STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID C. PETERS, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5576-E PERB Decision No. 2479 April 20, 2016

Appearances: William D. Evans, Attorney, for David C. Peters; Office of the General Counsel by Effie Turnbull, Assistant General Counsel, for Los Angeles Unified School District.

Before Martinez, Chair; Winslow and Gregersen, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by David C. Peters (Peters) to the proposed decision (attached) of PERB administrative law judge (ALJ). The unfair practice complaint alleges that the Los Angeles Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by retaliating against Peters because of his protected activity. The ALJ concluded that Peters failed to demonstrate that the District made its decision to terminate his employment as a substitute teacher in retaliation for his exercise of rights under the EERA and dismissed the complaint.

The Board has reviewed the proposed decision, Peters' exceptions, and the District's response in light of the record and the relevant law. The ALJ's factual findings are supported by the record and, we therefore adopt them as the findings of the Board itself. The ALJ concluded that (1) Peters failed to demonstrate a prima facie case of retaliation, and (2) the

[1] EERA is codified at Government Code section 3450 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

District established that it had terminated Peters because of an alternative non-discriminatory reason. The ALJ's conclusions are well-reasoned and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself subject to the following discussion of Peters' exceptions.

PROCEDURAL HISTORY

On April 30, 2012, the Office of the General Counsel issued a complaint alleging that the District violated EERA section 3543.5, subdivision (a) by retaliating against Peters because of his protected activity. On May 18, 2012, the District filed its answer denying the essential allegations of the complaint and raising several affirmative defenses.

On September 11, 2012, the parties met for an informal settlement conference, but the matter was not resolved. A formal hearing was conducted on March 18-22, 2013. The ALJ issued a proposed decision on June 11, 2014.

On July 21, 2014, Peters timely filed exceptions to the ALJ's proposed decision. On August 8, 2014, the District timely filed its response. Also on August 8, 2014, PERB's Appeals Assistant notified the parties that the filings were complete and that the case had been placed on the Board's docket.

FACTUAL SUMMARY

Peters has regularly worked for the District as a substitute teacher since 1994. District substitute teachers are included in a bargaining unit exclusively represented by the United Teachers of Los Angeles (UTLA) and are covered by a collective bargaining agreement (CBA) between UTLA and the District. (Proposed Dec., p. 2.)

Peters held various leadership positions for substitute teachers with UTLA including chapter chairperson, substitute director, and substitute committee chairperson. As a UTLA representative, Peters regularly represented other bargaining unit employees in meetings with

the District regarding disciplinary matters. In 2009**,** Peters participated in unfair practice proceedings undertaken by substitute teachers against UTLA challenging a side-letter agreement UTLA had entered into with the District regarding substitute teachers' available work assignments. Peters personally questioned District managers, including then-Superintendent Ramon Cortines, concerning the District's involvement in the side-letter agreement. Peters also participated in a public protest about the side-letter agreement in front of District office**s** and addressed the District's Board of Education on the side-letter agreement at a public meeting. District administrators, including those who upheld the decision to terminate Peters' employment, knew of these activities. (Proposed Dec., p. 5.)

On November 29, 2010, Peters accepted a substitute teaching assignment via Subfinder[2] at West Vernon Elementary School (West Vernon) teaching first grade. Peters had taught at West Vernon on a dozen or so other occasions. (Proposed Dec., p. 5.)

When Peters**'** students returned from lunch, one of the students was missing. Also at this time, a man identifying himself to Peters as "Mr. Montes" (Montes) entered the classroom claiming to be a teacher's aide. West Vernon teacher's aides do not customarily display name badges or other employment identification. Peters testified that he had no reason to doubt that Montes was a teacher's aide. He did not, however, call the office or inquire with the teacher in the adjoining room to verify that a teacher's aide had been assigned to his classroom. (Proposed Dec., p. 6.)

Montes volunteered to look for the missing student and left the classroom with two of Peters' male first grade students, who went with Montes to help find the missing student. Shortly thereafter, Montes returned with the missing student and the other two students. After Montes returned with the students, Peters assigned him to circulate through the classroom and

[2] Subfinder is an automated phone system through which the District's substitute teachers receive teaching assignments.

to assist students individually with math worksheets. Montes remained in the classroom for approximately one hour before leaving at approximately 1:15 p.m. The school day ended at 2:15 p.m. (Proposed Dec., p. 6-7.)

At approximately 2:45 p.m., a fifth grade student approached then-assistant principal, Daniel Laner (Laner), who was in charge of security and student discipline. The fifth grader reported to Laner that her younger sister and another female student in Peters' first grade class had been touched on the "butt" during class time by a man helping in the classroom. Laner reported this to then-principal, Lupe Buenrostro (Buenrostro), and the two administrators decided that the school's psychiatric social worker, Dionicia Fox (Fox), should be the first point of contact with the two students. Buenrostro also instructed Laner to contact Peters to find out if the then unknown man had been in Peters' classroom during class time. (Proposed Dec., p. 8.)

During Peters' conversation with Laner, Peters confirmed that Montes had been in Peters**'** classroom and gave Laner a description of Montes. Laner informed Peters that an allegation of inappropriate touching had been made. Peters reported that he had not observed Montes touching any students or acting inappropriately. Peters asked Laner if he would be "written-up" over the incident. There is a dispute over this exchange, but Laner admits he told Peters that he had no reason to investigate Peters' behavior, and was merely trying to gather information so that the then unknown man could be identified and apprehended. (Proposed Dec., p. 8.)

Later that day, Fox interviewed the two girls who had reportedly been touched by Montes. After the interview**,** Fox reported to Laner and Buenrostro that it appeared to be a serious case of sexual abuse. Laner called the Los Angeles Police Department (LAPD) who, in turn, directed Laner to contact the District's own police department. Thereafter**,** two District

police officers interviewed the two girls separately in Fox's presence. Fox thereafter submitted a written report of the interviews to Buenrostro. One of the District police officers interviewed Peters in the other officer's presence. The District police officers filed a report, after which jurisdiction was turned over to the LAPD.

In addition to the investigative report filed by District police officers, an incident report was generated by their supervising sergeant. The incident report stated that Montes touched two students on the buttocks and, with regard to one of the students, he did so while rubbing his own genital area outside of his pants. (Proposed Dec., p. 9.) Peters testified that: "It's possible that [Montes] touched two students on the buttocks when I wasn't --- I didn't look at him every second that he was in the room. But there's no way he could have masturbated."

On November 30, 2010, the LAPD began its own investigation. LAPD police officers interviewed the two girls separately at West Vernon in the presence of school psychologist, Aaron Socie (Socie), who prepared a report of the interviews for Buenrostro. Laner accompanied the LAPD officers to the classroom where the incident occurred. While there, another student reported to the LAPD police officers that he had seen a man masturbating in the classroom the day before. (Proposed Dec., p. 11.)

On December 1, 2010, Peters called Subfinder because he had not received an assignment. Peters was informed that he had been placed on inactive status. Peters went to the District's employee relations office where he was informed that he would have to be cleared by West Vernon administrators before he could receive another substitute teaching assignment in the District. Peters went to West Vernon where he spoke with Laner. Peters asked Laner if he would be "written-up" for the incident. Laner explained that the LAPD had not finished its investigation and that West Vernon had not yet conducted its own investigation. During this meeting, Peters informed Laner that he had held leadership positions with UTLA and had

extensive experience representing substitute teachers in disciplinary actions. Prior to this meeting, Laner had been unaware of Peters' union activities. Laner relayed the information regarding Peters' union activities to Buenrostro. (Proposed Dec., pp. 12-13.)

Also on December 1, 2010, Peters spoke with the District administrator who directly supervised Buenrostro after which he attended a regular UTLA meeting. After the UTLA meeting**,** Peters spoke with Buenrostro by telephone and tried to arrange a meeting with her for later that day. Buenrostro declined to meet that day and scheduled a meeting with Peters at 11 a.m. the next day, December 2, 2010. Buenrostro also informed Peters that the LAPD had authorized West Vernon to commence its own investigation. (Proposed Dec., p. 14.)

On December 2, 2010, Peters arrived for his meeting with Buenrostro at 11 a.m. At the outset, Peters asked Buenrostro if the meeting could lead to discipline. Buenrostro informed Peters that the meeting was investigatory, but would not confirm that discipline could not result. Peters informed Buenrostro that he wanted representation if the meeting was investigatory. Buenrostro rescheduled the meeting for December 6, 2010. (Proposed Dec., p. 15.)

Also on December 2, 2010, Buenrostro instructed Laner to begin preparations for the school's internal investigation. On December 2, 2010, Buenrostro interviewed the two first graders who allegedly had been inappropriately touched by Montes. On December 3 and December 6, 2010, Laner interviewed six randomly selected first grade students who were present in Peters**'** classroom at the time in question. (Proposed Dec., p. 15.)

On December 3, 2010, Buenrostro called Peters to remind him of their upcoming meeting and to reiterate that he was entitled to bring a representative. Peters confirmed that the UTLA chapter chair/site representative would represent him at the meeting. After speaking with Buenrostro, Peters decided he did not want the chapter chair/site representative to represent him, and tried reaching Rick Schwab (Schwab), one of UTLA's outside legal

counsel, but was unable to speak to him. Peters sought Schwab's representation because Peters felt that Schwab was the "heavy hitter" for substitute disciplinary cases and Peters hoped that UTLA would pay for Schwab's representation. (Proposed Dec., p. 16.)

Peters contacted Buenrostro shortly before the scheduled meeting time on December 6 to inform her that he had changed his mind and did not want to meet without an attorney. Peters stated that he had not yet spoken with Schwab about his availability and therefore could not reschedule the meeting with Buenrostro. Peters reminded Buenrostro that**,** under Article X, section 7.0 of the CBA**,** she had ten working days after the date of the incident to issue an Inadequate Service Report (ISR). Peters testified that Buenrostro repeatedly asked him if he was refusing to attend the meeting to which Peters replied that he was not refusing to meet, but that he would not meet without an attorney. Buenrostro testified that she thought Peters was "stonewalling." Later that day, Buenrostro asked Peters if he could attend a meeting in the late afternoon or participate telephonically. Peters, not yet having spoken to Schwab, was unwilling to proceed without him. (Proposed Dec., pp. 16-17.)

Also on December 6, 2010, Buenrostro began preparing an ISR recommending Peters' termination. In reaching this conclusion, Buenrostro took into consideration her interviews with the two first graders whom Montes had allegedly inappropriately touched, Laner's report of his interviews of other children in Peters' class, the District police department report, and the reports of Fox and Socie. Peters was not the only employee fired over the incident. Buenrostro also fired an at-will employee who had been assigned to monitor visitors' arrivals at the school's main entrance. (Proposed Dec., p. 17.)

On December 7, 2010, Buenrostro issued the ISR**,** recommending that Peters not be reassigned to West Vernon and that his employment with the District be terminated because he allowed an unidentified man to enter and remain in his classroom for one hour, and while there,

the man touched two girls on the buttocks. The ISR also stated that a student approached Peters afterward to say that the man had touched her and Peters said, "tell your teacher tomorrow." Buenrostro testified that she believed Peters' termination was appropriate because Peters did not properly supervise his classroom and children were hurt. Also, according to Buenrostro, Peters did not respond appropriately when one of the students reported that she had been touched by Montes. Laner testified that he believed Peters had been lax in monitoring the classroom because he should have been continuously scanning the class for safety issues. Because several children had observed Montes' inappropriate behavior, Laner reasoned that had Peters exercised reasonable care as a teacher**,** he would have seen it too. (Proposed Dec., p. 18.)

On December 14, 2010, the District dismissed Peters. Subsequently, Peters requested an administrative review of the District's decision. On February 24, 2011, the District's review committee informed Peters that it had decided to uphold the decision to terminate his employment. (Proposed Dec., p. 19.)

PROPOSED DECISION

The ALJ identified the issue as whether the District had terminated Peters' employment in retaliation for his protected activities. The ALJ noted that in order to demonstrate a prima facie case that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5**,** subdivision (a), the charging party must show by a preponderance of evidence that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*).)

The ALJ noted that if a charging party demonstrates a prima facie case, the burden then shifts to the respondent to prove an affirmative defense, namely: (1) that it had an alternative

non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (See *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31 (*Palo Verde*) and the cases cited therein.) The ALJ observed that an employee who is subject to dismissal without cause bears a heavier burden in overcoming the employer's case for non-discriminatory motive. (*County of Santa Clara* (2012) PERB Decision No. 2267-M (*Santa Clara*), proposed dec., p. 23.)

Peters' Prima Facie Case

The ALJ determined that Peters established the first three elements of a prima facie case of retaliation/discrimination, Peters' protected activity, the District's knowledge of Peters' protected activity and adverse action.

