

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



TERESA PADILLA,

Charging Party,

v.

ADELANTO ELEMENTARY SCHOOL  
DISTRICT,

Respondent.

Case No. LA-CE-6240-E

PERB Decision No. 2630

March 1, 2019

Appearances: Teresa Padilla, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Mark W. Thompson and Lena Y. Shiraiwa, Attorneys, for Adelanto Elementary School District.

Before Shiners, Krantz, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Party Teresa Padilla (Padilla) to the attached proposed decision of an administrative law judge (ALJ). The complaint alleged that the Adelanto Elementary School District (District) violated the Educational Employment Relations Act (EERA)<sup>1</sup> by issuing Padilla a Notice of Unprofessional Conduct (Notice) in retaliation for filing and pursuing a grievance. Following a formal hearing, the ALJ dismissed the complaint and underlying unfair practice charge, concluding that Padilla failed to prove the District was unlawfully motivated in issuing her the Notice.

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions,<sup>2</sup> we conclude that the ALJ's factual findings are supported by the record and his conclusions of law are well-reasoned and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, as supplemented by the following discussion of Padilla's exceptions.<sup>3</sup>

## BACKGROUND<sup>4</sup>

### The Grievance

Padilla taught fourth grade at the District's West Creek Elementary School during the 2015-2016 school year. On May 3, 2016, Padilla filed a grievance alleging that Deborah Bowers (Bowers), West Creek's Principal, had reneged on an agreement to assign Padilla to teach a first grade class for the following school year. Bowers responded to the grievance by stating that she was willing to interview Padilla for the position. Padilla escalated the

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<sup>2</sup> Padilla filed an amended statement of exceptions after PERB notified the parties that filings in this matter were complete. Because PERB Regulations do not expressly permit or prohibit reply briefs, we have discretion to consider them. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 13.) We have reviewed Padilla's supplemental filing and determined that it does not assist our review of this case and would not, in any event, alter the outcome. We therefore have not considered her amended statement of exceptions in rendering our decision.

<sup>3</sup> Padilla has requested oral argument in this case pursuant to PERB Regulation 32315. The Board denies requests for oral argument when an adequate record has been prepared, the parties have had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Regents of the University of California* (2018) PERB Decision No. 2578-H, p. 2, fn. 3.) This case satisfies all of the above criteria. We therefore deny Padilla's request for oral argument.

<sup>4</sup> We summarize the material facts here to provide context for our discussion of Padilla's exceptions. A full recitation of the facts and procedural history can be found in the attached proposed decision.

grievance to level two based on her belief that Bowers had promised her the position, and that no interview was therefore necessary.

The May 4, 2016 Altercation and Ensuing Events

On May 4, 2016, Padilla was involved in an altercation with a student from her class. According to Padilla, the morning bell rang and students began lining up in front of their respective classrooms. Student DH accused student SC of scratching him, which SC denied.<sup>5</sup> SC then pushed DH. Padilla testified that she moved between the two students and used her left arm to block them from fighting. SC attempted to push Padilla's arm away. Padilla testified that she did not have any other physical contact with SC.

Although SC was officially assigned to her classroom, Padilla had placed SC on class suspension the day before for fighting or other misconduct. Consequently, SC was placed in the classroom next door to Padilla for May 3 and May 4. Robert Olivarez (Olivarez), a substitute teacher, was assigned to that classroom because Ms. Bell, the regular teacher, was on leave.

Padilla testified that after school that day she asked custodian Moises Gonzalez (Gonzalez) if he could unlock the door to Olivarez's classroom because a parent helper had expressed concern about the class. Gonzalez opened the door for Padilla. Gonzalez and Padilla both testified they entered the room together and left after a few minutes without taking anything from the room.

Bowers testified she heard reports that were inconsistent with Padilla's account of these events. Per Bowers' testimony, DH approached her in the West Creek office on the morning of May 4, 2016, and told her SC had pushed him and Padilla was upset over SC's actions. DH

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<sup>5</sup> At hearing, the parties referred to the students by only their initials to protect their privacy. We do the same.

had scratches on his arms and legs. Around the same time, Vice Principal Alicia Tuttle (Tuttle) informed Bowers that Olivarez had reported seeing Padilla yelling at and shaking SC. Bowers walked DH back to his classroom and then spoke to Olivarez, after which she asked him to draft a written statement of what he had witnessed.

Olivarez e-mailed his statement to Bowers that afternoon. According to the statement, Padilla yelled at and gestured aggressively at SC before physically moving another student towards SC and allowing him to push SC. When it appeared that SC intended to push the student back, Padilla grabbed SC by the arm, shoved him, and said “don’t you even think about it, see you are in trouble now.” Olivarez stated he then stepped in between Padilla and SC, causing Padilla to release SC.

According to the statement, Olivarez brought SC to his classroom with his other students. Padilla entered his classroom about 15 minutes later yelling about how she wanted SC to be referred to the office for discipline. She then announced that the computers in Olivarez’s classroom were hers and that she wanted to collect them. Olivarez stopped the lesson he was teaching with the computers and gave them to Padilla.

#### The District’s Investigations and Padilla’s Administrative Leave

Following receipt of Olivarez’s statement, Bowers reported the incident to the San Bernardino Sheriff’s Department.<sup>6</sup> Bowers contacted the District’s Child Welfare and Attendance Officer, Bruce Livingston (Livingston), and then-Chief Personnel Officer Todd Beal (Beal) for further instructions. Bowers also collected statements from three to four

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<sup>6</sup> Although Bowers received a matter number from the Sheriff’s Department, she never received a police report.

students, all of whom corroborated Olivarez's account of the incident.<sup>7</sup> Bowers estimated there were around five classes lining up in the area of the altercation at the time, but she did not feel the need to gather more statements since all of the ones she had obtained were consistent. She provided Beal with all of the materials she had gathered about the incident.

According to Bowers' testimony, at some point after the May 4, 2016 incident, she heard a report that Padilla and Gonzalez had been spotted outside Olivarez's classroom on the same day. Bowers spoke to Gonzalez, who said that Padilla had requested access to the classroom. Gonzalez admitted to unlocking the door for Padilla and then waiting outside. Bowers later heard from Tuttle that Gonzalez told her he went inside the classroom with Padilla. Bowers testified that Gonzalez had expressed a reluctance to be involved in the matter out of fear someone would accuse him of stealing.

The District decided to hire an outside investigator to look into the altercation between Padilla and SC. The District asked its legal counsel to conduct the investigation, and Brooke Jimenez (Jimenez) was selected as the investigator.

