**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| CARMEN FRITSCH-GARCIA,<br><br>Charging Party,<br><br>v.<br><br>LOS ANGELES UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | Case No. LA-CE-5779-E<br><br>PERB Decision No. 2447<br><br>August 10, 2015 |

Appearances: Carmen Fritsch-Garcia, on her own behalf; Office of the General Counsel by Marcos F. Hernandez, Assistant General Counsel, for Los Angeles Unified School District.

Before Martinez, Chair; Winslow and Gregersen, Members.

DECISION

GREGERSEN, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed on November 17, 2014, by Carmen Fritsch-Garcia (Fritsch-Garcia) to a proposed decision (attached) by an administrative law judge (ALJ), dismissing Fritsch-Garcia's unfair practice charge against the Los Angeles Unified School District (District). The charge, as amended, alleged that Fritsch-Garcia was laid off from employment in retaliation for her pursuit of an unfair practice charge against the District. Specifically, Fritsch-Garcia alleged that the District violated the Educational Employment Relations Act (EERA)[1] section 3543.5(a) by including Fritsch-Garcia on a list of employees

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

who were subject to a reduction in force (RIF), and by ultimately laying her off because she filed and pursued an earlier unfair practice charge with PERB against the District.[2]

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

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[2] Fritsch-Garcia's earlier unfair practice charge against the District, PERB Case Number LA-CE-5516-E, was filed on December 1, 2010, and dismissed by PERB on April 24, 2012. Fritsch-Garcia did not appeal the dismissal. The ALJ took administrative notice of PERB's records regarding that case during the formal hearing in this matter without objection.

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

Compliance with the regulation is required to afford the respondent and the Board an adequate opportunity to address the issues raised. (*Temecula Valley Unified School District* (1990) PERB Decision No. 836, pp. 2-3; see also *San Diego Community College District* (1983) PERB Decision No. 368.) Failure to comply with Regulation 32300 may 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 at p. 3; *Los Angeles Unified School District (Mindel)* (1989) PERB Decision No. 785.) We choose to do so here.

On November 17, 2014, within the time period for filing a statement of exceptions to an ALJ proposed decision, Fritsch-Garcia filed a six-page document with PERB titled "Appeal/Extension," which we construe as her statement of exceptions. In the document, Fritsch-Garcia made a fourth request for an extension of time to file her "appeal,"[4] requested a transcript of the formal hearing to use in filing a statement of exceptions,[5] and provided six pages of "fundamental flaws" with the proposed decision. On November 25, 2014, the District filed a response to Fritch-Garcia's November 17, 2014 filing.

Fritsch-Garcia characterizes her November 17, 2014 document as a response to the "fundamental flaws" found in the proposed decision. The "fundamental flaws" mentioned in the document identify numerous factual distinctions between the proposed decision and Fritsch-Garcia's understanding of what testimony was presented at hearing. For example,

[4] Because the document containing Fritsch-Garcia's fourth request for an extension of time also includes substantive content taking issue with the proposed decision, which the District responded to on November 25, the Appeals Assistant notified the parties that the filings were complete.

[5] Fritch-Garcia had the opportunity to request a transcript at the hearing, but elected not to do so. After the hearing, she was informed by the ALJ how to go about requesting a transcript. However, Fritsch-Garcia failed to properly request a transcript at any point prior to the filing of her November 17, 2014 document.

Fritsch-Garcia states that the ALJ misstated the facts in finding that displacement occurred because Fritsch-Garcia was no longer authorized to teach science. In support of her contention, Fritsch-Garcia provides seven paragraphs of factual background with no citation to a record or evidence presented during hearing. Fritsch-Garcia also alleges that evidence was produced showing that the District did not comply with contract language, again without citation to a record or evidence presented.

While the majority of Fritsch-Garcia's exceptions identify the part of the proposed decision to which each exception is taken, none designate the portions of the record relied upon for her exception. As previously stated, Fritsch-Garcia failed to requested a transcript of the formal hearing. As such, the formal hearing was not transcribed. Without a transcript to designate portions of the record Fritsch-Garcia relies upon, there is no basis to question the ALJ's findings of fact. Therefore, by virtue of PERB Regulation 32300(a)(3), Fritsch-Garcia's exceptions to the ALJ's factual findings are deficient.