Regarding the fourth element, retaliatory motive, the ALJ concluded that the only persuasive evidence demonstrating nexus is the close timing between Peters' request for union representation at the investigatory meeting with Buenrostro and the District's decision to terminate his employment. As to nexus factors other than timing, the ALJ concluded that Peters produced no evidence of disparate treatment; failed to demonstrate that the District departed from established procedures or gave inconsistent, contradictory, exaggerated or ambiguous reasons for Peters' termination; failed to demonstrate that the District's investigation was cursory; and failed to demonstrate that the District harbored animosity toward union activists. As the ALJ stated, "[c]lose timing, without more, is insufficient to demonstrate a causal connection between the adverse action and the protected conduct," citing *Charter Oak Unified School District* (1984) PERB Decision No. 404. On this basis**,** the ALJ concluded that Peters failed to demonstrate a prima facie case of discrimination and that "there is no inference of unlawful motivation underlying the District's action." (Proposed Dec., p. 33.)

The District's Defense

The ALJ assumed for discussion purposes only that even had Peters met his prima facie burden, the District proved its affirmative defense by establishing that it had an alternative, non-discriminatory reason for the challenged action and that it acted because of that non-discriminatory reason in this case. The District consistently maintained that it terminated Peters because it had determined, based on its own administrators' investigation and the reports of law enforcement agencies, that Peters did not reasonably supervise his classroom on November 29, 2010.

The ALJ found that classroom supervision is one of a teacher's core responsibilities, and concluded that the District had a legitimate concern for the integrity of its education program. The ALJ found that Peters appeared to be more concerned with potential disciplinary action the District might take against him than he was with student safety. The ALJ emphasized Peters' repeated inquiries regarding potential discipline as well as his failure to question whether a person holding himself out as an aide was who he purported to be. According to the ALJ, "[t]his suggests a willingness to allow strangers in classrooms he supervises for fear of jeopardizing his own employment. This type of attitude would also reasonably cause the District to question whether Peters was fit to continue to be entrusted with students' safety." (Proposed Dec., p. 34.)

The ALJ also rejected Peters' refutation of the adequacy of the District's reasons for his termination, in which he asserted that the District failed to call the first grade students to testify about what happened in Peters' classroom; that the only non-hearsay account regarding the incident is his own; and that while it is at least possible that Montes touched the children on their buttocks, it is impossible that Montes was masturbating at the time.

The ALJ ruled that it was fruitless for Peters to refute the adequacy of the District's "cause" for termination, as the District is not required to show "cause" to terminate a substitute teacher under Education Code section 44953. The ALJ observed that the relevant inquiry in a retaliation/discrimination allegation before PERB is not whether the employer acted for a lawful reason, i.e., had "cause" for termination, but whether it acted for an unlawful, discriminatory reason.

The ALJ rejected Peters' assertion that the District improperly relied on hearsay evidence in establishing its non-discriminatory reason. The ALJ ruled that the summary reports of the students' statements were not offered for the truth of the matters asserted therein, but merely to show the District's information about the incident and that the District took action based on that information. The ALJ cited *Office of the Los Angeles County Superintendent of Schools* (1982) PERB Decision No. 263 for the proposition that absent evidence of an employer's intentional reliance on inaccurate information, the truth of the allegations against an employee need not be proven in order to assess whether the employer acted lawfully. (See also, *Pasadena Unified School District* (1999) PERB Decision No. 1331 [employer's failure to show truth of student's complaints not an issue before PERB].)

The ALJ, however, observed, that the Board in *Palo Verde* had held that, where the employer's proffered non-discriminatory reason for acting is the employee's improper workplace conduct, the employer may not prove that it acted for that reason based only on a litany of hearsay reports without direct, corroborating evidence. The ALJ concluded that even if the students' statements contained in the reports were offered to prove the underlying truth of the matters asserted, an exception to the hearsay rule applies and the evidence would be admissible in court, at least as to those statements given to Fox and the District police officers soon after the incident. As the ALJ noted, the students' statements qualify under the

spontaneous statement exception to the hearsay rule under Evidence Code section 1240. The ALJ cited other authority for the principle that in cases of sex abuse, statements older than spontaneous statements are also admissible. The ALJ concluded that the District adequately demonstrated that it had, and terminated Peters because of, an alternative, non-discriminatory reason, and not because of Peters' protected activity.

PETERS' EXCEPTIONS AND DISTRICT'S RESPONSE

Peters takes exceptions to the ALJ's proposed decision. Nine of Peters' exceptions are to the ALJ's credibility determinations. Two exceptions are hearsay objections regarding the children's statements to investigators. Two exceptions are to the ALJ's determination that Peters' advocacy regarding the 2009 unfair practice charge against UTLA was too remote in time to support an inference of unlawful motive by the District. Six exceptions are to the ALJ's determination that the District did not deviate from past practice in issuing Peters the ISR. One exception is to the ALJ's determination that the District did not offer exaggerated reasons for terminating Peters. Five exceptions are to the ALJ's determination that the District did not conduct an inadequate investigation. Two exceptions are to the ALJ's conclusion that Peters did not demonstrate a prima facie case of retaliation/discrimination. Five exceptions are to the ALJ's determination that the District had an alternative, non-discriminatory reason for terminating Peters' employment. Two exceptions are to the ALJ's determinations regarding Peters' motives in expressing concern over potential discipline during the various investigations. Four exceptions are to the ALJ's determination that PERB's inquiry was limited to determining whether the District acted for an unlawful reason**,** not whether the District had cause to terminate Peters. One exception is to the ALJ's determination that Peters did not demonstrate that the District offered shifting justifications for Peters' dismissal.

Finally, one exception is to the ALJ's determination that the District did not offer a pretextual reason for terminating Peters' employment.

The District responded, urging the Board to dismiss Peters' exceptions and affirm the ALJ's proposed decision.

DISCUSSION

Standard of Review

The Board defers to the ALJ's findings of fact which incorporate credibility determinations absent evidence to support overturning such determinations. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390.) While the Board will defer to the ALJ's findings of fact that incorporate credibility determinations, the Board is free to draw both its own, and perhaps contrary, inferences from the evidence presented, and form its own conclusions. (*Palo Verde, supra,* PERB Decision No. 2337; *Woodland Joint Unified School District* (1990) PERB Decision No. 808a; *Santa Clara Unified School District* (1979) PERB Decision No. 104.)

EERA Rights of Substitutes

Under Education Code section 44953, substitute teachers are considered "at-will" employees and, as provided therein, are subject to dismissal "at any time at the pleasure of the [district governing] board." As substitute teachers, they are not entitled to Education Code due process procedures afforded permanent school district employees.

Substitute teachers are, however, "public school employees" within the meaning of EERA section 3540.1, subdivision (j).[3] Thus, substitutes enjoy the same rights under EERA to form, join and participate in the activities of employee organizations of their own choosing as

[3] EERA section 3540.1, subdivision (j) provides: "'Public school employee' or 'employee' means a person employed by a public school employer except persons elected by popular vote, persons appointed by the Governor of this state, management employees, and confidential employees."

any other public school employee; and they enjoy the same protections under EERA to be free from reprisals, threats, discrimination, restraints and coercion because of their exercise of protected rights as any other public school employee. (EERA, §§ 3543, 3543.5, subd. (a); *Dixie Elementary School District* (1981) PERB Decision No. 171 [substitutes and temporary employees]; *Oakland Unified School District* (1983) PERB Decision No. 320 [substitutes]; *Davis Joint Unified School District* (1984) PERB Decision No. 474 [temporary employees]; *McFarland Unified School District* (1990) PERB Decision No. 786 [probationary employees].**)**

To establish a prima facie case under our statutes of unlawful discrimination or retaliation, an employee must demonstrate protected activity, knowledge thereof by the employer, adverse treatment by the employer, and unlawful motivation or nexus between the protected activity and the adverse treatment. (*Novato, supra*, PERB Decision No. 210.) These elements of a prima facie case remain the same, regardless of the employee's at-will or similar status or the procedural protections to which the employee may or may not be entitled to in a different forum. Likewise, once the employee establishes a prima facie case**,** the employer's *Novato* defensive legal burden attaches, regardless of the status of the employee. The employer must demonstrate that it had, and acted because of, an alternative, non-discriminatory reason, and not because of the employee's protected conduct. (*Palo Verde, supra*, PERB Decision No. 2337.)

The ALJ noted, citing to *County of Santa Clara, supra,* PERB Decision No. 2267-M, ALJ proposed decision, p. 21: "An employee alleging discrimination who is subject to dismissal without cause bears a heavier burden in overcoming the employer's case for non-discriminatory motive." There is too great a risk that this statement from *County of Santa Clara* can be read to mean that at-will employees enjoy fewer rights and lesser protection under EERA than other public school employees or that there is a different legal standard to be applied to

their prima facie case or to the employer's defense. While the ALJ here labored under no misunderstanding of the applicable standards in deciding this case, we take the opportunity to affirmatively disavow such reading and caution against reliance on this passage from *County of Santa Clara* in a retaliation analysis. As many a Board precedent has pointed out:

> [The retaliation analysis and burden-shifting approach] apply despite the fact that the Education Code permits the public school employer's non-reelection of a probationary teacher without cause. (Ed. Code, § 44929.21; *McFarland Unified School District v. PERB* (1991) 228 Cal.App.3d 166 [11 Cal.Rptr.2d 405] (*McFarland*).) The District's power to non-reelect a probationary teacher for any lawful reason does not insulate its decision from PERB review in cases where that decision was made in retaliation for conduct protected under EERA.

(*Oakland Unified School District* (2007) PERB Decision No. 1880, ALJ proposed decision, p. 61.)

Peters' Exceptions

Many of Peters' exceptions raise points adequately dealt with by the ALJ in her decision, and those we do not revisit here. We consider Peters' exceptions to the ALJ's credibility determinations, to the ALJ's hearsay rulings, to the ALJ's conclusions concerning Peters' prima facie case, and finally to the ALJ's conclusions concerning the District's defense.

The ALJ's Credibility Determinations

Exceptions 1-7, 21 and 35 pertain to the ALJ's credibility determinations in favor of Laner and Buenrostro over Peters. Peters argues that some of the ALJ's credibility determinations are based on "weighing the probabilities of the situations, rather than based on [Peters'] demeanor." (Exceptions, p. 18.) We conclude that the ALJ properly assessed the credibility of witnesses using non-observational criteria.

PERB and the National Labor Relations Board (NLRB) have long recognized the appropriateness of assessing witness credibility on non-observational criteria. *(Regents of the University of California* (1984) PERB Decision No. 449-H [inconsistent pretrial statements;

selective memory on cross examination; evasive, exaggerated, or inconsistent testimony; inherently unbelievable testimony]; *North Sacramento School District* (1982) PERB Decision No. 264 [inconsistent testimony, contradictory documentary evidence]; *In Re Daikichi Corp.* (2001) 335 NLRB 622 [all the circumstances, including a party's failure to offer available witness testimony]; *Shen Automotive Dealership Group* (1996) 321 NLRB 586 [weight of the respective evidence, established or admitted facts, inherent probabilities, reasonable inferences which may be drawn from the record as a whole].)

Peters argues that his testimony that Laner told him he was not contemplating discipline against him and that he would be put on a "preferred list" to receive substitute assignments should be credited over Laner's testimony that his sole focus on the day of the incident was on gathering information about the then unknown man so that he could be identified and apprehended. Peters relies on the following:

> Laner . . . confirmed that one of the first questions that Peters asked him was whether the incident would result in an "unsatisfactory act" for Peters. Laner testified regarding his response to that question:
>
> > Frankly…I told him no….I wasn't investigating his behavior. I had no reason to. I hadn't heard anything against him….We needed the information, who is this guy, what was he doing in your room after lunch.

(Proposed Dec., p. 8.)

Laner's testimony concerned a telephone conversation he had with Peters during the time period immediately following a reported case of sex abuse against two first grade children. The focus was necessarily on identifying and apprehending the suspected child assailant, not on the future of Peters' employment with the District. The ALJ concluded that "[i]t simply does not make any sense that, in the midst of trying to gather information over a serious, criminal incident involving students, Laner would pause to assure Peters of future

favored treatment." (Proposed Dec., p. 9.) The ALJ's determination is based on inherent probabilities and reasonable inferences, both permissible bases on which to make a credibility determination. Because West Vernon had not yet conducted its own investigation or evaluated Peters' conduct during the incident, Laner's statement cannot reasonably be construed to foreclose the possibility of future discipline against Peters.

