STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LORI E. EDWARDS et al., Charging Parties, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6082-E PERB Decision No. 2633 March 8, 2019

Appearance: Lori E. Edwards, on behalf of Lori Edwards, Kim Rosales, Victoria Pickett and David Pickett; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Lake Elsinore Unified School District.

Before Banks, Shiners, and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Lori Edwards,[1] Kim Rosales, Victoria Pickett and David Pickett (collectively, Charging Parties) to the proposed decision (attached) of a PERB administrative

[1] On November 8, 2018, Edwards filed a request to withdraw from this case pursuant to a settlement agreement reached between her and the District. On December 3, 2018, Edwards filed a "Motion to Review Settlement Agreement Due to EERA Violations and to Compel the [Respondent] to Lawful [sic] Comply with the Terms and Conditions of the Agreement." (Some capitalization omitted.)

Under section 3541.5, subdivision (b), of the Educational Employment Relations Act (EERA), the Board "shall not have the authority to enforce agreements between the parties, and shall not issue a complaint on any charge based on alleged violation of any agreement that would not also constitute an unfair practice under this chapter." (EERA is codified at Government Code section 3540 et seq.) Because the Board has no power to enforce the disputed settlement agreement in this matter, we cannot act on Edwards' Motion. Further, in light of the concerns raised by her Motion, the Board denies Edwards' request to withdraw from this case. (See *ABC Unified School District* (1991) PERB Decision No. 831b, p. 3 [the Board itself has discretion to grant or deny a withdrawal request].)

law judge (ALJ), dismissing the complaint and underlying unfair practice charge against the Lake Elsinore Unified School District (District). The complaint alleged that the District violated EERA by depriving Charging Parties of the opportunity to teach either kindergarten or sixth grade classes during the 2015-2016 school year, while allowing four other employees to swap their kindergarten and sixth grade teaching assignments, in retaliation for Charging Parties' protected activities.

The Board has reviewed the hearing record and exhibits, the proposed decision, and Charging Parties' exceptions in light of applicable law.[2] Based on this review, we find the ALJ's findings of fact are adequately supported by the record and his conclusions of law are generally well-reasoned and in accordance with applicable law. Except where otherwise noted, we adopt the proposed decision as the decision of the Board itself, subject to the discussion below of Charging Parties' exceptions.

DISCUSSION

Factual and Procedural Background

The relevant facts are adequately set forth in the proposed decision and need not be repeated in detail here. Charging Parties, who are teachers at the Lakeland Village School (LVS) and employed by the District, claim disparate treatment, both as an adverse action and as evidence of the District's unlawful motive. They allege that, because of their protected activity, they were denied opportunities to change teaching assignments, which were

[2] In *Lake Elsinore Unified School District* (2017) PERB Order No. Ad-446, we found no good cause to excuse the District's untimely response to Charging Parties' exceptions, and in *Lake Elsinore Unified School District* (2017) PERB Order No. Ad-449, we found no good cause to consider a late-filed amendment to Charging Parties' exceptions, after determining Charging Parties' appeal from that administrative determination was itself untimely. Accordingly, the Board has considered neither the District's response and supporting brief nor Charging Parties' attempted amendment to their exceptions in deciding this matter.

guaranteed by the applicable collective bargaining agreement (CBA) and established practice, and which were afforded to other employees who had not engaged in protected activity.[3] In its answer to the complaint and in proceedings before the ALJ, the District denied any wrongdoing and averred that its conduct was fully authorized by established practice and/or by the CBA.

Following a three-day hearing and briefing by the parties, the ALJ issued his proposed decision, which considered three issues: (1) whether the complaint must be dismissed because Charging Parties, in their capacity as employees, lack standing to allege that the District unilaterally altered the collectively-bargained procedures governing voluntary and involuntary reassignments and/or the established practice of employees swapping assignments; (2) whether to consider allegations, which were not included in the complaint, that Rosales faced hostile treatment from LVS Principal Nick Powers (Powers) after she testified in separate PERB proceedings; and (3) whether the District retaliated against Charging Parties because of their protected activity by depriving them of the opportunity to teach either kindergarten or sixth grade, while allowing four other employees to swap kindergarten and sixth grade teaching assignments for the 2015-2016 school year.[4]

[3] The CBA is between the District and the Lake Elsinore Teachers Association (Association or LETA), which is the exclusive representative of the District's certificated employees, including Charging Parties.

[4] The ALJ denied the District's renewed motion to dismiss for lack of standing, reasoning that the complaint did not allege a unilateral change theory, but retaliation by the District against Charging Parties in violation of EERA. To the extent Charging Parties' case turned on whether the District's conduct violated the CBA and/or departed from established practice, the ALJ reasoned that it was an isolated breach affecting only this case, rather than a unilateral change having a generalized effect or continuing impact on bargaining unit employees. The District has not excepted to this ruling, and it is therefore not before us.

The ALJ analyzed the complaint's retaliation allegation under *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), which requires the charging party to show that: (1) one or more employees exercised rights under EERA; (2) the employer knew of the protected activity; (3) the employer took adverse action against the employee(s); and (4) the employer took the action because of the protected activity. (*Id.* at p. 6.) At the hearing, the District conceded, and the ALJ found, that Charging Parties had participated in protected activity by serving as site representatives or alternative site representatives for the Association and by participating in prior unfair practice proceedings, and that District officials, including Powers, knew of Charging Parties' protected activity. At issue were whether the District had adversely affected Charging Parties' employment conditions by not posting the swapped assignments in violation of the CBA or established practice thereby denying them the opportunity to seek other teaching assignments and, if so, whether the District had taken such action because of Charging Parties' protected activity.

Relying on the language of the CBA and the testimony of District and Association witnesses, the ALJ found that the District's conduct neither violated the CBA nor departed from established practice. As noted in the proposed decision, the CBA speaks of "reassignments" (either voluntary or involuntary) only to fill "openings," meaning assignments that are unfilled by a unit employee. To fill an "opening," the District must first "fly" or post the position by notifying all bargaining unit employees at the site of the opening and providing at least five days for employees to apply for the position. By contrast, the practice of swapping assignments is not mentioned or governed by the CBA, but has been accepted for years by both

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(PERB Reg. 32300, subd. (c) [PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.].)

the District and the Association. District and Association witnesses uniformly testified that, unlike the contractual process for voluntary reassignments, swapping involves a request by two employees to trade assignments, which may be approved by the District without posting or opening up the affected assignments to other bargaining-unit employees.