The majority of Fritsch-Garcia's exceptions also fail to identify grounds for the exceptions raised pursuant to PERB Regulation 32300(a)(4), and instead merely express disagreement with the ALJ's conclusions and repeat arguments made in the original charge documents. For instance, Fritsch-Garcia cites to the ALJ's finding that "the record showed that out of a total of 165 health teachers, 67 least senior were subjected to layoff, regardless of whether they were roster-carrying or in a contract pool." Such a finding, according to Fritsch-Garcia, verifies the inconsistencies, discrimination and favoritism showed by the District, but she does not explain how.

The Board need not address arguments that have already been adequately addressed by the ALJ, particularly where the excepting party has simply reasserted its claims without identifying a specific error of fact, law or procedure that would justify reversal. (*Salinas*

*Valley Memorial Healthcare System* (2015) PERB Decision No. 2433-M; *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3; *State of California (Department of Youth Authority)* (1995) PERB.)

Because Fritsch-Garcia raised no issues of fact, law or procedure warranting further Board review and failed to otherwise comply 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-5779-E are hereby DISMISSED.

Chair Martinez and Member Winslow joined in this Decision.

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| CARMEN FRITSCH-GARCIA,<br><br>Charging Party,<br><br>v.<br><br>LOS ANGELES UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | UNFAIR PRACTICE<br>CASE NO. LA-CE-5779-E<br><br>PROPOSED DECISION<br>(09/09/2014) |

Appearances: Carmen Fritsch-Garcia, on her own behalf; Office of the General Counsel by Marcos F. Hernandez, Assistant General Counsel, for Los Angeles Unified School District.

Before Valerie Pike Racho, Administrative Law Judge.

In this case, a teacher alleges that she was laid off from employment in retaliation for her pursuit of an unfair practice charge against the employer. The employer maintains that its decision was not motivated by the teacher's protected conduct, as she was one of several thousand employees in total, and of 67 Health teachers in particular, who were laid off in 2012 due to a necessary reduction in force (RIF) for reasons of declining budget and student enrollment.

## PROCEDURAL HISTORY

On December 28, 2012, Carmen Fritsch-Garcia filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Los Angeles Unified School District (LAUSD or District). On September 11, 2013, Fritsch-Garcia filed a First Amended Charge, and on October 14, 2013, she filed a Second Amended Charge. On February 4, 2013, October 4, 2013, and November 4, 2013, the District filed position statements responding to the original and amended charges.

On January 16, 2014, the PERB Office of the General Counsel issued a complaint alleging that the District violated the Educational Employment Relations Act (EERA)[1] section 3543.5(a) by including Fritsch-Garcia on a list of employees who were to be subjected to RIF, and by ultimately laying off her employment because she filed and pursued an unfair practice charge with PERB against the District.[2]

On February 5, 2014, the District filed its answer to the complaint, admitting certain facts, denying any violation of the law, and asserting various affirmative defenses.

On March 12, 2014, PERB conducted an informal settlement conference with the parties, but the issues were not resolved and the matter was then scheduled for formal hearing.

On June 23, 24, and 25, 2014, the hearing was held. The District made a verbal motion to dismiss the charge and PERB complaint at the conclusion of Fritsch-Garcia's case-in-chief. The District's motion was denied without prejudice by the Administrative Law Judge (ALJ) at that point, and the District then presented its own case-in-chief. After the conclusion of Fritsch-Garcia'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.[3]

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

[2] Fritsch-Garcia's earlier unfair practice charge against the District, PERB Case Number LA-CE-5516-E, was filed on December 1, 2010, and dismissed by PERB on April 24, 2012. Fritsch-Garcia did not appeal the dismissal. Administrative notice was taken of PERB's records regarding that case during the hearing in this matter without objection.

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

## FINDINGS OF FACT[4]

### The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k). At all times relevant to this case, Fritsch-Garcia was an employee within the meaning of EERA section 3540.1(j), and included within a bargaining unit exclusively represented by United Teachers Los Angeles (UTLA or Union).[5] UTLA and the District were and are parties to an operative collective bargaining agreement (CBA).[6]

### Fritsch-Garcia's Teaching Credentials and Employment History

Fritsch-Garcia began her employment with LAUSD in July 2004 working as an intern teacher in special education at the Elizabeth Learning Center. In 2005, the District offered Fritsch-Garcia a probationary contract to teach health. At that time, she had a preliminary single-subject teaching credential in health science.[7] Such a credential allows her to teach the subject of health at any school district in the state. She also obtained that year a Middle School Authorization (MSA) from the District that allowed her to teach outside of her credential area in biology.[8] The MSA must be approved and renewed yearly by the District in order to be valid, and authorizes a teacher to teach that subject only in the school district that issued it.

