

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



RENATE DERUITER,

Charging Party,

v.

GARDEN GROVE UNIFIED SCHOOL
DISTRICT,

Respondent.

Case No. LA-CE-5311-E

PERB Decision No. 2086

December 28, 2009

Appearances: Martha A. Torgow, Attorney, for Renate DeRuiter; Atkinson, Andelson, Loya, Ruud & Romo by Anthony P. De Marco and Fermin Villegas, Attorneys, for Garden Grove Unified School District.

Before Dowdin Calvillo, Acting Chair; Neuwald and Wesley, Members.

DECISION

NEUWALD, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Renate DeRuiter (DeRuiter) of a Board agent's dismissal (attached) of her unfair practice charge. The charge alleged that the Garden Grove Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ by retaliating against DeRuiter for engaging in protected activities. DeRuiter alleged that this conduct constituted a violation of EERA section 3543.5. The Board agent found most of the charge untimely and dismissed the remaining allegations for failure to state a prima facie case of retaliation.

We have reviewed the entire record in this case, and find the warning and dismissal letters well-reasoned and in accordance with applicable law. Accordingly, the Board hereby

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

adopts the warning and dismissal letters as the decision of the Board itself, as supplemented by the discussion below.

BACKGROUND

DeRuiter is a teacher with the District at Violette Elementary School. In or around 2006, she began serving as a campus grievance representative for the Garden Grove Education Association (GGEA). On March 10, 2006, she engaged in protected activity by approaching her supervisor to discuss concerns over access to bathroom facilities for bargaining unit members after school hours and on weekends. In her original charge filed April 2, 2009, DeRuiter alleges that, after this discussion and from 2006 through 2008, she received six negative performance evaluations, as well as two letters of concern regarding her performance, and was placed in the peer assistance review (PAR) program from April 27, 2007 until June 13, 2008.

In her amended charge, DeRuiter alleged that she also engaged in protected activity by assisting in the creation of a "Faculty Advisory Committee" and participated in that committee from April 2007 through October 2008. She also alleged that she filed a grievance in Spring 2008 concerning her placement in the PAR program and filed another grievance on February 11, 2009 concerning her treatment by District Representative Janet Loya. She further alleged that the District took adverse action against her by issuing negative reports of her teaching performance on December 9, 2008, January 14, 2009, March 12, 2009 and April 29, 2009. She further alleged that on November 17, 2008 and June 2, 2009, the District denied her requests for transfer. On May 1, 2009, the District issued an annual evaluation rating DeRuiter's performance as unsatisfactory.

DERUITER'S APPEAL

DeRuiter argues that she established a prima facie case of retaliation and that the most recent alleged adverse actions were a continuation of the initial actions taken in retaliation for her protected activity in 2006.

DISCUSSION

New Evidence on Appeal

On appeal, DeRuiter submitted two additional documents that were not previously provided to the Board agent. The first is a document dated September 11, 2009 signed by the GGEA executive director that states: "My School Visit Logs indicate that I presented an FAC (Faculty Advisory Committee) training to the staff at Violette Elementary School on May 24, 2007." The second is a document dated September 8, 2009, signed by a Violette Elementary first grade teacher, which states: "I am writing this statement that I was observed for 15 or more minutes approximately 4x during the school year 2007-2008."

PERB Regulation 32635(b) provides: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence."² (See, e.g., *Fremont Unified School District* (2003) PERB Decision No. 1571; *Lodi Unified School District* (2002) PERB Decision No. 1486; *Peralta Community College District* (2001) PERB Decision No. 1418; *Regents of the University of California* (1998) PERB Decision No. 1271-H.) The purpose of this regulation "is to require the charging party to present its allegations and supporting evidence to the Board agent in the first instance, so that the Board

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

agent can fully investigate the charge prior to deciding whether to issue a complaint or dismiss the case.” (*South San Francisco Unified School District* (1990) PERB Decision No. 830.)

DeRuiter has failed to offer any evidence of good cause for her failure to obtain and provide this evidence to the Board agent to consider. Both documents refer to events that occurred long before the filing of the charge. Therefore, we do not consider the new evidence presented on appeal.

