

STATE OF CALIFORNIA
DECISION OF THE



PUBLIC EMPLOYMENT RELATIONS BOARD

LYNETTE LUCAS,

Charging Party,

v.

RIO SCHOOL DISTRICT,

Respondent.

Case No. LA-CE-5717-E

PERB Decision No. 2449

August 31, 2015

Appearances: Lynette Lucas, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Mark R. Bresee, Attorney, for Rio School District.

Before Martinez, Chair; Banks and Gregersen, Members.

DECISION

GREGERSEN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed on January 22, 2015, by Lynette Lucas (Lucas) to a proposed decision (attached) by an administrative law judge (ALJ), dismissing the complaint and underlying unfair practice charge against the Rio School District (District). The complaint alleged that the District issued Lucas a notice of non-reelection in retaliation for speech activity protected under the Educational Employment Relations Act (EERA).¹

The Board has reviewed the entire record in this matter and finds the proposed decision well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board hereby adopts the proposed decision as the decision of the Board itself subject to the discussion of Lucas' exceptions below.

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

PROPOSED DECISION

The ALJ concluded that Lucas engaged in protected conduct when she made speeches at the District governing board meetings regarding the Boys & Girls Club, because such comments pertained to both the financial status of the District and the quality of the District's education programs, which PERB has previously determined to be protected conduct. (*Mt. San Antonio Community College District* (1982) PERB Decision No. 224 aff'd. by *California Teachers Association v. PERB* (2009) 169 Cal.App.4th 1076.) The ALJ also concluded that Lucas' speeches to the District governing board concerning negotiations between the Rio Teachers Association and the District constituted protected activity because such conduct was a challenge to the existing union leadership. (*California State Employees Association (Hackett, et al.)* (1995) PERB Decision No. 1126-S.)

It was undisputed that the District's decision to not reelect Lucas was adverse to her employment. Further, the ALJ found that the District governing board members responsible for not reelecting Lucas had heard her speak at the board meetings and therefore had the requisite knowledge.

The ALJ found that while several nexus theories were not substantiated by Lucas, nexus was nevertheless established because of the timing between Lucas' speeches and her non-reelection. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019, citing *Mountain Empire Unified School District* (1998) PERB Decision No. 1298.) As additional nexus factors, the ALJ found that the District governing board deviated from its own voting procedures (*Garden Grove Unified School District* (2009) PERB Decision No. 2086) and expressed enmity towards Lucas and her speeches. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561.)

However, under PERB's burden-shifting framework, the ALJ ultimately determined that the District met its burden of proving that it would have issued the non-reelection notice even if Lucas had not engaged in protected activity.

DISCUSSION

Lucas' exceptions do not generally challenge any factual findings or legal conclusions made by the ALJ related to any of the four elements of the prima facie case, or to the District's affirmative defense. Instead, Lucas claims that the ALJ erred in failing to address her concerns about witness tampering and intimidation, which "interfered with Charging Party's ability to put on a fair case" and is grounds for a new hearing. Each of the bases supporting Lucas' claim of witness tampering and intimidation is unfounded. Moreover, there is no basis on which to grant Lucas' request for a new hearing.

Inability to Present Two Witnesses

Lucas' primary contention is that she was unable to present two witnesses during her case-in-chief who, allegedly, would have allowed her to present sufficient evidence to prove her case.² Prior to the formal hearing, Lucas sought to compel the attendance at the formal hearing of District employees Eve Acosta (Acosta) and Maria Mauricio (Mauricio) by subpoena. Also at some point prior to the hearing, Lucas released both potential witnesses from the obligation to testify because, as Lucas argues, they were too intimidated and fearful. As a result, neither Acosta nor Mauricio testified on Lucas' behalf. Lucas now claims that these witnesses were critical to her case and the ALJ erred in failing to protect them. In support of her contention, Lucas argues that once the allegations of witness tampering and

² Despite her contention, Lucas did prevail in establishing a prima facie case of retaliation. The excluded witnesses would not have changed that result. Rather, the witnesses would only have affected the outcome of the District's affirmative defense.

intimidation were brought to the attention of the ALJ, it was the ALJ's responsibility to investigate and determine if the District was, in fact, acting illegally.

The problem with this argument, however, is that Lucas readily admits that she voluntarily excused the witnesses. The transcript quote cited in Lucas' exceptions states:

The big problem is that I withdrew a witness yesterday because she was fearful. This person, she was shaking, and she cried in my arms. And she told me directly that, if she testified, that she was worried about -- about the District taking her job.

(Reporter's Transcript (RT) Vol. II, p. 13:18-22.)

Further review of the transcript also found that, as a result of an off-the-record discussion, the ALJ made the following statement:

Charging Party is no longer seeking to call Eve Acosta as a witness. So we will not be requiring her testimony at this time, and I will not be ruling on the Respondent's motion to quash her testimony -- quash her subpoena.

(RT Vol. I, p. 36:11-15.)

Thus, when the accusations of tampering and intimidation were declared to the ALJ, neither witness was under subpoena to testify.

The burden of proof rests with the charging party to prove its case by a preponderance of the evidence. (PERB Reg. 32178.)³ Thus, at the formal hearing, it is incumbent on the charging party to present sufficient evidence to meet this burden. By withdrawing her subpoenas rather than letting the ALJ address the issue of alleged witness tampering and intimidation at the formal hearing, Lucas cannot now complain that she was unable to prove her case without the witnesses she had planned to call or that the ALJ failed to protect them. Accordingly, we find no merit to this exception.

³ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

ALJ's Statement to Witnesses

Lucas also takes exception to what she identifies as the ALJ's failure to provide District employee witnesses with a statement informing them that their right to participate in the PERB process is protected. According to Lucas, despite the ALJ agreeing to make such statement, he did not actually provide the statement to any of the District employees called as witnesses. As such, Lucas argues that she had no means to believe that her witnesses would have any assurance of protection if she were to recall those witnesses during rebuttal testimony. Lucas states that she was "pinned down" into not being able to present all of the evidence necessary to win her case.

The discussion with the ALJ Lucas references took place on the second day of formal hearing. At the start of day two, Lucas asked the ALJ to provide "instructions to each of the witnesses that they can testify and tell the truth and be protected, and if the School District takes any action against them, that they can bring it before the Board." After some discussion, the ALJ agreed that, before District employees testify, he would inform them that their right to participate in the PERB hearing process is protected under state law.

However, on day one, prior to her request for this instruction, Lucas had called five witnesses. Of those five witnesses, only two witnesses, Carmen Vasquez and Donna Collins were District employees.

It appears that Lucas did not call any District employees as witnesses *after* she made her request for the ALJ instruction. Other than herself, Lucas called: (1) Amy Prado, who confirmed when the ALJ asked her that she is not a District employee; (2) Tim Blaylock and Mike Barber, two individuals who had already been identified in the record as Board members;

and (3) Lawrence Anthony Frunk, who had testified the day prior and identified himself as “a licensed California private investigator” working on Lucas’ behalf.⁴

We find nothing in the transcript to show that the ALJ failed to follow through with his pledge to make the statement to potential District employees Lucas called as witnesses. As such, we find no merit to this exception.

Failure to Remove Individual from the Hearing

Lastly, Lucas excepts to the ALJ’s failure to remove an individual from the hearing room. At the outset of the hearing, Lucas requested that the Rio Teachers Association President, Rebecca Barbetti (Barbetti), who is identified on the record as an observing member of the public, be removed from the hearing because of her alleged past history of intimidation, coercion, and retaliation against District employees. A sequestration order had been issued for all potential witnesses, but, at the time of the discussion, it was not yet clear whether Barbetti would be testifying. After some discussion, the parties agreed to allow Barbetti to remain in the hearing. Lucas now takes exception with the ALJ’s “decision” and argues that Barbetti’s mere presence in the hearing room was a “force of coercion.”

Upon review of the hearing transcript, the following exchange occurred after an off-the-record discussion:

ADMINISTRATIVE LAW JUDGE CU: Okay. We’re back on the record. We were about to call the Charging Party’s first witness, but before we do that, I’d like to talk about a couple things we talked about off the record.

[¶]

⁴ Three of the District’s five witnesses were also District employees including Rio Real Principal Maria Hernandez, Rio Lindo Principal Veronica Rauschenberger, and Director of Human Resources Director Carolyn Bernal. However, nothing in the record or in Lucas’ statement of exceptions seems to suggest that the instruction was intended for these three witnesses.

And the other issue is that Ms. Rebecca Barbetti is in the room presently as an observing member of the public. It is my understanding that the parties do not yet have a full understanding of whether she's going to testify here and that the parties are jointly willing to agree that my previous ruling to exclude witnesses will not apply to Ms. Barbetti; is that correct as to both things, Acosta and Barbetti?

MS. LUCAS: Yes.

MR. BRESEE: Yes, your Honor.

(Reporter's Transcript, Vol. I, p. 36:7-24.)

From the record, it is clear that the parties mutually agreed that Barbetti could remain in the hearing. The ALJ did not fail to disallow Barbetti's presence. Accordingly, we find no merit to this exception.

Request for New Hearing

Also included in the statement of exceptions is a request for a new hearing pursuant to both federal and state laws. Citing both the United States Code and the California Penal Code, Lucas asserts that witness tampering is grounds for a new hearing. However, PERB's jurisdiction is limited to the determination of unfair practices arising under EERA and other public sector employer-employee relations statutes which we administer. PERB does not have jurisdiction over claimed violations of the California Penal Code (*State of California (Department of Corrections)* (2003) PERB Decision No. 1559-S) as well as a variety of federal statutes including the United States Code (*Service Employees International Union, Local 535 (Mickle)* (1996) PERB Decision No. 1168). As such, we simply do not have jurisdiction to enforce the statutes relied on by Lucas.

When considering a request to reopen the record to admit new evidence, the Board applies the standard set forth in PERB Regulation 32410(a) for a request for reconsideration

based on the discovery of new evidence. (*State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S.) The regulation provides, in relevant part:

A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

The information contained in Lucas' statement of exceptions fails to meet this standard. Included in her request to reopen the record, Lucas submitted a summary of the testimony that would have been provided by Mauricio had she testified at the formal hearing as well as a description of meetings which occurred between the (subpoenaed) witnesses⁵ and District representatives prior to the formal hearing.⁶ However, in her discussion of these facts and subsequent analysis, Lucas fails to explain why she did not provide the information earlier and therefore fails to establish that it could not have been discovered prior to the hearing with the exercise of reasonable diligence. Therefore, we decline to consider the new evidence on appeal.

⁵ Lucas does not identify the names of the witnesses subjected to meetings with the District, and refers to them only as "the teachers."