The swaps at issue in this case involved fifth grade teacher Robyn Mulvanny swapping her assignment with sixth grade teacher Carrie Christy, and Danyelle LaCroix, who had been involuntarily reassigned to teach kindergarten, swapping her kindergarten assignment with Kimberle Larson in return for Larson's fourth grade assignment (hereafter, the Mulvanny/Christy and LaCroix/Larson swaps, respectively). The ALJ found that neither swap violated the CBA because, as a practice not governed by the CBA, the District had no obligation to post notice or otherwise inform Charging Parties before approving the swaps.[5]

The ALJ also found that the District had not enforced its swapping policy in a discriminatory fashion or treated Charging Parties any differently from other, similarly-situated employees because they had never asked to swap an assignment with another employee, and the District had never denied such a request or otherwise indicated that it would prevent

[5] The ALJ found that the District had failed to post notice to the entire school of a kindergarten opening before involuntarily reassigning LaCroix to that kindergarten assignment from her previous assignment as a third grade teacher. Kimberly Rosales, Victoria Pickett and David Pickett testified they did not know of the opening, and it is therefore likely that they also had no notice of the LaCroix/Larson swap either. However, once LaCroix had been involuntarily reassigned, there was no longer an open position and thus no obligation for the District to give notice that LaCroix intended to swap positions with Larson. Because the complaint and the evidence presented at hearing were concerned only with the swaps themselves, and not with the District's inadequate notice of LaCroix's prior involuntary reassignment, we decline to consider whether that contractual violation adversely affected Charging Parties' employment conditions.

Charging Parties from swapping assignments.[6] Because the ALJ dismissed the complaint's retaliation allegation for lack of evidence that Charging Parties had suffered any adverse action, the proposed decision did not consider whether Charging Parties had established the separate nexus requirement of the *Novato* test.

Charging Parties have filed 40 exceptions to the proposed decision, all of which we deny for one or more of the following reasons.

Non-Compliance with PERB Regulations

PERB Regulation 32300 requires exceptions to a proposed decision to: (1) include a statement of the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate the portions of the record relied upon; and (4) state the grounds for each exception. (PERB Reg. 32300, subd. (a)(1)-(4).) An exception not specifically urged is waived, pursuant to subdivision (c) of the regulation. Compliance with the regulation is required to afford the respondent and the Board an adequate opportunity to address the issues raised. (*Temecula Valley Unified School District* (1990) PERB Decision No. 836, pp. 2-3; see also *San Diego Community College District* (1983) PERB Decision No. 368.) Although California courts and PERB recognize a strong public policy favoring hearing cases on their merits and against depriving a party of the right of appeal because of technical noncompliance

[6] Alternatively, the ALJ found no evidence that the four positions swapped by other employees were objectively superior to, or more desirable than, Charging Parties' assignments. The ALJ reasoned that, in the absence of such evidence, the District's failure to post notice could not constitute an objectively adverse employment action within the meaning of PERB precedent, because, even assuming such failure prevented Charging Parties from bidding on or bumping into another position, the loss of that opportunity would not have resulted in an objectively adverse employment situation. For reasons explained below, we decline to adopt this alternative reasoning.

in matters of form (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 916), failure to comply with PERB Regulation 32300 can result in dismissal of the matter without review of the merits of the excepting party's claims. (See *California State Employees Association (O'Connell)* (1989) PERB Decision No. 726-H, p. 3; *Los Angeles Unified School District (Mindel)* (1989) PERB Decision No. 785.)

Although the Board reviews exceptions to a proposed decision de novo, it need not address arguments that have already been adequately addressed in the same case or that would not affect the result. (*Trustees of the California State University* (2014) PERB Decision No. 2400-H, pp. 2-3; *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3.) Simply reasserting factual or legal contentions raised before the ALJ, without identifying any specific error of fact, law, procedure or rationale to justify reversal, fails to comply with the regulation. (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278, pp. 2-3 (*San Bernardino City USD*); *County of San Diego* (2012) PERB Decision No. 2258-M, pp. 2-3 (*San Diego*); *Los Rios College Federation of Teachers (Sander, et al.)* (1995) PERB Decision No. 1111, pp. 6-7 (*Los Rios College Federation of Teachers*); *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S, pp. 2-3 (*Department of Youth Authority*).)

Stating the grounds for each exception means the excepting party must not only identify the purported error of fact, law, procedure or rationale, but *explain* its significance within the context of the case. For example, an exception to a factual finding must not only identify the page or part of the record relied upon to demonstrate the error, but also explain how correcting the error would *materially* alter the outcome of the Board's decision or order. (*State of*

California (Department of Mental Health, Department of Developmental Services) (2013) PERB Decision No. 2305a-S, p. 4, fn. 5.) Where the addition or correction of a particular factual finding would not alter the analysis or result, its misstatement or omission in a proposed decision is not grounds for reversal. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231a-M, pp. 7-8; see also Asimow, et al., Cal. Practice Guide: Administrative Law (The Rutter Group 2018) ¶ 13:520 et seq.)

Most of Charging Parties' exceptions must be rejected for failure to comply with the requirements of PERB Regulation 32300 and applicable decisional law. While each exception references a part of the proposed decision, Charging Parties have rarely identified the purported error of fact, law, procedure or rationale, or explained its significance within the context of the case by stating the specific grounds for reversal.

For example, exceptions 23 and 24 quibble with the ALJ's finding that a meeting regarding the LaCroix/Larson swap took place at 3:00 p.m. on August 31, 2015, as scheduled. Exception 23 asserts that Edwards waited "several hours" to attend the meeting, while exception 24 asserts this delay was part of the District's larger scheme to prevent Edwards from attending meetings regarding teacher swaps and from performing her duties as the Association's site representative. However, the portions of the record cited do not show that Powers or any other person acting on behalf of the District delayed or changed the meeting time to prevent Edwards from attending or intentionally blocked her from performing her duties as a site representative.

Exception 26 appears to restate Charging Parties' disagreement with the Association over the proper interpretation of the CBA. Like other exceptions, exception 26 fails to specify

the issue of procedure, fact, law or rationale to which the exception is taken and includes no explanation of its significance, i.e., fails to state the grounds for the exception.

