STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ROBIN ROBINSON, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-5770-E PERB Decision No. 2432 June 12, 2015

Appearances: Robin Robinson, on her own behalf; Office of the General Counsel by Jacquiline M. Wagner, Assistant General Counsel, for Los Angeles Unified School District.

Before Huguenin, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Robin Robinson (Robinson) to a proposed decision (attached) by an administrative law judge (ALJ), dismissing Robinson's unfair practice charge against the Los Angeles Unified School District (LAUSD). The charge alleged that LAUSD terminated Robinson's employment in retaliation for her protected activity, including filing and pursuing a grievance challenging a work assignment allegedly awarded out of seniority order, in violation of the Educational Employment Relations Act.[1]

PERB Regulation 32300[2] requires the party filing exceptions to a proposed decision to include: (1) a statement of the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is

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

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

taken; (3) designate the portions of the record relied upon; and (4) state the grounds for each exception. (PERB Reg. 32300, subd. (a)(1)-(4).) Additionally, an exception not specifically urged shall be waived, pursuant to subdivision (c) of the same regulation.

Although the Board's review of exceptions to a proposed decision is de novo, it need not address arguments that have already been adequately addressed in the same case or that would not affect the result (*Trustees of the California State University (Culwell)* (2014) PERB Decision No. 2400 (*CSU (Culwell)*, pp. 2-3); *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3), particularly where the party seeking relief has simply reasserted its claims without identifying a specific error of fact, law or procedure to justify reversal. (*Los Rios College Federation of Teachers (Sander, et al.)* (1995) PERB Decision No. 1111 (*Los Rios*), pp. 6-7; *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S, pp. 2-3; *San Bernardino City Unified School District* (2012) PERB Decision No. 2278, pp. 2-3; *County of San Diego* (2012) PERB Decision No. 2258-M, pp. 2-3.)

Compliance with the regulation is required to afford the respondent and the Board an adequate opportunity to address the issues raised. (*Temecula Valley Unified School District* (1990) PERB Decision No. 836, pp. 2-3; see also *San Diego Community College District* (1983) PERB Decision No. 368.) Although California courts and PERB recognize a strong public policy favoring hearing cases on their merits and against depriving a party of the right of appeal because of technical noncompliance in matters of form (*United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 916), failure to comply with PERB Regulation 32300 can result in dismissal of the matter without review of the merits of excepting party's claims. (See *California State Employees Association (O'Connell)* (1989)

PERB Decision No. 726-H, p. 3; *Los Angeles Unified School District* (1989) PERB Decision No. 785.) We do so here.

After the ALJ issued her proposed decision, Robinson filed with the Board a two-page document, captioned "Arbitration Review Request – Section 538,[3]" in which Robinson asserts, among other things, that she engaged in protected activities under EERA and Labor Code section 132a,[4] was subjected to an adverse employment action, and that a causal link exists between her protected activities and the employer's adverse employment action. Assuming the filing was intended as a statement of exceptions, it fails to comply, even marginally, with the PERB regulation because it makes no reference to any factual, legal or procedural error by the ALJ nor cites to any portion of the record in this case.

Robinson does assert that LAUSD failed to comply with the constitutional pre-deprivation requirements for permanent public employees under *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194 (*Skelly*), which, if true, would constitute a departure from standard procedures and provide Robinson some evidence of nexus. However, based on the documentary record and Robinson's own lack of credibility, the ALJ determined that LAUSD *twice* sent documents by both regular and certified mail to notify Robinson of the charges against her and her right to respond in person or in writing. Robinson cites to no portion of the record to support her allegation that LAUSD failed to comply with *Skelly* nor identifies any evidentiary ruling or other procedural error that would warrant review of the ALJ's factual findings, let alone reversal of the proposed decision. Because the Board need not review recycled contentions that have already been adequately addressed in the same case

[3] The statutory, regulatory or other source of section 538 is not identified in Robinson's request. Because it does not appear to correspond to any statute or regulation within PERB's jurisdiction, we disregard it as a matter properly before the Board.

[4] California Labor Code section 132a governs claims of retaliation for filing or pursuing a workers' compensation claim, which is not within PERB's jurisdiction.