⁶ Lucas seeks to include the description of the pre-hearing meetings to support her accusations of witness tampering. Citing *Tuttle v. Combined Ins. Co.* (E.D. Cal. 2004) 222 F.R.D. 424, 431 (*Tuttle*), Lucas asserts that "an attorney cannot even indirectly cause a witness to not want to testify" and that the District's counsel violated the California Rules of Professional Conduct for attorneys. However, PERB lacks jurisdiction to enforce rights or duties imposed on attorneys by the California Rules of Professional Conduct. The power to impose attorney disciplinary actions is an inherent and exclusive judicial function, and it is exclusively held by the Supreme Court and the state bar, acting as its administrative arm. (See, e.g., *In re Rose* (2000) 22 Cal.4th 430; *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, as modified on denial of rehearing (February, 6, 2008).) As such, we find *Tuttle* inapplicable to the facts presented in this matter.

ORDER

The complaint and unfair practice charge in Case No. LA-CE-5717-E are hereby
DISMISSED.

Chair Martinez and Member Banks joined in this Decision.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LYNETTE LUCAS,

Charging Party,

v.

RIO SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-5717-E

PROPOSED DECISION
(November 20, 2014)

Appearances: Lynette Lucas, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Mark R. Bresee, Attorney, for Rio School District.

Before Eric J. Cu, Administrative Law Judge.

In this case, a former public school employee alleges that a public school employer issued her a notice of non-reelection in retaliation for speech activity protected under the Educational Employment Relations Act (EERA).¹ The employer denies any violation.

PROCEDURAL HISTORY

On July 9, 2012, Lynette Lucas filed the instant unfair practice charge with the Public Employment Relations Board (PERB), alleging retaliation by the Rio School District (District) because of speeches before the District's governing board about various topics. On December 12, 2012, the PERB Office of the General Counsel issued a complaint on Lucas's behalf, alleging that the District issued her a notice of non-reelection because, between "May 11 through March 2012," Lucas spoke "at [the District's] board meetings concerning retention of an after school program." On January 7, 2013, the District filed an answer to the PERB complaint, denying the substantive allegations and asserting multiple affirmative defenses.

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

The parties attended an informal settlement conference on May 16, 2013, but the matter was not resolved.

The parties participated in a formal hearing taking place on five non-consecutive days between January 13, 2014, and May 15, 2014. At the opening of the hearing, the Administrative Law Judge (ALJ) noted for the record that neither Lucas's unfair practice charge nor the District's response to that charge constituted evidence for the purposes of the formal hearing and that "I want the parties to fully understand that we are here to adjudicate what was – what is in the [PERB] complaint." Both parties agreed.

On the second day of hearing, January 14, 2014, Lucas verbally moved to amend the PERB complaint to add additional protected activity. Lucas described her amendment as seeking to add speech activity criticizing the District and her union's "negotiations in relation[] to pay and health benefits and class size." Lucas further stated that her speeches took the form of speeches during governing board meetings from May 2011 to March 2012, the same timeframe originally stated in the complaint. The motion was granted over the District's objection.

At the end of the formal hearing, the ALJ directed that closing arguments be submitted in the form of simultaneous closing briefs due on July 15, 2014. After granting multiple requests to extend the briefing deadline, both parties submitted closing briefs on Friday, September 12, 2014.

On Monday, September 15, 2014, Lucas attempted to file a "revised closing brief." She then asserted via e-mail that she inadvertently filed an incomplete draft of her brief on September 12, 2014. Lucas asked to accept her "revised closing brief" in its place. Later that day, the District e-mailed its opposition to accepting Lucas's new filing.

On October 16, 2014, the ALJ took official notice of the parties' e-mail correspondence over the filing of Lucas's "revised closing brief." The ALJ informed the parties that he would consider the parties' e-mail messages to be their official positions regarding Lucas's late filing. At that point, the record was closed and the case was considered submitted for decision.

LUCAS'S REQUEST TO ACCEPT THE "REVISED CLOSING BRIEF"

Although PERB Regulations² do not set forth specific timelines for filing closing briefs, PERB Regulations 32170, subdivision (j), and 32212 authorize the assigned ALJ to regulate the submission of briefs, including the time for filing. In general, requests to extend a filing deadline must be made in writing at least three days beforehand. (PERB Reg. 32132, subd. (c).) Under PERB Regulations, late filings may be excused "for good cause only." (PERB Reg. 32136.)

In *Stanislaus Consolidated Fire Protection District* (2012) PERB Order No. Ad-392-M, PERB held that "good cause" exists for a filing delay when based upon a "reasonable and credible" explanation, "honest mistakes," or some other short delay based on excusable misinformation or circumstances beyond the filing party's control. (*Id.* at pp. 3-4.) Additionally, "good cause only exists where the party has made a conscientious effort to timely file and the delay did not cause prejudice to any party." (*Trustees of the California State University (San Diego)* (2006) PERB Order No. Ad-355-H, p. 3, citing *United Teachers of Los Angeles (Kestin)* (2003) PERB Order No. Ad-325.)

In *Chaffey Joint Union High School District* (1982) PERB Decision No. 202 (*Chaffey JUHSD*), PERB accepted a document that was sent by the filing party before the filing deadline passed, but arrived late because the filing party inadvertently used the wrong delivery

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

method. (*Id.* at pp. 2-3.) PERB concluded that the filing party's "explanation of what occurred was not so unreasonable as to be unbelievable" and there was no showing that the opposing party was prejudiced by the delay. (*Id.*, citation omitted.) Similarly, in *Trustees of the California State University* (1989) PERB Order No. Ad-192-H (*CSU*), the filing party attempted to file a document on time, but due to errors in its postage meter, the document did not arrive until after the filing deadline. (*Id.* at p. 5.)

In *City of Redding* (2011) PERB Decision No. 2190-M, the respondent filed its closing brief on the deadline provided, but the charging party did not. After still not receiving the charging party's brief 15 days later, PERB granted the respondent's motion to reject any submission as untimely. (*Id.* at proposed decision, p. 2, fn. 5.)

In the present case, Lucas filed a version of her closing brief electronically on September 12, 2014, before the filing deadline passed. Three days later, on September 15, 2014, Lucas attempted to electronically file her "revised closing brief." In support of the late submission, Lucas explained that she inadvertently sent an incomplete version of her brief on September 12, 2014, and that the "revised closing brief" was the document she intended to file. Lucas also explained that she was confused about PERB's electronic filing and service requirements. Somewhat consistent with her explanation, Lucas's earlier filed brief does appear to be incomplete. Unlike the "revised closing brief," the earlier brief is written in multiple typefaces and includes blank spaces and sections where it appears as though Lucas intended to add content at another time. The earlier brief is 31 pages. The "revised closing brief" is 37 pages and is signed and dated September 14, 2014.

The District disputes Lucas's assertion that she was unfamiliar with PERB's filing process. It also takes issue with Lucas's failure to correct or mitigate the alleged error until

three days after the filing deadline. It asserts prejudice by the additional time Lucas had to complete her argument.

Although Lucas's explanation for not submitting the proper brief on time might be characterized as "honest mistake" about the version she filed, the present situation is fundamentally different from what occurred in *Chaffey JUHSD, supra*, PERB Decision No. 202 or *CSU, supra*, PERB Order No. Ad-192-H. Unlike each of those cases, Lucas remained in possession of the "revised closing brief," including the full ability to revise the document until September 15, 2014. At this point, there is no way to verify to what extent Lucas continued editing her brief during this additional time after the District filed its brief. In fact, Lucas never represented that she did not continue working on the document until September 15, 2014. It is undisputed that Lucas signed the "revised closing brief" on September 14, 2014. For these reasons, I cannot conclude that Lucas made a conscientious effort to file the "revised closing brief" on time.

More importantly, I agree that accepting Lucas's revised brief at this point would prejudice the District because the District already filed its own brief. I made it clear at the close of the hearing that that closing briefs were to be filed *simultaneously*, meaning on the same day. Even if Lucas did not review the District's brief until after she submitted the "revised closing brief," it remains true that she had more time than the District to develop her closing arguments. Again, Lucas has not demonstrated or asserted that she did not use this additional time to improve her arguments in the "revised closing brief." The harm from that advantage cannot now be undone. Because of this prejudice, Lucas's request to accept her "revised closing brief" is denied. The "revised closing brief" will not be considered as part of the record and only her original brief will be reviewed.

FINDINGS OF FACT

The Parties

The District and its governing board are collectively a public school employer within the meaning of EERA section 3540.1, subdivision (k). Prior to her non-reelection in June 2012, Lucas was a public school employee within the meaning of EERA section 3540.1(j). At the relevant times of her employment, Lucas worked as a teacher at the District.

The Rio Teachers Association

The Rio Teachers Association (RTA) is the exclusive bargaining representative of the District's teachers and other certificated employees. Rebecca Barbettis is the RTA president. The District and RTA were parties to a Collective Bargaining Agreement (CBA) that was in effect by its own terms from July 1, 2007, to June 30, 2011. Many terms of that CBA continued to represent the status quo for District teachers after the CBA expired. This includes the evaluation procedures, the teacher assistance program, and the public complaint procedure. The CBA also had a grievance procedure that culminated in binding arbitration during its effective period. It is unclear whether the grievance and arbitration procedure continued to apply after the CBA expired.

In 2011 and 2012, the District and RTA were in negotiations over a successor CBA. In or around March 2011, they reached impasse and invoked impasse resolution procedures pursuant to EERA section 3548. In May 2012, the parties participated in the factfinding process pursuant to EERA section 3548.1 et seq. They again failed to reach agreement and the factfinding panel issued a set of recommendations that were not included in the record. The District elected not to adopt the factfinders' report. Instead the two sides resumed negotiations and ultimately reached an agreement later in 2012.

The District's Governing Board

The District's governing board consists of five publicly elected officials. The board holds regular public meetings where it may discuss and take action on agenda items. The governing board may also discuss certain issues, such as personnel matters, during "closed session," which as its name implies, is not open to the public.

Governing board meetings also include a public comment period where individual speakers may provide input on agenda or non-agenda items for up to three minutes, unless the governing board modifies the public presentation time. Although the governing board may not act on matters not already on its agenda, board members may briefly respond or ask questions about issues raised during public comment.

RTA and the other union at the District, California School Employees Association (CSEA) are both involved in governing board politics. Both organizations have endorsed and campaigned for candidates. Other local community members and groups are also involved in a similar fashion.

As of November 2010, the District's governing board members were Mike Barber, Tim Blaylock, Henrietta Macias, Ramon Rodriguez, and Eleanor Torres. At one point or another, Blaylock, Macias, Rodriguez, and Torres received election support from RTA. Macias, Rodriguez, and Torres commonly voted together on certain issues and were referred to by some, including Lucas, as "the board majority."