Peters also asserts that his own testimony should have been credited over Buenrostro's with regard to a telephone conversation wherein Peters claimed that Buenrostro told him that he was "totally 'blameless'[4] and/or 'innocent.'" (Proposed Dec., p. 14.) The ALJ credited Buenrostro's denial that she would have said anything regarding blame or fault before West Vernon had finished its investigation. According to the ALJ, "it is inherently unbelievable that an experienced administrator, at that point in time, would have conveyed to Peters that disciplinary action was not even contemplated." (*Ibid*.) Again, the ALJ's credibility determinations are based on inherent probabilities and reasonable inferences, both permissible bases on which to make a credibility determination.

Without citing to a specific part of the record, Peters claims that a UTLA official, Virginia Sajor (Sajor), overheard the conversation on speakerphone, and corroborated Peters' version of the conversation. However, as the ALJ points out:

> Sajor testified during cross-examination that there was no discussion of any potential violation of District policies during the phone conversation. Sajor testified that she thought that Buenrostro's comments implied that Buenrostro did not think Peters was under suspicion of committing a crime.

(Proposed Dec., p. 14.) Thus, rather than corroborating Peters' testimony, Sajor's testimony supports the ALJ's determination that Buenrostro did not suggest that Peters would not be subject to disciplinary action by the District. Moreover, the events surrounding the phone call

[4] It is noted that Peters claims Laner used the same word, "blameless," to describe Peters' purported lack of culpability.

bely Peters' assertion that Buenrostro told him he was "blameless" or "innocent" and would not be "written up." Buenrostro concluded the call by asking Peters to meet her the next day at 11:00 a.m. At that meeting, Peters asked her if the meeting could lead to discipline. When Buenrostro did not assure him that discipline would not result, Peters informed Buenrostro that he would not meet without representation. In light of this evidence, we agree with the ALJ that Peters' testimony that Buenrostro told Peters he was "blameless," had nothing to worry about and would not be written up is not credible. Similar to the ALJ's credibility determination favoring Laner over Peters, comments made by Buenrostro that might have had a reassuring effect pertained solely to the fact that Peters was not under criminal suspicion for sexual assault. As the District had yet to conduct its own investigation, it was in no position to assure Peters of any particular outcome. In the days immediately following the incident, the District's top priority was to identify the then-unknown assailant and gather as much information about him as possible. Peters was the only adult percipient witness who could assist in this effort. That the District sought, and appreciated, Peters' cooperation in the identification and apprehension of a suspected sexual assailant should not have led Peters to believe that he would be given a pass once the District's attention shifted to him. If Peters had that belief, it was not because of anything Laner or Buenrostro said to him. The ALJ was right to credit their testimony over his about the statements they made. As the ALJ aptly stated:

> I find that, in general, Peters's characterization of administrators' statements to him regarding his lack of culpability to be exaggerated and self-serving, or at the very least colored by his own subjective view of these events. Put another way, I think Peters either heard what he wanted to hear or chose to ignore the context of the administrators' statements.

(Proposed Dec., p. 14.)

We conclude that the ALJ relied on permissible bases, including non-observation criteria, in making credibility determinations in favor of Laner and Buenrostro over Peters.

Thus, Peters' exceptions, asserting that the ALJ erred in crediting Laner and Buenrostro's testimony over his own testimony, lack merit and are denied. As guided by our long established principles of appellate review, we defer to the ALJ's findings of fact incorporating credibility determinations because there is no evidence to support overturning them. (*Los Angeles Unified School District, supra,* PERB Decision No. 2390.)

Hearsay

Peters takes exception to testimony of Socie, Buenrostro and Fox that they believed students' statements made during the investigation that Montes had "spit" on the arm of one of his victims referred to seminal ejaculate rather than saliva. Peters asserts that these were hearsay statements upon which the ALJ impermissibly based findings.

PERB Regulation 32176, in relevant part, states:

> Compliance with the technical rules of evidence applied in the courts shall not be required. Oral evidence shall be taken only on oath or affirmation. Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

The ALJ made no factual findings on the issue of what the students meant by "spit," nor does the issue of whether Montes masturbated figure into the retaliation analysis. The ISR recommended Peters' termination because he allowed an unidentified man to enter and remain in the classroom for one hour, and while there, the man touched two girls on the buttocks. No other details of the assailant's conduct were described in the ISR and accompanying conference memorandum prepared by Buenrostro recommending that Peters be terminated. For this reason, Peters' exceptions lack merit.

Peters' Prima Facie Case

Peters takes exception to the ALJ's determination that he failed to demonstrate a prima facie case of retaliation/discrimination. As noted above, the ALJ concluded that Peters

established three of the four elements of a retaliation/discrimination prima facie case, but failed to demonstrate a nexus between his protected activity and the District's adverse action.

Peters' takes exception to the ALJ's determination that his advocacy on behalf of substitute teachers regarding the 2009 unfair practice charge filed against UTLA was too remote in time from the District's decision to dismiss him from employment. The proximity in time between the protected activity and the adverse action goes to the strength of the inference of unlawful motive, but is not determinative by itself: there is no "bright line" rule for determining how close in time the protected activity must be to the adverse action in order to establish a strong inference of unlawful motive based on "close" temporal proximity. (*Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H [concluding that a seven-month gap in time between the protected activity and the adverse action created a "minimally sufficient temporal proximity" sufficient to establish an inference, albeit a weak one, of unlawful motive].)

We conclude on the facts before us that the gap between Peters' Fall 2009 protected activity in advocating for substitutes, and the dismissal of Peters in mid-December 2010, is too great to support an inference of retaliatory motive. As the ALJ noted, between the time of Peters' Fall 2009 protected activity and the District's decision to terminate Peters in mid-December 2010, Peters continued to receive substitute teaching assignments.

Peters also takes exception to the ALJ's conclusion that he failed to demonstrate any other nexus factor.

Peters' exceptions fail to address the ALJ's determinations regarding whether the District departed from its established procedures by issuing an ISR in fewer than ten days or prior to meeting with Peters after making an effort to do so and whether such a departure would have been relevant in light of the District's right under the Education Code to terminate

Peters' employment at any time and for any lawful reason. We conclude with the ALJ that Peters failed to demonstrate a departure from established procedures.

Peters also takes exception to the ALJ's determination that he failed to demonstrate that the District offered exaggerated reasons for terminating his employment. Peters relies on the District's submission of evidence regarding Montes' masturbation in the classroom (which Peters claims it did not present prior to hearing) for his assertion that the District exaggerated the reasons for his termination. As the ALJ properly noted, additional justifications revealed after-the-fact**,** which do not undermine the official reason for termination**,** do not provide evidence of shifting justifications. (*County of Santa Clara, supra,* PERB Decision No. 2267-M.) Moreover, the District has consistently maintained that it terminated Peters' employment because he failed adequately to supervise his classroom and as a result two children were inappropriately touched. Whether or not Montes also masturbated in the classroom does not change the reason for Peters' termination. Therefore we agree with the ALJ that Peters failed to demonstrate that the District offered shifting or exaggerated reasons for his dismissal.

Peters asserts that the ALJ should have concluded that the District failed to conduct an adequate investigation largely because it did not interview all of the children who were in Peters' classroom on November 29, 2010. According to the ALJ,

> [T]he District relied on the information provided by and the conclusions of two law enforcement agencies, two licensed mental health professionals, and two experienced administrators in reaching its decision. This hardly implies a perfunctory investigation.

(Proposed Dec., p. 32.) The fact that more students were not interviewed does not undermine the statements from those students who were interviewed. The six students who were interviewed were selected using a "random selection protocol," which is the standard practice

where children have witnessed a criminal act. These students provided the District with sufficient information to conclude that sexual abuse had occurred in Peters' classroom, and that Peters had failed adequately to monitor Montes' behavior. We conclude, with the ALJ, that the District did not conduct a perfunctory investigation merely because it did not interview all of the students who were in Peters' classroom on the day in question.

In sum, Peters has demonstrated a close temporal proximity between his request for union representation and the District's subsequent adverse action. Peters, however**,** has not maintained that the District harbored animosity toward him because of the representation request. Rather, Peters has consistently maintained that it was his advocacy on behalf of substitute teachers in 2009 that drew the District's ire. We conclude, as noted above, that Peters' protected activity in 2009 was too remote in time to support an inference of unlawful motive for the mid-December 2010 termination. Regarding Peters' request for union representation, there is insufficient evidence of nexus for us to conclude that the decision to terminate Peters' employment was taken because of anti-union animus rather than Peters' conduct during the November 29, 2010**,** incident in his classroom. We conclude, with the ALJ, that Peters failed to demonstrate a prima facie case for retaliation/discrimination.

The District's Defense

Peters' failure to demonstrate a prima facie case of discrimination/retaliation is sufficient basis to dismiss his claim. We address here Peters' exceptions to the ALJ's determination that even if Peters had established a prima facie case, the District established that it had acted because of an alternative, non-discriminatory reason when terminating Peters.

The ALJ determined that classroom supervision is a "core responsibility of a teacher, and failures in that regard would reasonably tend to cause the employer legitimate concern over the integrity of the education program." (Proposed Dec., p. 34.) Noting that the Board

has generally refused to overturn a public school employer's decision to terminate employment where the employer demonstrated legitimate concerns that a teacher's conduct may affect the integrity of its education program, the ALJ determined that the District had demonstrated that it would have terminated Peters' employment regardless of his protected activity. (See *Fall River Joint Unified School District* (1998) PERB Decision No. 1259.)

With regard to Peters' challenge to the District's proffered reasons for terminating him, the ALJ determined: (1) it was pointless for Peters to challenge the District's cause for termination when under the Education Code the District may terminate a substitute teacher without cause; (2) the relevant inquiry for PERB is not whether an employer acted for a lawful reason, but whether the employer acted for an unlawful reason under EERA; and (3) the District did not offer the reports of student statements for the truth of the matter asserted (hearsay) but to show that the District received the reports of student statements and relied on those statements in making its decision. On this basis the ALJ concluded that even if Peters had demonstrated a prima facie case of retaliation/discrimination, the District established an alternative non-discriminatory reason, and that it acted against Peters because of that reason and not because of his protected activity.

We affirm the result reached by the ALJ, to wit, that the District established that it had, and acted because of, an alternative nondiscriminatory reason for terminating Peters.

In *Palo Verde, supra*, PERB Decision No. 2337, the Board considered the release by a public school employer of a probationary classified employee. The employee established a prima facie case of retaliation because of her protected activity. The employer defended alleging that the employee was terminated not for her protected activity, but because she was unable to get along with other employees, thus disrupting the workplace. As to the employer's defensive burden, the Board stated:

To succeed under *Novato, supra,* PERB Decision No. 210, the employer must meet or exceed a charging party's prima facie case with equally or more persuasive affirmative defense. The degree of persuasion required of the employer will depend on the extent and persuasiveness of the prima facie case. Absent unlawful motivation, California statutory and common law often afford wide discretion to an employer to discharge an at-will or probationary employee with little or no warning, reason, notice or hearing. However, under our statutes once the charging party presents a persuasive prima facie case that the employer acted against an at-will or probationary employee because of the employee's protected conduct, the employer's burden under *Novato, supra,* PERB Decision No. 210 attaches. To succeed, the employer must then demonstrate persuasively that it had both a permissible (alternative and non-discriminatory) reason for its action and that it acted because of this reason and not the employee's protected conduct.

Our statutes protect the right of at-will and probationary employees to engage in protected activity and to be free of discrimination or retaliation therefor. (*McFarland, supra,* 228 Cal.App.3d 166.) A PERB ALJ hearing a retaliation case, including one brought on behalf of an at-will or probationary employee, must "inquire fully into all issues and obtain a complete record upon which the decision can be rendered" [fn. omitted] and "issue a written proposed decision." [fn. omitted.] Thus, when the burden in a PERB hearing shifts to an employer to establish an affirmative defense to a charge of discrimination or retaliation, the employer must demonstrate that it exercised its statutory or common law discretion in a manner consistent with the employee's rights under our statutes. We acknowledge that such demonstration imposes on an employer a greater burden of proof than would be required to sustain a routine discharge within its discretion where there has been no allegation of unlawful motivation.

We hold that under *Novato, supra,* PERB Decision No. 210, PERB's duty is to "analyze thoroughly and completely the justification for the . . . action presented by the employer" *(Escondido, supra,* PERB Decision No. 2019, at p. 21), and that in so doing PERB may "inquire fully into all issues" bearing on the employer's *Novato, supra,* PERB Decision No. 210 burden to establish that employer's affirmative defense was "honestly invoked" and its justification "was in fact the cause of the employer's action." (*Chula Vista, supra,* PERB Decision No. 2221, at p. 21.) We likewise hold that the employer's *Novato, supra,* PERB Decision No. 210 defensive burden is not limited by the extent of the employer's statutory or common law

> duty to the employee(s), but is measured rather by the extent and persuasiveness of the employee(s) prima facie case which a successful affirmative defense must either meet or exceed.

(*Palo Verde, supra*, PERB Decision No. 2337, pp. 33-34.)

