STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PAMELA JEAN LUKKARILA, Charging Party, v. JURUPA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5510-E PERB Decision No. 2283 August 21, 2012

Appearances: David Lukkarila, Representative, and Richard D. Ackerman, Attorney, for Pamela Jean Lukkarila; Fagen, Friedman & Fullfrost by Kerrie Taylor, Attorney, for Jurupa Unified School District.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on an appeal by Pamela Jean Lukkarila (Lukkarila) from dismissal of her unfair practice charge filed on November 12, 2010 against the Jurupa Unified School District (District) pursuant to the Educational Employment Relations Act (EERA).[1]

Lukkarila alleges in her initial and amended charge that she engaged in activity protected under EERA, and that the District's conduct violated EERA sections 3543.5(a), as well as 3543.5(b), (c) and (d). In her initial charge, Lukkarila also alleged violation of EERA section 3543.6.

On appeal, Lukkarila asserts that PERB's Office of General Counsel mistakenly dismissed her allegations, and urges us to reverse and issue a complaint. The District urges us to affirm.

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

We have reviewed the record and the dismissal in light of Lukkarila's appeal, the District's response thereto, and the relevant law. Based on this review, we shall affirm in part and reverse in part the dismissal, and will remand the matter for issuance of a complaint.

We turn first to the procedural history, then an introduction, followed by Lukkarila's allegations and their disposition by the Office of General Counsel, and finally our discussion and disposition of the legal issues.

PROCEDURAL HISTORY

On November 12, 2010, Lukkarila filed her unfair practice charge.

On December 20, 2010, the District filed a position statement opposing the charge.

On April 7, 2011, PERB's Board agent issued a warning letter.

On June 21, 2011, Lukkarila filed an amended charge.

On July 25, 2011, the District filed a supplemental position statement opposing the amended charge.

On August 25, 2011, PERB's Board agent dismissed the charge.

On October 13, 2011, Lukkarila timely filed her appeal of the dismissal.

On November 4, 2011 the District timely filed its response to the appeal.

On November 7, 2011, Lukkarila served and filed a reply to the District's response.[2]

On November 17, 2011, PERB's Appeals Office notified the parties that the filings were complete, and that the case was placed on the Board's docket.

[2] PERB regulations are codified at California Code of Regulations, title 8, section 31001, et seq. Our regulations governing appeals to the Board itself (PERB Regs. 32300 – 32325) make no provision for a reply to a response. Without foreclosing our discretion in an appropriate future case to request or consider a reply, we note that in this case we did not consider the reply.

INTRODUCTION

At the outset we observe that Lukkarila filed a lengthy charge, and then a much longer amended charge, with scores of appended exhibits. The exhibits were crucial to a full understanding of the EERA-relevant allegations, but were discussed as well for their other content. Thus, the charge was not concise, and in some instances less than clear. The Board agents in the Office of General Counsel organized and discussed EERA issues arising from the allegations. Our review here was well served by their work.

We emphasize below Lukkarila's performance evaluation by her Principal Jay Trujillo (Trujillo) and Lukkarila's subsequent complaint regarding that evaluation. We view these occurrences differently than did the Office of General Counsel, and thus arrive at different conclusions regarding timeliness and nexus issues.

Finally, we caution that our discussion treats charge allegations. We presume as we must that the facts alleged are true.[3] We do so because when assessing whether a charge dismissal is appropriate, we view a charging party's allegations in the light most favorable to the charging party. If this matter goes to hearing, Lukkarila will bear the significant burden of proving through persuasive competent testimony and authenticated documentary evidence all the allegations in the complaint.

We turn now to the charge allegations. We organize the discussion by chronology and subject matter. In each section we present first a summary of Lukkarila's essential allegations and then summarize the conclusions reached thereon by the Office of General Counsel. After

[3] At this stage of the proceedings, we assume as we must that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB* Decision No. 12; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755 [*Prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB.].)

laying out the allegations and the Office of General Counsel's disposition, we will then take up separately our own assessment and disposition of the legal issues.

CHARGING PARTY'S ALLEGATIONS

Factual Background

Lukkarila is high school teacher employed by the District. She is exclusively represented by an employee organization, National Education Association (NEA-Jurupa or Union), which at all times relevant herein has maintained a collective agreement with the District. Lukkarila is a permanent employee. Accordingly, Lukkarila is subject to performance evaluation on a biannual cycle under the evaluation procedures set forth in the Union's collective bargaining agreement and in the Education Code.

During a portion of 2008-09 school year Lukkarila was absent on a maternity leave pursuant to the collective agreement. She returned to work part way through the 2008-09 school year. As 2008-09 was an evaluation year for Lukkarila, Trujillo evaluated her that year, rating her as meeting District standards. In Lukkarila's 2008-09 final evaluation, Trujillo commented on her use of maternity leave. On May 15, 2009, Trujillo informed Lukkarila that because of her absence on maternity leave during 2008-09, he would evaluate her again in 2009-10. Lukkarila had enjoyed previously a cooperative relationship with Trujillo. She did not object when notified in May 2009 of the consecutive annual evaluation. Following the events of the Spring of 2010, Lukkarila's view of her 2008-09 evaluation changed, viz., she then perceived Trujillo's Spring 2009 comments concerning her pregnancy and maternity leave, his directive that she undergo a consecutive annual evaluation in 2009-10, and his conduct of her 2009-10 evaluation, all as evidence of improper discrimination.

We summarize the major categories of Lukkarila's essential allegations, and the Office of General Counsel's conclusions and disposition. We group them as follows: the 2009-10

evaluation and complaint; the group complaint; and the parental complaint. Again, we caution that we here describe allegations, not proven facts.

The 2009-2010 Evaluation and Complaint

1. Lukkarila's Allegations

a. The January Observation

Trujillo's 2009-10 evaluation of Lukkarila was supposed to commence with an observation of Lukkarila's teaching in November 2009. Trujillo failed to make the November observation, however. In late January 2010, Trujillo conducted the first observation of Lukkarila's teaching. He prepared an evaluation observation report and provided it to Lukkarila. In February 2010, Lukkarila responded to the report, requesting several changes. Trujillo replied, offering to make some changes. Thereafter, upon learning that Lukkarila had obtained the Union's assistance in dealing with the January observation report, Trujillo withdrew his proposed changes and refused thereafter to discuss with Lukkarila any change to the report. Lukkarila then consulted a Union lawyer about Trujillo's reaction. The Union lawyer wrote to Trujillo, demanding that he not retaliate against Lukkarila for obtaining Union assistance in dealing with her evaluation. The lawyer sent a copy of the letter to Lukkarila and to the District's Assistant Superintendent for Personnel, Tamara Elzig (Elzig).

b. The March Observation

On March 15, 2010, Trujillo conducted a second observation of Lukkarila's teaching. Concurrently, Trujillo received the Union lawyer's letter. Trujillo immediately issued to Lukkarila a written warning threatening a charge of insubordination over Lukkarila's alleged failure to respond with sufficient alacrity to a request from Trujillo's secretary. Several days thereafter Trujillo issued to Lukkarila a written report summarizing Trujillo's March 15, 2010 observation of her teaching, in which report Trujillo harshly berated Lukkarila's performance.