Exception 29 cites to, but does not appear to dispute, the ALJ's finding that Charging Parties wanted to swap assignments because they thought they would be better suited to teach the other's assignment. Instead, this exception reiterates Charging Parties' contention that, absent changes in student enrollment or curricular need, swaps are forbidden by the CBA's provision that "an assignment shall continue." This exception fails to comply with the requirements of PERB's regulations, because it does not identify any specific issue of procedure, fact, law or rationale to which exception is taken or state the grounds for the exception. It also fails to explain why the Board should address an argument that has already been adequately addressed in the proposed decision or how, even assuming the exception has merit, correcting any asserted error would affect the result. (*San Bernardino City USD*, *supra*, PERB Decision No. 2278, at pp. 2-3; *San Diego*, *supra*, PERB Decision No. 2258-M, at pp. 2-3; *Los Rios College Federation of Teachers*, *supra*, PERB Decision No. 1111, at pp. 6-7; *Department of Youth Authority*, *supra*, PERB Decision No. 1080-S, at pp. 2-3.)

For the most part, Charging Parties' exceptions and supporting brief simply re-argue their case rather than identify any reversible errors in the proposed decision. In some instances, it is unclear whether Charging Parties are excepting to a passage from the proposed decision as factually, legally or procedurally incorrect, or whether they are citing to it as support for their case. For example, exceptions 24 and 31 appear to except to the ALJ's finding that Edwards discussed her disagreement with the swap with LaCroix and Larson before the meeting. According to Charging Parties, Edwards only spoke to LaCroix and Larson for two minutes before the meeting started and "could not [have] expressed much in

two minutes." Charging Parties do not identify any specific error of fact, law, procedure or rationale, nor explain how correcting this supposed error by the ALJ would alter the analysis or result in this case.

In similar fashion, exception 16 relies, in part, on testimony the ALJ excluded as objectionable. Charging Parties' exceptions do not challenge this or any other evidentiary ruling by the ALJ. Instead, they simply cite to a portion of the transcript containing objectionable testimony, without stating any specific issue of procedure, fact, law or rationale for the exception, or identifying any grounds for overruling the ALJ's decision to exclude the testimony as objectionable.

Because most of Charging Parties' exceptions either fail to comply, even minimally, with the requirements of PERB's regulations or are otherwise unintelligible, the remaining discussion focuses solely on those exceptions which attempt to address material issues in this case.

Assignment Swaps as an Extra-Contractual Established Practice

The ALJ found that the practice of swapping assignments was not included in the CBA and, consequently, Charging Parties' arguments based on the contractual provisions of Article 6 governing assignments and transfers were not persuasive evidence either of disparate treatment or of Charging Parties' asserted rights to notice of other employees' assignment swaps. Many of Charging Parties' exceptions take issue with the ALJ's findings and conclusions regarding the extra-contractual practice of swapping assignments. Exceptions 19 and 20 concern Edwards' disagreement with Mario Montano (Montano), a member of the Association's executive board, on whether the Mulvanny/Christy swap violated the CBA. Exception 22 also asserts, in conclusory fashion, that the District's failure to post a

kindergarten position to the entire school site was both a contract violation and an adverse action against the Charging Parties for participating in protected union activities. Exception 37 reiterates Charging Parties' contention that they were treated differently from other, similarly-situated employees with respect to assignment swaps, while exception 38 argues that the LaCroix and Larson assignments were vacant/open, and that the District failed to follow the contractual procedures for reassignments because it "did not open the kindergarten position to the rest of the staff."

Each of these exceptions reiterates Charging Parties' position that neither the CBA nor established practice authorized the Mulvanny/Christy swap without first posting the "opening" to all unit members at the applicable site, and that Powers' decision to approve the swap therefore violated the CBA. These exceptions do nothing, however, to undermine the testimony of both District and Association witnesses that the extra-contractual practice of swapping assignments is not subject to the posting requirement for voluntary reassignment found in Article 6 of the CBA.[7]

[7] Exception 25 concerns the ALJ's finding that the Association advised Edwards that the LaCroix/Larson and Mulvanny/Christy swaps did not violate the CBA. The evidence and argument included in this exception do not appear to dispute the ALJ's finding but instead assert that the Association's position demonstrates its president's animosity against Edwards for performing her duties as a site representative. Because these allegations are the subject of a separate unfair practice charge brought by Edwards against the Association, and because they do nothing to undermine the ALJ's finding that Charging Parties failed to prove the "adverse action" element of their case, they were properly excluded from consideration in this case.

Exception 21 reiterates, and seeks to renew Charging Parties' allegations in a separate unfair practice charge, that by the actions of Montano and LETA President Cavanaugh, LETA colluded with the District to violate Charging Parties' rights under EERA. Because the District is the only respondent named in the present complaint, and because exception 21 seeks to litigate issues included in a separate charge and/or to allege additional unlawful conduct by the District in collusion with the Association, without satisfying the requirements of PERB's

Although exception 30 cites to the ALJ's finding that Powers approved the LaCroix/Larson swap, it does not so much dispute the factual finding as contest whether Powers had the authority to approve the swap without violating the CBA. Charging Parties contend that the procedures for swapping require posting the opening to all unit members at the applicable site and following Articles 6.56.2 and established practice. According to Charging Parties, under the established practice, "a transfer of one of the 'voluntary change' (Article 6.5) Multiple Subject teachers, [in this case either Christy or Mulvanny,] needed to occur." Then, according to Charging Parties, the assignment must be opened up at the site to fill the curricular need, as required by Article 6.1.2 of the CBA. This interpretation conflicts with that of both the Association and the District, who negotiated the CBA and who uniformly testified that the contractual provisions governing voluntary reassignment do not apply to the extra-contractual practice of swapping assignments. Because Charging Parties have not shown how the proposed decision erred on this issue, we decline to disturb the ALJ's findings and conclusions regarding the meaning of the CBA and the established practice of swapping assignments.

Exception 37 challenges the ALJ's finding that none of the swapped positions were open because they were filled by teachers at the time of the swap. Charging Parties argue the kindergarten position that was the subject of the LaCroix/Larson swap was open. As support, they rely on testimony of Kip Meyer (Meyer), Assistant Superintendent of Personnel Services, explaining how the LaCroix/Larson swap transpired, that LaCroix "was in third grade, and there was an opening for kinder[garten]." They also rely on Edwards' testimony on direct

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unalleged violations doctrine, we deny Charging Parties' request to consider those separate allegations in this case and we likewise deny this exception.

examination that LaCroix "was being reassigned to kindergarten, which was the open position."[8]

Exception 38 argues that the LaCroix and Larson assignments were vacant/open and the District failed to follow the contractual procedures for reassignments because it "did not open the kindergarten position to the rest of the staff." According to Charging Parties, "[t]he two teachers who swapped assignments without a posted opening, without changes in student enrollment, [and] without changes in student curricular needs were required to transfer out of these positions if they no longer desired to work in their assignments if there were no openings they wish to reassign into at the site." Thus, the transfer of these teachers would "create openings for *other teachers*, [including Charging Parties,] to reassign into at the site . . . in a fair and non-discriminatory manner." (Original emphasis.)