In *Palo Verde* the employer relied on hearsay and double hearsay evidence of reports by co-employees, presented through testimony of a supervisory employee and a manager, that the discharged employee engendered disruptive personality conflicts. The Board affirmed the ALJ's determination that this hearsay evidence was insufficiently reliable to support a finding. The Board stated:

> A responding party must prove up its affirmative defense through persuasive evidence. Although admissible, hearsay testimony and documents are insufficient to support a finding. (PERB Reg. 32176.) [Fn. omitted.] The Board requires "sufficient independent [non-hearsay] evidence" to conclude that the challenged action would have occurred in the absence of the employee's protected activity. *(County of Riverside* (2009) PERB Decision No. 2090-M; *Escondido Union Elementary School District* (2009) PERB Decision No. 2019 *(Escondido); The Regents of the University of California* (1998) PERB Decision No. 1255-H *(Regents); Woodland Joint Unified School District* (1987) PERB Decision No. 628.)[9]
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> [9] See also *Hilmar Unified School District* (2004) PERB Decision No. 1725 *(Hilmar)* (district official's testimony regarding alleged complaint from health plan administrator about union agent's telephone calls to administrator deemed hearsay and insufficient to establish operational necessity defense to alleged interference); *Alamo Rent-A-Car, Inc.* (2002) 338 NLRB 275 *(Alamo)* (absent independent evidence, supervisor's hearsay account of customer complaint held insufficient to establish *Wright Line, supra,* 251 NLRB 1083, defense to General Counsel's prima facie case of retaliation).

(*Id.* at p. 19.)

Returning to the case at hand, we conclude**,** along with the ALJ, that the District met its burden under *Novato, supra*, PERB Decision No. 210, to prove by persuasive evidence that it had, and acted because of, an alternative, non-discriminatory reason, and not because of Peters'

protected activity, when it terminated his employment on December 7, 2010. In particular, the District adduced persuasive admissible evidence of the incident occurring in Peters' first grade classroom on November 29, 2010, through the statements of student witnesses recorded and testified to by the school's psychiatric social worker and by the District's own police. (Proposed Dec., pp. 36-37.) The District relied on this evidence to support its conclusion that Peters**'** classroom conduct on November 29, 2010**,** was inappropriate, to wit, insufficiently attentive to the safety of his students, who, while Peters was in the classroom, were reportedly sexually abused by an unauthorized intruder posing as a teacher's aide.

Peters argued that the District should have produced first grade student witnesses to testify at the PERB formal hearing. The District's failure to do so, according to Peters, leaves no admissible evidence upon which to base a finding except his own account of what happened. Peters' account, however, includes an admission that he did not watch Montes continuously and that it is at least possible that Montes touched the children on their buttocks. The ALJ concluded that Peters' arguments in rebuttal to the District's affirmative defense were misplaced for three reasons.

The ALJ reasoned that refuting the adequacy of the District's "cause" for termination was fruitless because the District is not required to show cause to terminate a substitute teacher under the Education Code. It is true that the District is not required to show cause to terminate a substitute teacher for Education Code purposes. To the extent this statement can be interpreted to mean that for EERA purposes the employer's *Novato* defense is altered as a result, that interpretation is rejected. The legal elements of the defense are the same no matter the status of the employee. As stated above, a public school employee's status as a substitute teacher affects no modification in the prima facie elements of the charging party's case or in the legal element of the employer's defense. Regardless of the employee's status as a

substitute teacher, the employer in proving up its affirmative defense must demonstrate by a preponderance of the evidence that it did not take adverse action against the charging party because of the charging party's protected activity.

In making its case, the employer must prove that it had an alternative non-discriminatory reason for the challenged action and that it took adverse action against the employee because of that reason. An employer that is not required to show "cause" to terminate an at-will employee under a different statutory regime is still required to overcome a charging party's proven prima facie case with persuasive evidence that it took adverse action against the charging party for a non-retaliatory reason. For the reasons adequately described above and in the proposed decision, the District has met that burden in this case.

A charging party has the right to attempt to discredit or undermine the employer's stated reason for the adverse action, notwithstanding the charging party's at-will employment status. Peters failed to rebut the District's affirmative defense not because of Peters' status as an at-will employee under the Education Code. Peters failed to rebut the District's affirmative defense because he failed to persuade the ALJ, and now the Board, that the District's reason for terminating him was unlawful under EERA, i.e., that the District terminated his employment because of protected activity and not because he failed to adequately supervise his classroom. That Peters admits that first grade children might have been touched on the buttocks by Montes under his watch supports the District's case that it would have terminated Peters even in the absence of his protected activity.

Relying on a much-cited Board decision, *Baker Valley Unified School District* (2008) PERB Decision No. 1993, the ALJ states that the relevant inquiry for PERB is not whether the employer acted for a lawful reason, i.e., had "cause" to terminate under the Education Code, but whether the employer acted for an unlawful, discriminatory reason.

While this is an accurate statement of the law, we caution against interpreting it to mean that PERB has no right to question a school district's reasons for terminating a teacher when evaluating whether the school district was motivated by anti-union animus. As the Board explained in *County of Orange* (2013) PERB Decision No. 2350-M:

> The ALJ relied on *Baker Valley Unified School District* (2008) PERB Decision No. 1993 *(Baker Valley)* in his articulation of the standard for the proposition that "the focus of this analysis 'is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason.'" In *Baker Valley,* the school district argued that PERB had no authority to second-guess its reasons for not renewing a teacher because the administrative hearing procedure in the Education Code provides the exclusive means for making that assessment. In other words, the school district argued that the [EERA] may not supersede these Education Code sections under a preemption-type analysis. The Board in *Baker Valley* rejected the school district's argument holding:
>
> > The District's argument misconstrues PERB's inquiry in a retaliation case. PERB does not determine whether the employer had cause to discipline or terminate the employee. (*San Bernardino City Unified School District* (2004) PERB Decision No. 1602.) Rather, PERB weighs the employer's justifications for the adverse action against the evidence of the employer's retaliatory motive. Thus, PERB's inquiry is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason. (See *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169 [276 Cal.Rptr. 26] [stating "the District has cited no authority, nor can it, for the proposition that its power to deny tenure for any lawful reason insulates it from the scrutiny of the PERB when an unfair labor practice complaint alleges that tenure was denied in retaliation for the exercise of a protected right"].)
>
> Context is critical. In stating that PERB's inquiry is not "whether the employer had a lawful reason," the Board was responding to and rejecting the school district's argument that the Education Code provides the exclusive measure of what is lawful in a non-renewal setting and that PERB has no authority to evaluate the school district's proffered reasons.

(*Id.* at pp. 16-17.)

The role PERB plays in retaliation cases is shaped by the specific labor relations concern underlying the statutory scheme. PERB's role is to ensure that public employees can exercise their right to participate in union and other organizational activities free of adverse action by the employer. The reason proffered by the employer for the adverse action is necessarily what must be examined by PERB in determining whether it is pretextual or, in cases involving dual motives, whether it is the "but for" cause for the adverse action. After a charging party has met its prima facie burden of establishing retaliatory motive and the burden shifts to the employer to prove its affirmative defense, the charging party is entitled to challenge and probe the employer's evidence to ensure that the employer's evidence is credible, the employer's affirmative defense is honestly invoked and the employer's justification for the challenged action is the true cause for the action taken. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221.) It, however, matters not whether the proffered reason for the adverse action meets external law or contractual standards, except to the extent that deficiencies in the employer's discipline case against the employee evidences an unlawful retaliatory motive.

In a case, such as this, involving the termination of an at-will employee, PERB must examine the employer's exercise of discretion, but not to second guess or judge it for any other reason than to ensure that the employer's exercise of discretion was not motivated by the employee's exercise of protected rights. The ALJ did so here.

The ALJ determined that the evidence supporting the District's affirmative defense was sufficient. We agree.

When assessing the persuasiveness of an employer's *Novato, supra,* PERB Decision No. 210 defense, PERB must "'inquire fully into all issues'" in order to "establish that the employer's affirmative defense was 'honestly invoked' and its justification 'was in fact the

cause of the employer's action.'" (*Palo Verde, supra*, PERB Decision No. 2337, p. 34.) Relevant evidence includes any evidence bearing on the persuasiveness of the employer's defensive claims. That would include, without limitation, the extent to which reports relied upon by the employer regarding events forming the basis for discipline or discharge of the employee, are reliable. An employee seeking to rebut an employer's *Novato* defense may adduce, and, subject only to admissibility standards, PERB must consider, argument, testimony and documentary evidence tending to challenge the accuracy, truthfulness or reliability of the testimony or documentary evidence adduced by the employer in support of its defense.

Regarding Peters' assertion that the children's statements were hearsay and could not be relied on, the ALJ observed that the District did not intend to offer the students' statements for the truth of the matters asserted, but to show the information it was given and the actions that it took based on that information. As the ALJ points out, even if the statements were offered for the truth of the matter asserted, an exception to the hearsay rule applies. The statements were made by first grade students within hours of the trauma, while it was still fresh in their minds and still under the stress of the event. Statements made under those circumstances are inherently reliable, which is why they qualify under the spontaneous utterance exception to the hearsay rule under Evidence Code section 1240. And, as the ALJ pointed out, even older statements are admissible in cases of sex abuse.

The ALJ's reliance on *Office of the Los Angeles County Superintendent of Schools* (1982) PERB Decision No. 263 and *Pasadena Unified School District* (1999) PERB Decision No. 1331 does not suggest that PERB must accept a respondent's asserted reason for taking adverse action unquestioningly, or that a charging party may not seek to discredit the respondent's asserted reason. If the charging party can show that the respondent's reason for

the adverse action was pretextual or the respondent's "alternative non-discriminatory" reason in a dual motive case is not credible, then the employer's affirmative defense fails.

Particularly in light of Peters' concession that he did not watch Montes continuously and that it is at least possible that Montes touched the children on their buttocks, we agree with the ALJ that Peters' attempt to undermine the accuracy of the children's statements about the sexual assaults that reportedly took place in his classroom is of no avail. For PERB's purposes, the determinative fact proven at the formal hearing is that the District took adverse action against Peters based on the information it and law enforcement authorities had gathered, including the children's statements. The District was not required to prove up its affirmative defense by subpoenaing these former first grade children to testify at a formal hearing about what happened on the day in question. The odious nature of such a requirement notwithstanding, it matters not what the children would have testified to on the stand, but what they reported to school administrators and law enforcement authorities that became the basis for the District's decision to terminate Peters' employment. There is no evidence that the District fabricated the children's statements, exaggerated the seriousness of the events or intentionally relied on information it knew to be false. It is not that the "accuracy" of the underlying events is unimportant in the evaluation of the District's affirmative defense. It is that Peters has given PERB no reason to conclude that the District's affirmative defense was not honestly invoked and that the District's proffered reason for the challenged action was not the true reason for his termination. Ultimately, even if criminal proceedings were to exonerate Montes or the children were subsequently found to be lying about the incident in question, neither would negate the proven fact that the reason for Peters' termination was not that he requested union representation, or going further back in time, advocated on behalf of substitute

teachers, but that he failed to supervise his classroom in which first grade students had reportedly been sexually assaulted.

In sum, we conclude, with the ALJ, that Peters failed to prove up a *Novato, supra,* PERB Decision No. 210, prima facie case of discrimination/retaliation. We also conclude that even had Peters established his prima facie case, the District established its *Novato* defense, viz., that it both had, and terminated Peters because of, an alternative, non-discriminatory reason, and not because of his protected activity.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5576-E are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Member**s** Winslow and Gregersen joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

DAVID C. PETERS, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5576-E PROPOSED DECISION (06/11/2014)

Appearances: William D. Evans, Attorney, for David C. Peters; Office of the General Counsel by Effie Turnbull, Assistant General Counsel, for Los Angeles Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

In this case, a substitute teacher alleges that his employer terminated his employment because he is a union activist. The employer denies any unfair practices and asserts that it took action because the substitute teacher failed to properly monitor classroom activities, and as a result, two female first grade students were assaulted by an unauthorized visitor.

PROCEDURAL HISTORY

On June 14, 2011, David C. Peters filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Los Angeles Unified School District (District). On March 1, 2012, a first amended charge was filed. On April 30, 2012, the PERB Office of the General Counsel issued a complaint alleging that the District retaliated against Peters because of his protected activity in violation of the Educational Employment Relations Act (EERA).[1]

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

On May 18, 2012, the District filed its answer to the complaint, denying any unfair practices and asserting various affirmative defenses, including that the charge was not timely filed.[2]

On September 11, 2012, PERB held an informal settlement conference, but the dispute was not resolved and the matter was set for hearing.

The formal hearing was held on March 18-22, 2013. With receipt of the parties' post-hearing briefs on July 18, 2013, the record was closed and the matter was submitted for decision.