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[4] This proposed decision omits discussion of certain facts in the record deemed immaterial to deciding the issues presented.

[5] UTLA was not a party to the case and did not represent Fritsch-Garcia.

[6] The CBA was not introduced into evidence.

[7] Health science is a distinct subject area from physical and biological sciences. The California Commission on Teacher Credentialing (CTC) maintains credential records for teachers.

[8] The record does not demonstrate, however, that Fritsch-Garcia ever taught biology. It appears that she taught life science after receiving the MSA.

Fritsch-Garcia does not currently, and has never, possessed a single-subject teaching credential in biology or any other category of sciences.[9] It is undisputed that Fritsch-Garcia could, without the assistance of the District, apply for a supplemental authorization from the state to teach science classes, but has never done so. Fritsch-Garcia taught both health and life science for several years at Elizabeth Learning Center. In 2010, Fritsch-Garcia learned that her MSA had not been renewed and was therefore no longer valid.

Issues Surrounding Fritsch-Garcia's Displacement From Elizabeth Learning Center

In or around April 2010, Fritsch-Garcia was "displaced" from Elizabeth Learning Center. Displacement occurs when the number of teachers at a particular school site exceeds the number of teaching positions needed based on student enrollment. Teacher Bruce McIver was also displaced from Elizabeth Learning Center in or around April 2010. It is undisputed that McIver possesses a credential or authorization under records maintained by the CTC that allows him to teach science courses at any school district within the state. Fritsch-Garcia questioned how McIver obtained that credential because she overheard him saying during science department meetings that his undergraduate degree was in political science.[10] According to Garcia, she had greater seniority than McIver.

Displaced teachers retain their level of salary and benefits and remain employed by the District. They are either transferred to another school site in a regular assignment as a teacher with a "roster," meaning that they have a class with assigned students, or they may be assigned to a "contract pool" at a particular school site or sites. A contract pool teacher fills in for

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[9] The record also does not reflect that Fritsch-Garcia ever completed the process of obtaining a credential to teach in special education.

[10] McIver did not testify at the PERB hearing.

absent teachers at a school site in the manner of a substitute teacher. After displacement in 2010, Fritsch-Garcia was assigned to the contract pool at South Gate High School.

According to Fritsch-Garcia, McIver returned to Elizabeth Learning Center after receiving an authorization from the District that allowed him to teach health sometime in or around July 2011. According to the CTC records introduced in evidence in the PERB hearing, McIver does not appear to possess a preliminary or clear health science credential. Fritsch-Garcia admitted that she was unaware if McIver also taught science classes at the time he returned to the school, or whether he does so currently. The District introduced evidence of records from Elizabeth Learning Center that were collected in October 2011 showing that McIver taught science-geology at that time. It is Fritsch-Garcia's belief, but it was not conclusively established in the record, that McIver currently teaches health at Elizabeth Learning Center. Sometime after June 30, 2012, Fritsch-Garcia was called to substitute for him in a health class at the school.[11]

Fritsch-Garcia believed that her displacement violated the CBA. She also believed that the principal of Elizabeth Learning Center, Sharon Sweet, selected her for displacement to get rid of her.[12] During her testimony, Fritsch-Garcia expressed the belief that one of the reasons she was displaced was because Sweet did not renew the MSA that would have allowed her to teach science courses. There was no evidence in the record showing that the MSA renewal would have prevented, or was even related to, Fritsch-Garcia's displacement, however. Fritsch-Garcia testified to her belief that Sweet manipulated the displacement process in order

[11] After her layoff, Fritsch-Garcia worked as a substitute teacher for the District through September 2013.

[12] Sweet did not testify at the PERB hearing.

to favor certain teachers over others. However, there was no evidence presented that Sweet actually decided who was to be displaced. Earlier, in 2009, Fritsch-Garcia filed a grievance with UTLA's assistance, alleging that Sweet violated the CBA by reprimanding Fritsch-Garcia in front of her peers. The outcome of that grievance was not explained in the record. There was no evidence introduced that Sweet ever negatively evaluated Fritsch-Garcia's performance or took any disciplinary action against Fritsch-Garcia.[13]

Fritsch-Garcia requested that Sweet provide her with a seniority list of teachers assigned to the school site. Fritsch-Garcia and Sweet exchanged a number of emails and Sweet offered to meet with Fritsch-Garcia to explain the seniority list. Fritsch-Garcia cancelled that meeting because she was ill. The record does not indicate that Fritsch-Garcia ever attempted to reschedule the meeting with Sweet to go over the list. At some point, Fritsch-Garcia received a document entitled "Middle School Single Subject Seniority List by Department" for teachers at Elizabeth Learning Center. The list did not include the teachers' dates of hire with the District.

