STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVE LUKKARILA, Charging Party, v. CLAREMONT UNIFIED SCHOOL DISTRICT, Respondent.	Case Nos. LA-CE-5811-E LA-CE-5894-E LA-CE-5914-E PERB Decision No. 2459 October 27, 2015

Appearances: Dave Lukkarila, on his own behalf; Fagen, Freidman & Fulfrost by Brian D. Bock and Milton E. Foster III, Attorneys, for Claremont Unified School District.

Before Huguenin, Winslow and Gregersen, Members.

DECISION

GREGERSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Dave Lukkarila (Lukkarila) to a proposed decision (attached) by an administrative law judge (ALJ). Three separate unfair practices charges were initially filed by Lukkarila. PERB's Office of the General Counsel issued a complaint in Case No. LA-CE-5811-E, alleging that the Claremont Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by retaliating against Lukkarila for engaging in protected activity. The Office of the General Counsel issued a complaint in Case No. LA-CE-5894-E, alleging that the District violated section 3543.5(a) of EERA by retaliating against Lukkarila for engaging in protected activity. The Office of the General Counsel issued a complaint in Case No. LA-CE-5914-E, alleging that the District

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

violated section 3543.5(a) of the EERA by interfering with Lukkarila's protected rights. The three cases were consolidated for the PERB formal hearing.

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

DISCUSSION

In his statement of exceptions, Lukkarila sets forth three exceptions. In his first exception, Lukkarila claims that the ALJ erroneously analyzed the facts contained in Case No. LA-CE-5894-E, solely under the discrimination standard. Lukkarila states that the same facts satisfied not only the requirements for a prima facie discrimination violation, but also the requirements for a prima facie interference violation.

The Office of the General Counsel issued a complaint in this case alleging a single discrimination allegation. No interference allegation was alleged. Therefore, to constitute a source of liability for the District, any interference claim must meet the requirements for an unalleged violation.

The case was litigated as a discrimination case and Lukkarila did not attempt to amend the complaint either prior to or during the hearing to assert a separate and independent interference allegation.[2] The charge, complaint, hearing, and briefs[3] that were filed by the parties only address the claim that the District unlawfully retaliated against Lukkarila, in

[2] Pursuant to PERB Regulation 32648, the charging party may move to amend the complaint by oral motion on the record. In ruling on such a motion, the ALJ should consider prejudice to the respondent, among other factors. (PERB Reg. 32648.) (PERB regs. are codified at Cal. Code of Regs., tit. 8, § 31001 et seq.)

[3] Lukkarila did not file a post-hearing brief.

violation of EERA section 3543.5(a). In the proposed decision, the ALJ found that Lukkarila failed to establish a prima facie discrimination violation.

PERB has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided to respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*County of Riverside* (2010) PERB Decision No. 2097-M (*Riverside*); *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation must also have occurred within the applicable statute of limitations period. (*Riverside.*)

We find no compelling reason to entertain an unalleged violation that the District interfered against Lukkarila in this case. There was no notice to the District of a need to defend and the unalleged violation was not fully litigated. Moreover, Lukkarila had ample opportunity to move to amend the complaint prior to hearing, but did not. Therefore, in the absence of clearly articulated rationale in support of the requirements for consideration of the unalleged violation, we decline to make any findings as to an interference allegation.

Of the remaining two exceptions, neither contain any reference to the evidence in the record relied upon or properly identify the grounds for the exceptions. Rather, Lukkarila's remaining exceptions provide single conclusory statements followed by possible remedies for the Board to order.

PERB Regulation 32300 requires the party filing exceptions to a proposed decision to include: (1) a statement of the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate the portions of the record relied upon; and (4) state the grounds for each

exception. (PERB Reg. 32300(a)(1)-(4).) Additionally, an exception not specifically urged shall be waived, pursuant to subdivision (c) of the same regulation.