Lukkarila thereafter tendered a written rebuttal to Trujillo's report of March 15, 2010 observation. Lukkarila alleges that the evaluation procedure calls for attachment of her rebuttal to the observation report. Article IX, Evaluation Procedures, Section 3, Paragraph F, of the collective agreement provides, in pertinent part:

> The evaluatee has the right to submit a written rebuttal to the evaluation at any time. Such rebuttal shall become a permanent attachment to the copy of the valuation in the unit member's personnel file.

Trujillo failed to attach Lukkarila's rebuttal to the observation report.

c. The Final Evaluation

On May 12, 2010, Lukkarila met with Trujillo for the final evaluation conference. She brought with her a Union representative. Trujillo's final evaluation report negatively assessed Lukkarila's teaching, departing significantly from Trujillo's final evaluations of Lukkarila made in prior school years. Trujillo's final report rated Lukkarila "Needs Improvement" overall and in four of the six assessment categories, and faulted Lukkarila for failing to make changes he had recommended following his formal observations, although Trujillo had not visited Lukkarila's classrom since March 15, 2010. During the evaluation conference, Lukkarila and her Union representative noted that Trujillo had not yet attached Lukkarila's written rebuttal to Trujillo's written report of the March 15, 2010 observation.

d. The Complaint

On June 21, 2010, Lukkarila filed an individual written complaint under the Unit Member Complaint Resolution Procedure (Procedure) in Article V, Unit Member Rights, Section 14, of the collective agreement. The Procedure provides, inter alia, for: a written complaint at Level I within 30 business days or a reasonable time from the incident; a response to the employee complainant in writing within 10 business days by the administrator receiving the complaint; an appeal to Level II by the employee complainant within ten business days; a

response in writing by the administrator at Level II within 10 business days; an appeal to Level III within 10 business days; an opportunity at Level III to address the governing board, with representation and in closed session; and lastly, a final and binding decision by the governing board no later than the second next regularly scheduled governing board meeting.

In her June 21, 2010, written complaint Lukkarila contended, inter alia, that when conducting her performance evaluation for 2009-2010 Trujillo violated evaluation and discrimination provisions of the collective agreement and retaliated against her because she had obtained Union assistance. Lukkarila's complaint asked the District to investigate the violations of the Union's collective bargaining agreement, and requested as a remedy that the District destroy the offending 2009-10 evaluation documents.

On August 13, 2010, the District Superintendent Elliott Duchon (Duchon) sent Lukkarila an untimely initial written response to her June 21, 2010 written complaint. The response stated that Lukkarila had failed to substantiate the violations she alleged, proposed to rescind Lukkarila's 2009-10 evaluation, and directed Lukkarila to submit to a successive annual evaluation in 2010-2011. On August 27, 2010, Lukkarila timely replied in writing to the District's response.

In September 2010, the District passed over Level II of the Procedure, moving Lukkarila's complaint directly to Level III, the District's governing board. Surprised, Lukkarila objected to this maneuver, and requested time to prepare a presentation to the governing board. The District disregarded this request. On September 20, 2010, the governing board met in a closed session, refused to hear Lukkarila, and rejected her complaint. Lukkarila received a letter from Duchon dated September 20, 2010, informing her that the complaint process was concluded.

2. General Counsel Disposition

a. The Observations and The Final Evaluation

The Office of General Counsel determined that Lukkarila had filed her charge on November 12, 2010, and that EERA's six-month limitations period therefore precluded PERB's consideration of conduct alleged to occur prior to May 12, 2010. Accordingly, it dismissed allegations of Trujillo's conduct in 2009 and in February, March and May 2010, including Trujillo's final evaluation report which was dated May 10, 2010, and which Trujillo discussed with Lukkarila on May 12, 2010. The warning and dismissal letters addressed neither equitable tolling of the EERA limitations period due to Lukkarila's filing and processing of the complaint under the Procedure, nor application of a continuing violation theory.

b. The Complaint

The Office of General Counsel determined that Lukkarila's June 21, 2010 filing of the complaint was not a "logical continuation of group activity," and therefore not protected under EERA.[4] The Office of General Counsel likewise determined that because Lukkarila included in her complaint allegations of sexual harassment, that the complaint exceeded PERB's jurisdiction.[5] The warning and dismissal letters addressed neither the contractual nature of the Procedure nor the contractual nature of the claims Lukkarila made in the complaint.

Lukkarila contends that the District processed, investigated, and assessed her complaint perfunctorily and without complying with the Procedure, viz., departing from the Procedure's time constraints, entirely omitting Level II, failing to consult with her about her allegations,

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[4] *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246 (*Oakdale*); *Regents of the University of California* (2010) PERB Decision No. 2153-H.

[5] *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.

and denying her the specified Level III hearing in closed session with the governing board. The warning and dismissal letters did not address Lukkarila's claims that in processing her complaint the District departed from the Procedure and treated her complaint in a perfunctory fashion.

Lukkarila contends that the District retaliated against her by requiring that she submit to a consecutive annual performance evaluation in 2010-11. The Office of General Counsel concluded that the District's directive for a consecutive annual evaluation was not "adverse." (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2140-H (CSU San Marcos); *Fresno County Office of Education* (1993) PERB Decision No. 978 (*Fresno*); *Simi Valley Unified School District* (2004) PERB Decision No. 1714 (*Simi Valley*).) The warning and dismissal letters did not address provisions of the contractual evaluation procedure or cognate provisions of the Education Code establishing a biannual evaluation cycle for permanent employees, and mandating an annual evaluation of a permanent employee only after the employee receives an unsatisfactory rating. (See discussion at pp. 18-19 below.)

Group Complaint

1. Lukkarila's Allegations

On June 21, 2010, Lukkarila joined with other employees and, through counsel, filed with the District a "master grievance/CDE uniform complaint" (group complaint) in which the employees alleged violations of applicable collective agreements as well as external law. The Union took no part in the group complaint.