On May 6, 2016, the District placed Padilla on administrative leave. One of the conditions of her leave was that Padilla not enter the West Creek campus. Notwithstanding this prohibition, Padilla went to the campus area on June 2, 2016, the last day of the 2015-2016 school year. Padilla testified that she was to meet a colleague and friend after school. While she was waiting, she saw Gonzalez. She waved to Gonzalez and said, "Hey, Moises, how are you doing?" Later, she saw Gonzalez's car in the parking lot and left him a note apologizing for his involvement in the District's investigation.

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<sup>7</sup> The students' statements were not admitted as evidence in this case.

### Level Two and Three Grievance Responses

On May 13, 2016, Bowers responded to the grievance at level two with a letter stating Padilla would not receive the first grade assignment because she did not meet the school's needs. On May 31, 2016, Padilla advanced the grievance to level three. On August 29, 2016, Beal denied the grievance on the grounds that Bowers had not promised the position to Padilla and Padilla had failed to attend a scheduled interview for the position. Padilla then escalated the grievance to level four.

### The Investigator's Findings

As part of the District's investigation, Jimenez interviewed Padilla on August 30, 2016. Also present at the interview were Beal, a representative from the Adelanto District Teachers' Association, and a private attorney representing Padilla (telephonically). Beal testified that Jimenez also interviewed Olivarez, Bowers, other West Creek employees, and some West Creek students. At the end of the investigation, Jimenez—who did not testify—verbally informed Beal that her investigation confirmed the truth of the allegations that Padilla had yelled at and shaken SC.

### Level Four Grievance Meeting

On October 18, 2016, Padilla presented her grievance to the District's governing board. Subsequently, Beal drafted a letter to Padilla dated October 24, 2016, stating that the governing board had sustained her grievance and that she would be assigned to a first grade class for the 2017-2018 school year. For reasons that are not in the record, Padilla did not receive the letter at or around that time.

### The Notice of Unprofessional Conduct

On or around October 31, 2016, the District issued Padilla the Notice. The Notice stated the findings of the District's investigation. Specifically, the District concluded that: (1) on May 4, 2016, Padilla yelled at and shook SC, yelled at Olivarez in front of his class, and entered Olivarez's classroom after school without permission; (2) several items were missing from the classroom the following day; (3) Padilla violated the terms of her administrative leave by entering the West Creek campus on June 2, 2016 and communicating with Gonzalez inappropriately; and (4) Padilla was dishonest about her conduct on May 4, 2016 and June 2, 2016.

The Notice also contains allegations dating back to the 2014-2015 school year concerning Padilla's interactions with parents, students, and other teachers. Bowers testified that she had counseled Padilla about these interactions, though Padilla denied ever being counseled. The District attached multiple supporting documents to the Notice, including declarations from Bowers, Tuttle, Olivarez, and another West Creek employee. The Notice did not include statements from Padilla, Gonzalez, or any students.

Finally, the Notice outlined a "Plan of Assistance" with specific directives for Padilla to correct her behavior, and notified her that failure to do so could subject her to disciplinary action, including dismissal. The Notice provided Padilla with ten days to respond, at which point the District would place both the Notice and the Response in her personnel file. The record does not contain evidence that Padilla submitted a response to the Notice.

### Level Four Grievance Response

On December 13, 2016, Padilla e-mailed the governing board and stated that she had not received a response to her level four grievance. The next day, Beal personally delivered

the October 24, 2016 letter to Padilla, informing her she would receive the first grade assignment as requested. At hearing, Beal could not recall why the District had not provided the letter earlier. The District subsequently assigned Padilla to teach a first grade class at West Creek for the 2017-2018 school year.

### DISCUSSION

As a preliminary matter, the District argues that we should disregard Padilla's exceptions in their entirety for their failure to comply with PERB Regulation 32300.<sup>8</sup> PERB Regulation 32300 requires a statement of exceptions filed with the Board to identify the page or part of the decision to which the exception is taken, state the grounds for each exception, and designate by page citation or exhibit number the portions of the record, if any, upon which the party relies for each exception. (PERB Reg. 32300, subd. (a).) While Padilla's exceptions do not cite to relevant portions of the record, they do identify the portions of the proposed decision to which she excepts and the reasons for each exception, and often describe the evidence (or lack thereof) that supports the exception. We therefore exercise our discretion to address her exceptions despite their technical non-compliance with Regulation 32300. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, pp. 6-7; *Los Angeles Unified School District* (2014) PERB Decision No. 2390, pp. 9-10.)

Though we exercise our discretion to address Padilla's exceptions, we are not compelled to consider arguments the ALJ has already adequately addressed. (*Hartnell Community College District* (2018) PERB Decision No. 2567, p. 3.) The Board also need not address alleged errors that would not impact the outcome. (*Ibid.*)

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



EERA prohibits employers from retaliating or discriminating against employees because of their exercise of protected rights under the Act. (EERA, § 3453.5, subd. (a).) To demonstrate that an employer has discriminated or retaliated against an employee in violation of section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), pp. 6-8.) The ALJ found that although Padilla satisfied the first three elements, she failed to state a prima facie claim of retaliation because she did not present sufficient evidence of the District's unlawful motive in issuing her the Notice.

Unlawful motive is the required nexus between the employee's protected activity and the adverse action. A charging party may establish unlawful motive by either direct or circumstantial evidence. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 21; see *Novato, supra*, PERB Decision No. 210, p. 6.) Timing of the employer's action in proximity to the protected conduct may create an inference of unlawful motivation, but it is not alone determinative. (*Los Angeles Unified School District* (2016) PERB Decision No. 2479 (*Los Angeles Unified*), adopting proposed decision at p. 20.) Here, the ALJ correctly found that the District's initiation of its investigation into Padilla's alleged misconduct the day after she filed the grievance, and issuance of the Notice 13 days after her fourth level grievance meeting with the District's governing board, supported an inference that the Notice was motivated by her protected grievance activity.

In addition to temporal proximity, a charging party must also present direct or circumstantial evidence of one or more other indicators of unlawful intent—what we often

refer to as “nexus factors”—to state a prima facie claim for retaliation. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 10-11; *Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 11.) The employer’s cursory or limited investigation of an employee’s alleged misconduct is one such factor. (*Los Angeles Unified, supra*, PERB Decision No. 2479, pp. 21-22; *City of Torrance* (2008) PERB Decision No. 1971-M, pp. 17-19; see *County of Riverside* (2009) PERB Decision No. 2090-M, pp. 37-38 [employer’s failure to inquire into readily available sources of information supported a finding that its investigation was cursory].) Another factor tending to show discrimination is an employer offering reasons that are exaggerated, inconsistent, or vague. (*Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, p. 16.)