Compliance with the regulation is required to afford the respondent and the Board an adequate opportunity to address the issues raised. (*Temecula Valley Unified School District* (1990) PERB Decision No. 836, pp. 2-3; see also *San Diego Community College District* (1983) PERB Decision No. 368.) Failure to comply with PERB Regulation 32300 may result in dismissal of the matter without review of the merits of excepting party's claims. (See *Los Angeles Unified School District (Mindel)* (1989) PERB Decision No. 785; *California State Employees Association (O'Connell)* (1989) PERB Decision No. 726-H.) We do so here, with respect to Lukkarila's second and third exceptions. Because the second and third exceptions fail to comply with PERB Regulation 32300, we decline to review Lukkarila's assertions contained therein.

ORDER

The complaint and unfair practice charge in Case Nos. LA-CE-5811-E, LA-CE-5894-E, and LA-CE-5914-E are hereby DISMISSED.

Members Huguenin and Winslow joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVE LUKKARILA, Charging Party, v. CLAREMONT UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NOS. LA-CE-5811-E LA-CE-5894-E LA-CE-5914-E PROPOSED DECISION (January 28, 2015)

Appearances: Dave Lukkarila, on his own behalf; Fagen, Friedman & Fulfrost by Milton E. Foster III, Attorney, for Claremont Unified School District.

Before Kent Morizawa, Administrative Law Judge.

In these three consolidated cases, a public school employee claims that his employer violated the Educational Employment Relations Act (EERA)[1] by retaliating against him for engaging in protected activity and interfering with his right to communicate with bargaining unit members. The employer denies any violation.

PROCEDURAL HISTORY

On May 17, 2013, Dave Lukkarila (Lukkarila) filed the unfair practice charge in Case Number LA-CE-5811-E with the Public Employment Relations Board (PERB or Board) against the Claremont Unified School District (District). On November 8, 2013, Lukkarila filed an amended unfair practice charge.

On February 4, and April 8, 2014, Lukkarila filed the unfair practice charges in Case Numbers LA-CE-5894-E and LA-CE-5914-E, respectively.

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

On May 5, 2014, the PERB Office of the General Counsel (General Counsel) issued a complaint in Case Number LA-CE-5894-E alleging that the District violated EERA section 3543.5, subdivision (a), when it retaliated against Lukkarila for engaging in protected activity by continuing his placement on paid administrative leave.

On May 9, 2014, the General Counsel issued a complaint in Case Number LA-CE-5811-E alleging that the District violated EERA section 3543.5, subdivision (a), when it retaliated against Lukkarila for engaging in protected activity by investigating him with regard to testing irregularities. All other allegations were dismissed.[2] No timely appeal of the partial dismissal was filed.

The parties did not participate in an informal settlement conference in Case Numbers LA-CE-5811-E and LA-CE-5894-E, and the two matters were consolidated and set for hearing.

On May 27, 2014, the District filed answers to the PERB complaints in Case Numbers LA-CE-5811-E and LA-CE-5894-E denying any violation of EERA and setting forth its affirmative defenses.

On July 7, 2014 the General Counsel issued a complaint in Case Number LA-CE-5914-E alleging that the District interfered with Lukkarila's rights under EERA in violation of EERA section 3543.5, subdivision (a), when it directed him not to contact bargaining unit employees while on paid administrative leave.

The parties did not participate in an informal settlement conference in Case Number LA-CE-5914-E, and the matter was consolidated for hearing with Case Numbers LA-CE-5811-E and LA-CE-5894-E.

[2] The dismissed allegations concerned the District's failure to investigate two testing irregularity reports filed by Lukkarila and its choice of legal counsel.

On July 25, 2014, the District filed an answer to the PERB complaint in Case Number LA-CE-5914-E denying any violation of EERA and setting forth its affirmative defenses.

PERB held a formal hearing on September 30, October 1, October 29, October 30, and November 4, 2014. The matter was submitted for decision when post-hearing briefs were filed on January 16, 2015.[3]

FINDINGS OF FACT

The Parties

Lukkarila is an employee within the meaning of EERA section 3540.1, subdivision (j). At all relevant times, he was employed by the District as a social sciences teacher at Claremont High School (CHS).