Prima Facie Case of Retaliation

We adopt the Board agent’s discussion and analysis of the issues of timeliness³ and retaliation as set forth in the attached warning and dismissal letters, subject to the discussion below.

EERA section 3543(a) provides, in relevant part:

Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, an employee in that unit shall not meet and negotiate with the public school employer.

³ We agree with the Board agent that the continuing violation doctrine does not apply in this case. We note, however, that while actions outside the statutory limitations period may not be considered as separate violations in the absence of an independent violation within the limitations period (*Trustees of the California State University* (2009) PERB Decision No. 2038-H), they may nonetheless be considered as background evidence of the employer’s motive. (See *Trustees of the California State University* (2008) PERB Decision No. 1970-H; *California State University, Hayward (Dees)* (1991) PERB Decision No. 869-H; *North Sacramento School District* (1982) PERB Decision No. 264.) Here, however, we find insufficient evidence to support a finding that the evaluations and letters of concern issued prior to the statutory period demonstrate unlawful motivation.

EERA section 3540.1(d) defines “[e]mployee organization” as “any organization which includes employees of a public school employer and which has as one of its primary purposes representing those employees in their relations with that public school employer.” PERB has found that a “Teachers Forum” composed of teachers from each school within the district constituted an “employee organization” under Section 3540.1(d), where the group was established and used to improve communications and solve problems, functioned as a representative body, discussed negotiable subjects, and was generally perceived by employees as a better way of solving problems involving working conditions than through the exclusive representative. (*Oak Grove School District* (1986) PERB Decision No. 582.) Similarly, PERB found a “classified senate” to be an employee organization, where it was clear from the organization’s constitution and bylaws that the organization had a “representational purpose” and the evidence established the organization’s involvement in the employer’s decision making. (*Ventura Community College District* (1994) PERB Decision No. 1073.)

Both of these cases involved allegations of unlawful employer domination pursuant to EERA section 3543.5(d).⁴ In contrast, in *California School Employees Association & its Chapter 36 (Peterson)* (2004) PERB Decision No. 1683, the Board dismissed a charge alleging that a union representing school employees discriminated and retaliated against a member for serving as president of a classified senate, finding that the charging party failed to establish that the classified senate was an employee organization within the meaning of EERA section 3540.1(d).

⁴ EERA section 3543.5(d) makes it unlawful for a public school employer to “Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another.”

We agree with the Board agent's determination that DeRuiter has failed to provide any details concerning the activities of the FAC that would permit the Board to determine that the FAC has a "representational purpose" so as to constitute an employee organization within the meaning of EERA section 3540.1(d).

We also agree with the Board agent that DeRuiter's complaints to her supervisor about employee working conditions were protected activity. It is unclear whether DeRuiter was acting in her capacity as a union representative when she complained to the principal about after-hours bathroom and facility access and safety issues related to student discipline. However, EERA section 3543 recognizes a protected right of self-representation that includes the right of an individual to present complaints to the employer about unsafe working conditions. (*Pleasant Valley School District* (1988) PERB Decision No. 708; *Livingston Union School District* (1992) PERB Decision No. 965.) Therefore, even if DeRuiter was not acting in her union capacity, her complaints constituted protected acts of self-representation.

ORDER

The unfair practice charge in Case No. LA-CE-5311-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820



September 3, 2009

Martha A. Torgow, Attorney
The Torgow Law Firm
9413 Donna Avenue
Northridge, CA 91324

Re: *Renate DeRuiter v. Garden Grove Unified School District*
Unfair Practice Charge No. LA-CE-5311-E
DISMISSAL LETTER

Dear Ms. Torgow:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 2, 2009. Renate DeRuiter (DeRuiter or Charging Party) alleges that the Garden Grove Unified School District (District or Respondent) violated section 3543.5(a) of the Educational Employment Relations Act (EERA or Act)¹ by retaliating against her for engaging in protected activities.

Charging Party was informed in the attached Warning Letter dated June 26, 2009, that the above-referenced charge did not state a prima facie case. She was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, she should amend the charge. She was further advised that, unless she amended the charge to state a prima facie case or withdrew it prior to July 8, 2009, the charge would be dismissed. DeRuiter received an extension of time until July 27, 2009 to file the amended charge and, on that date, the amended charge was filed.