Lucas's Speeches at Governing Board Meetings

It is undisputed that Lucas spoke at several governing board meetings on a variety of subjects. Witnesses described Lucas as making general expressions of animus towards governing board members. Other witnesses said that she "frequently" spoke on the

negotiations between the District and RTA. At one meeting, on May 12, 2011, Lucas spoke on a multiple subjects. For example, Lucas claimed that governing board member Macias unlawfully took money from her employer in her private life. Lucas also complained about RTA's representation in negotiations, stating that RTA failed to properly to update unit members. She also asserted that Barbetti was looking out for herself at the expense of others.

Barbetti also spoke about negotiations at the May 12, 2011 meeting. She said that the District did not fully comply with requests for information during bargaining and implied that the District declared impasse prematurely. Around that time, the District was circulating bargaining updates and stating its perspective on the negotiations.

The District's Afterschool Program

The District sponsors an afterschool program for District students on District premises. The afterschool program is operated and staffed by the Boys and Girls Club of Oxnard and Point Hueneme (Boys & Girls Club). The District's relationship with the Boys & Girls Club is defined in a memorandum of understanding (MOU) between the two organizations. The program is funded, at least in part, by two grants. At the times relevant to this case, the After School Education and Safety grant was managed by the District and the 21st Century grant was managed by the Boys & Girls Club. Each grant was for roughly \$1 million. Governing board member Blaylock is also the chief professional officer of the Boys & Girls Club.

In or around May 2011, the board majority supported an audit of the Boys & Girls Club's relationship with the District. One purpose of the audit was to address whether Blaylock had any conflict of interest due to his role at both the District and the Boys & Girls Club. Around this time, members of the community raised other concerns about the Boys & Girls club. Governing board member Rodriguez said that his constituents mentioned the

conflict of interest issue, as well as concerns over the quality of the education components in the afterschool program, and the cleanliness of Boys & Girls Club staff. Rodriguez said heard about these issues from District teachers and from community members.

Lucas testified that, as this was happening, there was some discussion amongst the public about whether another entity could administer the afterschool program instead of the Boys & Girls Club. Other options bandied about included the Young Men's Christian Association or the District's own teachers. There is no evidence that the governing board ever voted on or discussed any alternative administrator for the afterschool program.

In June 2011, an independent audit was performed on the afterschool program. Relevant to this case, the audit concluded that Blaylock's role on both the governing board and the Boys & Girls Club created a "potential conflict of interest." The auditor recommended that Blaylock recuse himself from voting on financial matters involving the Boys & Girls club. The auditor further recommended the District and the Boys & Girls Club sign a new MOU without Blaylock's participation or signature. The District adopted that recommendation and agendized the issue of a new MOU for its August 17, 2011 governing board meeting.

The August 17, 2011 Governing Board Meeting

On August 17, 2011, the District's governing board held a meeting to discuss, among other things, a new MOU with the Boys & Girls club. Many members of the public, including parents of students in the afterschool program, attended the meeting. Before the meeting, Lucas had passed out flyers encouraging members of the public to attend and speak to the governing board about preserving the District's afterschool program.

The attendance at the meeting was well-over the capacity for the meeting room. The governing board decided to postpone the vote over the MOU until it could secure a larger room

for the public attendees. Before the meeting adjourned, members of the public, including Lucas, commented about the afterschool program. Lucas's comments centered around her belief that retaining the Boys & Girls club as the operator of the afterschool program would ensure that the District received \$1 million in grant funding for the program and that losing those funds harmed the District's ability to serve children. Those comments were similar to assertions she made in flyers that she either created or passed out before the meeting. Lucas's flyers also implied that the District was planning on either discontinuing the program or severing its relationship with the Boys & Girls Club. Both Rodriguez and Torres responded negatively to the flyers, describing them as "lies" or "fabrication."

Before the meeting ended, Torres made a statement to the crowd. She said:

The Rio School District will continue to have an afterschool program until your kids are out of the District. That was not an option. So those of you who thought, "what is going to happen to my kids when school starts?" Don't worry. *Everything will stay the same. There will not be any cancellation of the afterschool program.* So I hope I have made that clear.

(Emphasis supplied.) Shortly afterwards, the meeting adjourned.

Lucas's September 22, 2011 Speech

On September 22, 2011, Lucas again addressed the governing board during the public comment period. Lucas spoke about how she believed the Boys & Girls Club afterschool program benefitted students. According to Lucas, "[k]ids that went to afterschool club made much more growth than kids that did not go to the afterschool club." She also stated that teachers could request assistance from Boys & Girls Club staff. For instance, Lucas said that she asked Boys & Girls Club staff to work with her students and teach them to write their names. Lucas also said that a Boys & Girls Club staff member attended her class and translated for a student who only spoke an indigenous Mexican dialect.

The October 13, 2011 Governing Board Meeting

The District's governing board reconvened to discuss the Boys & Girls Club on October 13, 2011. The meeting was held in a room that could accommodate a larger audience. The governing board voted unanimously to approve the MOU, except Blaylock did not participate on behalf of either the Boys & Girls Club or the governing board.

At the same meeting, District interim-superintendent Howard Hamilton formed an ad hoc committee to review the District's afterschool program further. The committee later concluded that the Boys & Girls Club ran the program effectively, but recommended that if the District appointed the director of the program, it would give the District more say in how to run the program. As of the date of the hearing, the Boys & Girls club continued to administer the District's afterschool program. There was no evidence that the District ever considered either eliminating the afterschool program or selecting another administrator.

Lucas's Employment at the Child Development Center

Lucas was hired by the District as a teacher at an unspecified time during the 2009-2010 school year. The nature of her teaching position was not made clear for the record. Lucas testified that she was "pinked" every school year between 2009-2010 and 2010-2011, but "I was brought back, so each year, I was brought back." The circumstances of her return during each of those years were also not made clear for the record.³

³ There was some documentary evidence suggesting that Lucas was hired as a tenure-track probationary teacher in the 2009-2010 school year, but the content of those documents is hearsay. No evidence was offered about who produced the documents or under what circumstances. Nor was the information from the documents verified by any non-hearsay source. One of Lucas's former supervisors, Veronica Rauschenberger, said that she heard Lucas was probationary in 2009, but that she had no direct knowledge of Lucas's employment status.

Lucas's first teaching assignment was at the Community Day School (CDS). That school serves at-risk youth who were either expelled or serving extended suspensions. The CDS was designed to help those kids change some behaviors and re-integrate back into mainstream education programs. The CDS had one full-time teacher with other part-time teachers and staff. Prior to Lucas's hiring at some point in the 2009-2010 school year, the District had difficulty retaining a full-time teacher in that position.

Lucas's supervisor at CDS, Veronica Rauschenberger, described Lucas as "actually really good with [the student] population [at the CDS], and she was a step ahead of those kids in the school." She also said that Lucas sometimes had difficulty collaborating with some of the part-time people" and that "other staff members complained that "Lynette was yelling at them or being difficult to work with." Rauschenberger recalled an encounter with Lucas during a meeting over Lucas's performance evaluation. She said:

[W]hen we got to the part where I was discussing an improvement needed on item six [on the performance evaluation form],^[4] she got upset. She stood up, was agitated and cut my conversation short. As she was walking out, she said, you know, this is bullshit, and slammed my door. And I wasn't able to finish the conversation.

In or around November 2010, Lucas testified that then-governing board president Macias visited her classroom and said that if Lucas stopped speaking at governing board meetings, she (Macias) would make sure that the District did not close the CDS. At the time, the District was considering closing the CDS for budgetary reasons. Lucas told Rauschenberger that Macias should not have been allowed to visit unannounced.

⁴ Item 6 on the District's evaluation form is labeled "Developing as a Professional Educator" and references working with communities, families, and colleagues.

Rauschenberger said that governing board members visit classrooms frequently and that she welcomes such visitations.

The CDS continued operating during the 2010-2011 school year with Lucas as its only full-time teacher. Rauschenberger said Lucas's interactions with colleagues would improve and regress "depending on what was going on." That year, she issued Lucas a performance evaluation with no negative marks or comments on it. Rauschenberger explained these scores by stating that she was trying to focus on the "positive" aspects of Lucas's performance and that she "tried to be supportive and not really focus on the area that [they] tried to discuss before and just try and make it through and get through the year."

At the end of the 2010-2011 school year, the District closed the CDS. Rauschenberger said she supported that decision because of the large budget cuts the District experienced that year and because the CDS program had only limited ability to reach students given its small size. Lucas was allowed to select a new position from among all available teaching spots throughout the District. She selected a first and second grade combination class at Rio Real in the 2011-2012 school year.

Lucas's Position at Rio Real

Lucas taught a first and second grade combination class at Rio Real during the 2011-2012 school year. The principal of that site is Maria Hernandez.⁵ Early in that school year, some faculty members complained to Hernandez about Lucas's rude behavior. For example, on or around September 13, 2011, two language testing facilitators complained that Lucas was rude when they entered her classroom during instructional time to take some students for testing. Lucas told the facilitators that the students they requested had already been tested.

⁵ Hernandez and Rauschenberger are in a romantic relationship.

Hernandez recalled the facilitators describing Lucas as loud, rude, and unprofessional. None of the facilitators testified in this case.

In October 2011, Heather Knauer, a second grade teacher at Rio Real, complained about some encounters with Lucas that Knauer described variously as “aggressive,” “unprofessional,” “impolite,” “disrespectful,” “inconsiderate,” “insulting,” and “intimidating.” Knauer described those encounters in an e-mail message on or around October 21, 2011. Knauer recounted an October 6, 2011 data team meeting where teachers meet to review data from student assessments. Lucas had not input the data from her own students, which Knauer felt affected the group’s ability to discuss the data. Knauer described Lucas as being unprofessional and argumentative with the data team coordinator.

Knauer also described an incident during a meeting between second grade teachers on October 16, 2011. According to Knauer, Lucas acted rudely during a discussion about the focus of instruction that year. Knauer also referred to other incidents where she felt Lucas was disrespectful. Knauer did not testify.

Hernandez received other complaints from others at Rio Real, including the data team coordinator and staff members. According to Hernandez, the complaints were similar to those reported by the test facilitators and by Knauer. Those complaints were also broadly consistent with Hernandez’s own experience with Lucas. Hernandez also attended the October 6, 2011 data team meeting and said that Lucas was rude to both her and to the data team coordinator. Hernandez took issue with Lucas’s “argumentativeness” and how she spoke to others. Hernandez said that her concerns were “[n]ot necessarily that [Lucas] didn’t agree with [others] on issues but just the manner in which that disagreement was expressed, and the,

maybe, unwillingness to work collaboratively and to come to either a consensus or a resolution to the disagreement.”

