception challenges the ALJ's determination that Davis was warned at the December 8, 2010, meeting that her conduct could result in discipline. On April 7, 2012, a hearing officer recommended that the District's personnel commission rescind Davis' dismissal and, instead, impose a ninety (90)-day suspension without pay. The basis for the hearing officer's recommendation was the conclusion that the District had not met its burden of proving that "the consequences of disobedience were known to the employee." (Respondent's Exh. 28, pp. 31-32, 34-35 [enumerating conditions for reversing penalties for insubordination and District's failure to meet burden of proof].)

However, the relevant inquiry in a nexus analysis is whether the District deviated from an established policy or treated the charging party differently from other similarly situated employees. Davis has failed to establish what the District's policy was regarding notice to employees at pre-disciplinary meetings and has failed to establish that she was treated differently from other employees at pre-disciplinary meetings. Therefore, we conclude that Davis' fourth exception lacks merit.

Davis' fifth exception is that the testimony of one of her witnesses corroborates her version of how she injured herself when she fell off a chair. It is unclear what the purpose of this exception is. Davis mentions that Givens was present in the room when she injured herself. Given that Givens testified that he did not know the details of how Davis injured herself, the exception may be intended to discredit Givens. We do not conclude that corroboration of Davis' version of how she injured herself contradicts Givens' testimony that he was unaware of the details of the injury or otherwise impugns Givens' testimony. Regardless, even if Davis' account of her injuries from the broken chair is accepted, it is unclear how this supports her allegation that the District retaliated against her for exercising EERA-protected rights. We conclude that Davis' fifth exception lacks merit.

Davis' sixth exception again raises the District personnel commission hearing officer's finding in the dismissal hearing that she was never warned that her conduct could lead to discipline and that she was never given expectations to improve her performance. Again, we conclude that there was sufficient evidence for the ALJ to determine that Davis knew that failure to correct her performance would lead to discipline. In addition to the December 8, 2010, meeting, Seary testified that a "pre-disciplinary" meeting was held with Davis and a union representative on December 17, 2010. Seary testified that "pre-disciplinary" meetings were held to insure that the employee understood what the concerns are about his or her performance and to let the employee know the District was contemplating some sort of discipline. We conclude that Davis' sixth exception lacks merit.

Lastly, we briefly address a section Davis entitled "Additional Offer of Proof." Davis maintains that Seary's record testimony was inconsistent, that Davis had never been disciplined prior to the 2010-2011 school year and that the ALJ did not address the testimony of one of Davis' witnesses. We do not find the alleged discrepancies in Seary's testimony to be significant. None of the alleged discrepancies suggests that there is a nexus between the District's adverse actions and Davis' protected activity. One "discrepancy" involves a matter that occurred long before Davis engaged in protected activity. Another "discrepancy" provides support for Davis' version of her workplace injury which, as we have noted above, is not relevant to the nexus inquiry.

Davis also urges us to construe the District's "Notice of Unsatisfactory Service" as evidence of "treachery." The March 3, 2011, notice indicates that it is being mailed to Davis because she had been absent from work since February 9, 2011. We do not infer from this that the District's dismissal was due to Davis' absence, but infer instead merely that the notice was mailed, instead of served personally, because Davis was not on campus. We find the bare fact

that Davis had not been disciplined prior to the 2010-2011 school year relevant, but not sufficiently persuasive to conclude that the District's actions during the 2010-2011 school year were motivated by animus. For these reasons we conclude that Davis' "Offer of Proof" also lacks merit.

CONCLUSION

Based upon the foregoing findings of fact and conclusions of law, and the entire record in the case, we conclude that the Los Angeles Unified School District did not violate EERA when it imposed discipline and sought to dismiss Davis during the 2010-2011 school year.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5557-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SONDRA DAVIS, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5557-E PROPOSED DECISION (February 28, 2013)

Appearances: Jimmie Laverne Thompson, Consultant, for Sondra Davis; Richard Ettensohn, Assistant General Counsel, for Los Angeles Unified School District.

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a former public school employee alleges that a public school employer violated the Educational Employment Relations Act (EERA)[1] by terminating her employment and taking other adverse employment actions against her in retaliation for engaging in protected activity. The employer denies any violation.