These exceptions are without merit, as they conflate the contractual procedures governing voluntary and involuntary reassignments with the extra-contractual practice of swapping assignments without, however, citing to any evidence in the record to undermine the ALJ's findings and conclusions regarding this distinction.

Disparate Treatment

Several of Charging Parties' exceptions also take issue with the ALJ's finding that the District did not enforce its swapping practice in a discriminatory fashion or otherwise treat Charging Parties differently from other, similarly-situated employees. Exceptions 14 and 37 reiterate Charging Parties' contention that the District treated them differently from other similarly-situated employees with respect to assignment swaps because the LaCroix/Larson

[8] Exception 37 also reiterates Charging Parties' contention that they were treated differently from other, similarly-situated employees, which is addressed elsewhere in this Decision.

and Mulvanny/Christy swaps were approved without posting an opening to all unit members at the applicable site, as required by the CBA or established practice. The proposed decision adequately addressed this claim of disparate treatment and we find no basis in the record to disturb the ALJ's conclusion that the District's conduct did not constitute an adverse action.

Exception 14 also asserts that the District's decisionmakers failed to post notice of the LaCroix/Larson and Mulvanny/Christy swaps because "they were aware of the Charging Parties[']desire for these assignments."[9] In support of this exception, they cite to a passage appearing on page 7 of the proposed decision, which reads as follows:

> Victoria Pickett testified she would have applied for the kindergarten opening that LaCroix was involuntarily reassigned to had she known about it. Rosales testified she was also interested in that position. David Pickett testified he was interested in Christy's sixth grade position, and Edwards testified she was interested in Christy's sixth grade position and Larson's fourth grade assignment.

This portion of the proposed decision accurately summarizes Charging Parties' testimony that they were "interested in," or even would have applied for, the swapped positions, had they only known about them. It does not, however, indicate that Charging Parties ever advised Powers or any other District official of Charging Parties' interest in these positions, much less support their contention that Powers or other District officials failed to post notice of the swapped positions because "they were aware of the Charging Parties[']desire for these assignments." As noted previously, the ALJ found, and we agree, that swapped positions are occupied by the incumbents at the time of the swap, and are therefore not "open" positions

[9] Exceptions 21 and 27 similarly argue, without citation to evidence in the record, that Powers approved the LaCroix/Larson and Mulvanny/Christy swaps in violation of the CBA to discriminate against Charging Parties, because Powers knew that Victoria Pickett and Rosales "both had been seeking and waiting for a kindergarten assignment for years."

subject to the CBA's posting requirement. In the absence of evidence to show they were entitled by the CBA or established practice to notice of an assignment swap between other teachers, we decline to disturb the ALJ's finding that Charging Parties failed to show they suffered any adverse action.

Exceptions 16 and 17 similarly rely on Victoria Pickett's testimony to show she informed Powers that she was interested in teaching kindergarten. However, even if we accepted Charging Parties' interpretation of the CBA to find that the District was required to post notice of assignment swaps, nothing in the record supports Charging Parties' contention that Powers "knew" of their interest in kindergarten assignments in 2015, either generally, or with specific reference to those positions affected by the LaCroix/Larson and Mulvanny/Christy swaps. One portion of the record cited includes no time frame or other details to indicate when or how Pickett advised Powers of her interest in any kindergarten position, while the other testimony relied on by Charging Parties pertains to a conversation between Pickett and Powers which occurred in 2013. Charging Parties apparently contend that, because Pickett advised Powers of her interest in a kindergarten assignment in 2013, he "should have scheduled a meeting with Pickett and Edwards like he did for Larson and LaCroix and Mulvanny and Christy" two years later when the events at issue occurred. Charging Parties do not explain how one conversation between Pickett and Powers occurring in 2013 would put the District on notice that Pickett was still interested in obtaining a kindergarten assignment two years later when the events at issue in this case are alleged to have occurred.

Exception 27 asserts that Powers knew Victoria Pickett and Rosales "both had been seeking and waiting for a kindergarten assignment for years." The evidence cited in support of

this exception includes testimony from Victoria Pickett that she would have actively sought to teach kindergarten during the 2015-2016 school year "if [she] had known there was an opening," but no other details indicating that she had advised Powers of this interest. To the contrary, Pickett testified repeatedly that she never went to Powers about the 2015-2016 position to seek an assignment swap. Victoria Pickett testified that she had informed Powers of her interest in a particular kindergarten position in 2013, but, on cross-examination, she admitted that she had not since spoken to Powers about her interest in any kindergarten position.

In support of this exception, Charging Parties also rely on testimony from Rosales that she only attempted to transfer from her school site once, but she has "been looking for open positions, and there haven't been kindergarten or first grade positions available." As with Pickett's testimony, the passage cited from Rosales' testimony does not state that she ever informed Powers of her interest in teaching kindergarten and includes no other facts from which we could infer such knowledge by Powers.[10] Rosales also testified that the other Charging Parties informed her of their interest in the swapped positions at issue in this case, but she did not convey that information to Powers.

The only other evidence cited by Charging Parties to show that Powers "knew" Victoria Pickett and Rosales "had been seeking and waiting for a kindergarten assignment for years" was Pickett's testimony that, in her opinion, it would have been "more fair" if the kindergarten

[10] Charging Parties also cite to PERB Case No. LA-CE-5908-E to support their assertion that Powers knew of Rosales' desire to teach kindergarten. Although PERB may take official notice of its own files and records, including allegations included in separate unfair practice cases (*Lake Tahoe Unified School District* (1993) PERB Decision No. 994, pp. 14-15; see also *Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16), a blanket citation to an unfair practice case, without "designat[ing] . . . the portions of the record . . . relied upon," does not comply with PERB Regulation 32300, subdivision (a)(3), and we decline to scour the entire record of a separate case to determine whether it includes evidence to support the claim urged here by Charging Parties.

position had been posted and "been made available for any and all people interested to apply for it." The cited testimony does not, however, indicate that Pickett ever informed Powers, or that Powers otherwise knew, of Pickett's desire to teach kindergarten.