In the amended charge, DeRuiter continues to allege that the District engaged in "pattern of retaliation" against her. DeRuiter was informed in the June 26, 2009 Warning Letter that PERB is prohibited from issuing a complaint regarding allegations of unlawful conduct occurring more than six months prior to the date that the charge was filed. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072; *Los Angeles Unified School District* (2007) PERB Decision No. 1929.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) The Charging Party has the burden of establishing that the charge is timely filed. (PERB Regulation 32615(a)(5); *Compton Unified School District* (2009) PERB Decision No. 2015.)

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

In this case, the charge was filed on April 2, 2009. This means that the statutory period extends back until October 2, 2008. DeRuiter alleges misconduct by the District ranging from May 18, 2008 through December 12, 2008. DeRuiter was informed in the June 26, 2009 Warning Letter that she had not established that the allegations of conduct occurring outside of the statute of limitations period were timely filed.

DeRuiter contends that alleged events occurring outside of the statute of limitations should not be dismissed under the continuing violation doctrine. According to the continuing violation doctrine, "a violation within the statute of limitations period may 'revive' an earlier violation of the same type that occurred outside of the limitations period." (*Trustees of the California State University (Kyrias)* (2009) PERB Decision No. 2038-H; *Compton Community College District* (1991) PERB Decision No. 915.) The violation within the statute of limitations period must, however, constitute an independent violation without reference to the earlier violations. (*Trustees of the California State University (Kyrias)*, *supra*, PERB Decision No. 2038-H, citing *North Orange County Community College District* (1999) PERB Decision No. 1342.) Therefore, it is appropriate to first consider whether DeRuiter's allegations of misconduct occurring within the statute of limitations period constitute violations of EERA without reference to the earlier violations.

I. Retaliation for Protected Activity

As explained in the June 26, 2009 Warning Letter, to demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).)

A. Alleged Protected Activity With Knowledge of the District

In the original charge, DeRuiter alleges that, in March 2006, she served as a grievance representative and held a discussion with her supervisor concerning faculty member bathroom access privileges. As explained in the June 26, 2009 Warning Letter, participation as a union officer and complaining to management about working conditions constitute protected activity. (See *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778; *Los Angeles Unified School District* (1999) PERB Decision No. 1338.)

In the amended charge, DeRuiter alleges that she assisted in creating something titled the Faculty Advisory Committee. EERA protects employees' right to form, join, and participate in the activities of employee organizations. (EERA, § 3543(a).) An "employee organization" is defined as any organization that includes public school employees and has as one of its primary purposes representing those employees in their relations with the public school

employer. (EERA, § 3540.1(d).) In *Ventura Community College District* (1994) PERB Decision No. 1073, the Board held that a non-union employee group constituted an “employee organization” under EERA section 3540.1(d) where it was clear from the organization’s constitution and bylaws that the organization had a “representational purpose.” In contrast, in *California School Employees Association & its Chapter 36 (Peterson)* (2004) PERB Decision No. 1683, the Board found that a classified senate did not qualify as an employee organization where the charging party failed to present facts regarding the purpose and structure of the organization. In this case, DeRuiter alleges that she participated in the Faculty Advisory Committee from April 2007 through October 2008. However, DeRuiter does not provide any details concerning the activities of this committee and accordingly, she does not establish that one of the primary purposes of the Faculty Advisory Committee was to represent District employees in their employment relationship with the District. Thus, DeRuiter does not demonstrate that forming the Faculty Advisory Committee qualifies as protected activity.

DeRuiter also asserts in the amended charge that she filed a grievance in Spring 2008 concerning her placement in the District’s Peer Assistance Review (PAR) program and filed another grievance on February 11, 2009 concerning District representative Janet Loya’s conduct towards DeRuiter. The filing and processing of grievances constitutes protected activity. (*City of Modesto* (2008) PERB Decision No. 1994-M; *Ventura County Community College District* (1999) PERB Decision No. 1323.) Moreover, as the District took action in response to DeRuiter’s grievances, it was aware of these activities.