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). Jim Elsasser (Elsasser) is the Superintendent and assumed his duties on July 1, 2012. He convenes a cabinet meeting on a weekly basis to discuss issues pertaining to the District. Kevin Ward (Ward) is the Assistant Superintendent of Human Resources and a member of the cabinet. His duties include serving as the District's complaint officer in charge of fielding, investigating, and responding to complaints from constituents. Bonnie Bell (Bell) is the Assistant Superintendent of Educational Services and also a member of the cabinet. Her duties include serving as the District's testing coordinator and overseeing the implementation of testing throughout the District.

Claremont Faculty Association

At all relevant times, the Claremont Faculty Association (CFA) was the exclusive representative of a bargaining unit of certificated employees in the District. The evidence and

[3] Lukkarila did not file a post-hearing brief.

testimony at hearing referenced a collective bargaining agreement (CBA) between CFA and the District. However, neither party introduced the CBA into evidence.

Case Number LA-CE-5811-E

Lukkarila's Safety Complaints and Grievances

On February 28, 2012, Lukkarila filed a Williams complaint with the District pursuant to Education Code section 35186.[4] Although the complaint itself is not in evidence, there is no dispute that it dealt with unsafe conditions at CHS caused by persistent water intrusion and leakage into classroom buildings. Lukkarila filed this complaint at the behest of his colleagues, who were also experiencing the negative impact of water intrusion and leakage into their classrooms.

On March 1, 2012, Lukkarila filed a complaint with the Claremont Police Department (CPD) alleging that the District was retaliating against him for voicing concerns about ongoing problems stemming from water intrusion and leakage. The day after filing his complaint, a CPD officer met Lukkarila on campus, and Lukkarila escorted the officer around campus to show him water damage around the site. The officer took photographs of the water damage and also interviewed Steven Patterson (Patterson), an assistant principal at CHS. The officer eventually issued a police report.[5]

On March 20, 2012, Lukkarila filed two grievances with Brett O'Connor (O'Connor), the principal of CHS. The first alleged that the District failed to remedy ongoing problems, such as mold and water damage, stemming from persistent water intrusion and leakage in

[4] This Education Code section is colloquially referred to as "the Williams Act" and allows individuals to file complaints against a school district regarding, among other things, deficiencies related to instructional materials and facilities conditions that pose a threat to the health and safety of students or staff.

[5] The police report was not introduced into evidence.

numerous buildings on the CHS campus. Attached to this grievance were photographs taken by Lukkarila that documented the ongoing problems. The second grievance alleged that O'Connor and other administrators retaliated against Lukkarila after a February 3, 2012 meeting where he made known his intent to file a Williams complaint and a safety grievance.

At about the same time Lukkarila filed his March 20, 2012 grievances, he also filed a complaint with the California Division of Occupational Safety and Health (Cal/OSHA) regarding water intrusion and leakage on the CHS campus.[6] Lukkarila testified that although he had the option to file the complaint anonymously, he opted not to do so since he had already filed prior safety grievances and complaints against the District.

Beginning in April 2012, Cal/OSHA conducted several inspections of the CHS campus. On at least one inspection in April 2012, O'Connor accompanied a Cal/OSHA inspector as he inspected the campus.

On April 3, 2012, O'Connor denied both of Lukkarila's March 20, 2012 grievances. On April 16, 2012, Lukkarila appealed O'Connor's denial to Gloria Johnston (Johnston), who at the time was serving as the District's Interim Superintendent.

On May 2, 2012, Ward sent Lukkarila a report regarding Lukkarila's Williams complaint. The report acknowledged receipt of the complaint and stated that the District conducted a detailed survey of CHS on April 7, 2012. Following the survey, the District began taking action to remedy problem areas, including removing mold and making any necessary repairs to structures.

On May 12, 2012, Johnston denied the appeals of Lukkarila's March 20, 2012 grievances.

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[6] The record is unclear as to the exact date when Lukkarila filed his complaint with Cal/OSHA, but he did so prior to April 2012.

On May 30, 2012, Lukkarila filed a grievance with O'Connor alleging that the District failed to take adequate measures to remediate damage caused by water intrusion and leakage. The grievance follows an informal conference with O'Connor held on April 30, 2012, and alleges that the District failed to comply with the recommendations set forth in the reports generated by its own inspectors.