FINDINGS OF FACT[3]

The District is a public school employer within the meaning of section 3540.1(k). Prior to December 14, 2010, Peters was an employee within the meaning of section 3540.1(j) and included in a bargaining unit exclusively represented by United Teachers-Los Angeles (UTLA or the union.) The District and UTLA were at all relevant times parties to an operative collective bargaining agreement (CBA).

Background Events and Relevant CBA Provisions

Peters was first employed as a substitute teacher by the District in 1964, and had regularly worked in that capacity for the District since 1994. Because of year-round school schedules, Peters averaged around 220 days of teaching per year and received health insurance coverage. Substitutes receive their teaching assignments via an automated telephone system

[2] The District did not present any evidence demonstrating that the charge was untimely nor argue that theory in its post-hearing brief. For this reason, the affirmative defense is not considered herein. (See, *Los Angeles Unified School District* (2014) PERB Decision No. 2359.)

[3] The proposed decision omits discussion of facts in the record deemed to be immaterial to deciding the issues presented.

called Subfinder. Substitute teachers who work regularly, like Peters did, typically receive daily calls from Subfinder beginning around 5:30 a.m.

CBA Article XIX, "Substitute Employees," section 10.0, "Information," requires that substitutes be given information necessary for performance of their duties, "including, but not limited to, student attendance information, lesson plans, class roster, appropriate keys, seating chart(s), and security and emergency plans." Such information can be contained in a "Sub Folder" that is given to the substitute teacher at the school office and which would also indicate if the classroom is assigned a teacher's aide and the times of the aide's service. It is undisputed that Sub Folders are commonly missing for many assignments, as well as lesson plans and even class rosters. In that case, the substitute teacher must draw upon common sense and experience to plan the day's lessons. Peters acknowledged that it is "absolutely" the responsibility of the substitute teacher to monitor and control the classroom environment. Because substitutes frequently travel to different school sites, the District expects that they will ask as many questions of office staff, colleagues, and even students as necessary to familiarize themselves with the school's procedures.

While substitute teachers are included in the UTLA bargaining unit and therefore subject to the CBA, they are at-will employees who may be dismissed from employment without cause and thus are not entitled to the same due process procedures afforded to permanent employees.[4] Substitute teachers may be informed of deficient performance by

[4] See Education Code section 44953: "Governing boards of school districts may dismiss substitute employees at any time at the pleasure of the board." Compare with Education Code sections 44932-44939 and the California Supreme Court's decision in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, which govern the procedural due process rights for permanent employees in public employment.

issuance of an Inadequate Service Report (ISR). ISR procedures are set forth at CBA Article X, "Evaluation and Discipline," section 7.0 (section 7.0):

> Inadequate Service by Substitutes: The site administrator *may*, for cause, issue to a day-to-day substitute employee a notice of inadequate service. Such a notice *shall*, absent compelling circumstances, be issued *within* ten working days after the date(s) of service, with a copy to the employee (either in person or by certified mail to the employee's address of record). Prior to issuance of such a notice, the site administrator shall make a *reasonable* effort to contact and confer with the substitute regarding the allegations. Upon employee request, a meeting will be held to discuss the matter. The employee may be accompanied by a UTLA representative or a person of the employee's choice as long as that person is not a representative of another employee organization. The timeliness of the employee's request for a meeting, *or the non-availability of the employee or representative shall not delay issuance of the Inadequate Service Report beyond the ten working days period set forth above*. In addition to the grievance procedure, the employee may attach a written response to the report *within ten working days* from the date received. The written response becomes a permanent part of the record.

(Emphasis added.)

It is the District's practice in dismissal and disciplinary actions involving substitute employees to submit the charges for review by an ad hoc committee (review committee) of administrators, whose composition varies. The review committee may decide to uphold the recommended action, to modify it, or that no action is warranted. The employee is informed of the committee's determination by letter and may request additional administrative review. These are voluntary actions by the District. The District chooses to take them because it has an interest in trying to retain qualified and experienced employees. Because substitute teachers are at-will employees who may be dismissed with or without cause under the Education Code, even a successful grievance over the failure to follow the ISR procedures described above has no bearing on the District's analysis of the conduct described in the ISR. Thus, in such a case, even if an ISR was removed from an employee's personnel file at the conclusion of the

grievance procedure, it does not automatically follow that the District's decision to terminate employment would be disturbed.

Since at least 2004, Peters has held various UTLA leadership positions for substitute teachers, including chapter chairperson, substitute director, and substitute committee chairperson. In those capacities he communicated regularly with unit employees via a widely distributed email newsletter. He also regularly represented employees in meetings with the employer regarding discipline matters. In 2009, he was a participant in an unfair practice charge filed collectively by substitute teachers against UTLA over a side-letter agreement reached with the District that affected substitutes' available work assignments. While visiting District offices, Peters personally questioned then-Superintendent Ramon Cortines and another District management employee, Susan Masters, over the District's involvement in reaching that agreement. Peters thought they looked annoyed by his questions. Peters also participated in a public protest in front of District offices around that time, and afterward spoke publicly during the District Board of Education meeting. It is undisputed that higher-level District administrators, including those that upheld the final decision to terminate his employment, were aware of Peters's union positions and activism on behalf of substitute teachers.

The Incident at West Vernon Elementary School on November 29, 2010

On November 29, 2010,[5] Peters accepted an assignment via Subfinder at West Vernon Elementary School (West Vernon) teaching first grade. He had taught there previously, perhaps a dozen times. When Peters arrived at the school office before the start of school that

[5] All dates hereafter refer to the year 2010 unless stated otherwise.

day, there was no Sub Folder or lesson plans for his assignment.[6] Initially, he was given keys to the wrong room.

The morning passed uneventfully. At the conclusion of the lunch period, around 12:15 p.m., Peters went to the playground to accompany the children back to the classroom. When they returned to the room, some students announced that a male student was not with the group. At that point, a man who identified himself as "Mr. Montes" entered the classroom claiming to be a teacher's aide.[7] Aides at the school did not customarily display name badges or other identification showing that they were District employees. Peters testified that he had no reason to doubt that Montes was who he purported to be, and said it would be "suicidal" for a substitute teacher to challenge the authority of a teacher's aide because school management "always backed the aides." Peters opined that it would not be in a substitute teacher's interest to risk disciplinary action by offending an aide.[8] Peters did not call the office, or inquire with the teacher in the adjoining room, to verify that the class was assigned an aide named Montes.

Montes told Peters that he knew the missing student and offered to look for him along with two male students who had volunteered to go get him. Peters apparently agreed and the three of them left the room together. It was Peters's impression that the students knew Montes, but he admitted that he did not ask any students whether they recognized the man, whether he

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[6] Peters admitted during cross examination that he could not recall ever being provided with a Sub Folder during any assignments at West Vernon.

[7] This person's true identity is not known. For ease of discussion, he will be referred to herein as Montes.

[8] Tom Stekol, field director in the District office of staff relations, testified that he has never seen a grievance filed by a substitute employee or UTLA over any disciplinary action imposed because the substitute questioned or challenged the authority of a teacher's aide. Stekol's office has handled approximately 1,000 grievances per year since he began working there in 2002.

was their regular aide, or whether the class even had an aide. It is undisputed that there are only a handful of aides working at the school.

Montes returned to the classroom shortly thereafter with the missing student and the other boys. Peters and Montes chatted about Montes's native American heritage and service in the Marine Corps. The students were working on math worksheets. Peters told Montes to walk around and individually assist the students with their worksheets, and the man did so. Peters thought that, for the most part, he was "probably on the right side [of the classroom]" and Montes was "probably on the left side." Peters could not confirm that all children were seated during the time that Montes was present and "may" have remembered some children being off to the side or in an alcove. Montes was in the classroom for about an hour and left at approximately 1:15 p.m. Peters did not notice anything unusual about Montes or about any activities in the classroom while Montes was present.

The school day ended at approximately 2:15 p.m. Daniel Laner, then-assistant principal at West Vernon,[9] was in charge of security and student discipline. In this role, he regularly monitored the campus during lunch periods and after school and was in charge of locking and unlocking gates. Laner's campus rounds ended that day at approximately 2:45 p.m. As he was walking back to his office, a female fifth grade student ran up to him saying that she had been looking for him. Laner knew this student. She was the older sister of a first grade student from Peters's class. She told Laner that a man helping in her sister's class had touched her sister and another female first grade student on the "butt" during class time. Laner immediately told the principal, Lupe Buenrostro, and they decided that such an allegation required the school's psychiatric social worker, Dionicia Fox, to be the first point of

[9] At the time of the hearing, Laner had retired from employment with the District.

contact with the girls. The complaining first grade students were identified in the record as C2 and C3.[10] Buenrostro told Laner to call Peters while Fox began her interviews to find out if another man had been in his classroom.

Peters received Laner's first phone call that afternoon just after he had returned home. Laner asked whether a man had been present in his classroom after lunch, and Peters recounted everything he could remember about Montes's physical description and what Montes had said and done in class. Laner told Peters what had been reported by the students and stated that school management was urgently trying to get a description of the man. Laner did not recall the exact words he used to describe the allegations to Peters, but stated generally that there had been reports of inappropriate touching. Laner testified that Peters was helpful and cooperative. Peters reported to Laner that he had not observed Montes touching any students or acting inappropriately.

Peters recalled asking Laner during phone conversations that day if he would be written-up over the incident, to which Laner replied that Peters was "blameless" and that it was the school's fault, since the man was able to gain entry to the campus. Peters also testified that Laner told him the campus wanted him back and that he would be put on a "preferred list" to receive substitute assignments. Laner did not recall ever saying that the school was at fault, and could not precisely recall whether he used the word "blameless," but confirmed that one of the first questions that Peters asked him was whether the incident would result in an "unsatisfactory act" for Peters. Laner testified regarding his response to that question:

> Frankly…I told him no….I wasn't investigating his behavior. I had no reason to. I hadn't heard anything against him….We needed the information, who is this guy, what was he doing in your room after lunch.

[10] No students testified in the hearing. Their names were redacted from the record to protect the privacy of minor children.

Laner testified that his focus that day was entirely on gathering information about the unknown man so that he could be identified and apprehended. He was not questioned about whether he told Peters he would be put on a preferred assignment list. I credit Laner's testimony over Peters's. Laner testified consistently that, since it did not appear that Peters had touched the students in question, he was concentrated on "catching the rat," as he put it. Thus, any statement that Peters was "blameless," if Laner used that word, was likely regarding the fact that Peters was not being accused of touching the girls. Furthermore, I find it unbelievable that, given the backdrop of events, Laner would have said that Peters would henceforth be targeted for preferred assignments at West Vernon.[11] It simply does not make any sense that, in the midst of trying to gather information over a serious, criminal incident involving students, Laner would pause to assure Peters of future favored treatment.

Fox conducted the interviews of C2 and C3 separately. Afterward, she told Laner and Buenrostro that it appeared to be a serious case of sexual abuse and Laner called the Los Angeles Police Department (LAPD), per protocol in such situations. The LAPD directed Laner to contact the District's school police department. Two school police officers, Alan Chavez and David Joyce, were then dispatched to West Vernon to investigate.

The school police officers interviewed the girls separately. Fox was present during these interviews, but she did not ask any questions. Fox later prepared a written report that summarized her own interviews and the ones she observed, which was presented to Buenrostro on or about December 1.

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[11] See *Regents of the University of California* (1984) PERB Decision No. 449-H, proposed decision at pp. 84-88 [inherently unbelievable testimony casts considerable doubt over the bulk of testimony].)

After their first interview of one of the girls, an officer asked Laner to call Peters to find out whether Peters recalled Montes being near one or both of the complaining students. Laner called Peters, who said that he did not remember Montes being near the girls or touching anyone, even casually. Later, Officer Chavez also called Peters directly while in Officer Joyce's presence. Officer Chavez did not testify. Officer Chavez prepared a report of the incident that night, which Officer Joyce reviewed and approved. Officer Joyce testified that in cases like this, after taking initial statements and filing a report, jurisdiction is then turned over to local law enforcement for further investigation, which here was the LAPD. He and Officer Chavez had no further involvement in the investigation after they filed their report.

In addition to the investigative report filed by school police officers, an incident report called an "I-STAR" was generated by their supervising sergeant. The I-STAR is mandatory for events on a school campus involving an injury to students, staff, or visitors. It is distributed to management officials at a school site and District offices. The I-STAR in this case described the substance of the incident verbatim as follows:

> On November 29, 2010, at 1215 pm [sic], an unknown adult male walks into a first grade classroom with a classmate of the victims. He makes contact with the teacher and identifies himself as a school staff member. He states that he travels to different classrooms assisting students in need.
>
> The suspect walks over to Victim #1[12] and has her stand up. He then touches her buttocks three times while simultaneously rubbing genital area outside of his pants. Victim #1 said she was scared. The suspect then walks over to Victim #2 and touches her buttocks two times. He then leaves and goes over to a male student and then returns and touches Victim #2 two more times on her buttocks.
>
> Per the teacher, the suspect spent approximately one hour in the classroom helping different students before leaving.