B. Adverse Actions

In the amended charge, DeRuiter supplements and clarifies what she contends constitute adverse employment actions. On December 9, 2008 and January 14, 2009, March 12, 2009, and April 29, 2009, the District issued DeRuiter reports containing negative comments about DeRuiter’s teaching performance based on observations from her supervisors. On November 17, 2008 and June 2, 2009, the District denied DeRuiter’s requests to be transferred to different positions. On May 1, 2009, the District issued DeRuiter an annual evaluation that rated her as unsatisfactory.

C. Nexus

In this case, the alleged adverse actions referenced above are approximately two years or more removed from DeRuiter’s alleged March 2006 protected activity. As explained in the June 26, 2009 Warning Letter, the length of time between these events is not sufficient to support a nexus or causal connection. (*Oakland Unified School District* (2003) PERB Decision No. 1512.) However, DeRuiter’s later protected activity, namely the grievances she filed in Spring 2008 and on February 11, 2009, occur closer in time to the District’s allegedly adverse actions. But, as temporal proximity alone is not sufficient to establish the required nexus (see *Moreland Elementary School District* (1982) PERB Decision No. 227), PERB must undertake further investigation as to whether there is additional evidence of a causal connection.

DeRuiter does not provide sufficient information to further demonstrate nexus. Although DeRuiter contends that she was treated differently from other teachers at the District, she does not provide facts supporting this conclusion. And, as stated in the June 26, 2009 Warning Letter, mere conclusory remarks are not sufficient to demonstrate a violation. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) DeRuiter appears to allege that she was evaluated differently and more frequently than her coworkers. In *Simi Valley Unified School District* (2004) PERB Decision No. 1714, the Board found that the unusual frequency and tenor of a supervisor's classroom observations was evidence of nexus where a supervisor visited the teacher 26 times in a period of two months, which was far more frequent than what took place with any other teacher. (*Ibid.*) In the present case, DeRuiter does not provide any information concerning existing policies for evaluating or observing teachers. Nor does she discuss the frequency or manner of observations and evaluations of other teachers. Thus, there is insufficient information to determine whether DeRuiter was treated differently from other teachers.

DeRuiter also contends that the District improperly denied her request to be evaluated by someone other than by members of the District's human resources office. An employer's departure from existing procedures concerning evaluations may be evidence of nexus. (See *Regents of the University of California* (2004) PERB Decision No. 1592-H). In this case, however, DeRuiter does not demonstrate that she was entitled to a different evaluator. As already discussed above, DeRuiter does not provide information regarding the existing evaluation process. Nor does DeRuiter explain under what circumstances a unit member may request an independent evaluator or whether other employees were afforded this opportunity. Thus, there is insufficient information to conclude that this allegation supports DeRuiter's retaliation claim.

DeRuiter also alleges that the comments made during some of the District's observations and evaluations were based on false information and inaccurate data. An employer's cursory investigation or improper justification for its actions is evidence of nexus. (*Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M; *Novato, supra*, PERB Decision No. 210.) In this case, DeRuiter does not provide sufficient information about the allegedly false information to determine whether this supports a finding of nexus. For example, it is unclear from the charge whether the allegedly false information concerned the observations and evaluation occurring within the statutory limitations period or whether the District made use of this information in its earlier, untimely evaluations and observations. Thus, PERB is unable to determine whether the timely adverse actions were based upon a cursory investigation or improper justification. Therefore, this also does not support DeRuiter's retaliation claim.

DeRuiter also contends that the District threatened DeRuiter. Specifically, DeRuiter alleges that District Principal Jason Bevacqua stated that DeRuiter should go into a different line of work and that he believed that DeRuiter would be placed into the PAR program in the future. The Board has found that an employer's hostile comments towards union or other protected activity is evidence of nexus. (*Contra Costa Community College District* (2006) PERB

Decision No. 1852.) The issue is whether a reasonable person under the same circumstances would understand the comments to be directed towards the protected activity or protected group. (*Ibid.*) In this case, the comments at issue do not bear any direct relationship to DeRuiter's activities in 2006 or her later grievance activity in either 2008 or 2009. Rather, both sets of comments appear to concern her individual teaching performance. Thus, there is insufficient evidence to determine that these comments demonstrate the District's animus towards DeRuiter's protected activities.