On June 14, 2012, O'Connor denied Lukkarila's May 30, 2012 grievance. On June 27, 2012, Lukkarila appealed the denial to Johnston. Elsasser denied the appeal on July 12, 2012.

On September 20, 2012, Cal/OSHA issued a Citation and Notification of Penalty, which found that the District had not effectively corrected water intrusion or leakage into the classrooms at CHS and that moist or wet ceiling tiles had the potential to grow mold and expose employees to health hazards associated with mold. The District was ordered to pay fines, correct the violations, and post notice of the violations at CHS.

STAR Testing Investigation

In April and May 2012, the District conducted testing under the Standardized Testing and Reporting program (STAR testing),[7] during which time Lukkarila was serving as a proctor. There were several changes to the testing system at CHS in 2012. In prior years, each classroom had two proctors. However, that year there was only one proctor per classroom. In addition, teachers did not receive a copy of the Directions for Administration (DFA), which is a booklet from the State that contains guidelines and protocols for administering the test. In that year, CHS also switched to a system whereby test booklets followed students and moved from room-to-room instead of remaining in a single location. Lukkarila testified that these changes made it more challenging to proctor the exam than in prior years.

[7] STAR testing is a state testing program that has since been repealed.

On May 10, 2012, the California Department of Education (CDE) notified Bell that a student in the District had posted a photograph of STAR testing materials to a social media website. The CDE directed Bell to conduct an investigation, which should include the interview of students and faculty, and file an irregularity report. Bell in turn contacted O'Connor and directed him to investigate the irregularity. She testified that it is typical for an investigation regarding testing irregularities to be conducted at the site level, and the manner in which the investigation is conducted will be determined by the site depending on the circumstances.

The photograph at issue was a close-up of the front cover of a testing booklet. O'Connor was able to identify the student who took the photograph from information contained on the social media website where the photograph was posted. Based on the photograph's date stamp and an annotation on the test booklet that read, "LUK," O'Connor inferred that the photograph was taken during a time period in which Lukkarila was proctoring the STAR test. O'Connor interviewed several students as part of his investigation, including the student who took the photograph.

O'Connor testified that the student who took the photograph admitted to doing so during his interview. The other students who were interviewed gave O'Connor information regarding the conditions in Lukkarila's classroom at the time when the student took the photograph. Eight students were interviewed in total, including the student who took the photograph, and each student completed a student incident report. Based on all the evidence gathered, O'Connor determined that the student took the photograph at a time when Lukkarila was proctoring the STAR test. O'Connor submitted the results of his investigation to Bell, including a copy of all the student incident reports, on May 14, 2012.

At some point in time, O'Connor interviewed Lukkarila.[8] Lukkarila attended the interview with then-CFA President Joe Tonan (Tonan). At the meeting, Lukkarila demanded to know the name of the student who took the photograph and to see the student incident reports and the photograph at issue. After his requests were denied, Lukkarila and Tonan ended the meeting and requested that they be provided the information. At this point, Bell stepped in to lead the investigation.

Lukkarila and Tonan met with Bell on May 21, 2012. At that meeting, Bell did not make available the student incident reports or the photograph of the test booklet. Lukkarila reiterated his request for these documents and also requested to interview O'Connor, Patterson, and other administrators who conducted the investigation, but his requests were ignored. Following the May meeting with Bell, Lukkarila and Tonan continued to request to see the student incident reports and the photograph of the test booklets.

On May 29, 2012, Lukkarila emailed Bell requesting a status update on the investigation into the alleged testing irregularity. In this email, he references his prior grievances and safety complaints relating to water intrusion at the CHS campus. Also on May 29, 2012, Bell submitted an irregularity report to the CDE. The report stated that the student admitted to taking the photograph of the testing booklet and posting it online, and that the student was disciplined. The report also stated that the teacher of the class did not implement provisions of the DFA, that the security breach was documented and shared with the employee, and that steps were put in place so it does not happen again. Bell testified that she did not give Lukkarila an opportunity to review the irregularity report prior to submitting it to the CDE, which is her normal practice.

[8] The record is unclear whether this interview took place before or after O'Connor's May 14, 2012 email to Bell.