Exception 36 also asserts, in conclusory fashion, that the District took numerous adverse actions against Charging Parties in the form of contract violations and violations of established practice to prevent Charging Parties from swapping assignments, and that it did so "because they [sic] knew beforehand of the Charging Parties[']] interest in these assignments." As discussed previously with respect to exception 27, Charging Parties have cited no evidence to support their contention that Powers, or any other District official, was aware of any ongoing desire to obtain assignments in kindergarten positions.

Exception 34 appears to take issue with the ALJ's finding that Charging Parties never asked to swap assignments with each other. The exception cites to Victoria Pickett's account of how, after a kindergarten opening had been posted and closed in the 2013-2014 school year, she approached Powers and advised him that she would like the kindergarten position. According to Pickett's testimony, Powers said the position had been posted and it was not available to her. Her account gives no indication that she requested a swap with any other teacher. Accordingly, this exception is also without merit, as it neither demonstrates that Charging Parties suffered any adverse action or were treated differently than other employees *who had requested a swap*.

Exception 35 concerns the ALJ's finding that there was no discriminatory application of the District's swapping policy because Charging Parties failed to establish they had been treated differently than LaCroix, Larson, Christy and Mulvanny. This exception includes two charts summarizing the evidence concerning four swaps, which Charging Parties contend

demonstrates disparate treatment. Specifically, Charging Parties contend the record demonstrates that the District failed to post the open kindergarten position to all unit members at the applicable site before swapping Larson into the kindergarten position, whereas it had previously posted the open position in the swap involving Cook and Edwards. According to Charging Parties, the District also failed to post the opening for the fourth grade position which Larson vacated, as it had done in the swap between Edwards and Deana Steagall (Steagall).

These exceptions appear to argue that the ALJ's findings are unsupported by and are contrary to the record, including testimony by Meyer regarding a swap in 2012 involving Edwards, who at that time was teaching fourth grade, and Steagall. Initially, Steagall was a sixth grade teacher whose position was being eliminated due to decreased enrollment. There was an opening in first grade but Steagall did not want to teach first grade. She approached Edwards, who was willing to teach first grade, but Meyer testified that, according to his understanding of the CBA, he could not have placed Edwards in an opening for first grade and allow Steagall to take Edwards' fourth grade position without first filling it through involuntary reassignment or through posting the opening and accepting applications. According to Meyer, what made this situation different from the LaCroix/Larson and Mulvanny/Christy swaps was that there was an actual opening (in first grade), and that it involved three different assignments, rather than a simple one-to-one swap in which one teacher traded positions with another. Accordingly, these exceptions are also meritless, as Edwards was not similarly-situated to any of the employees involved in the one-to-one swaps at issue in this case.

Exception 36 disputes the ALJ's finding that there was no discriminatory application of the swapping policy because the District never indicated that it would prevent Charging Parties

from swapping assignments. Relying on Meyer's testimony regarding the Steagall/Edwards swap in 2012, this exception fails to acknowledge Meyer's explanation that, unlike the two swaps at issue in this case, the situation in 2012 involved three assignments and two teachers. Because there was not a one-to-one swap, in accordance with the CBA and established practice the District posted the first grade opening and then involuntarily transferred Steagall to the first grade assignment before allowing her to swap with Edwards for her fourth grade assignment. Because Charging Parties have cited no evidence to discredit Meyer's explanation, they have not shown they were treated differently than other, similarly-situated employees.

Exceptions Concerning Unalleged Matters

Exception 32 appears to challenge the ALJ's refusal to consider an unalleged violation that Powers removed one of Rosales' responsibilities, viz. her participation on the SST,[11] allegedly in retaliation for her protected activity. The exception references part of the proposed decision in which the ALJ observed that, to have an unalleged violation considered, the charging party must demonstrate, among other things, that the unalleged matter is timely. Specifically, the ALJ found that "Charging Parties failed to meet their burden to show the claims regarding Powers'[] hostile treatment toward Rosales are timely since the allegation that Powers blocked Rosales from leaving her classroom occurred over a year before the charge was filed, and no dates were provided for when Powers is alleged to have taken other hostile actions, including scowling at her in front of her students." Exception 32 contends that Powers removed Rosales' SST assignment in August of the 2015-2016 school year, shortly

[11] As noted in the proposed decision, the record does not establish what SST stands for or what this particular assignment entails.

after she testified in a separate PERB case against the District in May 2015, and that this allegation was therefore timely.

It is unclear from the passage cited above whether the SST allegation was included among the "other hostile actions" for which no dates were provided and which the ALJ thus refused to consider. However, timeliness is only one of the criteria that must be met for an unalleged matter to be considered as a source of liability. As explained in the proposed decision, the respondent must also have adequate notice and opportunity to defend against the matter, the unalleged conduct must be intimately related to the subject matter of the complaint and part of the same course of conduct, the unalleged matter must have been fully litigated, and the parties must have had the opportunity to examine and be cross-examined on the issue. (*County of Riverside* (2010) PERB Decision No. 2097-M, p. 7.) Neither exception 32 nor any of Charging Parties' other exceptions address these other requirements so that, even assuming Powers' removal of Rosales' SST assignment was timely for consideration as part of the present case, Charging Parties have not shown that the ALJ erred by refusing to consider these allegations under the unalleged violations doctrine.

Exception 33 similarly disputes the ALJ's conclusion that the unalleged matter concerning Rosales' SST assignment is not intimately related to the matters alleged in the complaint. Charging Parties argue that Powers' allegedly hostile demeanor towards Rosales in close temporal proximity to her testimony before PERB in May 2015 demonstrates animus and is therefore relevant to the complaint's allegation that the District retaliated against Charging Parties for their participation in the May 2015 PERB hearing.

However, the only evidence cited in support of this exception consists of Edwards' explanation during cross-examination that, by approving the LaCroix/Larson and

Mulvanny/Christy swaps, allegedly in violation of the CBA, the District also violated Charging Parties' rights under EERA. The testimony cited does not support the exception or even reference Powers' allegedly hostile demeanor towards Rosales, much less show how it was intimately related to the matters alleged in the complaint. Additionally, although Charging Parties contend that Rosales was examined and cross-examined on this matter, the exception references no portion of the record to support this contention. Accordingly, to the extent Charging Parties except to the ALJ's refusal to consider unalleged matters as separate adverse actions, we agree with the ALJ's reasoning and ruling.