[12] In the school police report and I-STAR, Victim #1 refers to the student identified in the record as C3. Victim #2 refers to the student identified in the record as C2.

Peters testified regarding Montes's classroom conduct: "It's possible that he touched two students on the buttocks when I wasn't—I didn't look at him every second that he was in the room. But there's no way he could have masturbated." He also noted that he had not learned until the hearing in this matter that it was alleged that Montes had been touching himself.

Events After the Incident

November 30

Peters received a call from Subfinder for a teaching assignment at a different school. Peters accepted and performed the assignment.

LAPD officers went to the West Vernon campus to investigate the incident and conduct individual interviews of C2 and C3.[13] The school psychologist, Aaron Socie, was present to observe both interviews, which took place in his office. He did not personally ask C2 or C3 any questions. Socie prepared a report of the observed interviews, which was presented to Buenrostro on or about December 2.[14]

While Laner escorted officers to the classroom where the incident occurred, a boy identified in the record as C8 excitedly approached Laner and exclaimed that he had seen a man masturbating in class the day before. C8 used common vernacular to describe this sexual act. Socie and Laner testified that it is not uncommon for West Vernon students, even younger

[13] LAPD officers did not testify and their investigative report was not introduced in evidence.

[14] Socie testified that the interviews he observed took place on the same date of his report (December 2), and was not sure whether the law enforcement entity conducting interviews was the school police or the LAPD. In comparing the testimony of other witnesses, it is clear that LAPD officers were only present on campus on November 30, and that these are the interviews Socie observed. His lack of clarity on these details does not materially impact the substance of his testimony, nor cast doubt on his general reliability as a witness.

ones, to have knowledge of adult topics, such as sexual acts and drug use. Thus, the way C8 described a sexual act was not that surprising to Laner.

December 1

Around 6:00 a.m., since Peters still had not received a Subfinder call, he called in to the system and was informed that he had been placed on inactive status. He knew this was a bad sign. Peters then visited the District's employee relations office to find out what was happening and was told that he would need to be cleared by West Vernon before he could go back to active status and receive assignments in Subfinder.

Next, Peters headed to West Vernon and spoke to Laner. According to Peters, Laner reiterated that Peters was completely blameless in the matter and further opined that he had acted "commendably," but also stated that he would need to talk to an administrator from the Local District office in order to be cleared for future teaching assignments.[15] Laner said the police were following up on a lead that the assailant was the father of a student in class.[16] When questioned about this meeting with Peters, Laner again noted that Peters had been very cooperative with the police and with Laner's own attempts to gather information about the incident. Thus, I find if Laner commented that Peters had acted "commendably," it was likely in that context.

Peters asked repeatedly whether he was going to written-up. At this point, however, West Vernon administration had not yet been given clearance by either Local District 5 or the LAPD to begin its own administrative investigation into the incident. Laner and other District witnesses testified that in employment incidents involving alleged criminal conduct, local law

[15] The District is subdivided into numbered "Local Districts" by region. West Vernon is located in Local District 5.

[16] The police later cleared that person as a suspect.

enforcement has discretion to allow the District to do an administrative investigation concurrently with a police investigation, or to require the District to wait until the police have finished with witness and victim interviews before allowing it to proceed. At the time of this meeting with Peters, West Vernon had received no permission from LAPD to proceed with its own investigation. So in response to Peters's questions about being written-up, Laner told him that he had not yet investigated his conduct and that the District was focused on trying to aid the police's investigation in order to catch the unknown assailant.

Laner admitted that Peters informed him about his UTLA leadership positions and his extensive experience representing substitute teachers in disciplinary actions. Prior to this conversation, Laner did not know about Peters's history of union activities. Laner testified that he told Buenrostro about Peters's union activities, stating that Peters seemed to have more experience dealing with the District's offices of staff relations and employee relations than they did.[17]

After leaving West Vernon, Peters visited Local District 5 offices and spoke with the director of elementary education, Maria Martinez. Martinez is Buenrostro's direct supervisor. Peters testified that Martinez told him that everything was going to be okay and the matter should be taken care of quickly. Peters said that Martinez told him he would be able to return to work soon because an arrest in the case was expected. Martinez did not testify. I decline to credit Peters's testimony here and thus do not consider this purported statement by Martinez as falling within a party admission exception to the hearsay rule. I find Peters's account of her statements highly implausible. It is unclear what bearing an arrest in the case would have had

[17] District management representatives in the office of staff relations are responsible for collective bargaining and the administration of the CBA, including grievance processing, whereas management representatives in the office of employee relations are responsible for maintaining employee records and overseeing discipline and dismissal processes.

on Peters's role in the events that day or his ability to return to the classroom. I find that, in general, Peters's characterization of administrators' statements to him regarding his lack of culpability to be exaggerated and self-serving, or at the very least colored by his own subjective view of these events. Put another way, I think Peters either heard what he wanted to hear or chose to ignore the context of administrators' statements.

Late in the afternoon, Peters went to UTLA offices to attend a regular meeting. Afterward, Peters gave a ride home to the treasurer of the UTLA substitute committee, Virginia Sajor. As they were getting into the car, Peters recognized an incoming call from a West Vernon campus phone number and answered it on speaker so that Sajor could overhear the conversation. Buenrostro was the caller. According to Peters and Sajor, Buenrostro said that Peters was totally "blameless" and/or "innocent" and had nothing to worry about. Peters also asserted that Buenrostro said that he would not be written-up, but Sajor testified during cross-examination that there was no discussion of any potential violation of District policies during the phone conversation. Sajor testified that she thought that Buenrostro's comments implied that Buenrostro did not think Peters was under suspicion of committing a crime. Buenrostro testified that she would never have said anything about Peters's blame or fault before the school's investigation had concluded. I credit Buenrostro, because it is inherently unbelievable that an experienced administrator, at that point in time, would have conveyed to Peters that disciplinary action was not even contemplated. It is much more likely that, similar to Laner, any comments intimating Peters's innocence by Buenrostro were regarding the fact that he was under no criminal suspicion.

According to Peters, he also mentioned during this phone conversation that he was blocked in Subfinder and asked if he could immediately go to West Vernon to talk to Buenrostro, but she said no. Peters testified that Buenrostro told him that she was driving at

the time of their conversation, which he knows was false, since the caller identification showed that the call originated from West Vernon. Sajor testified that Buenrostro said in response to Peters's request to meet right away: "No. I am going home. I'm on my way home. I'm driving home." Buenrostro, however, testified that Peters did not ask to meet that day. I find this factual dispute to be inconsequential. It is more likely than not that Peters requested to come by the office, Buenrostro indicated words to the effect that she was about to drive home, and she did not recall these details of the conversation during her examination at hearing. Buenrostro concluded the call by asking Peters to meet her the next day at 11:00 a.m., and told him that the LAPD had now authorized the school to begin its own investigation.

December 2

Peters arrived for his meeting with Buenrostro at 11:00 a.m. Before it began, he asked her whether it could lead to discipline. She told him that the meeting was investigatory and would not confirm that discipline could not result. Peters informed Buenrostro that he could not meet without representation if the meeting was investigatory. Buenrostro agreed to reschedule the meeting for the following Monday, December 6.

Also on this date, Buenrostro instructed Laner to begin preparations for the school's internal investigation into the incident. She told him to use a "random selection protocol" to determine which students to interview, which Laner testified was the standard practice where children have witnessed a criminal act. Depending on the number of students in a class, typically between four and five students are selected to interview. It was six students in this case. Buenrostro had Laner prepare a diagram of the classroom so that students could identify where Montes and Peters were located during the time Montes was in the room. Buenrostro also told him to prepare a series of questions that would be asked of each student and instructed him to not deviate from those questions for consistency. Laner's interviews of the

children took place on December 3 and 6. He prepared a report that was presented to Buenrostro. Buenrostro conducted her own interviews of C2 and C3 inside of their classroom on December 2.

Events Between December 3-5

Buenrostro called Peters on Friday, December 3 to remind him that they were scheduled to have a conference the following Monday and that he was entitled to bring a representative. Peters confirmed that a UTLA chapter chair/site representative, Paul Hernandez, would represent him in the meeting. According to Peters, Buenrostro stated several times that the meeting was no longer investigatory, but a "conference." Buenrostro testified that she called him to confirm the conference, but did not address whether she told him there was no longer an investigation.

After his conversation with Buenrostro, Peters concluded, "I wasn't going to trust my fate to a chapter chair." He believed that site representatives, for lack of a better description, were "in bed with the principal," and were therefore ineffective. He tried all weekend to reach UTLA outside legal counsel Rick Schwab by telephone, but was unable to speak to him. Peters was not interested in trying to secure any other lawyer from Schwab's firm, because Schwab was the "heavy hitter" for substitute discipline cases. He was also not interested in trying to secure a lawyer in another firm because he was really hoping that UTLA would foot the bill. Presumably, Schwab's firm operates under a retainer agreement with UTLA.

Events Between December 6-14

Peters called Buenrostro shortly before the scheduled time of the conference on December 6 to inform her that he had changed his mind about who should represent him in the meeting, and no longer was satisfied with representation by a UTLA site representative. Peters stated he did not want to meet without an attorney. Peters had just learned from Schwab's

office staff that Schwab was to be in court all day. Peters admitted to Buenrostro that he had not yet spoken with Schwab to confirm his availability, and therefore could not reschedule the conference with her. Peters told her that Schwab would "likely" be available on another day that week. Peters also informed her that under section 7.0, she had until December 13 (the following Monday) to issue an ISR. She said was aware of the contractual timeframes. According to Peters, Buenrostro repeatedly asked whether he was refusing to come to the conference, and Peters said that he was not refusing to meet, but he could not do so without his attorney. Buenrostro believed that Peters was "stonewalling." Later that day, she called Peters to see whether he could participate in a conference late that afternoon or even by telephone, but he still had not talked to Schwab directly at that point and was unwilling to proceed without him.

Also on December 6, Buenrostro began preparing an ISR recommending to terminate Peters's employment with the District. In reaching that decision she considered her own interviews with C2 and C3; Laner's report of his interviews of other children in Peters's class; and the reports of the school police, Fox, and Socie. She never discussed the substance of the incident with Peters. Peters was not the only employee fired over the incident. Buenrostro also fired an at-will employee who had been assigned to monitor visitors' arrivals at the school's main entrance. Laner testified that on his campus rounds on November 29, all of the gates were properly locked. It was later concluded that the man most likely entered the campus by walking in through the main entrance where visitors are supposed to sign-in, or by hopping a back fence.

On December 7, Buenrostro issued the ISR and accompanying conference memorandum[18] to Peters via certified mail to his home address.[19] He received it on the evening of December 9. The documents informed Peters that he had until December 13 to respond in writing, which does not track the deadline set forth in section 7.0 for an ISR response. Buenrostro admitted that the CBA allows ten working days to respond to an ISR, and noted that Peters's written response to the ISR was received and accepted by the District after the deadline she set forth in her letter had passed.[20] She also essentially admitted that she used the wrong timeframe in her letter and that it was inadvertent.

The substance of the ISR and accompanying memorandum informed Peters that it was recommended that he not be reassigned to West Vernon and that his District employment be terminated because he allowed an unidentified man to enter and remain in his classroom for one hour, and while there, the man touched two girls on the buttocks. No other details of the assailant's conduct were described in these documents. The report also stated that a student approached him afterward to say that the man had touched her and Peters said, "tell your teacher tomorrow." Peters was instructed that it is a part of his professional responsibility to not allow unauthorized visitors to enter a classroom and touch students, to actively monitor all

[18] The "conference memorandum" was written from the perspective of what she would have told him, had they held a conference discussing the substance of the allegations.

[19] After Buenrostro issued the ISR, she received on December 9 a letter from Schwab dated December 7 stating that he was representing Peters regarding the incident and requesting to schedule a conference with her. On December 14, Buenrostro received another letter from Schwab dated December 10 that discussed Peters's position on the incident.

[20] By letter dated December 22, Schwab responded on Peters's behalf to the ISR and the District's decision to terminate Peters's employment.

persons and classroom activities, and to promptly report to the administration and child protection agencies any reports of inappropriate touching.[21]

Buenrostro believed that termination was appropriate because, in her opinion, Peters had not properly supervised the classroom and children were hurt. Additionally, she believed that Peters had not properly acted when a student reported to him that she had been touched, and Buenrostro could not say with certainty that Peters could properly supervise classrooms if allowed to continue substitute teaching. Similarly, Laner testified that he believed that Peters's classroom monitoring had been lax because, at minimum, he should have been continuously scanning the class for safety issues. Since several children observed Montes's inappropriate behavior, if Peters had been exercising reasonable care as a teacher, he would also have seen the conduct.