(*CSU (Culwell), supra,* PERB Decision No. 2400, pp. 2-3; *Los Rios, supra,* PERB Decision No. 1111, pp. 6-7; *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S, pp. 2-3), to the extent Robinson has excepted to the ALJ's findings and conclusions regarding LAUSD's compliance with Robinson's *Skelly* rights, we decline to review the exception.

Robinson's filing includes citations to various court cases interpreting California and federal non-discrimination laws. Assuming for the sake of argument that these cases provide even persuasive authority for how PERB should interpret the anti-discrimination provisions of EERA, because she has failed to identify any specific errors or issues of fact, law or procedure in the proposed decision, it is unclear how any of the authorities cited bear on any issue properly before the Board, much less how they warrant reversal of the proposed decision. (*California Federation of Teachers (Malik)* (2004) PERB Decision No. 1662.)

Clark County School Dist. v. Breeden (2001) 532 U.S. 268, a case arising under federal non-discrimination laws, involved a single incident during a school district's review of a job applicant's profiles. A male supervisor, in the presence of one male and one female employee, read aloud a sexually explicit statement attributed to one applicant and stated that he did not know what it meant. The male employee responded: "I'll tell you later," and both men laughed. The U.S. Supreme Court held that no reasonable person could have believed that the sex discrimination provisions of federal law were implicated by this incident and dismissed the plaintiff's claim that she had suffered retaliation for making an internal complaint about the exchange. Robinson has not explained how the case relates to any factual, procedural or legal error in this case, nor how it supports Robinson's position or offers any guidance for PERB's interpretation of EERA's non-discrimination language, as required by PERB Regulation 32300, subdivision (a)(1) or (4).

Robinson also cites *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, which concerned the standards for showing that an employee has engaged in protected activity and for determining whether an employee was subjected to an adverse employment action sufficient to survive dismissal on summary judgment. Protected activity and adverse employment action are elements of the prima facie case of discrimination within PERB's jurisdiction. However, they are not at issue in this case as Robinson's charge was dismissed for failure to establish the other two elements of discrimination, employer knowledge and nexus, not for lack of protected activity or adverse action. The Board will not consider issues that were not decided adversely to the party asserting the exception or would not affect the outcome of the proposed decision. (*CSU (Culwell), supra*, PERB Decision No. 2400-H, p. 3; *Fremont Unified School District* (2003) PERB Decision No. 1528 (*Fremont*), pp. 2-3; see also *IBEW Local 1245 (Neronha)* (2008) PERB Decision No. 1950-M, p. 1.)[5]

Robinson also cites *Yartzoff v. Thomas* (9th Cir. 1987) 809 F.2d 1371 (*Yartzoff*), at page 1376, as support for her allegation that she engaged in protected activities. However, Robinson's case was dismissed for failure to show employer knowledge of her protected activity and a causal link between her protected activity and the adverse action. The ALJ found that Robinson engaged in protected activity through her representation in a 2006 grievance and by filing and pursuing a work assignment grievance in October-November 2012. Thus, even assuming the case offers some guidance on issues of employer knowledge and/or nexus, the two elements on which Robinson's charge was dismissed, Robinson has not identified what those

[5] Pursuant to PERB Regulation 32310, the Board will consider *cross*-exceptions, i.e., exceptions filed in response to exceptions in order to preserve an argument before the Board, in the event it reverses a proposed decision. However, the regulation governing cross-exceptions is not applicable to Robinson here because her Arbitration Review Request was filed in apparent response to the proposed decision and not in response to any exceptions by another party to this case.

issues might be nor how *Yartzoff* offers an alternative approach or analysis from the reasoning of the proposed decision in this case. We therefore disregard it as well.

The only other authority cited is *Ohton v. Board of Trustees of the California State University* (2010) 180 Cal.App.4th 1402 (*Ohton*), which is of no more assistance than the other cases cited by Robinson. *Ohton* involves the standards for determining whether administrative remedies have been exhausted before filing a court action alleging retaliation for making a "protected disclosure" under the California Whistleblower Protection Act (CWPA), section 8547.12, which, like federal and California workplace discrimination statutes, is not within PERB's jurisdiction. The appellate court's discussion in *Ohton* focuses on whether the claimant made a "protected disclosure," i.e., engaged in protected activity under CWPA (*Ohton, supra,* at pp. 1412-1417), and whether the respondent's investigation of the claimant's administrative complaint considered the full scope of adverse actions. (*Id.* at pp. 1416-1418.)