On June 25, 2010, Elzig sent Lukkarila and other District employees a memo criticizing their group complaint. In the memo, Elzig belittled the complaining employees and accused them of disloyalty and of conspiring against her. On June 30, 2010, citing Elzig's June 25,

2010 memo, Lukkarila requested that Elzig not participate in the District's investigation of Lukkarila's own written complaint then pending under the Procedure.

2. General Counsel Disposition

The Office of General Counsel concluded that the group complaint was protected "as an extension of group activity" (*Oakdale*) and that the June 25, 2010 memo from Elzig was not adverse to Lukkarila's employment. The warning and dismissal letters did not address Lukkarila's June 30, 2010 communication regarding her complaint then pending under the Procedure.

Parental Complaint

1. Charging Party's Allegations

In mid-September 2010, the District notified Lukkarila that she was the subject of a serious complaint, but did not disclose to Lukkarila the allegations against her. The contractually-established procedures for parent complaints require, inter alia, that a teacher be informed promptly of the charges against her and provided an opportunity to meet with the complaining parent to resolve the matter. The District did neither. Later in September, the District notified Lukkarila that she was required to attend an investigatory meeting on September 29, 2010 with District officials, including Elzig and an attorney. The District advised her to have Union representation. Lukkarila pressed the District for information regarding the complaint. In late September, the District informed her that the complaint, from a parent, concerned alleged conduct of Lukkarila in her classroom in August 2010. Lukkarila requested that she be accompanied in any investigatory meeting by her attorney. The District refused. Lukkarila requested the District reschedule the meeting because she had other personal business on the September 29, 2010. The District rescheduled the investigatory meeting to October 11, 2010.

Lukkarila requested Union representation for the October 11, 2010 investigatory meeting. The District set the meeting during the faculty workday. On October 11, 2010 Lukkarila's customary Union representative was unavailable. The District designated a different Union representative to attend. Lukkarila requested to confer briefly and in private with the designated Union representative, prior to commencing the interview. The District refused. Long after the investigatory interview, the District issued Lukkarila a written Summary of Meeting memo which was disciplinary in nature.

2. General Counsel Disposition

The Office of General Counsel concluded that the misconduct investigation was adverse[6] and that the subsequent Summary of Meeting memo was also adverse, but that Lukkarila failed to establish a nexus between her earlier protected conduct and either the District's decision to investigate the parental complaint, or the District's decision to issue the disciplinary memo. The warning and dismissal letters did not address the alleged irregularities in the District's investigation of the parental complaint or in the issuance of the Summary of Meeting memo. The Office of General Counsel concluded as well that Lukkarila's allegations regarding Union representation at the October 11, 2010 investigatory meeting did not establish interference with her EERA representation rights.

DISCUSSION

We take up now the legal issues presented by Lukkarila's allegations and the dismissal of her charge by the Office of General Counsel. We treat the issues in the following categories: jurisdiction and standing, timeliness, and the prima facie cases for retaliation and interference. We begin with jurisdiction and standing.

[6] *Poway Unified School District* (2001) PERB Decision No. 1430.

Jurisdiction and Standing

The Office of General Counsel made several rulings on standing and one on jurisdiction. We look at each.

The Office of General Counsel concluded that Lukkarila, an individual employee pursuing a charge on her own behalf, lacked standing to allege an employer's violation of an employee organization's EERA rights[7] (EERA § 3543.5(b)) or an employer's failure to meet and negotiate in good faith with an employee organization or an employer's failure to provide information in response to an employee organization's request.[8] (EERA § 3543.5(c).) It dismissed these allegations. We affirm.

Lukkarila also alleged violation of EERA section 3543.5(d). This provision seeks to assure that employees have a free choice between competing organizations and that employee organizations remain independent of the employer. Lukkarila alleges no facts suggesting competition among organizations and no employer favoritism as between organizations. She does, however, allege facts possibly suggesting employer domination or interference with administration of an employee organization. Under our precedents only an employee organization, and not an individual employee, may bring a charge of domination or interference with an employee organization. (*Corrections*.) Lukkarila, who makes her allegations as an individual employee and not as an organizational agent or representative, lacks standing to charge her employer with domination or interference with administration of an employee organization. We therefore affirm dismissal of the alleged violation of EERA section 3543.5(d).

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[7] *State of California (Department of Corrections)* (1993) PERB Decision No. 972-S (*Corrections*).

[8] *State of California (Department of Corrections)* (2003) PERB Decision No. 1559-S; accord, *Los Angeles Unified School District* (2009) PERB Decision No. 2073.

The Office of General Counsel concluded that Lukkarila's allegations of improper conduct by NEA-Jurupa, Lukkarila's union, were not properly presented in a charge against the District. It dismissed these allegations. We affirm. An employee organization's duty of fair representation runs to the employee, and is enforced by a charge against the employee organization, not against the employer.[9]

The Office of General Counsel concluded that Lukkarila's allegations of discrimination against her by the District and its agents based on her age, gender, pregnancy or education, exceed PERB's jurisdiction. It declined to rule on these discrimination allegations. To the extent that such allegations were based solely on external law other than EERA, and were raised only in Lukkarila's individual complaint(s), we agree and affirm.

Timeliness

The Office of General Counsel determined that all allegations of District conduct occurring prior to May 12, 2010 were untimely, and on that basis dismissed them. We disagree.

We conclude that Lukkarila's allegations establish a prima facie case for tolling EERA's six-month limitations period while Lukkarila processed a complaint under the Procedure, a non-binding bi-lateral complaint procedure contained in the collective agreement covering Lukkarila's employment. (*Long Beach Community College District* (2009) PERB Decision No. 2002.) We conclude that as alleged, Lukkarila's use of the Procedure qualifies for equitable tolling under our precedents: (1) the Procedure is contained in the collective bargaining agreement; (2) Lukkarila's complaint under the Procedure sought to resolve a dispute which is the subject of the unfair practice charge, to wit, three instances of retaliation by Trujillo because Lukkarila obtained Union assistance with her evaluation (a written warning

[9] We note that Lukkarila has filed a charge against NEA-Jurupa.

in mid-March 2010 threatening insubordination, a negative report of the March 15, 2010 evaluation observation, and a negative May 2010 final evaluation); (3) Lukkarila reasonably and in good faith pursued the Procedure; and (4) tolling does not frustrate the purpose of the limitations period by causing surprise or prejudice to the District.