Superiority or Desirability of Swapped Assignments

Exception 39 disputes that part of the proposed decision finding insufficient evidence to show that the four positions swapped by other employees were "objectively" superior or more desirable than Charging Parties' assignments. In the absence of such evidence, the ALJ reasoned that denying Charging Parties an opportunity to bid or bump into one of the swapped assignments could not have adversely affected their employment conditions in any quantifiable or objectively adverse fashion. Exception 40 similarly challenges the ALJ's reasoning that the District's failure to post an opening cannot constitute an adverse action because the record does not show the kindergarten assignment was objectively superior or more desirable to any of the Charging Parties' assignments. We find partial merit in these exceptions.

In the first place, Charging Parties did present some evidence that the swapped assignments at issue in this case were "objectively" better or more advantageous than the ones currently held by at least some Charging Parties.[12] Moreover, Charging Parties' theory of the

[12] Aside from matters of personal preference or a desire for change, which are inherently individualized and arguably not indicative of "objectively" better or worse working

case was not that the District had denied them the opportunity to apply for objectively superior positions, but that the CBA and established practice permits employees to seek another assignment, even for purely "subjective" reasons, and that, after being posted to all employees at the affected school site, such assignments should be awarded on the basis of qualifications and seniority. Thus, under Charging Parties' theory, denial of the opportunity to seek another position (through failure to post the position to all potentially interested employees) would itself be an adverse action under the contract or established practice, regardless of whether the sought-after position would be objectively superior.

For example, in addition to David Pickett's testimony regarding the distinct advantages to a sixth grade assignment, Edwards, Rosales and Victoria Pickett expressed their desire simply for a change of scenery. Thus, whether the swapped positions were objectively more advantageous than those held by Charging Parties was irrelevant to Charging Parties' theory of the case.

However, while we recognize this distinction, it does not fundamentally alter the analysis or the outcome of this case because, as explained above, Charging Parties failed to establish that the CBA or established practice granted them the right to notice and opportunity to intervene when two other bargaining unit employees have asked the District to swap assignments. In the absence of such a right, Charging Parties have not been denied anything to which they were entitled, and they have not otherwise alleged or shown that their employment conditions changed

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conditions, David Pickett testified that he preferred the sixth grade position because it included "an opportunity to have only two subject preps, a conference period, opportunity for extra duty assignments, [and an] opportunity to use my technological expertise," which, in turn, might qualify him for extra-duty assignments and a chance to increase his pay before retirement. According to Pickett, having only two "preps" means "you're prepping for two things a day instead of a whole wide range of things for elementary."

in any objectively adverse manner, as required by our precedents. (*Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12; *Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 12.) Charging Parties have therefore suffered no adverse action, regardless of whether the teaching assignments involved in the LaCroix/Larson and Mulvanny/Christy swaps were objectively more desirable than others.

Conclusion

For the foregoing reasons, we deny Charging Parties' exceptions and adopt the proposed decision, as supplemented by the above discussion.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-6802-E are DISMISSED.

Members Shiners and Krantz joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

LORI E. EDWARDS, ET AL., Charging Party, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-6082-E PROPOSED DECISION (November 29, 2016)

Appearances: Lori E. Edwards on behalf of herself, David Pickett, Victoria Pickett, and Kimberly A. Rosales; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for the Lake Elsinore Unified School District.

Before Kent Morizawa, Administrative Law Judge.

In this case, several public school employees claim their employer violated the Educational Employment Relations Act (EERA)[1] by retaliating against them for engaging in protected activities. The employer denies any violation.

PROCEDURAL HISTORY

On November 16, 2015, Charging Parties Lori E. Edwards, David Pickett, Victoria Pickett, and Kimberly A. Rosales filed the instant unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Lake Elsinore Unified School District (District). An amended charge was filed on January 14, 2016.

On February 1, 2016, the PERB Office of the General Counsel issued a complaint alleging the District violated EERA section 3543.5, subdivision (a), when it retaliated against Charging Parties for engaging in protected activity by depriving them of the opportunity to

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

teach either kindergarten or sixth grade but allowing four other employees to swap teaching assignments, including kindergarten and sixth grade.

On February 22, 2016, the District filed an answer to the PERB complaint denying any violation of EERA and setting forth its affirmative defenses. On March 9, 2016, the parties participated in an informal settlement conference, but the matter was not resolved.

On August 31, 2016, the District filed a motion to dismiss the complaint, which was denied on September 14, 2016.

Formal hearing was held on September 19-21, 2016. On the first day of hearing, the District renewed its motion to dismiss the complaint. The motion was again denied, and the matter was submitted for proposed decision with the filing of post-hearing briefs on November 17, 2016.

FINDINGS OF FACT

The Parties

Charging Parties are public school employees within the meaning of EERA section 3540.1, subdivision (j), and are teachers at Lakeland Village School (LVS) in the District. Edwards is a kindergarten teacher, Victoria Pickett and Rosales are first grade teachers, and David Pickett is a second grade teacher.

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k).

Lake Elsinore Teachers Association

The Lake Elsinore Teachers Association (LETA) is the exclusive representative of a bargaining unit of certificated employees in the District. At all relevant times, Edwards and Rosales were site representatives and David Pickett was an alternate site representative.

LETA and the District were parties to a collective bargaining agreement (CBA) whose terms were in effect at all relevant times.

Charging Parties' testimony at a prior PERB hearing

Charging Parties testified in *Lori E. Edwards v. Lake Elsinore Unified School District*, PERB Case No. LA-CE-5908-E (*Edwards I*). The hearing dates for that case were May 20-22 and June 5, 2015.[2]

Rosales testified she faced hostile treatment from LVS Principal Nick Powers following her testimony in *Edwards I.* Specifically, that she was removed from the SST team[3] at the beginning of the 2015-2016 school year after having served as the SST coordinator since 1993. Rosales also testified that in August 2014, Powers and the assistant principal came into her classroom and blocked her in. She further testified that Powers came into her classroom and scowled at her so much that the students commented on his behavior.[4] Powers denied engaging in any of the conduct to which Rosales testified.

Procedures for changing assignments at a school site

A teacher's assignment consists of her grade level or subject area, work schedule, and work site. (CBA Article 1.3.3.) A reassignment is a change in assignment at the same site.[5]

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[2] The Board has held that it is appropriate for an administrative agency, such as PERB, to take official notice of its own records. (*Regents of the University of California* (1999) PERB Decision No. 1359-H, proposed decision p. 18, fn. 11, citing *El Monte Union High School District* (1980) PERB Decision No. 142.) Accordingly, official notice is taken of the hearing dates in *Edwards I.*

[3] The record does not indicate what function(s) the SST coordinator or SST team performs.