Thus, even assuming the elements for proving a CWPA claim are analogous to the elements for proving an unfair practice charge alleging discrimination under EERA (see *Novato Unified School District* (1982) PERB Decision No. 210), the particular elements at issue in *Ohton* were protected activity and adverse action, neither of which were decided adversely to Robinson in the proposed decision, and neither of which would be properly before the Board, even assuming they had been adequately raised by Robinson's exceptions. (*CSU (Culwell), supra,* PERB Decision No. 2400; *Fremont, supra,* PERB Decision No. 1528.) Moreover, the appellate court's decision in *Ohton* is pending review by the California Supreme Court, further undermining any value it may, even arguably, have for the present matter. (*Ohton v. California State University of San Diego* (Cal. 2010) 108 Cal.Rptr.3d 74.) Finally, because Robinson fails to explain the significance of the *Ohton* decision for any of the issues before PERB, as with the

other cased cited by Robinson, we decline to consider it as well. (PERB Reg. 32300, subds. (a)(1), (a)(4).)

Because Robinson has raised no issues of fact, law or procedure warranting Board review or otherwise complied with PERB's regulation governing exceptions to a proposed decision, we find that the ALJ's findings of fact are adequately supported by the record and her conclusions of law are well-reasoned and in accordance with applicable law. We hereby adopt the proposed decision as the decision of the Board itself.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5770-E are hereby DISMISSED.

Members Huguenin and Gregersen joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ROBIN ROBINSON, Charging Party, v. LOS ANGELES UNIFIED SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5770-E PROPOSED DECISION (08/11/2014)

Appearances: Robin Robinson, on her own behalf; Office of the General Counsel by Jacqueline M. Wagner, Assistant General Counsel, for Los Angeles Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

In this case, a teacher's aide alleges that her employer terminated her employment in retaliation for her pursuit of a grievance regarding work assignments. The employer denies that its actions were retaliatory and maintains that the teacher's aide was fired because she was suspected of committing child abuse.

PROCEDURAL HISTORY

On December 6, 2012, Robin Robinson filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Los Angeles Unified School District (District). On April 21, 2013, a first amended charge was filed.

On July 15, 2013, the PERB Office of the General Counsel issued a complaint alleging that the District violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by suspending Robinson's employment pending her dismissal because she filed a grievance in October 2012.

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

On August 29, 2013, PERB conducted an informal settlement conference with the parties but the dispute was not resolved. The matter was set for hearing on November 13 and 14, 2013.

On November 5, 2013, the District filed a notice of appearance, petition to file a late answer, and answer to the complaint denying any violation of EERA and asserting various affirmative defenses. The District noted that the reason for its failure to submit a timely answer was due to miscommunication between attorneys for the District due to the recent retirement of the attorney formerly handling the case on the District's behalf. Robinson did not oppose the District's petition.

On November 8, 2013, the District requested a continuance of the hearing due to the unavailability of a key witness. Robinson did not oppose the request. The hearing was rescheduled for February 11 and 12, 2014.

On February 11, 2014, the District appeared at the PERB Los Angeles Regional Office for the hearing, but Robinson did not. An Order to Show Cause (OSC) for failure to appear and prosecute the case was issued to Robinson on that same date. The District's request to file its answer late was granted.

On February 20, 2014, Robinson timely submitted her written response to the OSC, explaining her failure to appear and requesting that the hearing be rescheduled. The District later submitted an untimely written objection to Robinson's response to the OSC that lacked proof of service on Robinson. On March 14, 2014, the administrative law judge (ALJ) issued a written ruling granting Robinson's request to reschedule the hearing.

The hearing was held on June 17 and 18, 2014. The District made a verbal motion to dismiss the charge and PERB complaint at the conclusion of Robinson's case-in-chief. The District's motion was denied without prejudice by the ALJ at that point, and the District then

presented its case-in-chief. After the conclusion of Robinson's case-in-rebuttal, the District again verbally moved to dismiss the charge and PERB complaint. After hearing argument from both parties, the ALJ granted the District's motion on the record and stated that she would issue a proposed decision on the matter under PERB Regulation 32215.[2]

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). Prior to her release from employment, Robinson was an employee within the meaning of EERA section 3540.1(j). During her employment, Robinson was included in a bargaining unit exclusively represented by Service Employees International Union, Local 99 (Local 99). At all times relevant to the allegations in the charge, the District and Local 99 were parties to an operative collective bargaining agreement (CBA) that included a grievance procedure.[3]