Sondra Davis filed the instant unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Los Angeles Unified School District (District) on April 29, 2011, alleging multiple violations of EERA and the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101 et seq.). On April 6, 2012, the PERB Office of the General Counsel dismissed all claims that LAUSD violated the ADA for lack of jurisdiction over those laws. That same day, the General Counsel's Office issued a complaint alleging that LAUSD called Davis into an investigatory meeting, issued her a notice of unsatisfactory service and terminated her employment in retaliation for reporting safety concerns at her workplace and requesting union assistance. On April 18, 2012, LAUSD filed an answer to the

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

PERB complaint denying the substantive allegations and asserting multiple affirmative defenses.

Informal settlement conferences were held on May 29, July 24, and August 23, 2012, but the matter was not settled. Thereafter, the case was set for formal hearing on October 22-24, 2012. On August 29, 2012, LAUSD filed a motion to amend its answer to add additional affirmative defenses. The formal hearing was held on October 22-24, 2012 as scheduled. On the first day of hearing, LAUSD's motion was granted over Davis's objection.

On January 18, 2013, LAUSD filed its closing brief. Davis filed her closing brief on January 28, 2013. At that point, the record was closed and the matter was submitted for decision.

FINDINGS OF FACT

The Parties

LAUSD is a public school employer within the meaning of EERA section 3540.1(k). Prior to her termination on May 11, 2011, Davis was a public school employee of LAUSD within the meaning of EERA section 3540.1(j). At the time of her employment, Davis was part of a bargaining unit whose interests were represented by Service Employees International Union, Local 99 (Local 99).

The Sojourner Truth School Site

The Sojourner Truth school site is part of LAUSD. The site is physically composed of a two-story house and an adjacent driveway in a Los Angeles neighborhood. Apparently, LAUSD leases the property from a private land-owner. The first story of the house is a classroom for Central High School, which is a continuation school. At all times relevant to this case, Kevin Stricke was the teacher assigned to this classroom. On the second floor, there is a classroom for the Tri-C Community Day School (Tri-C CDS), which is a school for special

education students. The outside area is used for a nutrition period, lunch, recess, and physical education classes.

Central High School and Tri-C CDS share a central administrative office separate from the Sojourner Truth campus. At all times relevant to this case Janet Seary was the principal of both Central High School and Tri-C CDS. Janine Antoine was an assistant principal who worked for Seary and oversaw the Sojourner Truth campus.

Most Tri-C CDS students have mild to moderate special education needs. Oftentimes, students at Tri-C CDS are considered "at risk," meaning there was something in their background, e.g., abuse or criminal history, making it difficult for them to integrate into a more traditional classroom environment. Students were variously described as "violent" or "hyper" by different witnesses. Students commonly used profanity, which is grounds for discipline under LAUSD policy. At any given time, there were between 12 and 15 students assigned to the Tri-C CDS Sojourner Truth class, mostly boys.

Davis's Employment at Tri-C CDS

Davis began working as a special education assistant for Tri-C CDS in 2004. Her primary job was to assist the special education teacher. Davis described her job as "doing whatever the teacher and the principal asked me to do." At some point, Davis was assigned to the Sojourner Truth campus. Davis initially worked with special education teacher Dr. Flynn (first name not provided), with whom she had a good working relationship. When Dr. Flynn, left Sojourner Truth, in or around June 2010, Davis requested to transfer with him to his next assignment. Davis never received a response to her request.

In July 2010, special education teacher Hiawatha Givens was assigned to replace Dr. Flynn at Sojourner Truth for the 2010-2011 school year. During that year, Davis, Givens, and Stricke were the only LAUSD personnel working on site daily.

Davis took personal leave from late July until August 4, 2010. While Davis was away, Givens decided to use a spare room in the upstairs area as a computer lab. Up until that point, Davis had used that room as an office and kept some of her personal belongings there. Givens boxed up Davis's belongings, breaking a picture frame in the process. At some point, some food Davis kept in the room went missing. In addition, while Davis was away, some unauthorized people went onto the Sojourner Truth campus.