As the ALJ correctly noted, lack of just cause for a disciplinary action is not necessarily tantamount to unlawful intent. As we stated in *Moreland Elementary School District* (1982) PERB Decision No. 227, “[d]isciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board is therefore without power to remedy.” (*Id.* at p. 15; see *McFarland Unified School Dist. v. PERB* (1991) 228 Cal.App.3d 166, 169 [neither PERB nor the courts can review the sufficiency of cause for denying tenure].) “Once PERB determines that the employer did not take action for an unlawful reason, its inquiry is at an end; PERB has no authority to determine whether adverse action not motivated by protected activity was just or proper.” (*Santa Ana Unified School District* (2012) PERB Decision No. 2235, p. 14.) Thus, PERB’s task is to ascertain whether the District issued Padilla the Notice because of her exercise of protected rights under EERA, i.e., filing and pursuing the reassignment grievance. Although our task is not to determine whether the District had just

cause to issue Padilla the Notice, we nonetheless must consider evidence of the alleged wrongdoing in order to determine if the employer exaggerated or otherwise mischaracterized what occurred, thereby evidencing an unlawful motivation.

Padilla argues that the District's investigation was inadequate because the evidence gathered in the investigation failed to prove she engaged in the conduct alleged in the Notice. In so arguing, Padilla has also raised a claim that the District gave an exaggerated justification for its action.

In *Los Angeles Unified*, the employee argued that his employer failed to conduct an adequate investigation into the incident that precipitated the employee's termination, in part because the employer did not interview all of the students who were in the classroom at the time. (*Los Angeles Unified, supra*, PERB Decision No. 2479, p. 21.) The Board concluded that the employer's investigation, which included information from two law enforcement agencies, two licensed mental health professionals, and two experienced administrators, was not perfunctory simply because the employer did not interview all of the students who were present in the employee's classroom during the event in question. (*Id.* at pp. 21-22.)

Similar to *Los Angeles Unified*, the record here supports the ALJ's conclusion that the District, both on its own and through its outside investigator, adequately investigated the May 4, 2016 altercation that led it to issue Padilla the Notice. The morning of the incident, Bowers asked Olivarez for a written statement concerning what he had witnessed. Olivarez e-mailed the statement to Bowers that afternoon. Bowers then contacted the San Bernardino Sheriff's Department, Livingston, and Beal. She also collected statements from three or four students, all of whom corroborated the incident as Olivarez described it, and forwarded all information she had gathered about the incident to Beal. Beal, in turn, hired an outside

investigator to research the matter. The investigator interviewed Padilla, Olivarez, Gonzalez, Bowers, other West Creek employees, and West Creek students. Along with the District's reporting to law enforcement and its methodical investigation including interviews of multiple witnesses, the six-month plus span between the May 4, 2016 incident and the issuance of the Notice further suggests the District's investigation was neither cursory nor rushed.

Furthermore, contrary to Padilla's contention, the District's investigation was adequate even though it may have relied in part on hearsay statements. In determining whether Padilla established a prima facie case, we are not concerned with the truth of the witness' statements to District investigators, that is, whether the May 4, 2016 incident actually occurred as Olivarez and the student witnesses alleged.<sup>9</sup> The pertinent inquiry for the Board is whether the District's investigation was perfunctory, cursory, or inadequate under the circumstances. (*Los Angeles Unified, supra*, PERB Decision No. 2479, pp. 21-22.) Based on our review, the record supports the ALJ's finding that the District met with all relevant individuals inclusive of students, administrators, and staff, including Gonzalez, a potentially exculpatory witness as to the charge of theft against Padilla, before concluding the Notice was warranted. (Proposed decision, p. 19.) Bowers also testified that none of the people she spoke with contradicted Olivarez's account of the May 4, 2016 incident, and she had no reason to believe they were being untruthful. Thus, the fact that some of the statements upon which the District relied in issuing the Notice were hearsay does not render the investigation cursory, so as to support an inference of unlawful motivation. (See *Escondido Union Elementary School District* (2009) PERB Decision No. 2019, pp. 17-19 [charging party has burden to produce evidence showing

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<sup>9</sup> The reliability of statements relied upon by the employer is one consideration in determining whether the employer proved its affirmative defense that it would have taken the same adverse action in the absence of the employee's protected activity. (*Los Angeles Unified, supra*, PERB Decision No. 2479, p. 30.)

the decisionmaker had reason to be suspicious of the credibility of reports of the employee's alleged misconduct, and therefore should have conducted an independent inquiry into the allegations].) Nor has Padilla shown by a preponderance of the evidence that the District exaggerated the allegations against her.

Thus, although the ALJ found the timing of the District's issuance of the Notice coincided with events relating to Padilla's grievance, we conclude that he correctly determined Padilla did not prove her prima facie case of retaliation because she did not establish that her protected activity was a motivating factor in the District's issuance of the Notice.<sup>10</sup>

#### ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-6240-E are DISMISSED.

Members Krantz and Paulson joined in this Decision.

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<sup>10</sup> Because Padilla failed to prove her prima facie case, we need not address whether the District proved its affirmative defense that it would have issued Padilla the Notice absent her protected activity. We note, however, that an employer may not rely solely on hearsay evidence to prove its affirmative defense under *Novato*. (*County of Orange* (2018) PERB Decision No. 2611-M, p. 20; *Palo Verde Unified School District, supra*, PERB Decision No. 2337, p. 19; *Escondido Union Elementary School District, supra*, PERB Decision No. 2019, p. 23.)





**STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD**

TERESA PADILLA,

Charging Party,

v.

ADELANTO ELEMENTARY SCHOOL  
DISTRICT,

Respondent.

UNFAIR PRACTICE  
CASE NO. LA-CE-6240-E

PROPOSED DECISION  
(May 25, 2018)

Appearances: Teresa Padilla, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo, by Mark W. Thomson and Lena Y. Smith, Attorneys, for Adelanto Elementary School District.

Before Eric J. Cu, Administrative Law Judge.

**INTRODUCTION**

In this case, a public school employee accuses her public school employer of issuing her a Notice of Unprofessional Conduct because she filed a grievance. The employer denies any violation.

**PROCEDURAL HISTORY**

Teresa Padilla filed an unfair practice charge against Adelanto Elementary School District (District) on April 27, 2017. Padilla accused the District of violating the Educational Employment Relations Act (EERA)<sup>1</sup> and the Education Code by issuing her a “Notice of Unprofessional Conduct Pursuant to Education Code Section 44938” (Notice) in retaliation for filing a grievance and also by failing to provide information requested by her union. On July 25, 2017, Padilla withdrew the allegations about the union’s information request.