On June 4, 2012, Bell responded to Lukkarila's May 29 email by stating that her investigation into the testing irregularity was closed, and she could not comment on the other issues raised in Lukkarila's email because they were outside her purview. Lukkarila responded by again requesting a copy of the report and a picture of the photograph at issue.

On June 13, 2012, Bell sent Lukkarila a copy of the irregularity report, a copy of the photograph at issue, and a memorandum to Lukkarila titled, "STAR Irregularity Report." This was the first time Lukkarila received any of this information. The memorandum summarized the District's investigation and findings, and reminded Lukkarila of the need to comply with the guidelines set forth by the State, District, and site for administering the STAR exam. The memorandum also stated that a picture being taken in class could have the adverse effect of invalidating scores from the students in the classroom or the entire CHS campus, which Bell testified was information relayed to her by the CDE. Bell testified that the memorandum was not disciplinary in nature and was meant to provide Lukkarila with guidance. Ward confirmed that Lukkarila did not receive any discipline as a result of the student posting the photograph of the test booklet.

On July 26, 2012, Lukkarila filed a grievance with Ward alleging that the investigation into testing irregularities was in retaliation for filing safety complaints and grievances. The record does not contain the District's response or any further correspondence regarding this grievance.

Case Numbers LA-CE-5894-E and LA-CE-5914-E

On February 6, 2013, Lukkarila sent an email to O'Connor stating, "Please let this letter serve [as] notice that I would like to file a Level I grievance." The basis of the grievance was alleged retaliation against Lukkarila for his prior grievance activity. On the same date, Lukkarila sent an email to Anita Arora, an assistant principal at CHS, stating, "Please consider

this letter notice that I would like to meet in order to notify you I would like to file a Level I grievance notification." The basis of the grievance was alleged interference with Lukkarila's ability to communicate with bargaining unit members, including CFA President David Chamberlain (Chamberlain). The record does not contain the District's responses or any further correspondence regarding these grievances.

On March 4, 2013, Lukkarila sent an email to Elsasser requesting personal necessity leave in order to attend a PERB hearing where he was representing his wife in an unfair practice proceeding. Elsasser responded that the request had been forwarded to Ward's attention. Ward testified that Lukkarila's request fit within the requirements for personal necessity leave under the CBA and was granted.

On March 21, 2013, Lukkarila sent an email to O'Connor requesting permission to conduct a "lunch-time lecture examining public goods versus private goods." The lecture would be open to anyone interested, including students, staff, parents, and alumni. Lukkarila indicated that he intended to discuss issues related to his prior safety complaints. On the same day, O'Connor informed Lukkarila that his request was forwarded to Ward.

On Friday March 22, 2013, Chamberlain and Kara Evans (Evans), a CFA executive board member, submitted a petition to Elsasser signed by 48 staff members at CHS. The petition alleged a number of concerns regarding the work environment at CHS, such as anxiety about attending staff meetings and harassment at the hands of a coworker, and requested that the District "act definitively to remedy the condition of a hostile and stressful work environment at Claremont High School." Although the petition does not name Lukkarila as a source of the alleged hostile and stressful environment, Chamberlain and Evans informed Elsasser that the petition was meant to address Lukkarila's conduct.

Elsasser testified that in the weeks prior to receiving the petition, he had received reports from O'Connor and others regarding Lukkarila's behavior that were consistent with what was described in the petition. Elsasser met with Ward the same day he received the petition. Given the prior reports about Lukkarila's conduct and the number of petitioners who signed the petition, Elsasser made the determination to put Lukkarila on paid administrative leave while the District investigated the allegations in the petition. Elsasser testified that placing an employee on paid administrative leave while conducting an investigation is standard protocol, especially when workplace safety is implicated. Elsasser met with O'Connor and June Hilton, an assistant principal at CHS, to inform them that Lukkarila was going to be placed on paid administrative leave.

On the following Monday, March 25, 2013, Ward and Mike Bateman, the District's Assistant Superintendent of Student Services, went to CHS to notify Lukkarila of his placement on paid administrative leave. Jim Munsey (Munsey), a CHS librarian, attended the meeting with Lukkarila. Munsey is not a union representative and was summoned when Lukkarila's first choice for representative, Chamberlain, was not available to attend the meeting. The meeting took place in the Science Room, which has large windows opening up to a corridor where passersby can see into the room.