The August 5, 2010 Directive

Principal Seary called Davis into a meeting on August 5, 2010. Davis brought a Local 99 representative to the meeting, but Seary was not there. The Local 99 representative left a note for Seary to contact him. Later that day, Seary contacted Davis by telephone. It is unclear whether the Local 99 representative was part of the conversation. Seary explained about the unauthorized visitors during her absence and directed Davis to watch the front door from 7:45 a.m. to 8:30 a.m. each day to make sure only students, staff, and parents enter the campus. Davis complained this directive "was putting my life in danger" due to the location of the campus. The Sojourner Truth campus has no security personnel. Seary replied that Davis could perform this job duty from inside the locked door. According to Seary, Davis was satisfied with this modification to the order. Davis testified that she was still concerned for her safety because of the condition of the door, but it is unclear whether she expressed those concerns to anyone at LAUSD.

Davis's Working Relationship With Givens

Davis and Givens did not have a good working relationship. Givens testified that he was concerned about Davis's work performance "immediately," as early as the first week of the 2010-2011 school year. According to Givens, Davis refused to follow his instructions and was argumentative with Givens in front of his class when he assigned her work. Givens felt that this conduct undermined his authority in front of a class that was already difficult to

manage. Givens also observed that Davis shouted at students and did not interact with them effectively. Givens felt this only provoked the students to misbehave more often. Davis, on the other hand, felt that Givens was rude to her. According to documentary evidence, Davis felt that Givens "barked orders" at her. Davis also did not feel that Givens supported her when students confronted her.

In early August 2010, Antoine set up the first of what would become multiple meetings with Givens and Davis.[2] The three discussed ways that they could resolve their differences as well as Davis's schedule and job duties. Givens apologized to Davis during the meeting.

After the meeting, Givens still felt that Davis was not responsive to his directives. For example, Givens instructed Davis not to plug a portable room heater into a particular power outlet because he thought it would cause problems due to the old wiring in the building. Davis did so anyway and it caused a power outage.

At Antoine's suggestion, starting on August 24, 2010 Givens gave Davis a list of "daily assignments." On Givens's initial list of duties, he requested that Davis (1) clear out the boxes of her personal belongings that were in the room she previously used as an office; (2) inventory the supplies; (3) inventory the First Aid kit; and (4) count the number of student absences for the periodic progress reports. Davis never completed the first three tasks on the list. In one instance, Davis crumpled Givens's written instructions up in front of the class. Givens also began documenting his interactions with Davis and sending them to Antoine. This was a common practice among teachers that had concerns or problems with a teacher's aide.

In or around August 27, 2010, Davis left the Sojourner Truth campus without informing Givens or anyone in the administrative office. Davis later explained that she went to the

[2] The precise date of the meeting was unclear. Some accounts list the meeting date as August 5, 2010.

LAUSD office to get supplies. Antoine reminded Davis that she needs permission from either a teacher or an administrator before leaving her assigned school site.

On November 9, 2010, Davis directed a student to pick up a piece of paper he dropped on the floor but the student began yelling at Davis and using profanity. The student then threatened to slap Davis. Antoine was visiting the Sojourner Truth campus that day and observed at least some of the incident. Antoine recalls Davis loudly stating to the student "well do it then, go ahead and hit me, do it!" From Davis's perspective, Givens and Antoine "just let the student rant and rave" until some point, Antoine directed Davis to go upstairs. Davis felt threatened and called the LAUSD campus police.

On November 19, 2010, special education coordinator Veronica Njoku arrived at Sojourner Truth for a scheduled parent conference for one of Givens's students. Davis scheduled the meeting and notified Njoku. When Njoku arrived, Givens was unaware of the conference and had not prepared to be away from his class to meet with the parent. When asked about the incident, Davis said she thought Givens had overheard her when she was scheduling the conference. On a separate occasion around that time, Njoku overheard Davis and a student yelling at each other from another room. She recalled Davis shouting "Yo mama!" to the student.

December 6, 2010

On December 6, 2010, Givens directed Davis to go downstairs and locate some students who had not yet returned from lunch. When Davis went downstairs, she was confronted by two students, who cursed at her loudly. One of the two students was the same person that Antoine and Njoku had observed Davis yelling at previously. That student said he would "beat [Davis's] big black B." The students were later suspended for their actions. The other events that occurred that day are in dispute.

According to Davis, one of the two students sprayed flammable liquid at her feet while the other held a lit lighter to the liquid. The liquid did not ignite. Davis called the LAUSD campus police, despite being told by Stricke not to. LAUSD police officer Alex Bello responded to the call. Davis asked Officer Bello to speak with the student who threatened her, but he had been sent home by Givens. A referral for discipline was written up for the student and Davis faxed it to the central office. Antoine would later state that the student was suspended until a parent conference was completed.