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq.

On July 28, 2017, the Public Employment Relations Board (PERB or Board) Office of the General Counsel issued a complaint alleging that the District committed a violation under EERA section 3543.5, subdivision (a), by issuing the Notice in response to Padilla's grievance activity. The District filed an answer to the complaint on August 25, 2017, admitting that filing the grievance was protected under EERA, but denying that it took any adverse actions against Padilla because of that grievance. The District also asserted multiple affirmative defenses.

An informal settlement conference was scheduled but not held. A formal hearing was held on February 12, 13, and March 5, 2018. During the hearing, Padilla confirmed that, within the context of this case, she only intended to litigate the issues alleged in the PERB complaint. Padilla affirmatively stated that she did not intend on litigating whether the District had interfered with her right to participate in the grievance process.

The parties submitted closing briefs on May 7, 2018.<sup>2</sup> At that point, the record was considered closed and submitted for decision.

### FINDINGS OF FACT

#### The Parties

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). Padilla is a public school employee within the meaning of EERA section 3540.1, subdivision (j). She has been employed as a teacher at the District's West Creek school site since at least the 2014-2015 school year.

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<sup>2</sup> Padilla attached documents to her closing brief that were not admitted as exhibits or discussed during the formal hearing. The parties were informed during the hearing that any documents they wanted considered as evidence in this case would have to be offered and admitted during the course of the hearing. Padilla's later-submitted documents will therefore not be considered.



## The Collective Bargaining Agreement

District teachers and other certificated employees are represented by the Adelanto District Teachers Association (Association). During the 2015-2016 school year, the District and the Association were parties to a collective bargaining agreement (Agreement) governing certain terms and conditions of employment for represented employees.

Under Article 20, vacancies that arise during the school year are posted internally for seven days. Interested unit members may apply. If the vacancy occurs after the first 20 instructional days of the school year, the District may select a unit member for the position, but that person will not assume the assignment until the following school year unless approved by the District. Typically, principals select the successful candidate for vacancies at their school sites. There is no fixed policy for interviewing the applicants before making a selection. Unsuccessful applicants may request a written explanation for the denial.

The Agreement also contains a five-level grievance procedure for resolving contract violation claims. At level one, the grievant meets with his or her immediate supervisor to discuss resolution. Unresolved grievances may advance to level two, where the same supervisor issues a written response within 10 days. The term “day” in the grievance article is defined as “a day in which the grievant is scheduled to render service to the DISTRICT.” At level three, the grievance is reviewed by the Superintendent or a designee, who then issues a written response within 10 days. As before, the response is due within 10 days. Typically, the Chief Personnel Officer (CPO) is responsible for level three decisions. If the grievance remains unresolved, the grievant may seek a level four meeting before the District’s Governing Board. The District must notify the grievant of the Governing Board’s decision, in writing,

within 10 days. Grievances that remain unresolved may be advanced to the final level, binding arbitration.

#### The First Grade Vacancy at West Creek

On or around October 30, 2015, a first grade position became vacant at West Creek. Padilla, who was teaching fourth grade at the time, expressed interest in the position. According to Padilla, she was the only unit member who applied. Padilla and West Creek principal Deborah Bowers met to discuss the position on or around December 4, 2015. According to Padilla, Bowers stated words to the effect of “being that this late in the year and past the first 20 days of school, you are the only one that applied and if you want the position, it will not be available until the next school year in August.” Padilla agreed it would be best if she did not leave her existing fourth grade class during the 2015-2016 school year. Padilla understood this exchange to mean that she would receive the first grade position at the start of the following school year. Bowers did not testify specifically about this meeting.

Bowers initially filled the vacant first grade position with substitute teachers, but in or around January 2016, she hired a teacher to fill the position until the end of the school year. Sometime in March 2016, Bowers contacted Padilla about interviewing for the position. The date and/or time selected for the interview was cancelled and changed at least once. Padilla does not recall whether it was her who cancelled the interview. She ultimately never participated in an interview. On April 29, 2016, Padilla saw a list of tentative staff assignments for the 2016-2017 school year and she was not listed as a first grade teacher.

### Padilla's Reassignment Grievance

On May 3, 2016, Padilla initiated a grievance alleging that Bowers had reneged on their earlier agreement about the first grade assignment (Reassignment Grievance). Bowers responded to the grievance, stating that she was still willing to interview Padilla for the position. Padilla advanced the grievance to level two based on her belief that Bowers had promised her the position and that no interview was necessary.

### The Altercation on May 4, 2016

On the morning of May 4, 2016, Padilla was involved in an altercation with a West Creek student. According to Padilla, the morning bell rang and students began lining up in front of their classrooms. Student DH accused another student, SC, of scratching him.<sup>3</sup> SC denied doing so and pushed DH. Padilla testified that she moved in between the two students and used her left arm to block them from fighting. SC attempted to push Padilla's arm away. According to Padilla, she did not have any other physical contact with SC. At hearing, Padilla explained that SC and DH had a history of fighting throughout the year. SC was on Padilla's "roll," meaning he was officially assigned to her classroom on the school's attendance sheets. However, the day before, Padilla placed SC on "class suspension," for fighting or other misconduct. This meant SC was moved to Room 905, the classroom next door to Padilla's, for May 3 and 4. At the time, substitute teacher Robert Olivarez was assigned to that classroom because the regular teacher, Ms. Bell, was on leave.<sup>4</sup>

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<sup>3</sup> Students were referred to only by their initials throughout the hearing. This proposed decision will continue that practice. No students testified at hearing.

<sup>4</sup> Neither Olivarez nor Bell testified.

Padilla testified that she entered Olivarez's classroom later that morning and asked to use the set of computers in his room. Padilla explained that she and Bell shared the machines and used them on alternating days. Olivarez's students were using the computers at the time and, according to Padilla, Olivarez said he did not know that it was Padilla's turn to use the computers. Padilla said that she would return for the computers later in the day.

After school that day, Padilla saw custodian Moises Gonzalez. She asked Gonzalez if he could let her into Room 905 because a parent volunteer expressed some concern about the class. At hearing, Padilla testified that she and Bell are close and that Bell had asked how things were going in her class while she was on leave. Bell did not specifically request that Padilla enter or inspect Room 905. Gonzalez agreed to open the classroom door.<sup>5</sup> Gonzalez and Padilla both testified that they entered the room together and left together after a few minutes. Neither took anything from the room.