Robinson's Employment History

Robinson began her employment with the District as an early education aide in 1993. Her first assignment was at Wadsworth Children's Center. At some point, Robinson transferred to 102nd Street Early Education Center (102nd Street). The duties of Robinson's position included reading to children, assisting children with arts and crafts, supervising children inside and outside of the classroom, maintaining a neat, clean learning environment, and assisting the teacher with various tasks. Her performance evaluations were always satisfactory. Robinson's final assignment was at the 52nd Street Early Education Center (52nd

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

[3] The CBA was not introduced into evidence.

Street),[4] directly reporting to Elizabeth Blackwell. Blackwell became the principal at 52nd Street in July 2012. Although Blackwell and Robinson had crossed paths before while working at various District school sites, this was the first date that Blackwell became Robinson's supervisor.

Sonya Hicks was an associate principal at 102nd Street while Robinson was assigned there. Hicks accused Robinson of verbally and physically threatening her during a meeting on or around August 10, 2006.[5] Blackwell, who was an assistant principal at a different school site at the time, attended Robinson's pre-disciplinary conference over that incident at Hick's request. Robinson sought and received representation by Local 99 for the conference. Blackwell stated that it is the District's policy to have two administrators present whenever an employee has requested union representation during a pre-disciplinary meeting. Robinson denied at the PERB hearing and during the pre-disciplinary conference that she had verbally or physically threatened Hicks. Robinson received a notice of unsatisfactory service, was suspended for 30 days, and was transferred to 52nd Street over the incident with Hicks.[6]

In early September 2012 at 52nd Street, Blackwell observed Robinson handling a child by picking up the child from the back of the arms and moving the child to another location in the classroom. Blackwell was startled because she considered that kind of contact to be improper. Blackwell approached Robinson and asked her why she had moved the child. Robinson responded that she had asked the child to move but the child did not comply with the request. Blackwell told Robinson that the way she had handled the child could have resulted in

[4] This school site was later renamed the Esther Collins Early Education Center.

[5] Hicks is now retired from District employment and did not testify.

[6] Robinson refused to acknowledge that the transfer was disciplinary; rather she characterized it as having been done for her benefit since the District wanted her to be in safe working environment. The documentary evidence belied Robinson's account.

an injury, and if her action had been observed by a parent, it could have been misconstrued. Blackwell instructed Robinson regarding acceptable ways of getting a child to move, including a verbal request and extending one's hand for the child to hold. Blackwell thought that Robinson was receptive to the verbal counseling and she did not believe that the incident was serious enough to warrant written disciplinary action. Robinson did not recall the incident or any counseling by Blackwell on the subject.

Robinson's Grievance Over Work Assignments

On October 15 2012, Robinson filed a grievance at the District's main offices and discussed it with Susan Masters, a District administrator. The grievance alleged that another employee, whom Robinson believed had less seniority than her, received an eight-hour position that Robinson thought should have gone rightfully to her. Robinson held a three-hour position. Masters told Robinson that she would look into the issues raised in the grievance.[7] Prior to speaking with Masters, Robinson exchanged words with Yelena Karachun, a senior human resources representative. Karachun testified that Robinson was disruptive in the office that day and that she considered calling the campus police to deal with the situation. Karachun was aware that Robinson was requesting paperwork to file a grievance. Robinson complained to Masters about Karachun's conduct. Karachun testified that she was unaware of that complaint. Masters and Karachun worked together in the District Office of Employee Performance and Accountability, but Masters was not Karachun's supervisor. Karachun did not handle Robinson's grievance and testified that she learned that Masters handled it during her preparation for the PERB hearing.

By letter dated November 20, 2012, Masters memorialized a telephone conversation on the same date informing Robinson that the grievance could not be processed because Robinson

[7] Masters is now retired from District employment and did not testify.

did not allege that any provision of the CBA had been violated. The letter also provided the telephone number for Maureen Diekmann, a District administrator in the division of Early Childhood Education, whom Masters thought could best address Robinson's concerns. Robinson testified initially that she was never informed about the outcome of the grievance, but admitted to speaking with Masters on the telephone and was at some point informed that Masters had retired. Robinson claimed that the telephone numbers provided by Masters did not work and that the District generally gave her the "run around" about the grievance. During cross-examination, Robinson did not recall whether she received Masters's November 20, 2012 letter. Later in her testimony, Robinson admitted that she received the letter and understood it to mean that her grievance was not being recognized.