Lukkarila's complaint alleges contract and statutory violations, and retaliation for having utilized Union assistance with her evaluation. As noted above, we deem only those alleged violations of EERA, to wit, the retaliation allegations, to have been tolled under our equitable tolling doctrine. (*Trustees of the California State University (San Jose)* (2009) PERB Decision No. 2032-H.) Also, as noted above, if this matter proceeds to a hearing, Lukkarila will bear the burden of establishing by persuasive competent testimony and authenticated documentary evidence all the allegations in the complaint, including those concerning equitable tolling.

In sum, Lukkarila alleges that she processed her complaint regarding her evaluation under the collectively-bargained Procedure between June 21, 2010 and September 20, 2010, at which time the District's governing board rejected it. She was then notified in writing by the District superintendent that the Procedure was complete. Thus, Lukkarila and the District utilized the Procedure for ninety-two (92) days. We deem the EERA limitations period extended by an equivalent period from May 12, 2010 to February 9, 2010. Allegations of conduct within the extended period are timely.

Retaliation

The Office of General Counsel dismissed Lukkarila's allegations that she was retaliated against because she engaged in activity protected under the EERA. We first review briefly the elements of a prima facie case, and then the legal analysis.

A prima face case of retaliation is established by allegations that the employee engaged in protected activity, the employer knew thereof, the employer took action against or adverse to the interest of the employee, and the employer acted "because of" the employee's protected activity. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) The motive ("because of") element is established by direct proof or inferred from the record as a whole. An inference of unlawful motive, i.e., the "nexus" between the protected conduct and the employer's challenged action, may be found in facts which suggest an unlawful motive, including suspicious timing, disparate treatment, departure from established policies and procedures, and employer justifications which are exaggerated, inadequate, inconsistent or contradictory. (*Novato*.) We turn next to the analysis of each element of the prima facie case.

1. Protected Activity

The Office of General Counsel concluded that Lukkarila engaged in protected activity when she sought and obtained Union assistance with her performance evaluation in February and March 2010, and when she requested Union representation at a meeting in October 2010. We agree. We note that Lukkarila also alleged that she was accompanied by a Union representative at the May 12, 2010 final evaluation meeting with Trujillo.

The Office of General Counsel concluded that participating with other employees in a group complaint filed through counsel on June 21, 2010 was protected activity. We agree. Joining with another employee or employees to enforce external law regarding workplace rights, is itself group activity protected by EERA against employer interference and retaliation. (*Franklin Iron & Metal Corp.* (1994) 315 NLRB 819, *enf'd* (6th Cir. 1996) 83F.3d 156 (*Franklin Iron*); *Eastex, Inc. v. NLRB* (1978) 437 U.S. 556.)[10]

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

The Office of General Counsel concluded that Lukkarila's filing on June 21, 2010 of an individual complaint under the Procedure was not protected activity. It found "insufficient information" to conclude that the complaint constituted a "logical extension of group activity." We disagree. Under EERA, a union and employer may negotiate to incorporate substantive statutory or constitutional rights in their collective agreement, thus strengthening the rights by making them enforceable under collectively-bargained procedures.[11] Lukkarila alleges that she sought individually to enforce under collectively-bargained procedures, both the evaluation and non-discrimination provisions of the collectively-bargained agreement. We hold that seeking individually to enforce provisions of a collectively-bargained agreement is "a logical continuation of group activity" and protected under EERA. (*Oakdale*; *Meyers Industries* (1986) 281 NLRB 882, affd. *sub nom. Prill v. NLRB* (D.C. Cir. 1987) 835 F.2d 1481; *California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096 (*Solano Community College*).) In so holding we do not distinguish between those collectively-bargained provisions which reflect rights also protected and enforceable under external law, and other collectively-bargained rights which spring solely from the bargained agreement. Our concern in either case is not with the substance of the collectively-bargained rights, but rather with their source in the agreement and the employee's use of collectively-bargained enforcement procedures. It is that activity which is implicated by Lukkarila's allegations, and protected by EERA.[12]

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[11] *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 866.

[12] A claim by an individual employee pursuing an individual remedy for alleged personal racial discrimination is not EERA-protected activity. (*Los Angeles Unified School District* (1985) PERB Decision No. 550, Warning Letter, at p. 5; *Jubilee Manufacturing Company* (1973) 202 NLRB 272, affd. *sub nom.*, *Steelworkers v. NLRB* (D.C. Cir. 1974) 504 F.2d 271.) But a discrimination complaint is protected activity where the employee is

The Office of General Counsel concluded that Lukkarila engaged in protected activity when she requested and utilized union representation in an investigatory meeting in September and October of 2010. We agree.

In sum, we conclude that Lukkarila has alleged that she engaged in protected activity known to the District when she: (1) obtained Union assistance in February 2010 with her evaluation and informed Trujillo thereof; (2) was represented by a Union lawyer who in March 2010 sent a letter to Trujillo and copied the letter to Elzig; (3) was accompanied by a Union representative in the final evaluation conference with Trujillo on May 12, 2010; (4) joined with other employees in filing, through counsel, a group grievance and complaint on June 21, 2010; (5) filed herself on June 21, 2010, a written complaint under the Procedure seeking to enforce provisions of the Union's collective agreement; (6) processed the complaint under the Procedure by communicating to the District in June, August and September 2010; and (7) requested and utilized Union representation in October 2010, when participating in an investigatory meeting with District officials concerning an alleged parental complaint.

2. Adverse Action

The Office of General Counsel concluded the District's 2010 annual performance evaluation of Lukkarila in May 2010 by Trujillo was adverse. We agree. The Office of General Counsel deemed untimely, and thus did not address, either Trujillo's negative report regarding Lukkarila's March 15, 2010 teaching or Trujillo's mid-March 2010 warning to Lukkarila which threatened insubordination over Lukkarila's alleged failure to respond with alacrity to a message from Trujillo's secretary. We deem both of these mid-March 2010 actions also to be adverse.

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seeking to enforce contractual provisions *prohibiting* discrimination. (*Interboro Contractors, Inc.* (1966) 157 NLRB 1295; *King Soopers, Inc.* (1976) 222 NLRB 1011.)

The Office of General Counsel concluded that a June 25, 2010 memo, sent to Lukkarila and other employees by Elzig, was not adverse to Lukkarila's employment interests. We agree.[13]

The Office of General Counsel concluded that the District's directive to Lukkarila on August 13, 2010, that she submit to a consecutive annual evaluation in the ensuing 2010-11 school year was not adverse. We disagree.