Principal Bowers heard reports that were inconsistent with Padilla's account of these events. According to Bowers, student DH entered the West Creek office in the morning and told her that student SC had pushed him and that Padilla was upset by SC's actions. DH had scratches on his arms and legs. Around the same time, Vice Principal Alicia Tuttle informed Bowers that Olivarez had reported seeing Padilla yelling at and shaking SC. Bowers walked DH back to his assigned classroom and then spoke to Olivarez. Bowers then asked Olivarez to draft a written statement of what he witnessed.

Olivarez e-mailed his written statement to Bowers that afternoon. According to the statement, Padilla yelled and gestured aggressively at SC. She then physically moved another student towards SC and allowed him to push SC. When it appeared that SC intended to push

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<sup>5</sup> Classroom doors at West Creek automatically lock when they close. Teachers have the key to their own classroom, but not others.

back, Padilla grabbed SC by the arm, shoved him, and said “don’t you even think about it, see you are in trouble now.” According to the statement, Olivarez stepped between Padilla and SC, which precipitated Padilla to release SC. Afterwards, Olivarez brought SC into his classroom with his other students, as SC was assigned to his class that day. Around 15 minutes later, according to the statement, Padilla entered his classroom yelling about how she wanted SC to be referred to the office for discipline. Olivarez replied that someone from the office would call if they wanted SC to go there and requested that Padilla leave. Then, Padilla said that the computers in Olivarez’s class were hers and that she wanted to collect them. Olivarez discontinued the lesson he was teaching with the computers and gave them to Padilla.

After receiving Olivarez’s statement, Bowers contacted the San Bernardino Sheriff’s Department to report the incident between Padilla and SC. She also contacted both Bruce Livingston, the District’s Child Welfare and Attendance Officer, and then-CPO Todd Beal for further instructions.<sup>6</sup> Bowers also collected statements from between three and four students. According to Bowers, the students corroborated what Olivarez had said about the encounter between Padilla and SC. No student statements were included as part of the record in this case. Bowers estimated that there were around five classes lining up in the area of the altercation at the time, but she did not feel the need to gather additional statements, since all of the statements she collected were consistent. Bowers provided all of the materials she gathered about the incident to Beal. Later in the day, Bowers heard from the Sheriff’s Department that they had contacted SC’s family. Bowers was provided with a matter number from the Sheriff’s Department, but did not see any police report.

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<sup>6</sup> Beal has since left the District. He testified pursuant to subpoena. Livingston did not testify.

Bowers later heard a report that Padilla and Gonzalez, the custodian, were seen outside Room 905. Bowers met with Gonzalez. According to Bowers, he said that Padilla requested to enter the classroom. Bowers said that Gonzalez admitted to letting Padilla into the room and that he waited outside. Bowers later heard from Vice Principal Tuttle that Gonzalez told her that he went inside the classroom with Padilla. According to Bowers, Gonzalez expressed that he was reluctant to be involved in the matter out of fear that he might be accused of stealing something.

#### The District's Investigation and Padilla's Administrative Leave

After Bowers reported the altercation between SC and Padilla to Beal, he decided to hire an outside investigator to look into the matter. Beal explained that this investigation operated independently from the Sheriff's Department investigation. Brooke Jimenez, from the Atkinson, Andelson, Loya, Ruud & Romo law firm was selected as the investigator.<sup>7</sup>

On May 6, 2016, the District placed Padilla on paid administrative leave. As part of the conditions of her leave, Padilla was directed not to enter the premises of the West Creek campus. However, Padilla did go to the area of the campus on June 2, 2016, the last day of the 2015-2016 school year. Padilla said that she went to meet with a colleague and friend afterschool to celebrate the end of the school year. While she was waiting, she saw Gonzalez. Padilla testified that she waved to Gonzalez and said, "Hey, Moises, how are you doing?" Padilla eventually left the area because her friend was not ready to leave.

Padilla returned to West Creek that evening to meet her friend. While she was waiting, she saw Gonzalez's car in the parking lot and left him a note apologizing for the fact that he

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<sup>7</sup> Jimenez did not testify. A declaration bearing her name, but unsigned, was admitted as an exhibit. Much of the content in that declaration was not corroborated by other sources.

had become involved in the District's investigation. At hearing, Padilla said "there's a debate" over whether the West Creek parking lot is part of the campus or private property.

Gonzalez testified that he saw the note Padilla testified about affixed to his window. Attached to the same note was the message "I wuz not here. U did not C me" on what appeared to be a Post-It style note. Although neither message was signed, Gonzalez believed that both were from Padilla. Padilla denies authoring the latter message. Gonzalez later reported seeing Padilla in the area to Bowers. He also gave Bowers the notes that he found on his car. He testified that he did not speak with Padilla that day.

#### The Level Two and Three Grievance Responses

On May 13, 2016, Bowers responded to the Reassignment Grievance at level two stating that "[a] letter will be issued stating Teresa Padilla will not receive the 1st grade position due to not meeting the needs of the school." Bowers did in fact send such a letter to Padilla later that day. On May 31, 2016, Padilla advanced the grievance to level three.

On August 29, 2016, Beal responded to the Reassignment Grievance. Beal denied the grievance on the grounds that Bowers had not promised the position to Padilla and Padilla failed to attend an interview Bowers scheduled for the position. Padilla advanced the grievance to level four.

#### The Investigator's Findings

Padilla was interviewed on August 30, 2016, as part of the District's investigation into the allegations against her. Beal was present, as was a representative from the Association. A private attorney representing Padilla was also present, via telephone conference. According to Beal, Jimenez also interviewed Olivarez, Bowers, other West Creek employees, and some West Creek students.

At the end of the investigation, Jimenez informed Beal that her investigation confirmed that the allegations that Padilla had yelled at and shaken student SC were true. Jimenez reported her findings to Beal over the telephone and in person. He does not recall reviewing any declarations from Jimenez. At that point, Beal felt that corrective action was warranted based primarily on Padilla's interactions with students.

#### The Level Four Grievance Meeting

On October 18, 2016, Padilla presented her level four grievance to the Governing Board in a closed session meeting. Subsequently, Beal drafted a letter to Padilla, dated October 24, 2016, stating that the Governing Board had sustained her grievance and that she would be assigned a first grade class for the 2017-2018 school year. However, Padilla did not receive the letter at the time. There was no evidence that the Governing Board was notified of the incidents on May 4, 2016.

#### The Notice of Unprofessional Conduct

On or around October 31, 2016, the District issued Padilla the Notice, which was authored by Beal. In the document, the District concluded that Padilla did yell at and shake student SC on May 4, 2016. The District also concluded that Padilla yelled at substitute teacher Olivarez in front of his class that day and that she entered Room 905 after school without permission. According to the Notice, several items were missing from the classroom the following day. The Notice also states that Padilla violated the terms of her administrative leave by entering the West Creek Campus on June 2, 2016, and communicating with Gonzalez inappropriately. The Notice also states that Padilla was dishonest about her conduct on those dates.