[4] The record does not indicate when this occurred.

[5] This is in contrast to a transfer, which is a change of work locations to another school or facility. (CBA Article 1.3.27.)

(CBA Article 1.3.21.) Reassignments occur as necessary to fill openings, which are site-specific assignments that are currently unfilled by a unit member. (CBA Article 1.3.19.) Announcements of openings must be posted on the LETA bulletin board and provided electronically to all bargaining unit members at the site at least five workdays prior to the application deadline. (CBA Articles 6.2.2 and 6.5.2.)

There are two types of reassignments—voluntary and involuntary. Requests for voluntary reassignment must be considered before an opening is filled through involuntary reassignment. (CBA Article 6.6.1.) Requests for voluntary reassignment will be considered on the basis of an interview and: (1) credentials, authorization, and Highly Qualified status required to perform the assigned duties; and (2) District seniority. (CBA Article 6.5.6.) If no teacher volunteers to fill an opening, the opening will be filled by involuntary reassignment. The teacher with the least amount of District seniority who is qualified to fill the opening will be involuntarily reassigned. (CBA Article 6.6.2.)

In addition to reassignments, teachers at a school site may change assignments through a process referred to as "swapping," a procedure not contained in the CBA. A swap occurs when two teachers at a school site voluntarily agree to switch assignments. At the high school level, a swap typically involves switching specific periods (i.e. a period of AP Government with a period of US history). At the elementary school level, a swap involves switching of entire assignments (i.e. a Kindergarten assignment for a 5th grade assignment). All swaps must be approved by the site administrator.

Charging Parties' history of reassignments at LVS

In the 2012-2013 school year, sixth grade teacher Deana Steagall's position was being collapsed due to low enrollment. She was to be involuntarily reassigned to an opening in first

grade, but did not want to take that assignment. Edwards was a fourth grade teacher at the time and offered to take the first grade assignment. They could not swap assignments because the first grade assignment was open and needed to be posted to the site for volunteers. Powers posted the first grade opening, and Edwards volunteered for it. She was the only applicant and was voluntarily reassigned to the position, which created an opening in fourth grade. Steagall then applied for the open fourth grade position and was voluntarily reassigned to that position.

In the 2013-2014 school year, Edwards' first grade position was being collapsed due to low enrollment. She was going to be involuntarily reassigned to an opening in kindergarten, but did not want to take the assignment. The kindergarten opening was posted to the school site, but there were no volunteers for the position, and Edwards was involuntarily reassigned to the position. Victoria Pickett was teaching first grade at the time and spoke to Edwards about taking the kindergarten position. She approached Powers after the posting period had closed and asked to take the kindergarten position. He said she could not do so because the posting period had already ended. Victoria Pickett and Edwards did not ask Powers to swap assignments.

The swaps at issue in this case

Two sets of LVS teachers swapped assignments during the 2015-2016 school year. On August 11, 2015, fifth grade teacher Robyn Mulvanny and sixth grade teacher Carrie Christy met with Powers, Rosales, and Mario Montano, a LETA Executive Board member, to discuss a voluntary swap of assignments. Mulvanny and Christy wanted to swap assignments because they felt they would be better suited to teach the other's assignment. Rosales stated the swap violated the contract, but Montano did not believe that it did. Powers approved the swap.

Danyelle LaCroix started the year assigned to third grade. Her position was being collapsed due to low enrollment, and she was set to be involuntarily reassigned to an open kindergarten position. She did not want to take the assignment and spoke to fourth grade teacher Kimberle Larson about a possible swap. Since the kindergarten position was open, it first had to be posted to the site for voluntary reassignment before LaCroix was involuntarily reassigned. Once the voluntary reassignment period closed with no volunteers, LaCroix was involuntarily reassigned to the kindergarten position.

Although the open kindergarten position was posted, it is unclear to whom it was posted. A copy of the posting is not in the record, either as an email sent to the site or a physical posting on the LETA bulletin board. Edwards testified the opening was only posted to the third grade teachers, although she knew about it because she was a kindergarten teacher. Rosales, Victoria Pickett, and David Pickett testified they did not know of the opening. Powers did not testify one way or the other about the posting. Based on the record, I find that Powers did not post the kindergarten opening to the entire school site.

On August 31, 2015, LaCroix and Larson met with Powers to discuss a voluntary swap of assignments. They wanted to swap assignments because they thought they would be better suited to teach the other's assignment. Powers approved the swap. Edwards and Rosales were invited to attend the meeting, but the meeting took place at the scheduled time without their presence. However, Edwards had made her disagreement with the swap known to LaCroix and Larson prior to the meeting.

Edwards argued to LETA that the two swaps violated the CBA and asked LETA to file a grievance. LETA responded to Edwards that the swaps did not violate the CBA, and it declined to file a grievance. LETA President Bill Cavanaugh testified to his belief that swaps

benefit teachers who would otherwise be stuck teaching assignments they did not wish to teach.

None of the Charging Parties attempted to swap assignments with other teachers in the 2015-2016 school year or any prior year. Victoria Pickett testified she would have applied for the kindergarten opening that LaCroix was involuntarily reassigned to had she known about it. Rosales testified she was also interested in that position. David Pickett testified he was interested in Christy's sixth grade position, and Edwards testified she was interested in Christy's sixth grade position and Larson's fourth grade assignment.

ISSUES

1. Do Charging Parties have standing?
2. Should the unalleged violations regarding Powers's treatment of Rosales be considered?
3. Did the District retaliate against Charging Parties for engaging in protected activity by depriving them of the opportunity to teach either kindergarten or sixth grade but allowing four other employees to swap teaching assignments, including kindergarten and sixth grade?

CONCLUSIONS OF LAW

Standing

The District's closing brief renews its argument that the complaint must be dismissed because Charging Parties lack standing to assert a violation of EERA section 3543.5, subdivision (c). This argument was rejected the previous two times the District raised it, and it is being rejected again. As stated in the prior rejections, while it is true that individual employees lack standing to assert a violation of EERA section 3543.5, subdivision (c), the

complaint does not allege such a violation. It only alleges the District retaliated against Charging Parties for engaging in protected activities in violation of EERA section 3543.5, subdivision (a).