No other witness would confirm the alleged fire incident. Officer Bello did not recall responding to a call on December 6, 2010 and his review of his police dispatch records indicated that no call for assistance was placed that day. In addition, Officer Bello did not recall ever responding to a call at the Sojourner Truth campus about any students' attempt to set an individual on fire. Davis offered no explanation for why she did not ask Officer Bello to speak with the other student involved in the alleged fire incident. At first, Davis said she completed the referral form about the incident, but she later said Stricke filled out the form. The referral form stated that the students had threated Davis, but it made no mention of an attempt to set Davis on fire, or the other student allegedly involved.

December 8, 2010

On December 8, 2010, Seary called Davis into a meeting. Antoine was also present, as was a Local 99 representative on Davis's behalf. At the meeting, Seary and Antoine discussed the multiple memoranda that Givens had been sending to them about Davis's failure to follow his directives and other concerns he had about her work. They also discussed their belief that Davis's conduct provoked students to further misbehave. Although not entirely clear, it is also possible that they discussed a parent's complaint that Davis called her repeatedly about the

student's behavior at school.[3] Seary informed Davis that failure to correct her behavior could lead to discipline. Davis asked for written proof of the accusations made against her. At some point, LAUSD provided her with a copy of the parent's written complaint. No discipline was issued at the December 8, 2010 meeting.

According to Davis, the group also discussed whether Davis had a role in provoking the students over the fire incident. However, no other witness recalled that discussion. In addition, none of the documentary evidence about the meeting, including the Local 99 representative's notes and Seary's written summary, mentioned such a discussion.

The Broken Chair Incident

On or around January 20, 2011, Davis was sitting on a wheeled chair in the classroom when it broke causing her to fall on her knee. At some point later, Davis's injury made it very painful for her to stand for long periods of time or to walk up or down stairs. On February 7, 2011, Givens directed Davis to go down the stairs multiple times for different job duties. After a while, Davis complained that she was unable to go down the stairs because of pain in her knee. It is unclear whether, up to that point, Davis ever told Givens about the extent of her injury. Davis then contacted Local 99, who instructed her to go to the doctor. It is unclear whether Davis told anyone about her conversation with Local 99. Davis visited the doctor that day, and limitations were placed on Davis's ability to walk and climb stairs.[4]

[3] It is possible that this part of the discussion occurred at a later meeting about Davis's work performance on or around December 17, 2010.

[4] Davis was very argumentative when testifying about this subject on cross-examination. When asked why she waited until February 7, 2011, to see the doctor, Davis first claimed that the February 7, 2011, visit was for headaches, even though the doctor's work restrictions bore no clear relationship to headache symptoms. Davis later recanted that testimony and suggested that she saw the doctor prior to February 7, 2011, for her knee injury but could not remember when. This testimony was suspicious because it was inconsistent with her testimony on direct examination. In addition, on direct examination, Davis was readily able to recall specific details about the incidents of January and February 2011. Davis's claim that she would forget about an important detail as her first doctor's visit lacks credibility.

When Davis returned to work on February 9, 2011, she informed Seary of her workplace restrictions. Seary contacted LAUSD's accommodations office who said they would not be able to accommodate Davis's work place restrictions. Seary told Davis that the LAUSD accommodations office was unable to accommodate her injury and that Davis was therefore considered completely disabled.

The Notice of Unsatisfactory Service and Termination From Employment

On or around March 3, 2011, Seary sent Davis a "Notice of Unsatisfactory Service with a recommendation for dismissal." The charges levied against Davis were failing to comply with Givens's directives and being non-responsive, contradictory, disrespectful or argumentative with Givens in front of students.

The notice provided multiple examples of this misconduct, including several of the incidents described above, as well as other events not independently described during the hearing. On March 30, 2011, Davis filed a statement disputing the allegations in the notice. LAUSD dismissed Davis from employment, effective May 11, 2011. Davis filed an appeal of the dismissal to the LAUSD Personnel Commission.