Robinson testified that she while she did not directly notify Blackwell about the grievance or give her a copy of it, she asked Blackwell at some point whether she had heard anything about it, and Blackwell said she was not aware of it. Blackwell testified that she could not recall having a conversation with Robinson about a grievance, never received a copy of it from the District, and did not actually learn of it until the first day of the PERB hearing. The grievance form states that a copy of a grievance is to be provided to the employee's supervisor.

Robinson is Accused of Child Abuse

On or about November 1, 2012, Robinson was working in a classroom with a substitute teacher, Virginia Vallejo. While the children were gathering on a rug for "circle time," Vallejo observed a two-year-old child leave the rug to continue playing in the back of the room. Robinson took the child by the arm and returned her to the rug. According to Vallejo, the child moved to get up again and Robinson forcefully pushed down the child to prevent her from standing up. Vallejo approached Robinson and said, "We don't do that." Vallejo reminded

Robinson that this was not the first time she had been instructed not to handle children inappropriately.[8] Vallejo told Robinson that she was going to talk to Blackwell. Robinson became upset and left the room.

Vallejo approached Blackwell later in the day and explained her concerns about Robinson. Vallejo told Blackwell that she thought the incident should be reported, because she thought Robinson's handling of the child was outside the scope of her duties and was not done to protect the child's well-being. Vallejo had never before submitted a report regarding suspected child abuse and was unsure about what to do. Blackwell instructed her regarding how to file the report. All school staff working with children are mandated to report suspected child abuse under state law and receive yearly training regarding child abuse. The District has several policies in place regarding appropriate levels of physical contact with children and a policy of zero tolerance for suspected abuse as mandated by the Education Code and other state laws.[9] All employees, including Robinson, receive regular training regarding these policies.

Because of the suspected child abuse report, the police came to 52nd Street and interviewed Robinson sometime in November 2012. Robinson asserted that other employees of the school had around the same time been the subject of police investigations for child abuse, and so she did not at first realize that they were there to speak to her. Neither Blackwell, nor Michael Haggood, the District's executive director of Early Childhood

[8] Robinson had worked with Vallejo in the past, including in September 2012 when Blackwell had counseled Robinson about handling children. Vallejo testified to being present during Blackwell's counseling of Robinson that day.

[9] The District's Code of Conduct With Students mandates that employees are to avoid touching or having physical contact with students that is not age-appropriate or within the scope of the employee's responsibilities or duties. The District's February 2010 Policy Bulletin regarding the abolition of corporal punishment noted that the use of corporal punishment for student discipline was abolished in 1984 and that corporal discipline, in any form, is not to be used within the District.

Education, recalled any other incidents of employees being investigated for child abuse at 52nd Street contemporaneously with Robinson's investigation. Karachun testified that a review of the District's computerized database, "I-STAR," which tracks and reports suspected child abuse incidents and other critical events at school sites, did not reveal any other child abuse investigations at 52nd Street around that time. During her direct testimony, Robinson acknowledged that she was aware in November 2012 that child abuse allegations had been made against her. During cross-examination, however, she refused to acknowledge that she was even aware of the allegations against her until "much later," after the District provided her with formal, written charges and causes for her termination from employment.

Blackwell had to report the allegations against Robinson to state and local regulatory agencies, as required by law. The school ultimately received a citation by state regulators over the incident, which found that the rights of a child were violated. Such violations of law threaten the ability of the school to operate by either revocation of its operating license or by being placed on probation. All parents of children enrolled in the school also had to be notified in writing about the incident. The parents of the child in question removed the child from the school.

The District's Investigation

Sometime in late November 2012, after police officers had visited 52nd Street and interviewed Robinson, Haggood contacted local law enforcement and received clearance for the District to investigate Robinson's conduct. In situations where the police are investigating the conduct of an employee to determine whether a crime has been committed, the District must wait until authorized by the law enforcement agency to begin its administrative investigation. Upon receiving permission from the police to proceed, Haggood called Robinson into his office and informed her that an allegation of child abuse had been made

against her by another employee. Robinson told Haggood that she did not know anything about it and was shocked that the police had mentioned her name. Robinson told Haggood that Vallejo was lying and also maintained that position at the PERB hearing. Next, Haggood contacted Vallejo. Haggood believed Vallejo's account of Robinson's conduct with the child. Haggood also asked to Vallejo to write down what happened, and Vallejo did so.