The District argues that even though the complaint alleges a violation of EERA section 3543.5, subdivision (a), a violation cannot be found unless a finding is made that the District committed an unlawful unilateral change. This argument is based on the faulty premise that any violation of the CBA or past practice must constitute an unlawful unilateral change. In fact, the opposite is true. (See *City of Montebello* (2016) PERB Decision No. 2491-M, p. 13., citing *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Victor Valley Union High School District* (1985) PERB Decision No. 487 [isolated breach of contract or departure from established practice insufficient to have a generalized effect or continuing impact on the terms and conditions of employment and therefore not an unfair practice].) It is absolutely possible for Charging Parties to prove their retaliation claims in the complaint without establishing the District implemented an unlawful unilateral change. Accordingly, Charging Parties have standing to proceed.

Unalleged violations

In their closing brief, Charging Parties argue that Powers retaliated against Rosales when he removed her from the SST team and took hostile actions toward her. These claims are not in the complaint. Therefore, to constitute a source of liability for the District, they must meet the requirements for an unalleged violation. The Board has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided to 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. (*County of Riverside* (2010) PERB Decision No. 2097-M, p. 7, citing *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation must also have occurred within the applicable statute of limitations period. (*Ibid.*)

Charging Parties did not provide adequate notice to the District that it sought to litigate Rosales' removal from the SST team and Powers's hostile treatment toward her. These claims are not included in either the original or amended unfair practice charge, and Charging Parties did not indicate during the hearing that they intended to litigate these claims. The claims are also not intimately related to the subject of the complaint, which deals exclusively with the swapping of assignments. Additionally, Charging Parties failed to meet their burden to show the claims regarding Powers's hostile treatment toward Rosales are timely since the allegation that Powers blocked Rosales from leaving her classroom occurred over a year before the charge was filed, and no dates were provided for when Powers is alleged to have taken other hostile actions, including scowling at her in front of her students. Accordingly, Powers's alleged retaliation against Rosales will not be considered as an unalleged violation.

Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6.)

The District does not dispute that Charging Parties engaged in protected activities by serving as site representatives and by testifying in *Edwards I*. It also does not dispute that it had knowledge of those activities. The District asserts Charging Parties cannot establish a prima facie case for retaliation because it took no adverse action against Charging Parties and there is no nexus between their protected activity and any alleged adverse action.

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 12.) In a later decision, the Board further explained that:

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

(*Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12; emphasis added; footnote omitted.)

The complaint frames the alleged adverse action as the District's discriminatory enforcement of the swapping policy against Charging Parties. Paragraph 6 states:

> On or about August 2015, Respondent, acting through its agent, LVS Principal Nick Powers[,] took adverse action against Charging Parties by depriving Charging Parties of the opportunity to teach either kindergarten or sixth grade but allowing four other employees to swap teaching assignments, including kindergarten and sixth grade.

In *Woodland Joint Unified School District*, the Board held that discriminatory enforcement of a work rule for the purpose of harassing or intimidating an employee in retaliation for having engaged in protected activity constitutes an adverse action. (*Woodland Joint Unified School District* (1990) PERB Decision No. 808, pp. 3-4, citing *Hyatt Regency Memphis* (1989) 296

NLRB No. 36 and 296 NLRB No. 37; *BMD Sportswear* (1987) 283 NLRB No. 4; *NLRB v. S.E. Nichols* (2d Cir. 1988) 862 F.2d 952.) There, a school district required a teacher to submit a doctor's note for four consecutive days of absence. (*Woodland Joint Unified School District*, *supra*, PERB Decision No. 808, p. 2.) Although the doctor's note requirement was in the CBA, the Board deemed the application of the requirement to the teacher to be an adverse action, since no other teachers were required to comply with the requirement. (*Id.* at pp. 2-4.)

Here, Charging Parties did not establish that they were treated differently than LaCroix, Larson, Christy, and Mulvanny. They never asked to swap assignments with each other or any other teacher, and the District never indicated that it would prevent Charging Parties from swapping assignments. Accordingly, there was no discriminatory enforcement of the swapping policy.

Charging Parties argue the swaps constituted an adverse action because they had the right to bid on the four teaching assignments that were swapped. In support of this argument, they point to language in the CBA that requires the District to post open assignments to the entire school site. However, by definition, none of the swapped positions was open since they were filled by teachers at the time of the swap. Charging Parties point to no language in the CBA that would allow them to bid on a non-vacant position or otherwise bump a teacher from a non-vacant position. Furthermore, even assuming they had such rights, there is insufficient evidence in the record to allow one to conclude that the four swapped positions were objectively superior or more desirable than Charging Parties' assignments. In other words, that those assignments would have resulted in better working conditions for Charging Parties. Absent this information, it cannot be determined that the denial of the opportunity to bid on or

bump into one of swapped assignments had an adverse impact on Charging Parties' employment.

Charging Parties note that Powers did not post the vacant kindergarten position that LaCroix was involuntarily reassigned to before she swapped with Larson. They argue that had he posted the opening to the site, they would have had the opportunity to apply for voluntary reassignment into the opening. The failure to post the opening cannot constitute an adverse action because there is again nothing in the record to allow one to conclude that the kindergarten assignment was objectively superior or more desirable to any of Charging Parties' assignments. Without this information, it cannot be determined that the denial of the opportunity to apply for the position had any adverse impact on Charging Parties' employment.

Based on the above, Charging Parties did not establish a prima facie case for retaliation because they did not show the District took any adverse action against them. Fundamentally, the crux of Charging Parties' argument is that the District violated the CBA when it allowed LaCroix, Larson, Christy, and Mulvanny to swap assignments. However, PERB has no jurisdiction to remedy a violation of a collective bargaining agreement absent a statutory violation. (*City of San Juan Capistrano* (2012) PERB Decision No. 2238-M, p. 3, citing *Grant Joint Union High School District*, *supra*, PERB Decision No. 196.) Charging Parties have not met their burden of showing a prima facie violation of EERA.[6] Therefore, no finding is made as to whether or not swapping violates the CBA.

[6] As the District has noted, Charging Parties lack standing as individuals to pursue the bargaining rights of LETA. (*Oxnard Federation of Teachers (Collins)* (2012) PERB Decision No. 2266, dismissal letter at p. 3, citing *Regents of the University of California* (2010) PERB Decision No. 2153-H and *San Francisco Unified School District* (2009) PERB Decision No. 2040.)

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-6082-E, *Lori E. Edwards, et al., v. Lake Elsinore Unified School District*, are hereby DISMISSED.

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

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 California Code of Regulations, title 8, section 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 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).)