The Personnel Commission Hearing

No witness testified in detail about the proceedings before the Personnel Commission. According to documentary evidence, a disciplinary hearing was held and a hearing officer issued a decision on April 7, 2012, recommending rescission of the dismissal and imposition of a suspension without pay. Documentary evidence also suggests that the Personnel Commission decided to adopt the hearing officer's conclusions on March 23, 2012, two weeks *before* the hearing officer's decision issued.[5]

[5] The content of this documentary evidence is hearsay and is therefore "not sufficient in itself to support a finding" according to PERB Regulation 32176. (PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.) The record of the Personnel Commission's actions is very unclear, including whether the documents reflected the actual disposition of

ISSUES

Did LAUSD (1) conduct an investigatory meeting about Davis's workplace conduct; (2) issue Davis a notice of unsatisfactory conduct; and/or (3) dismiss Davis from employment in retaliation for her protected activities?

CONCLUSIONS OF LAW

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 USD*).)

1. Protected Activities

The first element of a prima facie case is whether the charging party engaged in activity protected under EERA. PERB has held that "EERA section 3543 recognizes a protected right of self-representation that includes the right of individuals to present complaints to the employer about unsafe working conditions." (*Garden Grove Unified School District* (2009) PERB Decision No. 2086 (*Garden Grove USD*).) For example, in *Los Angeles Unified School District* (1995) PERB Decision No. 1129 (*Los Angeles USD*), PERB held that an employee's report of concerns for her safety in dealing with individuals who might be under the influence of alcohol or drugs constituted protected activity. (See also *Los Angeles Unified School District* (1992) PERB Decision No. 957.)

Davis's Personnel Commission appeal and how the Personnel Commission could have adopted the hearing officer's decision *before* the hearing officer rendered his decision. Irrespective of these discrepancies, Davis did clearly testify that her employment was terminated on May 11, 2011, and that she has not returned to work.

According to the PERB complaint in this case, on August 5, 2010, Davis complained to Seary that the assignment to guard the front door of the Sojourner Truth campus was unsafe due to the location of the campus. As in *Los Angeles USD*, *supra*, PERB Decision No. 1129, Davis's expressed safety concerns were protected under EERA.

The PERB complaint also alleges that Davis made a second safety complaint on December 6, 2010, regarding the alleged attempt to set her on fire and other student threats. As explained above, the evidence presented about the fire incident was not credible. No one else corroborated her story. Likewise, no documentary evidence, including the referral form about the incident and the police dispatch report, supported Davis's claim. Davis's own testimony about the incident was inconsistent, particularly with respect to the referral form. Based on these facts, Davis has not met her burden of proving that this incident occurred or, more importantly, that she reported the incident to someone at LAUSD.

Nevertheless, the record did show that Davis complained that a student had threatened her that day. Those comments were reflected on the referral form and both Antoine and Seary acknowledged knowing about the threats. This report is sufficiently related to workplace safety to constitute protected activity.

In addition, the PERB complaint also alleges that Davis engaged in protected activity on February 7, 2011, by contacting Local 99 regarding her knee injury. An employee's request for union assistance over working conditions is protected activity. (*County of Riverside* (2011) PERB Decision No. 2184-M, citing *City of Modesto* (2009) PERB Decision No. 2022-M; *Barstow Unified School District* (1996) PERB Decision No. 1164 (*Barstow USD*).)

There is also evidence that Davis engaged in other protected activities not specifically enumerated in the PERB complaint. Namely, on November 9, 2010, Davis reported other threats by a student against her. In addition, Davis brought a Local 99 representative to the December 8, 2010 meeting. As explained above, safety complaints and requests for union

representation are protected under EERA. (*Los Angeles USD, supra*, PERB Decision No. 1129; *Barstow USD, supra*, PERB Decision No. 1164.) PERB has considered unalleged protected activities where the following elements are met:

> (1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged [issue] has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue.

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241.) These elements are met in this case. LAUSD had ample notice about Davis's other activities, given that both were discussed during the Personnel Commission proceedings prior to the hearing. LAUSD's own documentary evidence referenced both instances as well. The additional acts are related to the claims at issue in this case because they merely represent additional acts of similar protected activity by Davis. Moreover, LAUSD's counsel questioned Davis and all other witnesses with any first-hand knowledge of Davis's activities. Based on these facts, it is appropriate to consider this conduct as protected activity.