The Notice also references prior behavior concerns dating back to the 2014-2015 school year, including yelling at parents of West Creek students, throwing students' backpacks out of her classroom, yelling at teachers and staff for parking in her preferred parking spot, and failing to return calls or e-mails from parents. At hearing, Bowers testified that she had previously counseled Padilla about her interactions with students, parents of students, and staff. According to Bowers, this was consistent with her practice of trying to address employee behavior issues locally, before reporting them to District administration.<sup>8</sup> Attached to the Notice were multiple supporting documents including declarations from Bowers, Tuttle, Olivarez, and another West Creek employee. It did not include statements from Padilla, Gonzalez, or any students.

The Notice included a "Plan of Assistance" with specific directives to correct her behavior. The Notice specified that failure to follow the directives could result in disciplinary action, including dismissal. Padilla was afforded 10 days to draft a response to the Notice, at which point both the Notice and the response would be placed in her official personnel file.

Padilla returned from administrative leave sometime in November 2016.

#### The Level Four Grievance Response

On December 13, 2016, Padilla e-mailed the Governing Board stating that she had not received any response to her level four grievance. The following day, Governing Board member Evelyn Glasper responded, stating that she would contact District administration about the grievance. Later that day, Beal personally delivered the October 24, 2016 letter to Padilla, informing her that she would be assigned to a first grade class as she had requested. Beal does

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<sup>8</sup> Padilla denies ever being counseled by Bowers.

not recall why the letter was not provided earlier. Padilla was thereafter assigned to a first grade class at West Creek for the 2017-2018 school year.

### ISSUE

Did the District issue Padilla the Notice in retaliation for filing and pursuing the Reassignment Grievance?

### CONCLUSIONS OF LAW

To demonstrate that a public school employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato USD*), pp. 6-8.) If the charging party satisfies all the elements of the prima facie case, the burden shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in protected activity. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 12, citing *Martori Bros. Dist. v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 721; *Trustees of the California State University* (2000) PERB Decision No. 1409-H; *Novato USD*.)

In this case, there is no dispute that Padilla's active participation in her Reassignment Grievance is protected under EERA. (See *Los Angeles Unified School District* (2012) PERB Decision No. 2244, pp. 4-5.) There is also no dispute that the District issued the Notice to Padilla on or around October 31, 2016. Although the District does not consider Notices of Unprofessional Conduct to be official forms of discipline, the Board has found similar

documents to be adverse employment actions under PERB retaliation analysis.

(*Rancho Santiago Community College District* (1986) PERB Decision No. 602, pp. 14-16, fn. 7 [Regarding a Notice of Unprofessional Conduct]; *City of Long Beach* (2008) PERB Decision No. 1977-M, p. 12, citing *Los Angeles Unified School District* (2007) PERB Decision No. 1930 [Regarding a counseling memo that threatens future discipline].) Finally, there is no dispute that then-CPO Beal, who authored the Notice, was aware of Padilla's grievance. Thus, the primary issue in contention here is whether Beal issued the Notice for unlawful reasons.

Direct evidence of retaliation is rarely available, so proof of a respondent's unlawful motive is usually demonstrated by circumstantial evidence and inferred from the record as a whole. (*Rio School District* (2008) PERB Decision No. 1986, p. 16, citing *Novato USD*, *supra*, PERB Decision No. 210.) The timing between protected activities and the adverse action is one important circumstantial factor when assessing the presence or absence of an unlawful motive. (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento SD*), proposed dec., p. 23) PERB may infer animus from adverse actions taken concurrent with or shortly after an employee's protected activities. On the other hand, this inference is weakened by the passage of time. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300 (*LAUSD*), dismissal ltr., p. 1.) In either case, timing alone is typically not determinative and other evidence is required to establish a prima facie case. (*Ibid.*)

#### 1. Timing as Evidence of Retaliation

Here, Padilla correctly points out that important developments in the District's decision to issue the Notice closely followed events in Padilla's Reassignment Grievance. For example, the District began investigating Padilla for misconduct on May 4, 2016, just one day after she

filed her written grievance with Bowers. Then, the District issued the Notice on October 31, 2016, less than two weeks from when the District's Governing Board heard Padilla's grievance at level four. The timing of these events supports Padilla's claim that issuing the Notice was unlawfully motivated. (See *Baker Valley Unified School District (2008)* PERB Decision No. 1993, pp. 8-9.)

2. Alleged Flaws in the District's Investigation

As further support for her retaliation claim, Padilla points to what she considers to be multiple deficiencies in the District's investigation into the allegations underlying the Notice. An employer's cursory or inadequate investigation into claims of misconduct may be evidence that adverse actions resulting from that investigation were unlawfully motivated. (*North Sacramento SD, supra*, PERB Decision No. 264, p. 26.)

In *County of Riverside (2009)* PERB Decision No. 2090-M, the Board found that an employer's "less than thorough investigation" suggested a retaliatory motive. There, the employer failed to produce any evidence supporting its claim that the accused employee had been dishonest. It also failed to explore fairly obvious sources in its investigation such as examining whether its security cameras recorded disputed events or listening to a recording where the employee allegedly made threatening statements. (*Id.* at pp. 37-38.) In *Jurupa Unified School District (2015)* PERB Decision No. 2450 (*Jurupa USD*), the Board inferred animus from the fact that the employer's investigator only considered statements corroborating an employee's alleged misconduct. The investigator declined to examine any positive comments it heard about the accused employee. (*Id.* at pp. 23, proposed dec., pp. 31-32.) In *City of Alhambra (2011)* PERB Decision No. 2161-M, the Board held that an employer's

failure to speak to people with first-hand knowledge of the alleged misconduct suggested that he was released from probation because of his protected activities. (*Id.* at pp. 10, 16.)

a. The Alleged Failure to Consider Evidence

Padilla contends that the District's investigation here was inadequate because the Notice failed to attach important documents. Among the documents that Padilla contends should have been included are notes and or statements from her own interview with the District's investigator, statements from West Creek custodian Gonzalez, and any reports from the Sheriff's Department. Initially, Padilla appears to conflate evidence attached to the *Notice* with evidence reviewed and considered during the District's *investigation*. No one from the District ever asserted that the documents attached to the *Notice* were intended to be a comprehensive summary of all materials it had gathered about Padilla and the allegations against her. Rather, the Notice appears to include only those documents that support the District's conclusions. Thus, I decline to infer any retaliatory motive from the District's failure to attach certain documents to the Notice. If Padilla believed that there were documents or other material that would tend to disprove the District's findings, she had the opportunity to include those documents in her response to the Notice. It is unclear whether she did so.