At the meeting, Lukkarila was notified of the petition, but not presented with a copy of it or given the names of the individuals who signed it. Lukkarila was handed a notice placing him on paid administrative leave "effective immediately and until further notice." The notice contained the following directive:

> You are also directed not to contact, question, confront, or otherwise have any contact (in person, via phone or via email/electronic means) with any District employees, students, or parents. You shall direct any and all questions or needs to [Ward]. You may contact your union president, David Chamberlain, or his designee, if needed.

Ward testified that this directive is given to all employees when they are placed on paid administrative leave. Although Elsasser and Ward were aware that Chamberlain was one of the individuals who signed the petition, they did not modify the directive to name another CFA contact person because they believed the situation would be handled internally by the union.

After placing Lukkarila on paid administrative leave, the District hired an outside firm to investigate the allegations in the petition. Although investigations are typically handed by the Human Resources Department, Ward testified that the District hired a third party because the large number of witnesses made it impractical for the Human Resources Department to conduct the investigation itself. There was at least one prior instance where an outside investigative firm was retained to conduct an investigation into alleged employee misconduct.

On July 29, 2013, Lukkarila filed a grievance with Elsasser stating, "Please consider this letter notification that I initiate the grievance procedure, referenced in the collective bargaining agreement, Article VII." The grievance alleges that the District's counsel, Brian Bock (Bock), retaliated against Lukkarila for engaging in protected activity. On August 1, 2013, Ward acknowledged receipt of the grievance on the District's behalf. The record does not contain more of the District's responses or any further correspondence regarding this grievance.

On August 1, 2013, the District's outside investigator contacted Lukkarila to schedule an investigatory interview in connection with the investigation into the allegations in the petition. Lukkarila was the last witness to be interviewed, and it was the District's intent to have the investigation completed prior to the start of the 2013-2014 school year. On August 7, 2013, another investigator contacted Lukkarila to schedule the investigatory interview. Lukkarila was unavailable for an investigatory interview before the 2013-2014 school year

started. However, because this time period was not part of the contractual year, he had no obligation to make himself available.

On August 21, 2013, Ward sent Lukkarila a letter stating the District could not conclude its investigation without interviewing Lukkarila, and on that basis the District was continuing his paid administrative leave into the 2013-2014 school year.

ISSUES

1. Are the allegations in Case Numbers LA-CE-5811-E and LA-CE-5914-E barred by the statute of limitations?

2. Should Lukkarila's unalleged violation regarding his initial placement on paid administrative leave be considered?

3. Did the District retaliate against Lukkarila for engaging in protected activity when it investigated him for STAR testing irregularities?

4. Did the District retaliate against Lukkarila for engaging in protected activity when it continued his paid administrative leave into the 2013-2014 school year?

CONCLUSIONS OF LAW

Statute of Limitations

EERA section 3541.5, subdivision (a)(1), prohibits PERB 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." Generally, 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.) However, under the doctrine of statutory tolling, the statute of limitations is suspended during the time the same issue is pursued to exhaustion using a grievance procedure that ends in binding arbitration. (*Los Angeles Unified School District* (1991) PERB Decision No. 894; *Sacramento*

City Unified School District (2001) PERB Decision No. 1461.) The statutory tolling doctrine only applies where the grievance and the charge raise the same issue. (*Peralta Community College District* (2001) PERB Decision No. 1462.)

Despite the District's assertion to the contrary, at hearing the respondent bears the burden of demonstrating that the charge was filed outside the six-month limitations period and that the tolling exception does not apply. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359.)

Case Number LA-CE-5811-E

The District initiated its investigation into the STAR testing irregularities on May 10, 2012, after being contacted by the CDE. Lukkarila became aware of the investigation shortly thereafter when O'Connor started interviewing students from his classroom, but he did not file his unfair practice charge until a year later. Under normal circumstances, this would make the charge untimely. However, Lukkarila's filed a grievance on July 26, 2012, alleging that the investigation constituted retaliation for protected activity, which is the same issue in this case. The CBA between CFA and the District includes a grievance process that ends in binding arbitration.[9] Therefore, Lukkarila's grievance had the effect of suspending the statute of limitations after running for two months.