Another Rio Real teacher, Carmen Vasquez, testified during the hearing that she was uncomfortable with how Lucas expressed herself during staff meetings. She also recalled other teachers, including Knauer, complaining about Lucas’s behavior. Vasquez did not file any complaints against Lucas.

The Verbal Warning

Later in October 2011, Hernandez met with Lucas to discuss her interactions with her coworkers. She issued Lucas a “verbal warning” based on the complaints she received and Hernandez’s own observations of Lucas’s behavior. Hernandez directed Lucas to behave more professionally and to not speak negatively to her colleagues. Hernandez also tried to minimize the amount of time Lucas and Knauer worked together. She issued Lucas a memo summarizing the meeting and allowed Lucas to respond in writing. The memo was not placed in Lucas’s personnel file. Hernandez described Lucas as being unreceptive to her feedback. Hernandez also said that she did not feel that Lucas’s behavior improved afterwards.

Lucas responded to the verbal warning on or around November 5, 2011. In the response, Lucas disputed that some of the complaints could form the basis for discipline for various reasons. Regarding her encounters with Knauer, Lucas acknowledged that they had a “heated debate over education strategies” and suggested that Knauer had behaved inappropriately. Similarly, Lucas acknowledged during the hearing that there was a “rift” between herself and Knauer. At no point in either her response to the verbal warning or during the hearing did Lucas confirm or deny that she had treated others rudely or disrespectfully.

Lucas's December 2011 Speeches to the Governing Board

At some point in December 2011, Lucas spoke at another governing board meeting about an agreement reached between RTA and the District increasing class sizes for teachers (the class-size MOU). Lucas described the class-size MOU as a "backroom deal" because RTA never informed its members about the agreement and the District had not approved the deal at a governing board meeting. She also complained that the agreement included "locking class size at 30," something she apparently opposed. District human resources director Carolyn Bernal confirmed that Lucas spoke at a governing board meeting about this issue. Neither provided the specific date of the meeting.

In or around March 2012, the governing board agendaized the class-size MOU for discussion at one of its meetings. The board formally approved the class-size MOU. Lucas said that, at some point, she filed an unfair practice charge against RTA over the class-size MOU.

The Soledad Trevino Complaint

On or around January 4, 2012, Soledad Trevino, a member of the community, filed a written complaint against Lucas with Bernal. Trevino stated that Lucas threatened her as well as other people, including RTA president Barbetti and governing board member Macias. Trevino had raised these same issues to the District earlier verbally, but the District took no action. Bernal formally notified Lucas of the complaint on or around January 11, 2012. The District hired an independent investigator to look into the matter, but decided against pursuing the complaint further after the investigator reported having difficulty reaching Lucas.

Lucas testified that, in November 2011, Bernal sent her a text message about Trevino's complaint. According to Lucas, Bernal's message said something to the effect of "watch out

and they are coming after [you.]" Bernal said that she typically informs employees ahead of time if she hears about a complaint being filed. Bernal said she was doubtful that she used the words Lucas described, but acknowledges that she may have warned Lucas about the complaint beforehand.

Hernandez's Recommendation for Non-Reelection

On January 30, 2012, Bernal e-mailed each District principal whether she would be recommending to not reelect any of their probationary teachers. This was Bernal's regular practice. In her e-mail message to Hernandez, Bernal stated "I think I know the answer, but please clarify...will you be recommending this teacher as a non-reelect and if so, will it be a surprise to her? Please let me know." Lucas was the only probationary teacher assigned to Rio Real that year. Bernal explained that she already knew that Hernandez was having difficulty with Lucas because the two had discussed issues such as Lucas's interpersonal conflicts with her colleagues and Lucas's failure to promptly meet upon request. There was no evidence that the two ever discussed any of Lucas's speeches before the governing board.

Hernandez responded to Bernal on February 7, 2012. She said that she would be recommending that Lucas not be reelected and that Lucas would not be surprised. Bernal said that she had the authority to override a principal's non-reelection recommendation but she did not exercise that authority in Lucas's case. Non-reelection decisions are not final until it is approved by the governing board.

On February 21, 2012, Hernandez met with Lucas to discuss a formal observation she previously conducted of Lucas's classroom. Although Hernandez did not observe Lucas's interaction with any coworkers during the observation, Hernandez raised that issue during the meeting. She said that Lucas was not receptive to any feedback about her interactions with her

coworkers. She described Lucas's behavior during the meeting as argumentative and disruptive, not allowing Hernandez to speak or respond to Lucas's questions. Hernandez's observation notes were used in Lucas's formal evaluation that year. Lucas later filed a grievance over Hernandez's evaluation. That grievance was never resolved.

The March 8, 2012 Governing Board Meeting

The District governing board met on March 8, 2012, to vote on, among other things, the non-reelection of probationary teachers for the following school year. The District's typical practice is that non-reelection decisions are made in a closed session meeting. The governing board is given a list with the employee identification numbers for all the teachers under consideration. The teachers are not identified by name. Board members have the opportunity to question all the principals about their non-reelection recommendations. After any questions are answered, the supervisors leave the room and board votes to approve or reject the entire list of teachers recommended for non-reelection.

During a closed session portion of the March 8, 2012 meeting, the governing board received a list of the teachers being considered for non-reelection for the 2012-2013 school year, identified only by employee number.⁶ Board members Barber, Blaylock, Rodriguez, and Torres were present. Macias did not attend. Deviating from the normal process, Blaylock inquired about whether Lucas was among those under consideration.⁷ Bernal confirmed that Lucas was on the list. Members Barber and Blaylock expressed concern that Lucas might sue the District. Blaylock also sought assurances that proper evaluation procedures had been

⁶ Evidence from the closed session portion of the March 8, 2012 meeting was produced in this case with the consent of the District's governing board.

⁷ Blaylock also said that board members sometimes learn who is under consideration for non-reelection from side conversations with the superintendent, outside of closed session.

followed for all the teachers on the list. He said he wanted to know whether any principal's recommendations were influenced by others.

Barber, Rodriguez, and Torres all voted to adopt all the non-reelection decisions. Blaylock voted against the decision. Rodriguez and Torres both said they supported the non-reelection decisions because they trusted the principals making the recommendations. A prior governing board member, Simon Ayala, testified that the board historically approved non-reelection decisions based solely on principals' recommendations.

Blaylock said that he too normally made non-reelection decisions based on "trust" of the recommending administrators but recently began having concerns that the board majority "targeted" their opponents. He said that he felt the need to do his "due diligence" to ensure that principals' non-reelection recommendations were not "being directed by somebody else." Blaylock admitted having no proof that any principal's recommendation was unduly influenced. He also did not elaborate on why he felt the board majority "targeted" others.

Barber said that he cast his vote after interim-superintendent Hamilton told him that if the governing board would need to reconvene at a special meeting with all members present if there was a tie in the vote. Hamilton expressed confidence that the entire non-reelection list would be approved at a special meeting. Barber said that he did not feel that more time or resources should be spent on the issue.

After the vote, Barber met with Hernandez to discuss her recommendation. He said that, like Blaylock, he had concerns over whether the board had coerced any principals' recommendations. Hernandez explained the nature of her concerns about Lucas's performance and that she was not influenced by anyone. Barber said he believed Hernandez was telling the

truth. He did not speak with any other principals about their non-reelection recommendations that year. The District then sent Lucas a notice of non-reelection on or before March 15, 2012.

ISSUE

Did the District not re-elect Lucas to a permanent teaching position because of protected comments she made during District governing board meetings between May 2011 and March 2012?

CONCLUSIONS OF LAW

The PERB complaint, as amended, alleges that Lucas was non-reelected because of protected statements she made during governing board meetings between May 2011 and March 2012. 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, pp. 6-8.)

1. Protected Activity

The first element of a prima facie case is whether Lucas engaged in EERA-protected activity by making statements to the District governing board during the time period alleged in the complaint. EERA section 3543 protects public school employees' right to form, join, and participate in the activities of their chosen employee organization for the purpose of representation in labor relations matters. EERA section 354, subdivision (a), includes the right to engage in "self-representation," meaning an individual's advocacy that is "a logical continuation of group activity." (*San Joaquin Delta Community College District* (2010) PERB

Decision No. 2091, p. 3.) However, an individual's advocacy made solely for his or her own benefit is not protected. (*Ibid.*) These protections may extend, for instance, to a teacher's comments to supervisors and to the school board about working conditions shared with other employees, such as class sizes. (*Livingston Union School District* (1992) PERB Decision No. 965 (*Livingston USD*), p. 3, proposed decision, p. 27, citations omitted; see also *Sierra Joint Community College District* (1983) PERB Decision No. 345, p. 5, pp. 15-16 (*Sierra JCCD*)).) In contrast, an employee's complaints about his own work assignments and his performance evaluation, unrelated to a negotiated dispute resolution procedure, were only for his own benefit and not protected. (*Regents of the University of California* (2010) PERB Decision No. 2153-H, warning letter, p. 5, citing *California State University* (1990) PERB Decision No. 853-H.) This case concerns Lucas's speeches made at governing board meetings on two broad subjects: (a) the Boys & Girls Club; and (b) negotiations between RTA and the District. I will address each issue separately, below.

a. Comments About the Boys & Girls Club

EERA protects employees' and employee organizations' right to comment on "working conditions," a term PERB has purposefully defined broadly. (*Sierra JCCD, supra*, PERB Decision No. 345, p. 15.) Thus, PERB held that a faculty union had the protected right to present to the school board its idea to hire an independent consultant to review the district's operations and finances. (*Id.* at pp. 2-3, 14-15.) The union's proposal in that case related to the district's assertion that it lacked the funds to support cost-of-living salary increases. (*Ibid.*) Similarly, in *Mt. San Antonio Community College District* (1982) PERB Decision No. 224 (*Mt. San Antonio CCD*), a group of nine faculty members distributed literature to students that was critical of a school district's management practices. (*Id.* at p. 6.) Although the teachers' union

and the district were in negotiations at the time, the leaflet made no reference to the negotiations or to the union. (*Id.* at pp. 3, 7.) PERB nonetheless held that the content of the flyers was a protected attempt to “bring attention to the plight of the college, allegedly endangered by bad management, and to work for the preservation of the college’s high educational quality.” (*Id.* at p. 6.) PERB reasoned that those issues were “of legitimate concern to teachers as employees.” (*Id.* at p. 7.) PERB distinguished the flyers in that case from other speech such as attacks on the quality of the employer’s services, with no discernible relationship to working conditions. (*Id.* at pp. 4-6.)