Turning next to the District's *investigation*, the record shows that the investigator did consider many of the issues raised in Padilla's closing brief. For example, it is undisputed that the investigator interviewed Padilla, with representation, about the events in question. Similarly, both Bowers and the District's investigator met with Gonzalez. Bowers testified that she later heard that Gonzalez gave conflicting information to another District administrator and expressed reluctance in getting further involved. Beal testified that Gonzalez was interviewed by the District's investigator, but Beal elected not to include a statement from

Gonzalez in the Notice because Gonzalez did not provide conclusive evidence to the investigator and did not respond to the investigator's efforts to contact him for more information. Gonzalez's conflicting statements and his general reluctance to be involved in the investigation are both plausible reasons for not including him in the process further.<sup>9</sup> Beal also said that he did not consider Gonzalez's statements to be a critical aspect of the investigation because Beal's own primary concern was Padilla's treatment of students.

Padilla is correct that District did not obtain a copy of the Sheriff's Department police report about the incident with SC during its investigation. As stated above, an employer's failure to examine known sources of exculpatory evidence during its investigation may suggest that adverse actions resulting from that investigation were unlawfully motivated. (*Jurupa USD, supra*, PERB Decision No. 2450, pp. 23, proposed dec., pp. 31-32.) Here, however, nothing in the record states or suggests that the materials in the police report would have provided any different information for the District's investigation. Bowers testified that she reported the incident to the Sheriff's Department. The information she provided was consistent with what she told Beal that same day. It was also consistent with what she later told the District's investigator during her interview. There was no evidence that the police report included anything that would contradict or clarify any of the conclusions in the District's investigation. Padilla herself does not identify anyone, other than herself, who witnessed the encounter and may have disputed the statements collected by either Bowers or the District's investigator. Therefore, I do not conclude that the District's failure to obtain the police report suggests that the Notice was issued in retaliation for her grievance.

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<sup>9</sup> Gonzalez's testimony, moreover, conflicts with Padilla's, about some of the events described in the Notice. For instance, Gonzalez testified that he and Padilla did not speak on June 2, 2016, while she was on administrative leave. Padilla, on the other hand, testified that she waved to Gonzalez and said, "Hey, Moises, how are you doing?" that day.

b. Alleged Problems with Olivarez's Statements

Padilla acknowledges that the District collected a statement from substitute teacher Olivarez during its investigation. On the afternoon of May 4, 2016, he e-mailed Bowers what he believes he saw during the encounter between Padilla and SC. Olivarez also provided a declaration that was attached to the Notice. Padilla contends that this is suspicious because the declaration contains far more detail than his initial statement. According to Padilla, Olivarez's later statement contained numerous exaggerations and falsifications. Even if this were true, I would not conclude that this demonstrates evidence of the District's retaliatory intent. There was no evidence that Olivarez knew about Padilla's grievance or took part in the District's decision to issue the Notice. There was also no evidence that anyone from the District directed Olivarez on what to include in either his statement or his declaration. Therefore, there is no basis for concluding that any differences in Olivarez's statements suggest that the District issued the Notice for retaliatory reasons. Finally, having reviewed both of the statement and the declaration, I find no substantial inconsistency in how Olivarez described describe Padilla's conduct.

Padilla also contends that the District's investigation was suspicious because it failed to direct Olivarez to report his description of Padilla's encounter with SC to law enforcement or other authorities as he was required to do under Penal Code section 11166.<sup>10</sup> This assertion is not supported by the record. No evidence was presented establishing whether Olivarez did or did not report the incident to the police or other authorities. At this stage, Padilla bears the burden of establishing all of the elements of her retaliation case. (See PERB Regulation

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<sup>10</sup> Penal Code 11166, is part of the Child Abuse and Neglect Reporting Act (Penal Code, § 11164 et seq.) In general, this legislation requires individuals designated as "mandated reporters" to report known or suspected incidences of child abuse and neglect to law enforcement.

32178.) This includes proving the existence of all facts she contends demonstrates the District's unlawful motive.<sup>11</sup> Furthermore, even if Padilla's assertions were true, I would nevertheless find insufficient evidence of any retaliatory motive. Olivarez reported the incident to Bowers, who directed him to draft a written statement. Afterwards, Bowers reported what she heard to the Sheriff's Department, the District's Child Welfare and Attendance Officer, and to Beal. The description of the incident was reported consistently throughout this process. If Olivarez or other individuals at the District failed to comply with other parts of any reporting requirement in Penal Code section 11166, I find nothing in the record that suggests that the failure suggests any animus towards Padilla's grievance activity. (See *Pasadena Unified School District (1999) PERB Decision No. 1331 (Pasadena USD)*, warning ltr., p. 4 [holding that the failure to obtain a child abuse report about claimed misconduct was not evidence that discipline based on those claims were unlawfully motivated].)

c. Failure to Interview Additional Student Witnesses

Finally, Padilla argues that the District's investigation into her altercation with SC was flawed because it failed to take statements from more potential witnesses. According to Padilla, there were upwards of 100 students in the area at the time. Bowers took statements from only three or four students shortly after the incident. The District's investigator also

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<sup>11</sup> Padilla makes numerous other assertions in her closing brief that were not supported by any facts in the record. For example, she states that no West Creek third grade students observed Padilla's encounter with SC. But no witness, document, or other evidence established what those students saw at the time. Padilla also contends that no students spoke to the Sheriff's Department about the incident. Once again, this assertion was not supported by any evidence. She also contends that, had the Sheriff's Department heard of the allegations, they would have arrested her. I find this conclusion to be speculative and lacking support. Nothing in the record specifies under what circumstances the Sheriff's Department would take a suspect into custody.



spoke with a limited number of students. Padilla contends that it was unreasonable for the District not to interview more students. However, I find insufficient evidence of any retaliatory motive. Unlike in *City of Alhambra, supra*, PERB Decision No. 2161-M, Bowers did meet with eyewitnesses to the incident with the student, including Olivarez, DH, as well as other students. This case is also different from *Jurupa USD, supra*, PERB Decision No. 2450, where the employer intentionally declined to collect statements from individuals who appeared to have exculpatory evidence about the employee. Here, Bowers testified that none of the people she spoke to contradicted what Olivarez originally reported to her. Nor did Bowers have any reason to believe that Olivarez or the other people she spoke with were being untruthful. There was also no evidence presented that the District's investigator failed to meet with pertinent people or otherwise investigated the incident only superficially. According to Beal, the investigator met with students, staff, and administrators and concluded that Padilla had inappropriate contact with student SC. Beal testified that the investigator's conclusions were the main reason he decided to issue the Notice.