The District did not provide any evidence regarding when (if ever) Lukkarila's grievance was resolved. Without this information, it cannot be determined whether Lukkarila's charge is untimely or not. Accordingly, the District did not meet its burden to establish that the charge is untimely, and a decision will be reached on the merits.

[9] Although the CBA is not in evidence, the evidenced introduced by the parties' references the CBA's arbitration provisions. Even assuming the CBA did not contain binding arbitration, it would be the District's burden to establish this as part of its affirmative defense, which it did not do.

Case Number LA-CE-5914-E

Lukkarila received the directive at issue on March 25, 2013, but did not file his unfair practice charge until over a year later on April 8, 2014. Unlike Case Number LA-CE-5811-E, the record does not contain any evidence that Lukkarila filed a grievance challenging the directive. Although he filed a grievance on July 29, 2013, the issue raised there is not the same as in this case. The July 29, 2013 grievance alleges that Bock gave him an improper directive and does not reference the March 25, 2013 directive, which was issued by Ward. Accordingly, the July 29, 2013 grievance does not meet the requirements to suspend the statute of limitations. No other exception to the statute of limitations applies, and case number LA-CE-5914-E is dismissed as untimely.

Unalleged Violation

At the hearing, Lukkarila presented evidence and made argument in support of his claim that his initial placement on administrative leave in March 2013 was in retaliation for engaging in protected activity. However, none of the complaints at issue here include this conduct by the District as a basis for retaliation. Therefore, to constitute a source of liability for the District, this claim must meet the requirements for an unalleged violation.

The Board has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided to respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation must also have occurred within the applicable statute of limitations period. (*County of Riverside* (2010) PERB Decision No. 2097-M.)

The District's March 2013 decision to place Lukkarila on paid administrative leave is directly referenced in case numbers LA-CE-5894-E and LA-CE-5914-E, and the parties had ample opportunity to litigate the circumstances surrounding the District's decision. However, the charges in both of those cases were filed six months after March 2013, and no exception to the statute of limitations applies that would make the claim regarding Lukkarila's initial placement on leave timely. Therefore, the unalleged violation cannot be considered as part of the complaint in case numbers LA-CE-5894-E or LA-CE-5914-E.

The charge in case number LA-CE-5811-E was filed within six months of March 2013. However, the claim that the District retaliated against Lukkarila by placing him on paid administrative leave is not intimately related to the subject matter of the complaint in that case or part of the same course of conduct. Neither the charge nor the complaint mentions Lukkarila's placement on leave in March 2013. Both focus on the circumstances surrounding the District's investigation into testing irregularities, which occurred a year before the District's decision to place Lukkarila on leave and played no role in that decision. Therefore, the unalleged violation cannot be considered as part of the complaint in case number LA-CE-5811-E.

Based on the above, the unalleged violation that the District retaliated against Lukkarila by placing him on leave in March 2013 will not be considered as part of this proceeding.

Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982)

PERB Decision No. 210 (*Novato*).) 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); (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 School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Case Number LA-CE-5811-E

Lukkarila engaged in protected activity when he filed two grievances on March 20, 2012,[10] (*Los Angeles Unified School District* (2012) PERB Decision No. 2244; *San Bernardino City Unified School District* (1998) PERB Decision No. 1270.), and the Williams complaint on February 28, 2012. (See *Los Angeles Unified School District* (1995) PERB Decision No. 1129 [reporting safety issues constituted protected activity]; *Los Angeles Unified School District* (1992) PERB Decision No. 957 [same].) The March 1, 2012 complaint to CPD and the March 2012 complaint to Cal/OSHA also constituted protected activity. (See *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246 [reporting safety issues to a third party can constitute participation in the activities of an employee organization and be protected under EERA where that report is consistent with the CBA and an extension of attempts to resolve safety issues through the union and employer.])