We conclude the authorities discussed in the warning and dismissal letters do not address squarely the issue posed here, that is, whether a consecutive annual evaluation of a permanent certificated employee is adverse.[14] We thus treat the issue as one of first impression, absent the assistance or strictures of our precedent. As a permanent certificated employee, Lukkarila was and is subject to evaluation bi-annually. (Article IX, Evaluation Procedures, Section 3, Evaluations and Conferences, Paragraph A ["at least once every other year for unit members with permanent status"]; Education Code § 44664(a)(2) ["At least every other year for personnel with permanent status"] .) The Education Code establishes and the negotiated evaluation procedure accordingly provides, for a "uniform system of evaluation" of certificated employees. Under that system probationary employees are evaluated annually, while permanent employees are assessed less frequently, either biannually or under specified

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[13] We conclude below, however, that the alleged publication and distribution of the June 25, 2010 memo tends to discourage exercise by employees of their EERA right jointly to seek enforcement of workplace rights, and would cause at least some harm to, and thus interfere with, employee rights. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*).) (See discussion under Interference at p. 28 below.)

[14] *CSU San Marcos* (supervisor's comments, not part of evaluation, deemed mere discussion of work performance--not adverse); *Simi Valley* (supervisor's frequent and unannounced observation visits to teacher's classroom--adverse.); *Fresno* (consecutive evaluation not connected to protected activity—no discussion of whether adverse).

circumstances even less often.[15] Only in exceptional circumstances, viz., following an unsatisfactory evaluation and "until the employee achieves a positive evaluation," must a school district assess annually a permanent employee.[16] Thus, requiring a consecutive year evaluation of a permanent employee treats the permanent employee as though she were probationary and simultaneously signals a performance deficiency requiring remediation and or termination. We conclude that as to a permanent employee subject normally to biannual evaluation under collectively-bargained procedures tracking Education Code sections 446604 et seq., a directive that the employee undergo a consecutive annual evaluation is the functional equivalent of an unsatisfactory evaluation, and thus adverse.[17]

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[15] We take official notice of Education Code section 44660 et seq. and contractual provisions establishing the evaluation protocols for probationary and permanent certificated employees.

[16] Education Code section 44664(b) provides, in pertinent part:

> If any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district.

Article IX, Evaluation Procedures, Section 3, Paragraph A, of the collective agreement provides, in pertinent part:

> Frequency. Evaluation and assessment of the performance of each unit member shall be made on a continuing basis, at least once each school year for probationary unit members and at least every other year for unit members with permanent status. . . . Upon receipt of an unsatisfactory evaluation the employee shall immediately be returned to the yearly evaluation cycle.

[17] The concurrence/dissent construes the Union's contract to "expressly contemplate that the evaluation of permanent employees may occur more frequently than once every other year," and infers that a decision taken within such authority is not adverse. We disagree. An employer's authority to act has no intrinsic bearing on whether the action when taken is or is not adverse to an employee. Many adverse employment actions are contractually authorized, viz., discipline, reduction in rank or status, a written warning or reprimand, etc. We here add to this list an employer's action subjecting to annual evaluation a permanent certificated employee normally evaluated only biannually. However, we caution that to be considered

The Office of General Counsel concluded that the investigation of Lukkarila commenced in September 2010 over alleged misconduct was adverse. We agree.

The Office of General Counsel concluded that a "Summary of Meeting" memo dated October 14, 2010, related to the misconduct charges and issued sometime thereafter to Lukkarila, was adverse. We agree.

In sum, we conclude that Lukkarila has alleged that the District engaged in conduct adverse to her when it: (1) issued to Lukkarila a warning threatening insubordination in mid-March 2010; (2) issued to Lukkarila a negative second observation report in March 2010; (3) issued to Lukkarila a negative final evaluation report in May 2010; (4) directed in August 2010 that Lukkarila undergo a consecutive year annual evaluation during 2010-2011; (5) investigated Lukkarila in September and October 2011 for alleged misconduct; and (6) imposed discipline on Lukkarila following an investigatory meeting in October 2010, in the form of a summary of meeting memo.

3. Nexus

"Unlawful motive is the specific nexus required in the establishment of a prima facie case. ...Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Trustees of Cal. State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1124.)

PERB has developed and applies a set of "nexus" factors in determining whether a charging party has alleged a prima facie case of retaliation. Although suspicious timing of the employer's adverse action in proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), it does not, without more, demonstrate nexus between the adverse action

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unlawful retaliation under our statutes, any alleged adverse action must be shown to meet as well the remaining criteria under our retaliation case law. (*Novato.*)

and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento; Novato.*)

The Office of General Counsel concluded that suspicious timing existed between Lukkarila's protected activities in February and March 2010 and the District's May 2010 evaluation, and also between Lukkarila's participation in the group grievance and complaint in mid-June 2010 and the District's Fall 2010 investigation of Lukkarila for alleged misconduct. It concluded, however, that Lukkarila's allegations failed sufficiently to connect her protected activity to the adverse actions of which she complains, and on that basis dismissed all her allegations of retaliation. We disagree.

We address nexus for each instance of alleged retaliation.

a. Trujillo's mid-March 2010 warning threatening insubordination

The Office of General Counsel did not address this warning, deeming it to be beyond the limitations period and thus to be considered, if at all, only as background in characterizing conduct within the limitations period. Having determined that this conduct itself falls within the limitations period, we address nexus.

The alleged timing was highly suspicious. Lukkarila alleges the warning threatening insubordination occurred: (1) within a month after she informed Trujillo she had used Union assistance in her unsuccessful effort to convince Trujillo to amend his first observation report from the January 2010 of her teaching, and (2) on the very day Trujillo received from the Union lawyer a demand letter, copied to Elzig, asserting Lukkarila's EERA right to Union assistance and representation in her evaluation issues.

Lukkarila alleges that Trujillo departed from established practice. Trujillo made a routine request, through his secretary, that Lukkarila visit the school office. Teachers routinely get such requests, and routinely respond when they can conveniently do so. After Lukkaila responded routinely, visiting the school office early the following morning, Trujillo characterized her behavior tardy and verging on insubordination.

Lukkarila alleges that the alleged tone and content of Trujillo's warning were exaggerated, given: (1) the very brief delay in Lukkarila's compliance with the secretary's request, viz., visiting Trujillo's office before class early the following morning rather than after classes on the day of the request, and (2) the commonplace nature of the transaction, viz., responding to request from school office staff to retrieve a document.

We thus conclude that Lukkarila has alleged sufficient nexus between her protected activity immediately preceding the warning, and the warning itself.

b. Trujillo's negative report of his March 15, 2010 observation of Lukkarila's teaching, forming part of her 2009-2010 annual evaluation

The Office of General Counsel did not address this observation report, deeming it to be beyond the limitations period and thus to be considered, if at all, only as background. Having determined that this conduct falls within the limitations period, we address nexus.