2. Knowledge of Protected Activity

The second element of a prima facie case is whether the employer was aware of the employee's protected activities. To establish this element, at least one of the individuals responsible for taking the adverse action must be aware of the protected conduct. (*Oakland Unified School District* (2009) PERB Decision No. 2061; *California State University (San Francisco)* (1986) PERB Decision No. 559-H.)

Seary and Antoine acknowledged being were aware of Davis's various safety complaints. Likewise, both recalled a Local 99 agent present during the December 8, 2010 meeting with Davis. This is sufficient to satisfy this element of the prima facie case.

On the other hand, Davis has not shown that anyone at LAUSD was aware of her February 7, 2011 request for Local 99 assistance. Davis testified that she contacted Local 99 and then informed both Givens and the Tri-C CDS administrative office that she was leaving to see the doctor. No evidence showed that she ever told anyone that she had contacted Local 99 or that she was seeing the doctor at Local 99's request. Thus, Davis has not proven that LAUSD representatives were aware of this activity.

3. Adverse Actions

The third element of a prima facie case is whether the employer took an adverse employment action against the employee. The Board uses an objective test to determine whether an employer's conduct is adverse to employment. (*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 supplied, fn. omitted.)

In this case, the PERB complaint lists three adverse actions. First, it is alleged that, on December 8, 2010, Seary called Davis into an investigatory meeting where the possibility of discipline was raised. In *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, the Board held that "any teacher being investigated for [alleged misconduct] of assigned students, would reasonably consider such action as having an adverse impact on his/her employment."

Second, the PERB complaint states that, on March 3, 2011, LAUSD issued Davis a notice of unsatisfactory service. PERB has found similar disciplinary documents to be adverse actions. (*Los Angeles Unified School District* (2007) PERB Decision No. 1930.)

Third, the PERB complaint alleges that the District terminated Davis's employment, effective May 11, 2011. PERB has held, in no uncertain terms that "[d]ismissal of an employee is an adverse action." (*City & County of San Francisco* (2011) PERB Decision No. 2207-M, citing *Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M.) In this case, documentary evidence would seem to suggest that Davis's termination was rescinded by the Personnel Commission, but no evidence was presented elaborating on those documents. The documents, by themselves, are not sufficient to establish the disposition of Davis's employment at LAUSD. (See PERB Reg. 32176; *County of Riverside* (2009) PERB Decision No. 2090-M.) Davis unequivocally testified that she was terminated effective May 11, 2011, and has not been back to work since then. LAUSD presented no evidence disputing that statement. This is sufficient to prove that her employment was terminated.

4. Nexus

The final element of a prima facie case for retaliation is whether there is a causal connection, or nexus, between the protected conduct and the adverse action. (*Novato USD, supra*, PERB Decision No. 210.) Davis's primary theory of nexus is based on timing; she asserts that adverse actions followed close in time to Davis's protected activities. The closeness in time between the charging party's protected activities and the adverse action is an important circumstantial factor in determining the employer's motive. (*North Sacramento School District* (1982) PERB Decision No. 264.)

Here, the record shows that LAUSD took each of the adverse actions in this case shortly after protected activity by Davis. Seary ordered the December 8, 2010 meeting just days after Davis made the December 6, 2010 safety complaint. Likewise, LAUSD issued the notice of unsatisfactory service on March 3, 2011, less than three months after Davis requested Local 99 assistance during the December 8, 2010 meeting. That notice became the basis for Davis's eventual termination from employment. PERB has found this closeness in time to be

circumstantial evidence of nexus. (*Los Angeles Unified School District* (2012) PERB Decision No. 2244; *Calaveras County Water District* (2009) PERB Decision No. 2039-M.)

However, timing alone is not sufficient to demonstrate the necessary connection between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Davis asserts a myriad of other theories to suggest LAUSD had an unlawful motive for its actions. Each will be discussed below.

a. Inadequate Investigation

Davis maintains that LAUSD did not adequately investigate Givens's complaints about her work performance. An employer's cursory or otherwise inadequate investigation into alleged misconduct may be circumstantial evidence of nexus. (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560.) However, a supervisor's reliance on reports from subordinates does not amount to an inadequate investigation where there is no reason to doubt the accuracy of the reports. (*County of Riverside, supra*, PERB Decision No. 2184-M.)