A court applied the holding from *Mt. San Antonio CCD, supra*, PERB Decision No. 224, in *California Teachers Association v. PERB* (2009) 169 Cal.App.4th 1076 (*Journey Charter School*). In that case, all the teachers at a charter school jointly drafted a letter to parents of students expressing “serious concerns over the financial, executive management, and accountability of the school,” raising questions about the continued viability of the school. (*Id.* at pp. 1081-1083.) As PERB found in *Mt. San Antonio CCD*, the court drew the “obvious inference” that teachers, as employees, had an interest discussing both the quality of the school’s education programs and its financial well-being. (*Id.* at pp. 1091-1092.)

In the present case, as in both *Mt. San Antonio CCD, supra*, PERB Decision No. 224, and *Journey Charter School, supra*, 169 Cal.App.4th 1076, Lucas’s comments during governing board meetings pertained to both the financial status of the District and the quality of the District’s education programs. Lucas made the argument that the Boys & Girls Club guaranteed an additional \$1 million in funding for the District’s afterschool program that the

District would not otherwise receive.⁸ Lucas spoke on these issues during the August 17, 2011 meeting, shortly before the governing board adjourned the meeting due to lack of space. Lucas made similar comments in flyers encouraging the community to attend the August 17, 2011 governing board meeting. At the September 22, 2011 meeting, Lucas spoke about how students participating in the Boys & Girls Club's afterschool program performed better in the classroom, which assists teachers. She also said that Boys & Girls Clubs staff sometimes assisted teachers with instruction.

I conclude that these issues bear a sufficient relationship to working conditions for teachers because they involve matters of interest to teachers as employees. Lucas adequately explained how her statements about the Boys & Girls Club relate to teachers' work. The record shows that the Boys & Girls Club was a topic of concern for other teachers as well. Governing board member Rodriguez testified that his constituents, including teachers, requested that he review Boys & Girls Club's education programs and the manner in which Boys & Girls Club staff use District facilities. For all these reasons, I conclude that Lucas's

⁸ Lucas never established that the District would actually lose any funding for the afterschool program if it terminated its relationship with the Boys & Girls Club. Equally unclear is whether the District governing board ever actually considered terminating its relationship with the Boys & Girls Club or what effect, if any, the District's failure to approve the new MOU with the Boys & Girls Club, as recommended by the audit, would have had. Resolution of these unknowns is not necessary to conclude that Lucas's commentary on these issues is protected under EERA. Even speech containing "inaccuracies and exaggerations" retained its protected status, if the speech concerned employment related subjects. (*Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755-H, p. 6, citing *Pomona Unified School District* (2000) PERB Decision No. 1375, *State of California (Department of Transportation)* (1983) PERB Decision No. 304-S.) It is only when the speech is "so 'opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice'" that it loses its statutory protection. (*Rancho Santiago Community College District* (1986) PERB Decision No. 602, quoting *Mt. San Antonio CCD*, *supra*, PERB Decision No. 224, p. 6.) In this case, Lucas provided un rebutted evidence that RTA and other community members supported replacing the Boys & Girls Club. Irrespective of whether anyone from the governing board supported those ideas, Lucas had a legitimate interest in speaking on the matter.

comments both about retaining the Boys & Girls Club as the administrator of the afterschool program and about the positive impact of that program were matters of legitimate concern to teachers as employees. Those comments were accordingly protected under EERA.

The District attempts to distinguish the present case from *Journey Charter School*, *supra*, 169 Cal.App.4th 1076 by stating that the holding in that case only applied to situations where a group of teachers acted collectively. This argument is rejected because even an individual's complaints relating to matters of common concern is protected under EERA. (*Los Angeles Unified School District* (1995) PERB Decision No. 1129, proposed decision, p. 8.) Also rejected is the District's assertion that the *Journey Charter School* holding only applies to cases involving charter schools. The court specifically rejected this argument, stating that its conclusions applied even if the court left aside any issues relating to the employer's status as a charter school. (*Id.* at p. 1090.) For these reasons, I conclude that Lucas's speech about the Boys & Girls Club were protected under EERA.

b. Comments about Negotiations

Lucas also commented to the governing board about the quality of RTA's representation in negotiations. PERB has previously recognized that an employee's challenges to and public disapproval of existing union leadership constitutes protected activity. (*California State Employees Association (Hackett, et al.)* (1995) PERB Decision No. 1126-S, p. 6, proposed decision, p. 4, proposed decision, p. 25.) Other critical comments about the union are also protected. (See *Civil Service Division, California State Employees' Association (Eisenberg)* (2009) PERB Decision No. 2034-S, dismissal letter, p. 3, warning letter, p. 4.)

In this case, Lucas called RTA president Barbetti a "hypocrite" at the May 12, 2011 governing board meeting, asserting her belief that RTA was not providing unit members with

sufficient information about ongoing negotiations and accusing Barbetti benefitting herself at the expense of others. In a December 2011 meeting, Lucas complained that the District and RTA negotiated a class-size MOU without informing the bargaining unit at large, and without governing board approval. Bernal admitted to hearing Lucas's comments about the class-size MOU in or around December 2011. Based on these facts, Lucas's critical comments about RTA and the class-size MOU were protected.⁹

2. Knowledge of Protected Activity

The second element of the prima facie case for retaliation is whether the respondent was aware of the charging party's protected activity. The charging party must prove that "at least one of the individuals responsible for taking the adverse action [was] aware of the protected conduct." (*Los Angeles Unified School District* (2014) PERB Decision No. 2390 (*LAUSD*), proposed decision, p. 12, citing *Oakland Unified School District* (2009) PERB Decision No. 2061, pp. 8-9; *California State University (San Francisco)* (1986) PERB Decision No. 559-H, pp. 5-6.)

a. The Governing Board's Knowledge of Lucas's Protected Activity

The District admits that all of its governing board members have heard Lucas speak at board meetings. It contends, however, that because Lucas spoke so frequently at governing board meetings on a mixture of different subjects, she failed to prove that the governing board members who actually voted on her non-reelection were present during the time she spoke on protected subjects. This argument is rejected. All three board members who supported Lucas's non-reelection testified at the hearing and are therefore readily recognizable. Both

⁹ The District's assertion that Lucas's comments on these subjects lack specificity is rejected. There was ample evidence supporting Lucas's claims, including the video and transcript of the May 12, 2011 meeting and the testimony of both Lucas and Bernal. This evidence provides a consistent and specific description of Lucas's comments on these issues.

Barber and Torres were observed in the video exhibit of the May 12, 2011 meeting, where Lucas spoke about RTA. Likewise, Barber, Rodriguez, and Torres can be observed in the video exhibit of the August 17, 2011 meeting, where Lucas spoke about the Boys & Girls Club. All three admit that they attended that meeting. Barber, Rodriguez, and Torres were also observed in the video exhibit of the September 22, 2011 governing board meeting where Lucas spoke about the Boys & Girls Club.

The same conclusions can be reached regarding Lucas's December 2011 speeches to the governing board. Lucas testified that she addressed the board about the class-size MOU that month. Although Lucas never specified which governing board members attended that meeting, the weight of the evidence supports the conclusion that the members who voted for her non-reelection were aware of her speech. The District's governing board could not have convened a meeting to conduct official business without at least three of its five members present. (Ed. Code, § 35164.) That means at least one of the three members who voted in favor of Lucas's non-reelection must have been present.

Furthermore, both Lucas and Bernal testified about Lucas's comments at the meeting in question. Neither identified the board members present, instead referring to the board as a single entity. However, I find it more likely than not that at least one of these two witnesses would have noted the absence of a board member had that been the case. For example, Bernal was asked specifically about each governing board member's reaction to Lucas's comments that day. If a board member was absent, I believe Bernal would have said so during this questioning. Finally, it is undisputed that the governing board continued discussing the class-size MOU issue after the December 2011 meeting. The governing board subsequently approved the class-size MOU at a public meeting, as Lucas had requested. Thus, even if

certain governing board members were not present at the December 2011 meeting, I conclude that it is more likely than not they were otherwise made aware of Lucas's comments.

Therefore, the governing board members responsible for voting to not reelect Lucas to a permanent position were aware of her protected comments during board meetings.

b. Hernandez's Knowledge of Lucas's Protected Activity

On the other hand, there was no evidence that Hernandez knew anything about Lucas's governing board speeches between May 2011 and March 2012. There was no showing, for example, that Hernandez attended any governing board meeting where Lucas spoke on protected subjects. Nor was there evidence that Hernandez learned of Lucas's speech through some other means.¹⁰ Therefore, Lucas has failed to demonstrate that Hernandez knew of Lucas's protected activities at the time she recommended Lucas for non-reelection. (See *Sacramento City Unified School District* (1985) PERB Decision No. 492, proposed decision, p. 34-35 [declining to impute knowledge of protected activity from one representative to another].)

The record shows that Hernandez was aware that Lucas filed a grievance during the 2011-2012 school year. Generally speaking, filing and pursuing grievances to enforce contractual rights is protected under EERA. (*Jurupa Unified School District* (2013) PERB

¹⁰ Some limited evidence was produced that Lucas told Rauschenberger about speaking at governing board meetings during the 2009-2010 and the 2010-2011 school years, while Lucas was assigned to CDS. Rauschenberger is Hernandez's romantic partner. However, this is insufficient to establish that Hernandez had knowledge of Lucas's protected speech activity at issue in this case. No evidence was shown that Rauschenberger and Hernandez ever discussed Lucas's speeches. Even if they did, the record does not show that Lucas ever explained to Rauschenberger what she was speaking about. I am unwilling to impute knowledge of any protected activity onto Hernandez solely by her relationship to Rauschenberger. Similarly, even though Bernal and Hernandez had discussed Lucas's problems at Rio Real, and were personal friends, there is insufficient evidence to conclude that they also discussed Lucas's speeches to the governing board concerning protected subjects.

Decision No. 2309, proposed decision, p. 7, citing *Ventura County Community College District* (1999) PERB Decision No. 1323.) However, Lucas's grievance activity was not described in the PERB complaint. Lucas did not mention the grievance in her verbal motion to amend the PERB complaint during the hearing. PERB may only address such unalleged issues when the following criteria are met:

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

(*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, p. 8 (*Lake Elsinore USD*), citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *Tahoe-Truckee Unified School District* (1988) PERB Decision No. 668.) These standards are not met here because, when Lucas moved to amend the complaint, she explicitly informed the District that the only protected activities she would be litigating in this case were speeches to the governing board between May 2011 and March 2012 about RTA's negotiating conduct and the class-size MOU. Nothing in Lucas's conduct during the hearing expressed or implied that Lucas was changing this position. In other words, the District was totally without notice that Lucas might attempt to later claim that

her non-reelection was also due to her grievance activity.¹¹ Therefore, it is not appropriate to consider Lucas's grievance as additional protected activity in this case.¹²

3. Adverse Action

The charging party also has the burden to prove that he or she suffered an adverse employment action at the hands of the respondent. The issue is whether a reasonable person under the same circumstances would consider the respondent's action to be adverse to employment. (*Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.) In applying that standard, PERB has consistently found that the termination of a probationary employee is an adverse employment action. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 14, citing *County of Riverside* (2011) PERB Decision No. 2184-M, *California State University, Fresno* (1990) PERB Decision No. 845-H; see also *Oakland Unified School District* (2007) PERB Decision No. 1880, p. 31.) This is undisputed by the District.