Initiating an investigatory interview for misconduct constitutes an adverse action. (*County of Riverside* (2009) PERB Decision No. 2090-M; *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S.) This is so even if the investigation does

[10] The grievances filed on May 30 and July 26, 2012 cannot serve as a basis for Lukkarila's claim of retaliation because they occurred after Bell initiated the STAR testing investigation in April 2012. (See *Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H [to establish prima facie case of retaliation, the protected activity must precede the adverse action.])

not ultimately result in discipline. (*California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S.) Therefore, Bell took adverse action against Lukkarila when she initiated the investigation into the STAR testing irregularity in Lukkarila's classroom.

However, the record does not establish that Bell had knowledge of Lukkarila's protected activity at the time she initiated the investigation into the STAR testing irregularity. Although Bell testified that she was aware of Lukkarila's grievances and safety complaints, Lukkarila did not establish when she became aware of Lukkarila's protected activity. The May 29, 2012 email from Lukkarila to Bell references Lukkarila's protected activities, but it was sent after Bell had already initiated her investigation earlier that month. The record does not contain any evidence that Bell was notified of Lukkarila's grievances or safety complaints prior to initiating her investigation. In addition, it is also unlikely that Bell would have received notice of Lukkarila's protected activity independently during the course of her normal duties since those duties do not include the need to review grievances and safety complaints. Although Bell became more familiar with these issues while attending Elsasser's weekly cabinet meetings, these meetings did not occur until at least July 2012, after her investigation was already concluded.[11]

Because it was not established that Bell knew of Lukkarila's protected activity at the time she initiated the investigation, Lukkarila did not establish a prima facie case for retaliation.

Case Number LA-CE-5894-E

Lukkarila engaged in protected activity when he filed grievances on February 6 and July 29, 2013. Representing his wife in an unfair practice proceeding in February and March

[11] The record does not indicate whether Elsasser's predecessor conducted weekly meetings.

2013 also constituted protected activity. (See *Golden Gate Bridge Highway & Transportation District* (2011) PERB Decision No. 2209-M [assisting in prosecution of PERB charge is protected activity.]) Lukkarila's request on March 21, 2013, to conduct a lunchtime meeting was an attempt to communicate with CHS staff about his safety complaints and grievances, and is also protected activity in and of itself. (See *City & County of San Francisco* (2011) PERB Decision No. 2207-M [employee complaints impacting employees generally are considered protected activity].)

Elsasser and Ward were aware that Lukkarila filed grievances on February 6 and July 28, 2013. They were also aware that he was representing his wife in an unfair practice proceeding and that he had requested to conduct a lunchtime lecture.

Although placing an employee on involuntary paid administrative leave is an adverse action *(San Mateo County Community College District* (2008) PERB Decision No. 1980; *Oakland Unified School District* (2003) PERB Decision No. 1529.), Lukkarila's initial placement on paid administrative leave is not at issue in the complaint. Rather, the alleged adverse action is the District's decision to continue his paid administrative leave into the 2013-2014 school year. This decision could serve as a second adverse action were the District to change the terms of the existing administrative leave so as to constitute a new adverse action. (See *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M [change in employment status determinative in finding adverse action].) However, the District did not do so when it continued Lukkarila's leave.

When the District initially placed Lukkarila on paid administrative leave in March 2013, it stated that his leave would continue "until further notice." There was no explicit or implicit understanding that Lukkarila would return to active status in time for the 2013-2014 school year. The District made clear that Lukkarila's leave would continue until the third party

investigators concluded their investigation. Upon realizing that the investigation would not be completed by the end of the summer of 2013, Ward sent Lukkarila the August 21, 2013 letter notifying him that his paid administrative leave would continue into the following school year. Ward's letter did not add any additional restrictions or terms to Lukkarila's leave and simply served as an update regarding the District's investigation and Lukkarila's leave status. Under these circumstances, the continuation of Lukkarila's leave does not constitute a new and distinct adverse action. It is simply a continuation of the initial adverse action that occurred on March 25, 2013.

Because it was not established that the District took any adverse action against Lukkarila when it continued his paid administrative leave into the 2013-2014 school year, Lukkarila did not establish a prima facie case for discrimination.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case Nos. LA-CE-5811-E, LA-CE-5894-E, and LA-CE-5914-E, are hereby DISMISSED.

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

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

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

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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