By letter from the District dated December 14, Peters was notified that after review of the conduct described in the ISR, he was dismissed from "substitute status," effective immediately.

Events after December 14

At some point in late December or early January 2011, Peters requested an administrative review of the District's decision to terminate his employment. Peters's appeal package consisted of over 100 pages, including his own statement regarding what happened in the classroom on the day in question, the previously submitted letters from Schwab, and many personal recommendations by administrators and teachers. Regarding the incident, Peters stated that it was the school's responsibility, not his, to ensure that visitors to a school are

[21] A grievance filed by UTLA over the issuance of the ISR in this case is in abeyance pending the adjudication of the unfair practice charge by mutual agreement between the District and UTLA.

properly identified and admitted, and noted that there was no established practice requiring a substitute teacher to verify the identity of an aide before permitting the aide to enter the classroom. Peters maintained that he observed the classroom conscientiously and did not notice any untoward conduct. He disputed that any child reported to him that he or she had been touched. Peters also continued to dispute that latter point during the PERB hearing. Peters further noted in his appeal submission that he had been denied the opportunity to present his side of the story, since Buenrostro had issued the ISR prior to holding a conference with him.

The District's director of employee relations, Ira Berman, was on the review committee. Berman testified that while he did not directly participate in his office's initial decision to accept Buenrostro's recommendation to terminate Peters's employment, by virtue of his position, he is the supervisor of the entire process. He identified the other District administrators who initially reviewed the documentation supplied by Buenrostro and readily admitted that all of them were aware of Peters's union activities. Berman was also personally familiar with Peters's union leadership positions and advocacy.

In his role on the review committee, Berman reviewed the ISR and accompanying documents, I-STAR, school police report, and Peters's appeal documents. Berman concluded that the termination should stand. Berman testified that he believed the investigation of the incident was competent and thorough, and that the primary reason termination was warranted under the circumstances was because Peters did not adequately supervise his classroom, which put his students in jeopardy. Student safety is of paramount importance to the District, and therefore, ensuring the safety of students is the most fundamental duty required of its employees. Berman described incidents involving probationary and substitute employees

whose employment was terminated for less serious conduct than at issue here. Peters was informed of the review committee's determination by letter dated February 24, 2011.

Investigation Procedures

As noted previously, all of the children were questioned separately by each interviewer. Fox, Socie, Officer Joyce, Laner, and Buenrostro all testified that after listening to the accounts of C2, C3, and/or the other children present in class, they believed that the children were being truthful. They noted that C2's and C3's accounts were largely consistent with each other. They each testified to techniques that they have been trained in to interview young children about traumatic events and confirmed that they used those methods in this case. A commonly recounted technique is to ask the same question in different ways in order to check for consistency in the account of the interviewee. All of these witnesses testified regarding the professional degrees and/or certifications they possess. All of them are legally mandated to report suspected child abuse and receive yearly training conducted by the District in that regard. Peters also receives this training. In Laner's case, he also administered such training to other employees.

The children's accounts across the interviews vary slightly in their details. What was consistently reported in all interviews by C2 is that Montes asked her to stand up while she was working on the math worksheet and then he touched her buttocks. The man walked away, approached C3, and then touched C3's buttocks. C2 stated in the interview observed by Socie that Montes "spit" on her arm. She also said this in Buenrostro's interview of her. Buenrostro tried to interview C2 a second time at the District's behest to clarify whether Montes had touched her inside of her underpants. During the second interview the child became very upset and the District determined that they should not ask her any more questions about the incident for fear of causing further trauma. Socie and Buenrostro testified that after considering all of

the information provided, they assumed that "spit" in this case was seminal ejaculate and not saliva. In C2's interview with the school police, she noted that Montes was sweating all over his face. C2 confirmed with Buenrostro that she did not tell Peters what happened to her.

C3 reported consistently in all interviews that Montes asked her to stand up while she was working on math, and then he touched her buttocks several times. C3 also reported that he did the same thing to C2. In her interviews by Fox, the school police, and observed by Socie, C3 described in her own words what all of the interviewers interpreted as masturbation by Montes. C3 was also able to consistently demonstrate by gesturing the actions she observed. In her interviews with Fox and observed by Socie, C3 stated that she saw Montes "spit" on C2's arm. Fox testified that she assumed the spit was actually seminal ejaculate. In her interviews with Fox and the school police, C3 noted that the man's face was covered in sweat and that he said he was there "to help the bad kids." In her interviews with Fox and Buenrostro, C3 said that she told the teacher, i.e., Peters, that Montes had touched her, to which Peters replied, "Tell your teacher tomorrow."

Both C2 and C3 said during their interviews with Buenrostro that while Montes was touching them, Peters was helping other children in the classroom.

Some of the other children present during the incident who were interviewed saw Montes put something on C2's shoulder. Some did not see Montes do anything unusual. One student, C8, witnessed Montes taking actions that Laner interpreted as being consistent with masturbation.

ISSUE

Did the District terminate Peters's employment in retaliation for his union leadership roles and/or other protected activities?

CONCLUSIONS OF LAW

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show by a preponderance of evidence that (1) the employee exercised rights under EERA, (2) the employer had knowledge of the exercise of those rights, (3) the employer took adverse action against the employee, and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*).)

If a charging party produces sufficient evidence demonstrating a prima facie case, and therefore an inference that the respondent's action was unlawfully motivated, the burden shifts to the respondent to prove (1) that it had an alternative non-discriminatory reason for the challenged action; and (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (See *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31 and the cases cited therein (*Palo Verde*).) An employee alleging discrimination who is subject to dismissal without cause bears a heavier burden in overcoming the employer's case for non-discriminatory motive. (*County of Santa Clara* (2012) PERB Decision No. 2267-M, proposed decision, p. 21(*Santa Clara*).)[22]

Protected Activity, Employer's Knowledge and Adverse Action

The threshold requirements to establish a prima facie case of unlawful retaliation are evidence that the employee engaged in activities protected under EERA and that the employer was aware of those activities. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.)

[22] When interpreting EERA, it is appropriate to rely upon decisional authority interpreting parallel provisions of state and federal labor relations law. (*Temple City Unified School District* (1990) PERB Decision No. 841, fn. 14, citations omitted.)

EERA section 3543(a) protects employees' right to form, join, and participate in the activities of employee organizations. It is therefore well-established that seeking help from and being represented by a union regarding employment concerns is protected activity. (*Los Angeles Unified School District* (1991) PERB Decision No. 894.) Likewise, holding union office and actively representing employees in grievance or disciplinary proceedings on behalf of the exclusive representative is protected conduct. (*Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778.) Voicing employment concerns and/or criticisms of management for the purpose of advancing the interests of employees in their working conditions is protected by EERA. (*California Teachers Assn. v. Public Employment Relations Bd.* (2009) 169 Cal.App.4th 1076, 1091; *San Ramon Valley Unified School District* (1982) PERB Decision No. 230.)

To demonstrate the knowledge element of a prima facie case, at least one of the individuals responsible for taking the adverse action must be aware of the protected conduct. (*Oakland Unified School District* (2009) PERB Decision No. 2061 (*Oakland*).) In other words, the issue is whether "the individual(s) who made the ultimate decision to take adverse action against the employee had such knowledge." (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 7 (*Sacramento*), citing *City of Modesto* (2008) PERB Decision No. 1994-M.)

Removing a substitute teacher's name from the employer's active substitute list is a classic adverse action because it terminates the substitute's employment. (*Sacramento*, *supra*, PERB Decision No. 2129, citing *Regents of the University of California (Einheber)* (1997) PERB Decision No. 949-H.)

These first three elements of the prima facie case are not in serious dispute and are met in this case. It is undisputed that Peters was, before December 6, seeking help from a UTLA

representative regarding the scheduled meeting with Buenrostro and that she was aware of that activity. Laner testified to informing Buenrostro of Peters's union leadership positions after he learned about Peters's history from Peters himself. Berman readily admitted that he and other higher-level administrators were aware of Peters's representational activities.

Some of Peters's advocacy on behalf of substitutes described at hearing was not alleged as protected activity in the complaint. Consideration of unalleged protected activities is appropriate where those activities are related to the claims in the complaint and the parties have had the full opportunity to litigate all issues. (*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241.) Here, it is at least arguable that Peters's advocacy regarding substitutes' work assignments and criticisms of District management in connection with the group unfair practice charge filed against UTLA could be related to the instant claims. Furthermore, because District administrators testified openly regarding their general awareness of Peters's union activities and the parties had full opportunity to litigate these issues, they are properly considered.

The District does not dispute in its closing brief that Peters termination from employment was an adverse action and such a conclusion is undisputable. Rather, the focus of the District's argument is that Peters failed to establish a causal connection between his employment termination and his protected activity.

Nexus

A critical element of a prima facie case is whether there is a causal connection, or nexus, between the adverse actions and the protected activity. Because direct evidence of unlawful motivation is rare, the existence or absence of nexus is usually established circumstantially after considering the record as a whole. (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278; *Moreland Elementary School District* (1982) PERB

Decision No. 227.) In other words, nexus evidence must not be viewed piecemeal or in isolation, but in the proper context of the entire record.

The timing between protected activity and adverse action is an important circumstantial factor to consider in determining whether evidence of unlawful motivation is present. (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*.) However, "'the closeness in time (or lack thereof) between the protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself.'" (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096, p. 11, quoting *Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M.)

In order to assist in assessing circumstantial evidence of unlawful motive, PERB has developed a set of nexus factors. In addition to close timing, one or more other factors demonstrating unlawful motivation must be present for a prima facie case: (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, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Timing of Protected Activity in This Case

The only specific instance of protected conduct that closely preceded the adverse action in this case is Peters informing Buenrostro that he would seek to be represented by a union site representative in an investigatory meeting with her. Although Peters spoke generally about his long history of representing substitute teachers in disciplinary conferences, he did not describe any recent examples, nor provide any approximate dates of that activity. He also, notably, did not assert that he had previously represented substitutes on assignments at West Vernon or in front of Buenrostro. Thus, it is not possible to conclude that such representational activity was recent enough to provide a strong inference of unlawful motivation by Buenrostro specifically or the District generally.

Regarding the other protected conduct discussed herein, it appears that Peters's advocacy regarding substitute employees' working conditions took place in or around Fall 2009, more than a year before the District terminated his employment. PERB has found such a gap in time to be too attenuated to support an inference of unlawful motivation. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086 [lapse of approximately two years between protected activity and alleged adverse action was insufficient to suggest nexus]; *Los Angeles Unified School District* (1998) PERB Decision No. 1300 [gap of five or six months between protected activity and adverse action is not close enough in time to show nexus].) Notably, Peters continued to receive regular teaching assignments from the time of this protected activity up until his dismissal. It seems that if the District's actions were

motivated by his conduct in this regard, then its adverse action would have been more swift. Therefore, the timing of the District's action here in relation to Peters's critical comments over the District's involvement in a side-letter agreement with UTLA and other concerted activities in 2009 does not provide a strong inference of an unlawful motivation.

Based on review of the entire record and as further explained below, the only evidence I find in support of the factors of discriminatory intent is the close timing between Peters's request for union representation in an investigatory meeting and his release from employment.

Peters Failed to Show Disparate Treatment

The record shows that Peters was not the only employee whom Buenrostro decided to fire over the incident. She testified to also determining to release from employment the employee charged with checking in visitors at West Vernon's main entrance on the day in question because she observed some carelessness by that employee. Carelessness or lack of reasonable diligence is the same essential reason that Buenrostro cited for recommending that Peters be terminated from District employment. Peters produced no evidence showing that other employees under similar circumstances were treated less harshly. Rather, Berman testified that substitute, and even probationary, employees have been terminated for less egregious actions than those at issue in this case, such as a belligerent attitude with office staff and inadequate supervision of students on a bus. Thus, Peters established no evidence showing that he was singled out or treated differently than other employees facing similar charges.

Peters Failed to Show That the District Departed From Relevant Established Procedures

Peters argues that the District departed from its procedures under the CBA by issuing the ISR without first providing him a conference with his chosen representative and truncating the timeframe for his written response thereto. For several reasons, I do not find that these

arguments persuasively demonstrate that the District's motivation was unlawful in light of the totality of the evidence.