Haggood and Blackwell discussed the situation and determined that termination from employment was warranted under the circumstances based upon their belief that Vallejo was telling the truth, Robinson's history of suspension and transfer for previous misconduct, and Blackwell's recent attempt to correct Robinson's methods of interacting with children, which was not heeded by Robinson. Haggood asked Blackwell to provide a written description of her verbal counseling of Robinson in September 2012, since that event was not memorialized in writing at the time it occurred, and Blackwell did so. Haggood admitted that he was the final decision-maker in the decision to terminate Robinson's employment, although his recommendation was also reviewed by his supervisor (Diekmann).

Employment Termination Procedures

Karachun was assigned by the District to draft the causes and charges for Robinson's termination from employment. Her division within the Office of Employee Performance Accountability deals exclusively with classified employees. Karachun is not a decision-maker in classified employee discipline and termination actions. She reviews the disciplinary recommendations of principals and administrators and then prepares the written causes for discipline. Although Karachun was charged with preparing the written documents supporting Robinson's dismissal, she had no role in deciding that dismissal was warranted. Rather, she prepared the documents based upon Haggood's recommendation.

If an employee exercises his or her right to appeal the discipline or employment termination decision, Karachun essentially prosecutes the case on behalf of the District. In that circumstance, Karachun presents the District's case to a hearing officer who issues a recommendation to sustain, modify, or overturn the discipline that is then considered and voted upon by the Personnel Commission. The decision of the Personnel Commission is then presented to the District's governing board, which makes the final employment decision. In the last three years Karachun has handled 20 cases where an employee was accused of suspected child abuse. In all of those cases, the administrators recommended termination from employment, which was ultimately upheld by the District's governing board.

Haggood and Karachun met with Robinson on December 5, 2012, and informed her that the District was recommending her termination and that she would be suspended pending the final dismissal action. Karachun also presented Robinson with a letter notifying her of the same. Karachun told Robinson during the meeting that she would receive a *Skelly*[10] packet in the mail. Karachun and Robinson both testified that neither of them informed Haggood about Robinson's grievance. Haggood testified that he did not learn of it until the first day of the PERB hearing.

On February 11, 2013, the District sent documents via regular and certified mail to Robinson's address of record informing her that the District intended to recommend to the District's governing board that her employment be terminated. It is the District's customary practice to send such documentation via regular and certified mail whenever an employee is no longer on a school site to receive hand-delivery. A Notice of Unsatisfactory Service was included, outlining the specific charges against her. Robinson was informed that if she wanted an opportunity to respond to the charges before they were presented to the District's governing

[10] See *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, 215, governing procedural due process rights for permanent public employees.

board, she should call the Office of Employee Performance Accountability to arrange a date, time, and location for a conference. The District did not receive any verbal or written response from Robinson in response to the documents mailed on that date.

On April 5, 2013, the District resent the documents described above via regular and certified mail to Robinson's address of record. The attached cover letter noted that the documents were first sent to Robinson on February 11, 2013, and also stated that she had seven calendar days to contact the District to set up a conference or notify of her intent to retire. Otherwise, the letter warned that the recommendation for termination would be forwarded to the District's governing board. Robinson did not respond, and the District's recommendation for her dismissal was then forwarded to and approved by the District's governing board. During the PERB hearing, Robinson testified that she did not recognize the documents mailed to her on April 5, 2013 and did not recall receiving them.

By letter dated June 5, 2013, the District notified Robinson that her 30-day suspension was imposed from May 7, 2013 to June 5, 2013 and that her termination from employment was effective as of June 5, 2013.[11] The letter also included instructions for filing an appeal of the dismissal with the Personnel Commission. Robinson exercised that option, and an appeal hearing was subsequently held before a hearing officer. The hearing officer issued a decision dated March 22, 2014, recommending that Robinson's suspension and employment termination be sustained. The Personnel Commission and the District's governing board ultimately upheld the hearing officer's recommendations.

ISSUE

Did the District suspend and terminate Robinson's employment because she filed a grievance in October 2012?