As with Trujillo's warning threatening insubordination, the alleged timing of Trujillo's report for the March 15, 2010 observation also was highly suspicious. Although the observation report was required to be issued shortly after March 15, 2010, and thus the timing itself was prescribed by the evaluation procedure and not within Trujillo's discretion, it nonetheless occurred, like the warning, immediately following Lukkarila's protected activity.

Lukkarila alleges that Trujillo departed from the evaluation procedure: He failed to attach to his observation report of Lukkarila, Lukkarila's written response to that report.

We thus conclude that Lukkarila has alleged sufficient nexus between her protected activity immediately preceding Trujillo's negative report of the March 15, 2010 observation, and the negative report itself.

c. Trujillo's May 2010 negative final evaluation of Lukkarila's teaching, forming part of her 2009-10 evaluation

The Office of General Counsel concluded the Trujillo's alleged final evaluation for 2009-10 was adverse, but not timely, and did not consider nexus. Having concluded above that the alleged 2009-10 final evaluation is adverse, we here address nexus.

The alleged timing of the final evaluation was suspicious, albeit not as suspicious by temporal proximity as that for Trujillo's warning and his March 15, 2010 observation report discussed immediately above. We note, however, that it was only in regard to her 2009-10 evaluation that Lukkarila alleges that she sought and utilized assistance of the Union, and thus

such protected activity would come inexorably to the parties' minds in early May 2010 during the ensuing and final step of the 2009-10 evaluation process. Thus, any lessening of Trujillo's animus owing to passage of time between mid-March and early-May 2010, would be offset by the parties' return to the matter of Lukkarila's 2009-10 evaluation, which required Trujillo to revisit previously-made observation reports and to provide an end of the year update.

Lukkarila alleges that Trujillo departed from the evaluation procedure. First, alleges Lukkarila, Trujillo failed even in May 2010 to attach Lukkarila's written response to Trujillo's written report of the March 15, 2010 observation. Second, alleges Lukkarila, Trujillo did not visit her classroom after March 15, 2010. Thus, alleges Lukkarila, Trujillo had no observational basis for the claims in the final evaluation report that Lukkarila failed to implement his recommendations, inter alia, that she employ non-lecture methodologies to increase student participation.

The foregoing factors, coupled with allegations of Trujillo's conduct in February and March 2010, convince us that Lukkarila has alleged sufficient nexus between Trujillo's final evaluation report and Lukkarila's protected activity. We include here Trujillo's alleged early February 2010 refusal, after learning of Lukkarila's consultation with the Union, to consider previously discussed changes in the evaluation observation report for January 2010;[18] Trujillo's alleged mid-March warning threatening insubordination; Trujillo's alleged negative

[18] We consider here Trujillo's alleged early February 2010, about-face on changes Lukkarila proposed to Trujillo's report of the January 2010 observation, on the basis that such background events may be relied upon in characterizing conduct falling within the limitations period. (*Service Employees International Union, Local 1021 (Sahle)* (2012) PERB Decision No. 2261-M; *Sacramento City Unified School District* (1982) PERB Decision No. 214; *Marin Community College District* (1980) PERB Decision No. 145, Proposed Decision, at p. 45; *Machinists Local v. National Labor Relations Board* (1960) *362 U.S. 411, 416* [events occurring prior to the limitations period may be utilized to shed light on the true character of matters occurring within the limitations period].)

report of his March 15, 2010 observation; and Trujillo's alleged continuing failure to attach thereto Lukkarila's written response to the report of the March 15, 2010 observation.

d. Duchon's August 13, 2010 directive to Lukkarila that she undergo a consecutive annual evaluation during 2010-2011

The Office of General Counsel concluded this directive was not adverse, and thus it did not consider nexus. Having concluded above that the alleged directive is adverse, we here address nexus.

The timing of the alleged August 13, 2010 directive for a consecutive annual evaluation in 2010-11 is suspicious, coming less than two months after Lukkarila's June 21, 2010 filing of an individual written complaint and her June 21, 2010 participation in a group grievance and complaint, and less than two months after Lukkarila's written request of June 30, 2010 to Elzig not participate in the District's investigation of her individual complaint.

In addition to suspicious timing, Lukkarila alleges other factors suggesting that Duchon's directive requiring Lukkarila to undergo a consecutive annual evaluation was "because of" Lukkarila's protected activity. First, Lukkarila alleges that the District departed from the Procedure by failing to respond within the specified timelines. The Procedure calls for a response at Level I within ten business days from the date the complaint is filed. The District instead responded on August 13, 2010, an unexplained delay of more than five weeks. Second, Lukkarila alleges that between June 21, and August 13, 2010, the District departed from the Procedure by failing to confer or consult with Laukkarila regarding her complaint. Third, Lukkarila alleges that during September and on September 20, 2010, the District continued to depart from the Procedure when it skipped altogether Level II, moved the complaint directly to Level III (the governing board), denied Lukkarila the right afforded by

the Procedure for a hearing, with representation, in closed session with the governing board, and then summarily considered and rejected Lukkarila's complaint.[19]

The foregoing allegations establish that the District departed consistently from the Procedure and processed Lukkarila's complaint perfunctorily. We consider as well here the District's alleged immediate and sharply-hostile response of June 25, 2010 to the group grievance and complaint, and the District's alleged negative evaluation of Lukkarila. Together, they provide a sufficient nexus between Lukkarila's protected activity and Duchon's directive that she undergo a consecutive annual evaluation in 2010-11.

e. Investigation of Lukkarila in September and October 2011 for alleged misconduct following a parental complaint

The Office of General Counsel concluded this investigation was adverse, but that Lukkarila had alleged insufficient nexus to her protected activity. We disagree.

We conclude that suspicious timing exists. Lukkarila alleges protected conduct which both preceded and overlapped some of the alleged investigation events in September 2010. Such protected conduct includes filing and processing the complaint under the Procedure, on June 21, June 30, August 13, and August 27, 2010, and in mid-September.

In addition to suspicious timing, Lukkarila alleges that the District departed from established procedures stated in the collectively-bargained agreement by: (1) failing to notify

[19] We note here the District's alleged treatment of Lukkarila's complaint both before and after the August 13, 2010 directive for a consecutive year evaluation. Ordinarily, we consider only conduct occurring prior to an event when assessing evidence of motivation for that event. Here, however, we deem it relevant that the District's alleged treatment of Lukkarila's complaint departed consistently from the Procedure. Thus, while one might excuse a tardy response at Level I of the Procedure as mere inadvertence and not purposeful, when viewed in the context with the alleged September events, the earlier events are seen as part of a consistent pattern of failing to process Lukkarila's complaint in accordance with the Procedure.

her promptly of the charges against her, and (2) failing to afford her an opportunity to meet with the complaining parent.