In this case, both Seary and Antoine were aware that Davis and Givens had a problematic working relationship. This could provide some basis for them to doubt the claims made in Givens's reports to Antoine. However Davis's assertion that LAUSD did not attempt to verify the claims in Givens's reports is simply false. Seary and/or Antoine met with both Givens and Davis multiple times to discuss their relationship in August 2010. Seary and Antoine also met with Davis multiple times in December 2010. In addition, both Antoine and Njoku personally witnessed Davis inappropriately shouting at students. Njoku also observed Davis scheduling appointments without informing Givens. Davis offered no evidence at the hearing disputing any of these facts. Based on this evidence, Davis failed to prove that LAUSD conducted an inadequate investigation.

b. Failure to Follow Procedures

Davis also alleges that LAUSD did not give proper notice of the December 8, 2010, investigatory meeting. An employer's failure to follow existing procedure or policies may be evidence of nexus. (*Santa Clara Unified School District* (1979) PERB Decision No. 104.) To establish that an employer departed from existing procedures, the charging party must show what the procedure was and how the employer deviated from that process. (*Garden Grove USD*, *supra*, PERB Decision No. 2086.)

In this case, no evidence was presented about what procedures LAUSD was required to follow when scheduling the December 8, 2010 meeting or otherwise informing her of possible discipline. Thus, Davis has not met her burden of proving that LAUSD deviated from existing procedures and policies.

c. Assigning Davis Job Duties Outside of Her Job Classification

Davis also asserts that Givens's assignment of duties outside of her job classification was evidence of animus towards her protected activities. This argument is unpersuasive under the facts in this case. The job description for Davis's position lists assisting teacher in a variety of capacities such as implementing lessons, directing activities, maintaining records, and supervising students. This is generally consistent with the clerical and student supervision duties Givens assigned to her. Furthermore, the job duties assigned to Davis appears to have been borne more out of necessity than animus for her protected activity. The record indisputably shows that the Sojourner Truth campus was a difficult work assignment and that the three staff members there, Davis, Givens, and Stricke, needed to be flexible and work together. Davis herself described her job as "doing whatever the teacher and the principal asked me to do" since 2004, long before any of the protected activities alleged in this case. This further undermines Davis's assertion that the job duties were assigned to her somehow evidenced a retaliatory motive.

d. Failure to Inform Davis of its Intent to Discipline Her

Davis also asserts that LAUSD did not ever inform her that her conduct could result in discipline. This position is factually untrue. The purpose of the December 8, 2010 meeting was specifically to inform Davis that failure to improve her performance would result in discipline. In addition, as explained above, Davis did not demonstrate whether LAUSD was required by policy or past practice to inform her of the discipline beforehand.

Moreover, Davis's argument, even if true, is unpersuasive. PERB has consistently found no retaliation where employees are disciplined for refusing to comply with a direct order. (*San Bernardino County Public Defender* (2009) PERB Decision No. 2058-M; *Los Angeles Unified School District* (2005) PERB Decision No. 1791, citing *The Regents of the University of California* (1996) PERB Decision No. 1158-H.) In this case, Davis did not dispute at the hearing either that she refused to perform several of the job duties Givens assigned her, or that she shouted at students. Davis engaged in this misconduct at her peril.

Although not clear, Davis may be contending that dismissal was unusually harsh discipline in light of her misconduct. In *San Joaquin Delta Community College District* (1982) PERB Decision No. 261, the Board found evidence of nexus where the employer's discipline was severe in comparison to the employee's relatively benign misconduct. In contrast, in *State of California (Department of Developmental Services, Napa State Hospital)* (1984) PERB Decision No. 378-S, PERB found no nexus between an employee's protected activities and his dismissal where there was no evidence that progressive discipline was the standard practice.

In this case, Davis presented no evidence about LAUSD's policies concerning discipline and whether LAUSD typically employed progressive discipline in cases similar to hers. Likewise, Davis has not shown that she was treated differently from other similarly situated employees. (*Sacramento City Unified School District* (2010) PERB Decision

No. 2129 [finding no nexus where the employee did not show that he was treated differently from other employees guilty of similar misconduct].)

e. Witness Credibility

Davis also asserts that all of the witnesses that testified about her misconduct lacked credibility and should not be trusted. In support of this position, Davis claims that Njoku's testimony in particular contradicted earlier testimony she gave during the Personnel Commission hearing. This claim is not supported by the record. According to the hearing officer's findings, Njoku testified that she overheard "an angry and loud argument between [Davis] and a Facility student, in which the student repeatedly referred to [Davis] as a 'bitch,' to which [Davis] repeatedly responded 'Yo momma [sic]'." This is consistent with Njoku's testimony during the instant hearing.[6]