I understand that Padilla vehemently disputes the conclusions reached in the Notice. However, PERB's inquiry into the employer's investigation practices is not to determine whether there was "just cause" for taking action against the employee. (See *Moreland Elementary School District* (1982) PERB Decision No. 227 (*Moreland ESD*), p. 15.) The Board has long held that the lack of just cause is not synonymous with animus towards protected activities. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561, proposed dec., p. 42, citing *Moreland ESD*, p. 15.) According to the Board:

Disciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by EERA and which this Board is therefore without power to remedy.

(*Moreland USD*, p. 15.) In other words, the central question here is whether the District's investigation suggests that the Notice was motivated by Padilla's grievance activity. In this case, Padilla does not identify anyone, aside from herself, who witnessed her encounter with SC and may have disputed the statements collected by either Bowers or the District's investigator.<sup>12</sup> There is insufficient evidence in the record to conclude that the District harbored animus towards Padilla's grievance activity simply because it credited other witness statements over Padilla's. Accordingly, I reject Padilla's argument that District's investigation here suggests animus towards her grievance activity.

### 3. The District's Failure to Follow the Grievance Procedure

Padilla also contends that the District's failure to follow the grievance response timelines in the Agreement is further evidence that the Notice was issued for retaliatory reasons. PERB 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 ltr., p. 4.) To establish such an inference, the charging party must demonstrate what the respondent's practice is and how the respondent deviated from that practice. (*Id.*; see also *Los Angeles Unified School District* (2014) PERB Decision No. 2390, pp. 11-12, proposed dec., p. 16.)

Furthermore, not all policy deviations suggest an unlawful motive. (*Regents of the University of California* (2012) PERB Decision No. 2302-H (*UC Regents*), proposed dec., pp. 25-26, fn. 7.) For instance, in *Jurupa USD, supra*, PERB Decision No. 2450, an employee

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<sup>12</sup> Padilla had two colleagues testify generally that they never witnessed her being angry or violent towards others, but this is insufficient to demonstrate that the District engaged in a cursory investigation that suggests retaliation for Padilla's grievance activity. Neither witness testified that they saw the incident in question.

alleged that his employer departed from its dismissal procedures by failing to provide a signed verification attesting to the accuracy of the charges in its dismissal notice. (*Id.* at proposed dec., p. 15.) PERB declined to infer any retaliatory motive in that case because the omission appeared to be merely an oversight, which was eventually corrected. Furthermore, the employer's omission had no impact on the employee's ability to respond to, or otherwise participate in the dismissal process. (*Id.* at proposed dec., pp. 32-33, fn. 14; see also *UC Regents, supra*, PERB Decision No. 2302-H, proposed dec., pp. 25-26, fn. 7 [holding record-keeping errors in the self-evaluation process was not evidence of unlawful motive where the evaluations had no bearing on the discipline taken against the employee].)

In *Rio School District* (2015) PERB Decision No. 2449, an employee alleged that her employer deviated from existing procedures when handling a complaint from a member of the community. PERB once again found no evidence of an unlawful motive because there was no showing that the employer considered the community complaint when deciding to take the adverse action in that case. (*Id.* at proposed dec., pp. 31-32; see also *Pasadena USD, supra*, PERB Decision No. 1331, warning ltr., p. 4.)

In *Omnitrans* (2008) PERB Decision No. 1996-M, the Board did find evidence of retaliation where the employer disciplined an employee for failing to comply with outdated, more burdensome, notice requirements when requesting time off for union leave. The Board rejected the employer's assertion using the older standard was simply a mistake because there was no evidence that it corrected itself after learning of the discrepancy. (*Id.* at pp. 22-23.)

In this case, Padilla contends that the District's level four grievance response was late by two months. The District was required to provide that response to Padilla within 10 days from her grievance meeting with the Governing Board. That meeting took place on October

18, 2016, but the District did not provide its level four response to Padilla until December 14, 2016. Nevertheless, I decline to find that this deviation from the grievance procedure suggests that the District issued Padilla the Notice for retaliatory reasons. Although Beal was responsible for issuing both the Governing Board's grievance response and the Notice, the two matters concerned distinct issues, i.e., the grievance was about Padilla's request for a first grade class assignment whereas the Notice involved Padilla's alleged encounter with student SC and other behavior issues. In addition, there was no evidence that key people providing the thrust behind the investigation, such as Olivarez, students DH and SC, or the District's investigator, even knew about the grievance. Likewise, there was no evidence that the Governing Board, who heard and decided the grievance at level four, knew about the investigation or that Beal was contemplating corrective action against Padilla.

Moreover, I find that the District's initial failure to provide the level four response to be inconsequential to either the grievance or the Notice. The error was eventually corrected and Padilla was informed that she prevailed in her grievance and would receive her desired assignment well before the assignment took effect. And, as in *Jurupa USD, supra*, PERB Decision No. 2450, there was no showing that the delay in the grievance response adversely affected Padilla in relation to the Notice. Unlike in *Omnitrans, supra*, PERB Decision No. 1996-M, the record shows that the District took steps to correct the deviation immediately after Padilla notified the Governing Board that she did not receive the response.<sup>13</sup> Under these circumstances, I find no inference of a retaliatory motive.

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<sup>13</sup> It is also worth noting that Padilla's assertions that the level four response was two months late appears to be an exaggeration. Although the grievance procedure requires the District to notify a grievant of its level four response within 10 days, the term "days" does not include time in which the grievant is not scheduled to render service to the District. Here, the District Governing Board reached its decision in October 2016, while Padilla was on

5. Conclusion

In this case, the only evidence of a retaliatory motive is the close timing between events in Padilla's grievance and the decision to issue the Notice. As stated above, temporal proximity is insufficient to establish that the employer's actions were unlawfully motivated. (*LAUSD, supra*, PERB Decision No. 1300, dismissal ltr., p. 1.) Therefore, Padilla has not met her burden of proving the elements of her prima facie case for retaliation. Her claim is accordingly 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-6240-E, *Teresa Padilla v. Adelanto Elementary School District*, are hereby DISMISSED.

Right to Appeal

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

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

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administrative leave. She did not return to service until sometime in November. According to the teacher calendar that is attached as an appendix to the Agreement, there are six holidays in that month.

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

A document is considered “filed” when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered “filed” when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, 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 Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)