Therefore, Lucas has established this element of her prima facie case.

4. Nexus

The final element of a prima facie case is whether there is a causal connection, or nexus, between the charging party's protected activity and the respondent's adverse action.

¹¹ In addition, the record shows that Hernandez made the recommendation not to reelect Lucas on February 7, 2012. Lucas did not file her grievance until around a month later. Under these circumstances, Hernandez's recommendation could not have been in retaliation for protected activity that had not occurred yet. (See *Grossmont Union High School District* (2010) PERB Decision No. 2126, proposed decision, p. 6.)

¹² The same can be said about Lucas's filing of an unfair practice charge against RTA sometime in or around January 2012. Although PERB normally finds the filing and prosecuting of an unfair practice charge to be protected (*San Bernardino City Unified School District* (1998) PERB Decision No. 1270, proposed decision, p. 72, citations omitted), the District had no notice that Lucas might be basing her retaliation claims on that conduct. Furthermore, Lucas did not establish that either Hernandez, or the District's governing board were aware of her other charge.

The existence or absence of nexus is usually established circumstantially after considering the record as a whole. (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278, warning letter, p. 3, fn. 2, citing *Moreland Elementary School District* (1982) PERB Decision No. 227.)

a. Timing as Evidence of Nexus

Closeness in time between the charging party's protected activity and the employer's adverse actions is typically an important circumstantial factor to consider in proving or disproving nexus. (*North Sacramento School District* (1982) PERB Decision No. 264, proposed decision, p. 23) PERB has held that "[t]iming is important in an unlawful motivation inquiry to the extent that it shows that [the respondent] responded to protected activity by initiating [a] negative personnel action against the [charging party]." (*State of California (Department of Social Services)* (2000) PERB Decision No. 1413-S, proposed decision, p. 11.)

In the present case, Lucas's protected activity covered a wide timespan. As explained above, Lucas commented on protected subjects at governing board meetings starting in or around May 12, 2011, and continuing until at least December 2011.¹³ The governing board voted to not reelect her for the following school year three months later, on March 8, 2012. This closeness in time supports an inference of unlawful retaliation. (See *Escondido Union Elementary School District* (2009) PERB Decision No. 2019 (*Escondido UESD*), p. 27, citing *Mountain Empire Unified School District* (1998) PERB Decision No. 1298.)

¹³ According to the PERB complaint, as amended, Lucas's protected activity continued until March 2012, but Lucas presented insufficient evidence of any protected comments made to the governing board after December 2011.

b. Departure From Established Procedures

PERB has found that it may infer unlawful motive from a respondent's departure from existing practices in its dealings with the charging party. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086, dismissal letter, p. 4.) To establish such an inference, the charging party must typically demonstrate what the respondent's practice is and how the respondent deviated from that practice. (*Ibid.*; see also *LAUSD, supra*, PERB Decision No. 2390, pp. 11-12, proposed decision, p. 16.)

i. The Non-Reelection Vote

In the present case, the record is clear that the District did not follow its own standard procedures regarding the governing board's vote not to reelect Lucas. The District admits that the governing board normally does not know the identity of any probationary employee considered for non-re-election until after the vote. Rather, the governing board votes based only on a list of employee numbers. The District further admits that it did not follow this practice at the March 8, 2012 meeting. Instead, Lucas was specifically identified before the board's vote. This departure implies that knowing Lucas was under consideration for non-re-election factored into the vote. It is accordingly additional evidence of nexus.

ii. The District's Public Complaint Procedures

Lucas contends that the District also deviated from existing procedures in how it handled complaints registered against her filed by Trevino, a member of the community. However, assuming for the sake of argument that Lucas's assertions were true, PERB has held that "not all departures from existing practices are evidence of unlawful motive." (*Regents of the University of California* (2012) PERB Decision No. 2302-H, proposed decision, p. 25, citation omitted (*UC Regents*)). In *UC Regents*, PERB found that minor deviations in a self-

evaluation process with no apparent effect on the charging party's suspension or termination was not evidence of nexus, absent some showing that the events were related. (*Id.* at proposed decision, p. 25, fn. 7, citation omitted.) In *Pasadena Unified School District* (1999) PERB Decision No. 1331, PERB held that an employer's alleged failure to maintain a report on student abuse complaints was not evidence of nexus where the charging party was terminated for failing to cooperate in the investigation, not the complaints themselves. (*Id.* at warning letter, p. 4.) In *Regents of the University of California* (1987) PERB Decision No. 615-H, PERB declined to find evidence of nexus where the employer's deviations from its existing appeal hearings process actually worked to the benefit of the charging party. (*Id.* at p. 21.)

In this case, Lucas did not establish that anyone from the District considered the Trevino complaint when deciding whether to reelect Lucas to a permanent position. Moreover, there was no showing that the Trevino complaint impacted Lucas's employment in any way. The record shows that the District declined to pursue the complaint after having trouble reaching Lucas. Under these circumstances, Lucas has not demonstrated that the District's handling of these complaints demonstrates nexus.

iii. The District's Designation of Lucas as a Probationary Employee

Lucas also maintains that the District wrongly classified her as a probationary employee for the 2011-2012 school year. Lucas asserts that she was a probationary employee for both the 2009-2010 and the 2010-2011 school years. She now argues that she should have received a permanent teaching position in the following year, 2011-2012 and was therefore ineligible for termination by non-reelection. Presumably, Lucas is referring to Education Code section 44929.21, subdivision (b), which guarantees permanency to certificated employees who work "two complete consecutive school years," and then return for a third year at a

qualifying school district. A “complete school year,” for purposes of that section is defined as at least 75 percent of all regular school days that year. (Ed. Code, § 44908; *Cox v. Los Angeles Unified School District* (2013) 218 Cal.App.4th 1441, p. 1445.)

Lucas failed to establish key facts supporting her claim that she should be considered a permanent employee. For instance, Lucas did not show that she worked “two complete consecutive school years” as defined by the Education Code. Lucas claims that documents admitted into the record support her claim, but the content of those documents are hearsay and not sufficient to support a factual conclusion. (See PERB Regulation 32176; *Escondido UESD, supra*, PERB Decision No. 2019, p. 23.) Moreover, even relying upon those documents would not be sufficient. The documents indicate that Lucas was hired as a probationary employee in or around November 2009. Without evidence about the length of the school year in 2009-2010 or in 2010-2011, it remains unclear whether Lucas worked “two complete consecutive school years” under the Education Code. The documents also indicate that Lucas was laid off at the end of the 2009-2010 school year, which again, muddies the record about whether Lucas should have received tenure in the 2011-2012 school year.¹⁴ Lucas’s own ambiguous statements about her employment history are also insufficient to demonstrate that she worked the required time to be considered permanent.

iv. The 2011-2012 Performance Evaluation

Lucas also contends that Hernandez failed to follow CBA procedures concerning her 2011-2012 performance evaluation. During the hearing, Lucas intimated that Hernandez failed to timely notify Lucas that she would be evaluated that year, failed to follow the evaluation timelines, and failed to follow through with her promise to issue Lucas an assistance plan.

¹⁴ Education Code section 44929.21(b) also only applies to school districts above a minimum enrollment threshold. No evidence was presented about the District’s enrollment.

However, adjudication of these claims is unnecessary to decide this case because Lucas never established that Hernandez was aware of any of Lucas's protected activities. Thus, any examples of Hernandez's deviation from existing practices would not indicate animosity towards that activity.

c. Disparate Treatment

Lucas asserts that the District governing board treated her differently from other speakers during public comment periods. Evidence that the charging party or alleged discriminate was treated differently from similarly situated employees may be evidence of nexus. (*Lake Elsinore USD, supra*, PERB Decision No. 2241, pp. 14-15.) Lucas asserts that speakers who supported certain governing board members were allowed to exceed the three-minute public comment period, while those who did not were criticized and limited in time.

While the record appears to show that the governing board enforced its procedural rules haphazardly, there was insufficient evidence that the board targeted Lucas or others who spoke against the District. In at least two of Lucas's video exhibits, she was allowed to exceed the public comment time period. One time, she spoke for almost an entire minute beyond her allocated time. In addition, during the August 17, 2011 meeting, the governing board delayed its vote on the Boys & Girls Club MOU specifically for the purpose of accommodating all the people who wanted to weigh in on the issue. During that meeting, the governing board heard and responded to the comments of another community member who spoke negatively about the governing board's failure to approve the Boys & Girls Club MOU.

Regarding the allegedly favorable treatment of other speakers, Lucas asserts that RTA president Barbetti was allowed to exceed the public comment time period during her presentation at the May 12, 2011 governing board meeting. However, in the exhibit Lucas

submitted to support this claim, Barbetti's speech was less than three minutes long. Moreover, even if Barbetti did exceed the time limit at the meeting, it should be noted that Barbetti expressed frustration at the District for its position in negotiations. For all these reasons, Lucas has not established that the governing board treated her, or others who were critical of the governing board, disparately. Therefore, this does not support Lucas's retaliation claims.

d. Shifting Justifications

Lucas also asserts that Rodriguez's conflicting testimony about his concern over the Boys & Girls Club MOU, and this his shifting positions are further evidence of nexus. An employer's inconsistent and/or contradictory explanation for taking adverse employment actions against a charging party may be evidence that those actions were taken for unlawful reasons. (*Livingston USD, supra*, PERB Decision No. 965, p. 4, proposed decision, p. 30.) However, it does not necessarily follow that an employer's inconsistency on other matters also demonstrates a retaliatory motive. Here, Rodriguez's alleged shift in position involved the Boys & Girls Club MOU, not Lucas's non-reelection vote. Lucas fails to establish how the two matters are related.¹⁵ Therefore, Lucas's argument is unpersuasive.

e. The District's Alleged History of Retaliation

Lucas maintains that the District retaliated against anyone who opposed the board majority, Macias, Rodriguez, and Torres. Proof of this claim was sparse, but not entirely absent. Blaylock testified that he was wary of his fellow governing board members because he

¹⁵ Moreover, Lucas did not prove, as a matter of fact, that Rodriguez actually changed his position. According to Lucas, Rodriguez originally said that his concerns were based on Blaylock's role on both the District governing board and Boys & Girls Club. Lucas asserts that he altered this position later, stating that his concerns stemmed from complaints he heard from constituents about Boys & Girls Club operations. Rodriguez's actual testimony was that he was concerned with both issues, but that he eventually voted to support the Boys & Girls Club MOU once those concerns were alleviated. I find no inconsistency in this position.

felt they “targeted” opponents. Barber expressed a similar sentiment. However, neither purported to have any support for these beliefs. Moreover, it remains unclear whether either believed that anyone from the governing board had a propensity for retaliation against EERA-protected activity. Even if the governing board openly displayed animus towards political opponents or conduct unrelated to employee working conditions, it would not necessarily follow that board members also harbored animus towards conduct protected under EERA. (See *LAUSD, supra*, PERB Decision No. 2390, p. 11 [holding that alleged animus over a student attendance dispute did not necessarily establish animus towards EERA-protected activities].) In fact, the record shows that RTA president Barbetti spoke negatively about the District’s position in negotiations without any adverse consequences.