[11] It appears that this letter was also sent via regular and certified mail to Robinson's address of record.

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*).)

Regarding the first element of the *Novato* standard set forth above, it is well-established that an employee's pursuit of a contractual grievance, with or without the assistance of an employee organization, is protected activity. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.) Accordingly, Robinson's attempt at filing and pursuing a grievance over her work assignment from October to November 2012 was protected under EERA. It was also revealed by the District at the PERB hearing that, in 2006, Robinson requested and received assistance from Local 99 over a disciplinary issue and Blackwell was involved in that matter.[12] This instance of protected conduct was not included in the PERB complaint. It is appropriate to consider additional protected activities not specifically alleged in the complaint when 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.) Since at least one of the decision-makers in the instant action was also involved with the handling of Robinson's 2006 discipline, and it was the District who introduced this evidence, it is properly considered here.

[12] Seeking and receiving assistance from an employee organization over employment concerns is protected conduct. (*County of Riverside* (2011) PERB Decision No. 2184-M.) 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.)

There is no question that suspension and dismissal from employment, as imposed on Robinson here, are adverse employment actions. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C.) Thus, elements one and three of the *Novato* retaliation standard are not in dispute in this case. However, as discussed in more detail below, Robinson has not met her burden of proving by a preponderance of evidence that the decision-makers here had knowledge of her grievance activity and that they took action because of that activity and/or her prior representation by Local 99.

The Employer's Knowledge of Protected Activities

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.) 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, citing *City of Modesto* (2008) PERB Decision No. 1994-M.)

The record demonstrated that Haggood and Blackwell were the administrators who decided that Robinson's employment with the District should be terminated. Blackwell admitted that she was asked by Hicks to participate in Robinson's pre-disciplinary meeting in 2006 because Robinson was going to be represented by Local 99. Thus, it is undisputed that Blackwell had knowledge of Robinson's first exercise of protected conduct. Documentation of the 2006 disciplinary action included information about Local 99's representation of Robinson, and this was also attached to the Notice of Unsatisfactory Service issued to Robinson in February and April 2013. Haggood testified to reviewing Robinson's employment history during the course of his investigation, including the prior disciplinary action. Thus, it can be

presumed that Haggood was also aware that Local 99 represented Robinson during her prior discipline proceedings.

Robinson admitted that she never discussed her October 2012 grievance with Haggood. Likewise, Karachun credibly testified that she did not inform Haggood about anything she knew about Robinson's grievance activity in October 2012, because it had no bearing on the situation and she did not think about it. Haggood testified that he did not learn about the grievance until he observed the first day of the PERB hearing. Haggood was a credible witness and there is no reason to question his account. Therefore, at the time Haggood made the decision to terminate Robinson's employment, he had no knowledge of Robinson's grievance.

Robinson asserted that at some point before she was suspended, she asked Blackwell if she knew what was happening regarding her grievance, and Blackwell did not seem to know anything about it. Blackwell did not recall such a conversation with Robinson, and asserted that she never received a copy of the grievance and did not learn about it until she observed the first day of the PERB hearing. Robinson also argued that Blackwell must have known about the grievance because the grievance form itself notes that a copy is to be provided to the employee's supervisor. Notwithstanding the notation regarding copy distribution on the grievance form, Blackwell's account is credited over Robinson's on this point, and in general. As explained below, Robinson's testimony was not credible in most respects because it was largely inconsistent.[13]

[13] PERB looks to the factors in Evidence Code section 780 to evaluate witnesses' credibility, including: bias; the capacity to perceive, recollect, or communicate; and prior consistent or inconsistent statements, among others. (*State of California (Board of Equalization)* (2012) PERB Decision No. 2237-S; see also *Santa Clara Unified School District* (1985) PERB Decision No. 500.)

During her direct testimony, Robinson admitted that she knew in November 2012 that there were pending child abuse allegations against her by the District. This is logical, considering that she admitted that the police interviewed her about those allegations at that time, and acknowledged that the District then started "talking about child abuse" and she was suspended because of the accusation against her shortly thereafter (on December 5, 2012). During cross-examination, however, her testimony changed. Inexplicably, she refused to acknowledge that she learned she had been accused of child abuse in November 2012, claiming instead that she did not know about the allegation until "much later," after she received formal, written charges from the District (presumably, the Notice of Unsatisfactory Service). Robinson's testimony regarding her communication with Masters over the grievance also changed at several points.