We conclude that Lukkarila alleged sufficient nexus between her protected activity and the District's investigation of her alleged misconduct.

f. Discipline imposed via a summary of meeting memo following an investigatory meeting in October 2010

The Office of General Counsel concluded this discipline was adverse, but that Lukkarila had alleged insufficient nexus to her protected activity. We disagree.

We rely on the same allegations discussed above regarding the District's investigation, plus Lukkarila's allegation that the District departed from established procedures by failing promptly to deliver to her the summary of meeting memo which she alleges she received much later. We conclude that Lukkarila alleged sufficient nexus between her protected activity and the District's imposition of discipline over her alleged misconduct.

In sum, we conclude that the following alleged District actions are adverse and have sufficient nexus to Lukkarila's protected activity to state a prima facie case of retaliation: (1) Trujillo's mid-March 2010 warning threatening insubordination; (2) Trujillo's negative report of his March 15, 2010 observation of Lukkarila's teaching, forming part of her 2009-2010 annual evaluation; (3) Trujillo's May 2010 negative final evaluation of Lukkarila's teaching, forming part of her 2009-10 evaluation; (4) Duchon's August 13, 2010 directive to Lukkarila that she undergo a consecutive annual evaluation during 2010-2011; (5) the investigation of Lukkarila in September and October 2010 for alleged misconduct based on a parental complaint, and (6) the discipline imposed via a summary of meeting memo following an investigatory meeting in October 2010.

We turn now to Lukkarila's allegations of interference.

Interference

The Office of General Counsel dismissed Lukkarila's allegations that the District interfered with her exercise of rights under EERA. We first review briefly the elements of a prima facie case, and then the legal analysis.

A prima facie case of interference is established by allegations that an employer's conduct tends to or does result in some harm to employee rights under our statutes. (*Carlsbad.*) Employees have the right to engage in activities protected by EERA, viz., forming, joining and participating in activities of an employee organization for the purpose of representation. (EERA § 3543.5(a).) Employer conduct which tends to or does result in some harm to an employee's exercise of these rights interferes therewith in violation of the EERA. (EERA § 3543.5(a).)

Protected employee activity includes, without limitation: (1) seeking to enforce collectively-bargained agreements, either individually or jointly with other employees; and (2) with one or more other employees, seeking to enforce workplace rights through administrative or judicial means. (*Oakdale; Franklin Iron.*) In addition, protected activity includes representation rights, known colloquially as "*Weingarten* rights," so named for a decision of the United States Supreme Court affirming the National Labor Relations Board (NLRB) decision which enforced them. (*NLRB v. J. Weingarten, Inc.* (1975) 420 U.S. 251.) These rights protect an employee's request for union representation, inter alia, when an employer seeks to question an employee under circumstances which are unusual or could lead to discipline for the employee.

We consider several instances of alleged District conduct which Lukkarila contends violate the EERA by interfering with employee rights. These are: (1) Elzig's June 25, 2010 written communication to employees, including Lukkarila, criticizing the employees for filing

the group grievance and complaint on June 21, 2010; (2) the District's alleged scheduling of an investigatory interview meeting with Lukkarila on October 11, 2010 at a time when her preferred Union representative was unavailable; (3) the District's alleged insistence that Lukkarila proceed with the scheduled investigatory interview accompanied by a Union representative chosen by the District; (4) the District's alleged denial to Lukkarila and the Union representative an opportunity to confer briefly immediately prior to the investigatory interview; and (5) the District's refusing to permit Lukkarila to be accompanied during the investigatory interview by her attorney.

The Office of General Counsel determined that none of these interference allegations stated a prima facie violation of the EERA. We disagree.

We conclude that Lukkarila has alleged prima facie District interference with her rights under the EERA in regard to the publication of the June 25, 2010 Elzig memo to employees. We explain.

Lukkarila alleges that the Elzig memo criticized those employees who, with Lukkarila, had joined together to file through counsel a grievance and complaint seeking to enforce workplace rights. Such alleged conduct by the District's assistant superintendent for personnel is attributable to the District. (*Antelope Valley Community College District* (1979) PERB Decision No. 97.) Employees reading the memo would understand the District to be hostile to their participation in activity protected by the EERA. We conclude this would result in at least some harm to employee rights. (*Carlsbad.*) Thus, we conclude that the allegation states prima facie an instance of impermissible interference with employee rights.

Lukkarila alleges that the District scheduled the investigatory interview at a time during the workday when her customary representative was not available, that the District arranged which Union representative would attend the interview, and that the District denied her request

just prior to the interview to confer in private with the Union representative. To be effective, the right to Union representation in an investigatory interview includes an opportunity for the employee prior to the interview to confer with the Union. Where the employer schedules the interview in such fashion that the employee has no opportunity to confer with the Union on the employee's own time prior to the interview, then upon request of either the employee or the Union representative the employer must provide a reasonable time for the employee and the Union representative to confer, in private, before proceeding with the interview so that the union representative "can provide meaningful representation" not merely be an observer.[20] We conclude that Lukkarila had sufficient time after learning of the impending investigatory interview to consult the Union for advice. The interview was scheduled for September 29, 2010, and rescheduled at Lukkarila's request for October 11, 2010. Thus, we conclude that the District did not interfere with Lukkarila's EERA right to representation in the investigatory interview, when on October 11, 2010, the District declined Lukkarila's request to meet privately with the Union representative prior to commencing the scheduled investigatory interview.

As to Lukkarila's remaining allegations of interference, we conclude with the Office of General Counsel that each fails to state prima facie interference with EERA rights. Under EERA a union designates the union's agents,[21] including without limitation union agents who will represent employees in investigatory interviews. EERA does not oblige an employer or the union to accommodate an employee's choice of union representative,[22] either in scheduling

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[20] Higgins, The Developing Labor Law (5th ed. 2006) Ch. 6, p. 234; *Postal Service* (1988) 288 NLRB 864.

[21] *Chaffey Joint Union High School District* (1982) PERB Decision No. 202.