In addition, the record here shows that the governing board actually supported the positions taken in Lucas’s protected speech activity. For example, on October 13, 2011, the board unanimously approved the Boys & Girls Club MOU, as Lucas had requested. Lucas also complained about RTA’s failure to properly update unit members about negotiations. The District, apparently agreed, issuing its own bargaining updates to teachers with its perspective of the ongoing negotiations. Finally, the governing board held a public meeting and voted on the class-size MOU after Lucas complained about it. This suggest that her views on issues relating to employee working conditions were not that different from the governing board’s own views. For these reasons, Lucas’s argument is unpersuasive.

f. Statements From District Representatives

Lucas provided evidence about a variety of District representatives who allegedly made incriminating statements about the District’s unlawful motives. The Board has found that outward expressions of animus towards union or other protected activity may provide evidence

of nexus. (*Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 7.) In *Los Angeles Community College District* (1995) PERB Decision No. 1091, PERB held that a supervisor's complaint about an employee's grievance activity, in conjunction with other evidence, demonstrated nexus. (*Id.* at pp. 2, 5.) There, the supervisor described having to deal with the employee's grievances as "pain in the ass." (*Id.* at proposed decision, pp. 14-15.) PERB reached a similar conclusion about negative comments regarding grievance activity in *Jurupa Community Services District* (2007) PERB Decision No. 1920-M (*Jurupa CSD*). There, PERB found animus where a manager actively discouraged an employee from filing grievances and described the employee as having a "bad attitude" after that advice was not followed. (*Id.* at proposed decision, pp. 15-16; see also *Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H, pp. 3, 11 [finding evidence of nexus in a director's comments that an employee's complaints to his union about the transfer of unit work were "getting under his skin" and "not a good thing"].)

However, a respondent's statements must be interpreted in the proper context. In *State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2118-S, PERB dismissed a retaliation charge prior to issuing a complaint. The charge was based primarily on the claim that a union representative received negative comments on his evaluation in retaliation for filing grievances. (*Id.* at p. 6.) The union based its nexus argument on a supervisor's statement that the employee was "bringing his [union] issues to work." (*Id.* at 3.) PERB concluded that this was insufficient evidence of unlawful motive because the "charge [did] not describe the context in which the statement was made or even when the statement was made." (*Id.* at p. 8; see also *Fallbrook Union Elementary School District* (2011) PERB Decision No. 2171, p. 10.)

i. Comments by Macias in November 2010

Lucas asserts that in November 2010, Macias told Lucas that the District would not close Lucas's school site if Lucas stopped speaking at governing board meetings. This allegation does not support Lucas's retaliation claim because it is too vague. This alleged conversation occurred before any of the protected activity pled in the PERB complaint, as amended. In addition, Lucas did not establish that her speeches to the board at the time qualified as activity protected under EERA. Therefore, even if Macias's statements demonstrated some kind of animus towards Lucas's speeches at the time, there is insufficient evidence in the record to conclude such animus was directed towards protected activity or towards the activity that is the focus of this case. Furthermore, Macias did not vote on Lucas's non-reelection and there was no showing that Macias was otherwise involved in that decision in another way. For these reasons, Lucas has not established that Macias's alleged comments in November 2010 support the present retaliation claim.

ii. Comments by Bernal

Lucas also claims that Bernal sent Lucas a text message with words to the effect of "watch out and they are coming after [you.]" Bernal expressed doubt that she would have used those words, but did admit to sending Lucas text messages. She also acknowledged that it is her practice, as director of human resources, to inform employees ahead of time if she learns of a public complaint. After reviewing the record as a whole, I conclude that it is unlikely that Bernal would have sent the text message as stated by Lucas. My impression of Bernal was that she is conscientious in her duties as human resources director, and generally honest. I find it highly improbable that she would send a text message that could implicate the District the governing board in wrongdoing. If she did, I believe she would have said so. It is also unclear

from Lucas's testimony whether she was trying to quote from Bernal's actual text message or whether Lucas was merely providing her own interpretation of that message. Lucas declined to either clarify this issue or provide the actual text message during her own testimony. After reviewing the record as a whole, I find it much more likely that Bernal notified Lucas that Trevino was considering filing a complaint, and that Lucas, perhaps even innocently, misremembered or misunderstood the content of Bernal's message.

Lucas also cites in support other comments by Bernal in support of her case. When Lucas asked Bernal whether she believed that her own job as human resources director could be jeopardized if the District discovered that Bernal's children passed out flyer's supporting the Boys & Girls Club, Bernal responded that "it could." Bernal also testified that she was "aware of some people who weren't favorable of certain [governing] board members [that] no longer work" at the District. However, both of these statements are far too vague to support an inference of unlawful motive. Neither statement, read separately or together with the record as a whole, indicates that anyone from the District possesses the motive to retaliate against public school employees for engaging in EERA-protected activity.

iii. Comments and Actions by Rodriguez

Lucas also claims that Rodriguez's reaction to her protected activity demonstrates nexus. He admitted being "frustrated" by the flyers produced and/or distributed by Lucas about the Boys & Girls Club. Those flyers contained the same basic message that Lucas expressed in speeches to the governing board. Rodriguez said that he was bothered because Lucas asserted to the public that the District planned on either eliminating the afterschool program or severing its relationship with the Boys & Girls Club. Rodriguez said that the governing board never entertained either option. Nevertheless, as discussed above, I find that

Lucas's statements were protected because these issues were in the periphery at the time the governing board was considering the Boys & Girls Club MOU. Lucas's comments on the matter, even if not fully accurate, remain protected because of their relationship to teachers' working conditions and the District's education programs as a whole.

I also find that Rodriguez's response to Lucas's comments to provide some evidence of nexus. While, not all expressions of frustration at protected activity demonstrate nexus (see *Bellevue Union Elementary School District (2003) PERB Decision No. 1561 (Bellevue UESD)*, proposed decision, p. 37), I conclude that such evidence is present here. Rodriguez admitted to walking out during Lucas's speeches during governing board meetings multiple times, which I consider to be a sign of disrespect. He justified this by saying that he oftentimes had to use the restroom whenever Lucas spoke, but this explanation lacks credibility. Rodriguez also admitted to removing posted flyers containing Lucas's message about the Boys & Girls Club.¹⁶ He admitted to taking the flyers down because of their message. Considering all these factors together, I find sufficient evidence of animus towards Lucas's protected speech.¹⁷

After viewing the entire record in this case, including the timing of events, Rodriguez's reactions to Lucas's protected speech, and the District's failure to follow existing procedures, I conclude that Lucas has demonstrated a sufficient nexus between her protected activities and

¹⁶ Lucas said that Rodriguez aggressively confronted her when he saw her posting these flyers in his neighborhood. He denies this. I find it unnecessary to resolve this factual dispute because, either way, his removing of the flyers supports an inference of retaliation.

¹⁷ Torres also said she was "upset" by Lucas's flyers because, like Rodriguez, she felt that Lucas's statements were untrue. However, I view her reaction differently from Rodriguez's. Unlike Rodriguez, Torres did not display animus towards Lucas's activities in any other fashion. She is entitled to her own point of view on this issue. (*Bellevue UESD, supra*, PERB Decision No. 1561, proposed decision, p. 37.) Moreover, her view that Lucas's statements were untrue is basically accurate. There was no showing that the District ever contemplated replacing the Boys & Girls Club.

her non-reelection. Therefore, Lucas has established all the elements of a prima facie case for retaliation.

5. The District's Burden of Proof

If the charging party proves all of the elements of the prime facie case for retaliation, the burden of proof shifts to the respondent to show that the adverse action occurred for reasons unrelated to the protected activity. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista ESD*), p. 21, citing *Novato USD, supra*, PERB Decision No. 210; *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.) In cases where an adverse action appears to have been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred "but for" the protected acts. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p.

22.) This requires the employer to establish both:

- (1) that it had an alternative non-discriminatory reason for the challenged action; and
- (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity.

(*Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde USD*), pp. 18-19, citations omitted; see also *County of Orange, supra*, PERB Decision No. 2350-M, p. 16.) Stated another way, the respondent must prove by a preponderance of the evidence that "the challenged action would have occurred in the absence of the employee's protected activity." (*Palo Verde USD*, p. 19, citing *County of Riverside* (2009) PERB Decision No. 2090-M; *Escondido UESD, supra*, PERB Decision No. 2019; *The Regents of the University of California* (1998) PERB Decision No. 1255-H; *Woodland Joint Unified School District* (1987) PERB Decision No. 628.)

It should be noted that, “the mere presence of animus is not determinative” in retaliation cases. (*Bellevue UESD, supra*, PERB Decision No. 1561, proposed decision, p. 37.) An employer may satisfy its burden of proof even in light of direct evidence of nexus. (*UC Regents, supra*, PERB Decision No. 2302-H, p. 4.) In *Bellevue UESD*, nexus was established based in part on a principal’s bias against union activity and the district’s failure to disclose or adequately investigate parent complaints. (*Id.* at proposed decision, pp. 35-37.) In the end, PERB concluded that retaliation was not the true motive behind the non-reelection decisions, given the lack of evidence of discrimination against other teachers who had engaged the same activity and the employer’s legitimate concerns about work performance that predated the protected activity. (*Id.* at proposed decision, p. 48.)