Robinson's description of her communications with Blackwell was also inconsistent.[14] When asked whether she recalled the verbal counseling incident, Robinson said she did not, and added that Blackwell rarely came out of her office. Robinson said she only spoke to Blackwell one time, when Robinson was informed that she was not coming back to the school. Later, after admitting that she only spoke to Masters about the grievance, Robinson added the account of inquiring about the status of the grievance with Blackwell. Additionally, at several points in her own testimony, Robinson asserted that her daily blood pressure medication sometimes caused memory problems and made her confused. However, her mental acuity was amply demonstrated by her cogent questioning of District witnesses about specific events.

[14] Notably, Robinson asserted during her rebuttal case that some of Blackwell's testimony at the PERB hearing was inconsistent with Blackwell's earlier testimony at Robinson's dismissal hearing, and therefore argued that Blackwell was not a credible witness. This assertion was found to be inaccurate, however. The relevant portion of the dismissal hearing recording was received in evidence as Charging Party's exhibit 18, and the audio file was played off the record in the presence of all parties. The ALJ concluded that Blackwell's testimony in the earlier preceding did not contradict her testimony at the PERB hearing.

Thus, any assertion about memory lapses or confusion seemed calculated by Robinson to avoid directly answering questions.

For these reasons, I credit Blackwell and find that she did not know about Robinson's October 2012 grievance at the time she recommended to Haggood that Robinson should be dismissed from employment with the District. As such, Robinson has failed to show that either of the decision-makers regarding her suspension and dismissal could have been motivated by her grievance activity.

Nexus

The final, 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

As discussed above, the only instance of protected conduct that the decision-makers in this case were aware of was Robinson's representation by Local 99 regarding the disciplinary action over the incident with Hicks in 2006. This exercise of protected conduct preceded the action at issue here by at least six years. 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].) Accordingly, the remote timing between Robinson's representation by Local 99 and the adverse action in this case does not strongly infer that the District was unlawfully motivated. There are also no additional indicators of nexus in the record, as explained below.

Other Nexus Factors

Robinson argued that nexus was demonstrated because the District departed from established procedures, since she did not receive a *Skelly* hearing. Robinson also argued that the District had no proof that child abuse occurred, which suggests a cursory investigation. She also implied that other employees investigated for child abuse were not treated as harshly as she was. None of these arguments have weight.

Regarding an alleged departure from established procedures, the evidence shows that consistent with its usual practice, the District offered twice, in writing, the opportunity for Robinson to schedule a conference to dispute the allegations against her prior to the recommendation for her dismissal being submitted to the District's governing board. Robinson did not take action to schedule a conference. She testified that she did not receive these notifications. Robinson's testimony was not believable, especially because she received and responded to other documents sent to the same address, including the notification of her right to appeal to the Personnel Commission and those sent to her by PERB regarding the instant charge. (*Jurupa Unified School District* (2013) PERB Decision No. 2309; see also Evidence Code section 641: "A letter correctly addressed and properly mailed is presumed to have been

received in the ordinary course of mail.") Thus, the record did not persuasively demonstrate a departure from *Skelly* procedures.

The evidence also does not demonstrate an inadequate investigation. Haggood interviewed both Robinson and Vallejo, and credited Vallejo's version of events. Haggood testified at length about the consideration he gave to Robinson's history of discipline for misconduct and prior counseling by Blackwell, the latter of which he found particularly relevant to the instant charges. His account does not imply a perfunctory review of Robinson's alleged misconduct, or that he did not have a genuine interest in uncovering the truth of what occurred.

Finally, Robinson testified that other employees were also investigated for child abuse around November 2012 at 52nd Street, and implied that they were not subjected to the same disciplinary actions as she was. The record did not demonstrate this, however, as Haggood, Blackwell, and Karachun all credibly refuted this claim. Karachun also testified that all 20 classified employees accused of child abuse within the last three years, like Robinson, have been dismissed from employment. Thus, there was no competent evidence of disparate treatment.

Conclusion

For these reasons, I find that Robinson failed to demonstrate a prima facie case of retaliation for her protected activities and that there was no inference of discriminatory intent by the District suspending and terminating her employment.

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-5770-E, *Robin Robinson 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).)