[22] *State of California (Department of Transportation)* (1994) PERB Decision No. 1049-S.

or conducting an investigatory interview; provided that, where an employee's preferred union representative is available, an employer may not insist upon a different representative. (*Consolidation Coal Co.* (1992) 307 NLRB 976.) Nor does EERA afford an employee the right to be represented by the employee's own attorney in an investigatory interview conducted by employer officials. (*Solano Community College.*)

In sum, we conclude that the District's alleged conduct interfered with the exercise by Lukkarila of rights protected under EERA, as follows: Elzig's June 25, 2010 written communication to employees, including Lukkarila, criticizing the employees for filing the group grievance and complaint on June 21, 2010.

CONCLUSION

Based on review of the entire record, we conclude with the Office of General Counsel that Lukkarila lacks standing to allege violations of EERA sections 3543.5(b), (c) and (d), and 3543.6, and we therefore affirm the dismissal thereof. We likewise conclude, with the Office of General Counsel, that PERB lacks jurisdiction to entertain and remedy allegations made by an individual employee of employment discrimination in violation of state or federal law other than statutes administered by PERB, and on that basis affirm the dismissal thereof.

We conclude, however, that an individual employee who seeks to enforce rights stated in a collectively-bargained agreement or memorandum of understanding, engages in activity protected by EERA, and in addition that employees engage in activity protected by EERA when they jointly seek to enforce statutory or other prohibitions against employment discrimination or jointly prosecute other alleged violations of workplace rights regardless of the source thereof. We conclude therefore that Lukkarila has alleged prima facie violations of EERA section 3543.5(a), both interference with protected activity and retaliation because of protected activity, as discussed above in this opinion.

ORDER

The Public Employment Relations Board (PERB or Board) reverses, in part, the dismissal of Pamela Jean Lukkarila's (Lukkarila) unfair practice charge as to alleged violations of section 3543.5(a) of the Education Employment Relations Act (EERA), and REMANDS the charge to PERB's Office of General Counsel for issuance of a complaint in accordance with this Decision.

The Board affirms, in part, the dismissal of Lukkarila's unfair practice charge, as to alleged violations of sections 3543.5(b), (c) and (d), and 3543.6, of the EERA. Such violations are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez joined in this Decision.

Member Dowdin Calvillo's concurrence and dissent begins on page 33.

DOWDIN CALVILLO, Member, concurring in part and dissenting in part. I concur in the result with the exception of one issue, as discussed below.

With regard to the retaliation allegations, I concur that the charge states a prima facie case of retaliation with respect to the following actions taken by the Jurupa Unified School District (District): (1) Jay Trujillo's (Trujillo) mid-March 2010 warning threatening Pamela Jean Lukkarila (Lukkarila) with insubordination; (2) Trujillo's negative report of his March 15, 2010 observation of Lukkarila's teaching; (3) Trujillo's May 2010 final evaluation of Lukkarila's teaching; (4) the investigation of Lukkarila for alleged misconduct based on a parental complaint; and (5) the summary of meeting disciplinary memo following the October 2010 investigatory meeting. I disagree, however, that the directive to submit to consecutive evaluations is an adverse action. Specifically, I disagree that the system established in the Education Code and the parties' collective bargaining agreement (CBA) provides for the annual evaluation of permanent employees only in exceptional circumstances. Instead, given the language requiring the evaluation of permanent employees "at least" every other year, I find nothing in the Education Code or the parties' CBA that would preclude the District from evaluating an employee more frequently than every other year under the circumstances of this case. Accordingly, I dissent on that issue.

The Public Employment Relations Board (PERB) has long held:

> 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; fn. omitted.) Applying this test to the allegations of the charge, I disagree that the charge alleges facts establishing that a reasonable person would consider the requirement that Lukkarila submit to a second annual

evaluation, after returning from an extended leave, to have an adverse impact on her employment. In reaching this conclusion, I have examined both the parties' CBA and the provisions of the Education Code governing teacher evaluations. Education Code section 44664 provides, in relevant part:

> (a) Evaluation and assessment of the performance of each certificated employee shall be made on a continuing basis as follows:
>
> (1) At least once each school year for probationary personnel.
>
> (2) At least every other year for personnel with permanent status.
>
> (3) At least every five years for personnel with permanent status who have been employed at least 10 years with the school district, are highly qualified, if those personnel occupy positions that are required to be filled by a highly qualified professional by the federal No Child Left Behind Act of 2001 (20 U.S.C. Sec. 6301, et seq.), as defined in 20 U.S.C. Sec. 7801, and whose previous evaluation rated the employee as meeting or exceeding standards, if the evaluator and certificated employee . . . agree. . . .
>
> (b) The evaluation shall include recommendations, if necessary, as to areas of improvement in the performance of the employee. If an employee is not performing his or her duties in a satisfactory manner according to the standards prescribed by the governing board, the employing authority shall notify the employee in writing of that fact and describe the unsatisfactory performance. The employing authority shall thereafter confer with the employee making specific recommendations as to areas of improvement in the employee's performance and endeavor to assist the employee in his or her performance. If any permanent certificated employee has received an unsatisfactory evaluation, the employing authority shall annually evaluate the employee until the employee achieves a positive evaluation or is separated from the district.

(Emphasis added.)

Consistent with the statutory language, Article IX, section 3, of the CBA states that evaluations "shall be made on a continuing basis, at least once each school year for probationary unit members and at least every other year for unit members with permanent status." (Emphasis

added.) Therefore, neither the statute nor the contract language requires only biannual evaluations; rather, they expressly contemplate that the evaluation of permanent employees may occur more frequently than once every other year. While subdivision (b) of Education Code section 44664 and the parties' CBA require annual evaluations in the event a certificated employee has received an unsatisfactory evaluation, the majority construes these provisions to mean that requiring a consecutive year evaluation of a permanent employee is an exceptional circumstance, treats the permanent employee as though she were probationary, or otherwise "signals a performance deficiency requiring remediation and or termination." I find no support for this position in the facts alleged in the charge. Instead, I find that the decision to require a consecutive annual evaluation so that the employer may have a fair basis for evaluating an employee after a lengthy absence to be consistent with the language of the Education Code and the CBA.[1] Accordingly, I find that the charge fails to allege facts demonstrating that the decision to require Lukkarila to undergo consecutive annual evaluations was an adverse action. Accordingly, I would find that the charge fails to states a prima facie case of retaliation with respect to that allegation.

[1] In reaching this conclusion, I do not intend to suggest that a decision taken within statutory or contractual authority can never be adverse. Rather, contrary to the majority, I find that the statutory and contractual language in this case does not support the conclusion that the decision to require consecutive annual evaluations of a permanent employee under the circumstances of this case constitutes an adverse action.