To the contrary, it is concluded that Davis lacked credibility as a witness. Davis was very argumentative during testimony, at one point denying assertions she wrote in her own unfair practice charge form as well denying statements contained in transcripts of her testimony before the Personnel Commission.[7] Davis also denied ever seeing her own job description even though that document was referred to frequently throughout the Personnel Commission proceedings. As noted above, Davis also contradicted herself when testifying about key issues including the events of December 6, 2010 and her January 2011 injury. Thus, to the extent that Davis's testimony conflicts with that of other witnesses, Davis's testimony is not credited.

[6] It is also noteworthy that the hearing officer in the Personnel Commission matter expressly credited Njoku's testimony over Davis's on this issue.

[7] Davis later acknowledged that the Personnel Commission transcripts were accurate and did not object to the admission of those transcripts as exhibits in this case.

f. School Site Funding

Davis also asserts that her termination was part of an effort by LAUSD to prevent her from suspending more students from school, which Davis contends adversely affects the funding for the Sojourner Truth school site. No evidence supporting this contention was presented. Even if there was such evidence, it would only suggest that LAUSD's motive for dismissal was something other than retaliation for EERA-protected activity, something PERB lacks jurisdiction to address.

Upon examining the record as a whole, it is concluded that Davis failed to meet her burden of proving a nexus between her protected activities and LAUSD's adverse actions.

5. LAUSD's Burden

Assuming for the purposes of discussion that Davis proved all the elements of a prima facie case, LAUSD would have met its burden of showing that retaliation was not its true motive for either the December 8, 2010 meeting, the March 3, 2011 notice of unsatisfactory service, or the May 11, 2011 dismissal from employment. If the charging party establishes all the elements of a prima facie case, the burden then shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in any protected activity. (*Santa Ana Unified School District* (2012) PERB Decision No. 2235, citing *Novato USD, supra*, PERB Decision No. 210, *Martori Brothers Distributors v. Agricultural Labor Relations Board.* (1981) 29 Cal.3d 721, 729-730 (*Martori Bros.*).) In other words, the issue is whether the adverse action would have occurred "but for" the protected acts. (*Ibid.*) However, the focus of this analysis "is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, citing *McFarland Unified School Dist. v. PERB* (1991) 228 Cal.App.3d 166, 169.)

In *City of Santa Monica* (2011) PERB Decision No. 2211-M, the Board held an employee's long record of unacceptable performance demonstrated that he was not terminated for his grievance activity. In *Martori Bros.*, *supra*, 29 Cal.3d at p. 730-731, the court found that an employee's protected activity was not the true cause for his termination given the "ample evidence" of misconduct, such as making threatening, obscene, and insubordinate statements. In *California State University, Long Beach* (1987) PERB Decision No. 641-H, PERB found that an employee's deteriorating relationship with his supervisor was justification for adverse actions. In contrast, in *Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa CSD*), the Board found that an employer's asserted justifications for taking adverse actions were pre-textual because they were either overblown, trivial, or based entirely on hearsay.

In this case, as in *Martori Bros.*, *supra*, 29 Cal.3d at pp. 730-731, the record showed that Davis had a history of inappropriate confrontations with both Givens and with students. And similar to *City of Santa Monica*, *supra*, PERB Decision No. 2211-M, there was evidence that LAUSD was not satisfied with Davis's work performance and with her failure to follow directions since at least August 2010. Unlike in *Jurupa CSD*, *supra*, PERB Decision No. 1920-M, the accusations that Davis failed to perform assigned job duties and inappropriately provoked students was quite serious and was based on testimony from Antoine, Givens, and Njoku. Notably, during the hearing, Davis never denied that she failed to follow several of Givens's directives, nor did she deny making inappropriate statements to students. Based on these facts, it is concluded that Davis's protected activity was not the true cause for the adverse actions taken against her.

PROPOSED ORDER

Sondra Davis has not established that the Los Angeles Unified School District retaliated against her for engaging in protected activities. Therefore, the Public Employment

Relations Board (PERB or Board) complaint and the underlying unfair practice charge in Case No. LA-CE-5557-E 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 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).)