In this case, the District asserts that Lucas’s principal, Hernandez, had a legitimate non-discriminatory reasons for recommending Lucas for non-reelection and that the District governing board would have accepted that recommendation even absent Lucas’s protected activities.

a. Hernandez’s Recommendation for Non-reelection

PERB has previously found that concerns over an employee’s performance may provide a legitimate, non-discriminatory reason for adverse employment actions. In *Cerritos Community College District* (1980) PERB Decision No. 141 (*Cerritos CCD*), PERB held that a school district’s decision not to retain a probationary employee was justified because his “suspicious, contentious and aggressive behavior prevented him from getting along with others.” (*Id.* at proposed decision, p. 14.) In *Coast Community College District* (2003) PERB Decision No. 1560 (*Coast CCD*), PERB held that discipline was warranted where “the record was replete with examples of [the charging party’s] failure to peacefully coexist with other

employees” and the failure to take direction from his supervisors. (*Id.* at proposed decision, p. 44; see also *Scotts Valley Union Elementary School District* (1994) PERB Decision No. 1052, proposed decision, pp. 28-29.) In *City of Santa Monica* (2011) PERB Decision No. 2211-M, the Board found that an employee’s release from probation was warranted given his history of complaints by others and the number of past warnings he received to correct his behavior. (*Id.* at pp. 9, 17.)

In contrast, in *Chula Vista ESD, supra*, PERB Decision No. 2221, the employer asserted that adverse actions were justified because of the charging party’s lack of “interpersonal skills.” PERB concluded that this explanation was pretext because the evidence showed that the employee worked well with others and there was no evidence that the employer previously counseled or directed her to improve in that area. In *Baker Valley Unified School District* (2008) PERB Decision No. 1993 (*Baker Valley USD*), an employer stated that it decided against retaining a probationary teacher “because of problems with student engagement in the classroom.” PERB found that explanation was pretext for retaliation because there was no record of problems in that teacher’s performance evaluations nor any record of counseling or discipline in his personnel file. (*Id.* at p. 13, citing *Simi Valley Unified School District* (2004) PERB Decision No. 1714.) PERB concluded that the employer in that case failed to carry its burden of proving that it would have made the same decision even if the teacher did not engage in any union activity. (*Id.* at p. 14.) In *Jurupa CSD, supra*, PERB Decision No. 1920-M, PERB similarly found pretext where the employer’s justification for termination was supported almost entirely by exaggerated claims and hearsay. (*Id.* at proposed decision, pp. 17-19.) Under those circumstances, PERB found that the employer did not meet its burden of proof and concluded that the employee’s termination was retaliatory. (*Id.* at p. 4.)

In this case, as explained above, there was no evidence that Hernandez knew of any of Lucas's speech activity before the governing board. Thus, I cannot conclude that her recommendation to not reelect Lucas to a permanent position was based on Lucas's protected activity. Rather, as in *Cerritos CCD, supra*, PERB Decision No. 141, the District demonstrated that Hernandez's recommendation was based on Lucas's interpersonal conflicts with other employees at Rio Real. The District produced multiple complaints Hernandez received about Lucas's behavior. Those complaints focused on Lucas's unprofessional attitude and discourteous treatment of others. Unlike in *Jurupa CSD, supra*, PERB Decision No. 1920-M, Hernandez corroborated the substance of the complaints with her own testimony at the PERB hearing. She also described her own personal experience with Lucas, stating that she found Lucas to be disrespectful towards herself and other adults and was unreceptive to feedback. Another Rio Real teacher, Vasquez, also testified at hearing that she was uncomfortable with how Lucas expressed herself during faculty meetings. She also recalled hearing complaints from coworkers.

As in *City of Santa Monica, supra*, PERB Decision No. 2211-M, and unlike in *Chula Vista ESD, supra*, PERB Decision No. 2221, and *Baker Valley USD, supra*, PERB Decision No. 1993, Hernandez warned Lucas that her behavior was unacceptable. Hernandez issued Lucas a verbal warning about that issue in October 2011 and also took steps to minimize Lucas's contact with those who complained about her. And as both in *City of Santa Monica* and *Bellevue UESD, supra*, PERB Decision No. 1561, Lucas had been warned about her unprofessional demeanor with colleagues even before any of her protected activity. While it appears as though her performance improved in the 2010-2011 school year, problems arose

again in 2011-2012. Hernandez said that Lucas's conduct did not improve throughout that year and that Lucas was unreceptive to feedback on the subject.

The legitimacy of Hernandez's concerns is further supported by the fact that Lucas never denied treating Hernandez or other Rio Real teachers rudely. (See *City of Sacramento* (2013) PERB Decision No. 2351-M, p. 32, [holding that uncontradicted and unimpeached testimony is sufficient to carry a party's burden of proving an issue in dispute].) Governing board member Barber said that he met with Hernandez to determine whether she was pressured by anyone to make her recommendation. Hernandez explained her reasoning and confirmed that she was not coerced by anyone. Barber said that he did not believe that Hernandez was being untruthful. Lucas also admitted that there was a "rift" between herself and Knauer, one coworker who complained about her. Lucas also did not dispute either that she was unreceptive to Hernandez's feedback or that she followed Hernandez's directives. (See *California State University, Long Beach* (1987) PERB Decision No. 641-H, proposed decision, p. 55 [holding that adverse actions due to an employee's "resistance to accepting directions and criticism from the supervisors."].)

Lucas contends that non-reelection was unwarranted because she was effective in the classroom. However, this argument is undermined by Hernandez's testimony that "Lucas had difficulty interacting with adults on campus, which is a large part of what a teacher's function is." Hernandez's assertion is consistent with the fact that "Working with colleagues to improve professional practice" is one of the standards under which all District teachers are evaluated. Moreover, even if Lucas's assertion was true, PERB considered and rejected this argument in *Coast CCD, supra*, PERB Decision No. 1560. There, PERB found adverse employment actions justified even though the charging party was "a very capable instructor,"

because of his history of inappropriate confrontations with others. (*Id.* at proposed decision, p. 44.) The same is true in this case. Hernandez issued Lucas specific directives about acting more professionally around her colleagues. Hernandez gave un rebutted testimony that Lucas failed to improve in her performance. Finally, even if Hernandez's reasoning was flawed, there is still no evidence that she knew of any of Lucas's protected activity or that she recommended Lucas for non-reelection for retaliatory reasons. (See *Cerritos CCD, supra*, PERB Decision No. 141, proposed decision, p. 16 ["Non-retention because of a personality conflict, however regrettable or seemingly unjustified, does not constitute a violation of the EERA."])

Lucas also argues that some teachers did not complain about her behavior and that she was able to work with other teachers without incident. This argument is unpersuasive in light of Lucas's failure to rebut the complaints claiming that she treated others unprofessionally. Thus, it remains undisputed that Lucas treated at least some of her colleagues, including her principal, unprofessionally. Furthermore, Lucas fails to address the possibility that some employees, like Vasquez, may have been uncomfortable with Lucas's behavior, but never filed a complaint about it. The fact that not all employees registered complaints against Lucas does not render Hernandez's assessment of Lucas's performance as unjustified.

For all these reasons, I conclude that Hernandez's recommendation to not reelect Lucas for the following year was based on Lucas's performance during the 2011-2012 school year, not her protected speech activity before the governing board.

b. The Governing Board's Non-reelection Decisions

Multiple governing board members testified that the board's usual practice was to vote consistently with principals' non-reelection recommendations. Former governing board

member Ayala said that this was the board's practice since as early as 2000. Rodriguez said he believed that he should trust the principals' recommendations because board members do not typically evaluate rank-and-file employees. Torres likewise explained that she relies on the administrators' insights whose job it is to be familiar with the day-to-day operations at school sites.

Blaylock said he previously made non-reelection decisions based on "trust," of administrators, but later believed that the governing board should play a more active role in assuring that employees considered for non-reelection were evaluated properly and that the non-reelection recommendations were free from coercion. He had no evidence that any principal's recommendation was unduly influenced.

Barber was not questioned about the extent to which he trusted administrators' recommendations, but his primary motivation for supporting Lucas's non-reelection appears to be unrelated to her protected activity. He said that he voted in favor of non-reelection because he did not wish to convene a special board meeting to reconsider the matter. He also said that he believed Hernandez was telling the truth when she said that she was not influenced or coerced in her recommendation.¹⁸

Untangling Lucas's protected activity from the governing board's motives in this case is not a simple task. Where it is not possible to separate the adverse action from the protected activity, then the adverse act must be rescinded. (*Los Angeles County Superior Court, supra*, PERB Decision No. 1979-C, p. 22, citing *Belridge School District* (1980) PERB Decision

¹⁸ Upon reflection, Barber did say that "after all I saw, all the—everything that turned out, I probably would not have voted the way I did." He did not explain this statement further. He also reiterated that he voted for Lucas's non-reelection because he felt that "I didn't think this issue needed another special meeting" and because he believed the matter would have passed anyway.

No. 157; *San Ysidro School District* (1980) PERB Decision No. 134.) However, comparing the District's evidence about its reasons for terminating Lucas's employment against Lucas's circumstantial evidence of nexus, I conclude that it is more likely than not that the governing board would have voted for Lucas's non-reelection even if she did not engage in protected activity. It is true that the governing board deviated from its normal practices by identifying Lucas before the vote. Under certain circumstances, one might infer that the board did so in order to target Lucas. But in this case, it was Blaylock who asked about Lucas, and he did not support the non-reelection decision. Lucas does not maintain that he had any retaliatory motive. Rodriguez, in contrast, said that he wished that he did not know that Lucas was on the list. Blaylock also said that board members have deviated from this practice in other cases, by asking the superintendent about which teachers are under consideration. Thus, the departure from normal practices is not conclusive on the issue of retaliation.

In addition, although Rodriguez admitted to reacting negatively to Lucas's speeches about the Boys & Girls club, his response is tempered by the fact that he ultimately agreed with Lucas's position and, like Lucas, he supported the Boys & Girls Club. As to the other evidence that Rodriguez disliked Lucas, it is unclear from the record whether those reactions were in response to Lucas's protected speech, or some other statements, such as general animus to the board or personal attacks against board members.

After reviewing the record as a whole, I conclude that Hernandez recommended Lucas for non-reelection based on Lucas's undisputedly unprofessional conduct with her colleagues, not for retaliatory reasons. Notwithstanding the evidence of nexus on the part of the governing board, I also conclude that a preponderance of the evidence shows that a majority of the board would have voted consistently with Hernandez's recommendation even if Lucas had not

engaged in any protected speeches. Specifically, I believe the board members would have either accepted the recommendation or voted to avoid a tie. Thus, the District would have issued Lucas a notice of non-reelection regardless of her protected activity. Lucas's retaliation claim is therefore dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-5717-E, *Lynette Lucas v. Rio School District*, are hereby DISMISSED.

Right to Appeal

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile

transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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