First, section 7.0 sets a maximum, not minimum, number of days within which an ISR may be issued absent compelling circumstances. Thus, that Buenrosto chose to issue the ISR on or about the sixth day of the 10-day time period does not show any deviation from established practice. Second, given Peters's equivocation over his choice of representative and since he had already cancelled the scheduled conference once, Buenrostro cannot be faulted for failing to accept Peters's assertions regarding his desire to reschedule the conference. Peters admitted to Buenrostro that he had not yet spoken with his attorney when he told her it was "likely" the attorney would be available to meet on another day that week. Peters made it clear that he was unwilling to proceed without this particular, seasoned attorney whose representation he had not at that point secured. Under the circumstances, I find that she made a reasonable effort to confer with Peters as required by section 7.0, and no departure from procedures can be inferred by the fact that she chose not to risk an unreasonable delay in the process by waiting for Peters to secure the representation of his preferred attorney.

Finally, and most importantly, even if there was a departure from section 7.0 procedures, such as imposing a shortened timeframe for Peters's written response, it is irrelevant to the termination action. Where an action alleged to be a departure from procedures does not substantively affect the outcome of the adverse action at issue and does not result in other harm to the charging party, the Board has refused to view the procedural defect as supporting a nexus finding. (*Regents of the University of California* (2012) PERB Decision No. 2302-H; see also *Regents of the University of California* (1987) PERB Decision No. 615-H, pp. 20-22.) Notably, nothing in the language of section 7.0 requires that prior to recommending the termination of employment of a substitute employee, the substitute *must* be

issued an ISR. Indeed, such a requirement would be at odds with the nature of substitutes' at-will employment status under the Education Code.

Under the express language of section 7.0, substitute employees *may* be informed of their inadequate service under the procedures set forth in that section. Nothing in this section can be reasonably interpreted as imposing upon the District any procedural or substantive *termination* procedures for substitutes. If the adverse action at issue here was the *manner* in which Peters was informed of his inadequate service, then his argument that such procedures were not followed would then at least apply to the action at issue. But that is not the case. The only adverse action alleged in the complaint is Peters's termination from employment with the District. Berman provided undisputed evidence of the District's procedures and decision-making process in that regard. Consistent with Berman's testimony, review committees evaluated both Buenrostro's initial recommendation to terminate employment and Peters's request for additional administrative review. Peters produced no evidence demonstrating that the reviewing committees did not respect and follow these procedures.

The District also provided undisputed testimony that procedural defects in ISRs that may result in a successful grievance have no influence on the District's conclusions regarding the underlying substantive conduct, nor disturb any disciplinary action issued. Thus, even if all ISR procedures were not precisely executed that could not have affected the outcome here as the ultimate decision-makers testified that they believed the substance of Peters's conduct justified dismissal from employment. Accordingly, any failure to comply with ISR procedures does not provide competent evidence of nexus between Peters's protected activity and the District's decision to terminate his employment.

Peters also argues that since there was no written procedure requiring substitute teachers to verify the identity of an aide, and because he was not provided with a Sub Folder,

he should not have been held responsible for Montes's unauthorized entry to the classroom. These arguments fail. Peters was not fired because he allowed Montes to enter the classroom unquestioned. He was fired because the District did not believe he exercised the reasonable care required of any teacher regarding classroom supervision. Peters admitted that it is absolutely the responsibility of the substitute teacher to monitor and control the classroom environment. District witnesses testified that, at minimum, a teacher should be vigilant in monitoring the room for safety issues. These are the standards that were applied by the District and there is no evidence that they were not followed in this case.

Peters Failed to Show That the District Gave Inconsistent, Contradictory, Exaggerated, Vague, or Ambiguous Reasons for Its Action

Most of Peters's arguments regarding alleged inconsistent or contradictory reasons offered for the District's action center around the statements of administrators regarding Peters's lack of fault over the incident. Peters's testimony regarding these statements has been discredited for the reasons previously discussed and thus provides no persuasive evidence of nexus.

Peters also argues that the District exaggerated or shifted the reasons for his termination by first revealing during the hearing that Montes was accused of masturbating in addition to touching the first grade students. Additional justifications revealed after-the-fact that do nothing to undermine the official reason for termination do not provide evidence of shifting justifications. (*Santa Clara*, *supra*, PERB Decision No. 2267-M, proposed decision, p. 22.) The District has consistently informed Peters, and all of its witnesses testified at hearing, that the reason his employment was ended was due to the fact that he failed to adequately supervise his classroom on November 29, and as a result two children were assaulted by an unauthorized visitor. No additional details regarding Montes's conduct that were revealed at the hearing

disturb or alter that official reason for his employment termination. Therefore, I reject Peters's argument that the District offered any exaggerated reasons for its actions.

Peters Failed to Demonstrate That the District's Investigation Was Cursory

As concluded above, Buenrostro made a reasonable effort under these circumstances to confer with Peters before making the decision to recommend his employment release. Thus, her failure to get Peters's side of the story before making her decision does not demonstrate a cursory investigation. Furthermore, Peters had already told Laner and the police that he did not observe any inappropriate conduct by Montes that day. This was communicated to Buenrostro. Thus, it is not clear what substantive information Peters could have really added to the investigation other than to express doubt over the children's allegations, as he did during his testimony.

Peters takes issue with the substance of the District's investigation. He contends that in a case like this every student in the class should have been questioned. He also argues that the District should have asked other follow-up questions regarding what was meant by the allegation that Montes "spit" on C2's arm, for example. Peters's arguments do not establish that the District conducted an inadequate investigation. Almost every investigation could be more detailed. Even if it were true that the District could have tried to elicit more information or conducted additional interviews, Peters has not shown that its failure to do so indicated a lack of interest in uncovering the truth of what occurred. Each of the witnesses who were involved in interviewing the children testified to their professional training and qualifications and to the standard investigation practices they employed in this and similar cases. The record showed that the District relied on the information provided by and the conclusions of two law enforcement agencies, two licensed mental health professionals, and two experienced administrators in reaching its decision. This hardly implies a perfunctory investigation.

Peters Failed to Demonstrate That the District Had Animosity Toward Union Activists or Any Other Factor Showing Nexus

The crux of Peters's evidence regarding the District's alleged animosity toward his union activism is that prior to December 3, Laner and Buenrostro were telling him that he was blameless and would not suffer any adverse consequences, and thereafter that story changed. He assumes that the source of the change must have been their consultation with higher-level District administrators, whom he believes must have been looking for an excuse to get rid of him due to his high-profile union activism. Again, Peters's subjective interpretation of Laner's and Burnrostro's comments to him before December 3 are not credited. Furthermore, absent Peters's speculation, there is no evidence in the record demonstrating that Berman, or any other higher-level administrator actually involved in the review process harbored any animus toward Peters specifically or UTLA generally. "EERA does not guarantee employee activists a right to be insulated from non-discriminatory personnel actions." (*Office of the Los Angeles County Superintendent of Schools* (1982) PERB Decision No. 263, p. 9 (*LA County Schools*).)

In sum, the only persuasive evidence demonstrating nexus is the close timing between Peters's request for union representation for the conference with Buenrostro and the District's decision to release him from employment. Close timing, without more, is insufficient to demonstrate a causal connection between the adverse action and the protected conduct. (*Charter Oak Unified School District* (1984) PERB Decision No. 404.) For this reason, I find that Peters has failed to demonstrate a prima facie case of discrimination and that there is no inference of unlawful motivation underlying the District's action. However, for purposes of discussion, even if Peters had met his burden the District showed that it had an alternative, non-discriminatory reason for its action and that it acted because of that non-discriminatory reason in this case. (*Palo Verde*, *supra,* PERB Decision No. 2337.)

The District's Case

Where an employer has demonstrated legitimate concerns that a teacher's conduct may affect the integrity of its education program, PERB has refused to disturb the employer's decision to terminate employment. (*Fall River Joint Unified School District* (1998) PERB Decision No. 1259.) The District has consistently maintained that it released Peters from employment because, based on its own investigation into the incident in conjunction with the reports of law enforcement agencies, it concluded that Peters did not reasonably supervise classroom activities on November 29, or he would have observed two children being sexually molested while in his care.

Adequate classroom supervision is a core responsibility of a teacher, and failures in that regard would reasonably tend to cause the employer legitimate concern over the integrity of the education program. Furthermore, from almost the first moment that Peters learned about the children's allegations and as reinforced throughout his testimony, his primary concern seemed not to be whether children had actually been harmed, but whether he would be subjected to disciplinary action. This was demonstrated by the fact that Peters asked Laner if he would be written up during initial contacts by Laner attempting to elicit information about the suspect. Laner, on the other hand, was focused on identifying and apprehending the assailant. It was also demonstrated by Peters's assertion that it would be "suicidal" to his own employment interests to question whether a person holding himself out as an aide was who he purported to be. This suggests a willingness to allow strangers in classrooms he supervises for fear of jeopardizing his own employment. This type of attitude would also reasonably cause the District to question whether Peters was fit to continue to be entrusted with students' safety.

Peters attempts to refute the adequacy of the District's cause for termination by urging PERB to reject the District's evidence because it did not produce students to testify regarding

classroom events on the day in question, and thus, the only non-hearsay account of those events that may be relied upon is Peters's. Peters, although admitting that he did not watch Montes every second and thus it is at least possible that the man touched the children on their buttocks, finds it utterly impossible that the man was also masturbating. Thus, he disputes that these events happened. Peters's arguments are misplaced for at least three reasons. First, refuting the adequacy of the District's "cause" for termination is fruitless because the District is not required to show cause to terminate a substitute employee under any circumstances. (See Education Code section 44953.)

Second, the relevant inquiry for PERB is not whether the employer acted for a lawful reason (i.e., in this case had "cause" for employment termination), but whether the employer acted for an unlawful, discriminatory reason. (*Baker Valley Unified School District* (2008) PERB Decision No. 1993.) There is no evidence of discriminatory reasons here.

Third, it appears that the District did not intend to offer the students' statements for the truth of the matters asserted, but to show the information it was given and the actions that it took based upon that information. In *LA County Schools*, *supra*, PERB Decision No. 263, the Board found that absent evidence of the employer's intentional reliance upon inaccurate information, the truth of the allegations against an employee need not be proven in order to assess whether the employer acted lawfully:

> [T]he accuracy with which [management] personnel interpreted certain incidents goes more to the issue of whether [the employer] made a sound decision in deciding not to retain [the employee] rather than the issue before PERB of whether it made a discriminatory decision within the meaning of section 3543.5(a). The soundness of the decision made by [management], in the absence of discrimination for reasons of protected activity, is simply a matter outside the jurisdiction of PERB.

(*Id.*, proposed decision, p. 33; see also *Pasadena Unified School District* (1999) PERB Decision No. 1331 [employer's failure to show that student's complaints were true not at issue

before PERB].) Thus, determining the accuracy of the underlying events here is not within PERB's purview. Moreover, there has been no evidence presented that the District fabricated or intentionally relied upon information it knew to be false. However, the Board recently held that where the employer's proffered non-discriminatory reason for acting is the employees' improper workplace conduct, it may not prove that it acted for that reason based only upon a litany of hearsay reports without direct, corroborating evidence. (*Palo Verde*, *supra*, PERB Decision No. 2237, p. 23, citations omitted.) PERB's general rule regarding hearsay evidence is that it is insufficient to support a finding unless it would be admissible over objection in civil actions. (PERB Regulation 32176.)

In this case, even if the students' statements to District witnesses were offered to prove the underlying truth of the matters asserted, at least for those statements given to Fox and the school police, an exception to the hearsay rule applies and the evidence would be admissible in court. C2's and C3's statements to Fox and the school police were made within hours of the girls' experiencing a traumatic event, while it was still fresh in their minds and while they were still under the stress and excitement of the event, and thus qualify under the spontaneous statement exception. (Evid. Code, § 1240; *Matter of Damon Drew H.* (1985) 165 Cal.App.3d 471 [statement of two-year-old still in pain describing sexual molestation was spontaneous]; *Matter of Cheryl H.* (1984) 153 Cal.App.3d 1098 [hearsay declaration admitted as fresh complaints under Evidence Code section 1240.) Moreover, in cases of sex abuse, even older statements are admissible. The delay affects weight, not admissibility. (*People v. Clark* (1987) 193 Cal.3d 178 [statement made seven months after sexual abuse admissible where child did not have impetus to make complaint until she attended class and learned importance of reporting molestation].) Thus, the District's evidence is sufficient to support a finding that it acted for a non-discriminatory reason in this case, especially given that Peters essentially

admitted that Montes may have been able to inappropriately touch students because he did not watch him all of the time.

The District has adequately demonstrated that it acted in this case not because it found Peters's union activities or request for representation objectionable, but simply because it did not trust that Peters should continue to supervise students. Additionally, Peters did not meet his initial burden of showing that the District's conduct was because of a discriminatory intent.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. LA-CE-5576-E, *David C. Peters v. Los Angeles Unified School District*, are hereby DISMISSED.

Right to Appeal

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

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

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(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).)