For these reasons, DeRuiter does not establish that the District retaliated against her and these allegations are dismissed.

II. Application of the Continuing Violation Doctrine

In order for the continuing violation doctrine to apply, DeRuiter must establish that the District's conduct within the statutory limitations period amounts to an independent violation of EERA. (See *Trustees of the California State University (Kyrias)*, *supra*, PERB Decision No. 2038-H.) As discussed above, DeRuiter does not establish that the District's actions within the statutory limitations period amount to a violation of EERA. Consequently, DeRuiter does not establish that the continuing violation doctrine applies here. Thus, any allegation of wrongdoing by the District occurring prior to October 2, 2008 is dismissed as untimely.

Right to Appeal

Pursuant to PERB Regulations,² Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

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

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

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

[CONTINUES ON THE NEXT PAGE]

LA-CE-5311-E
September 3, 2009
Page 7

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Eric J. Cu 
Regional Attorney

Attachment

cc: Renate DeRuiter; Anthony P. DeMarco

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
700 N. Central Ave., Suite 200
Glendale, CA 91203-3219
Telephone: (818) 551-2804
Fax: (818) 551-2820



June 26, 2009

Martha A. Torgow, Attorney
9413 Donna Ave.
Northridge, CA 91324

Re: *Renate DeRuiter v. Garden Grove Unified School District*
Unfair Practice Charge No. LA-CE-5311-E
WARNING LETTER

Dear Ms. Torgow:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 2, 2009. Renate DeRuiter (DeRuiter or Charging Party) alleges that the Garden Grove Unified School District (District or Respondent) violated section 3543.5(a) of the Educational Employment Relations Act (EERA or Act)¹ by retaliating against her for engaging in protected activities.

DeRuiter was hired as a teacher at the District on September 6, 1991. Teachers in the District are in a bargaining unit exclusively represented by the Garden Grove Education Association (Union). The Union and the District are parties to a Collective Bargaining Agreement containing a grievance procedure that culminates in binding arbitration.

From 1992 through 2005, DeRuiter received satisfactory evaluations from her supervisors. These evaluations were conducted by different supervisors over this time period.

In or around March 2006, DeRuiter began serving as a campus grievance representative for the Union. As part of her duties as a Union grievance representative, on March 10, 2006, DeRuiter approached then-Principal Jason Bevacqua to discuss concerns over bathroom access for bargaining unit members.

After this discussion, and from 2006 through 2008, DeRuiter's received six evaluations where she was rated as either "needs improvement" or as "unsatisfactory." The latest of these evaluations occurred on December 12, 2008.² In addition, on May 18, 2006 and October 16, 2006, the District issued DeRuiter letters of concern regarding her teaching performance. On April 27, 2007, the District placed DeRuiter in the Peer Assistance Review (PAR) program. DeRuiter was taken out of the PAR program on June 13, 2008.

¹ EERA is codified at Government Code section 3540 et seq. The text of the EERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

² The other, earlier, evaluations occurred on December 4, 2006, February 28, 2007, April 27, 2007, February 13, 2008, and April 30, 2008.

Discussion:

PERB Regulation 32615(a)(5)³ requires, inter alia, that an unfair practice charge include a “clear and concise statement of the facts and conduct alleged to constitute an unfair practice.” The charging party’s burden includes alleging the “who, what, when, where and how” of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party’s burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

In this case, the charge was filed on April 2, 2009. This means that the statutory period extends back until October 2, 2008. Therefore, any allegations of wrongdoing by the District occurring prior to October 2, 2008 are untimely unless an exception applies.

DeRuiter alleges several actions by the District occurring prior to October 2, 2008. These allegations include the issuance of letters of concern on May 18, 2006 and October 16, 2008, evaluating DeRuiter as needing improvement on February 28, 2007 and February 13, 2008, and evaluating DeRuiter as unsatisfactory on April 27, 2007 and April 30, 2008. DeRuiter does not establish that any of these allegations were timely filed. (See *Los Angeles Unified School District* (2009) PERB Decision No. 2011 [holding allegations of wrongdoing occurring outside the statute of limitations were not made timely by other allegations of actions occurring within the statutory period].) In addition, DeRuiter alleges that the District engaged in “tremendous harassment” and “constant monitoring” of her actions, but does not specify whether these allegations refer to actions apart from the evaluations and the letters of concern. To the extent that these allegations refer to different actions by the District, DeRuiter does not explain what actions the District actually took and when such actions were taken. As such, DeRuiter neither provides “a clear and concise statement of facts” supporting her unfair practice charge (PERB Regulation 32615(a)(5)), nor establishes that such allegations were timely filed. (*Los Angeles Unified School District, supra*, PERB Decision No. 1929.) DeRuiter’s legal conclusions that are alleged to have taken place at unspecified times, are not

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

sufficient to meet her burden. (See *Charter Oak Unified School District, supra*, PERB Decision No. 873.)

2. Retaliation for Protected Activities

Considering only DeRuiter's timely allegations, DeRuiter contends that the District conducted the December 12, 2008 evaluation in retaliation for her serving as a Union grievance representative in 2006. To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*)). 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.) In a later decision, the Board further explained that:

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

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action 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; *Campbell, supra*, 131 Cal.App.3d 416); (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; *San Leandro, supra*, 55 Cal.App.3d 553); (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; *San Leandro, supra*, 55 Cal.App.3d 553); (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 or the offering of exaggerated, vague, or ambiguous reasons (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (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 School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210.)

A. Protected Activity With the District's Knowledge

DeRuiter alleges that she served as the Union grievance representative and had approached her then-supervisor to discuss concerns about employees' access to school restrooms in March 2006. The Board has previously held that participation as a union officer and complaining to management about working conditions both constitute protected activities. (See *Los Angeles Unified School District* (1999) PERB Decision No. 1338; *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778.) Thus, DeRuiter establishes that she engaged in protected activity. Moreover, because she addressed at least one of her complaints to her supervisor, the District had knowledge of her activities.

B. Adverse Action

DeRuiter alleges that, on December 12, 2008, the District gave her an unsatisfactory evaluation. The Board has previously determined that a negative evaluation constitutes an adverse employment action. (*Woodland Joint Unified School District* (1987) PERB Decision No. 628.)

C. Nexus

DeRuiter does not establish a sufficient nexus between her protected activities and the District's adverse action. DeRuiter engaged in the alleged protected activities in or around March 2006, approximately two years prior to receiving the December 12, 2008 evaluation. This period of time is not sufficient to establish the necessary nexus. (*Oakland Unified School District* (2003) PERB Decision No. 1512.) In *Alisal Union Elementary School District* (2000) PERB Decision No. 1412, the Board found that a "long history of conflict with the District, coupled with other factors, justifies an inference of unlawful motivation" even where two years had passed between the protected activities and the adverse action. In that case, the employee at issue had been involved in PERB litigation against the employer for the past two years. In the present case, DeRuiter does not provide facts suggesting a "long history of conflict" exists between herself and the District. As explained above, DeRuiter's conclusory remarks that the District engaged in "tremendous harassment" does not include sufficient facts to support her case. (See PERB Regulation 32615(a)(5).) DeRuiter's previous evaluations, in and of themselves, also do not support a finding of nexus. (See *Fresno County Office of Education* (1993) PERB Decision No. 978 [holding that frequent evaluations, without more information, was insufficient to establish retaliation].)

Moreover, DeRuiter does not provide other information suggesting nexus. DeRuiter does not contend that the evaluations contained inaccurate information. Nor does she contend that the District either violated its policy on conducting evaluations or treated DeRuiter differently

June 26, 2009

Page 5

from other teachers. DeRuiter does allege that the District "abused" its evaluation process but, again, her conclusory remarks are not sufficient to support her case. (See *Charter Oak Unified School District, supra*, PERB Decision No. 873.) Thus, DeRuiter does not establish that the District retaliated against her for serving as a grievance representative or for speaking to her supervisor in March 2006.

For these reasons the charge, as presently written, does not state a prima facie case.⁴ If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before July 8, 2009,⁵ PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Eric J. Cu
Regional Attorney

EC

⁴ In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

⁵ A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)