The seniority list placed Fritsch-Garcia as the third and final teacher under both the departments of 7th grade health and moderate/severe disabilities. Fritsch-Garcia's name was not listed under the science department. The science department section of the list placed teachers in the following order: Ted Gebhart, George Sperry, Nicholas Castrillon, McIver, Arnold Brent, and Lila James. Gebhart and Sperry were also included in the list under the heading for the 7th grade health department, above Fritsch-Garcia.

[13] Fritsch-Garcia did receive overall meets-standards performance evaluations, as well as conference memoranda regarding alleged student and parent complaints about her, from other District administrators between 2005 and 2009. There was no evidence that Sweet was involved in any of those circumstances.

Fritsch-Garcia complained to Timothy Faulkner, a District certificated personnel specialist, and to UTLA about her displacement.[14] Fritsch-Garcia also complained to Faulkner that UTLA was not adequately addressing her concerns. Fritsch-Garcia was informed by UTLA representative Cami George that UTLA did not believe the displacement violated the CBA and therefore it would not pursue a grievance over the issue.[15] Fritsch-Garcia confirmed this understanding in email exchanges with UTLA representatives. Fritsch-Garcia was also informed that she could file a grievance, or pursue some other dispute resolution procedure, on her own.[16] The thrust of Fritsch-Garcia's dispute over displacement was that she did not receive reliable seniority information because the list that she was provided did not contain hire dates, so she had no way to independently verify its accuracy. She also questioned the reason that she was placed in the department of 7th grade health, rather than science, since she also taught life science.

On December 1, 2010, Fritsch-Garcia filed an unfair practice charge with PERB, Case No. LA-CE-5516-E, regarding the displacement issues.

On or around August 1, 2011, over one year after displacement, Fritsch-Garcia believed there was an opening to teach 9th grade health at Elizabeth Learning Center and emailed Sweet requesting to exercise her "return rights" under the CBA. Fritsch-Garcia believed there was an open position because of information she received from UTLA representative Megan Boyd.[17]

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[14] Faulkner did not testify at the PERB hearing.

[15] George did not testify at the PERB hearing.

[16] Although Fritsch-Garcia maintained during the hearing that she "challenged" the displacement, the record did not demonstrate that she filed a grievance or pursued any other formal dispute resolution process over that issue.

[17] Boyd did not testify at the PERB hearing.

However, Sweet responded to Fritsch-Garcia that there was no current vacancy for a health teacher at Elizabeth Learning Center.

Fritsch-Garcia then exchanged a number of emails with Faulkner in August and September 2011. Faulkner informed Fritsch-Garcia that under the CBA, any right to return to Elizabeth Learning Center had expired after "Norm Day" the previous year.[18] Fritsch-Garcia complained to Faulkner that Elizabeth Learning Center teachers Sperry, Mary Gomez, and Christopher Kyaw were each teaching one section of health, while she had been unfairly displaced by Sweet. She took issue with Gomez's and Kyaw's ability to teach health under their credentials. Fritsch-Garcia acknowledged during her testimony that Sperry, Gomez, and Kyaw are all credentialed to teach science courses. Fritsch-Garcia expressed her belief during the hearing that the District was contractually obligated to post an opening for a health teacher at Elizabeth Learning Center rather than use existing science teachers to cover sections of health classes. Fritsch-Garcia did not introduce into evidence the CBA provision that would support that theory. She took issue with the District requesting permits/authorizations for science teachers to teach health when she is fully credentialed and ready to teach health. Fritsch-Garcia also believes that McIver's return to Elizabeth Learning Center sometime in the 2011-2012 school year was to take over the health classes that Sperry, Gomez, and Kyaw had been covering and that this position should have gone to her instead.

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[18] Norm Day was described in the record as a day shortly after the start of the school year where projected student enrollment figures are compared to actual student attendance records. The District uses student attendance on Norm Day to ascertain its baseline staffing requirements for the following school year.

Fritsch-Garcia's Extended Disability Leave of Absence

Prior to displacement, sometime on or about January 29, 2010, Fritsch-Garcia sustained a workplace injury that was not specifically described in the record. As previously discussed, after displacement, Fritsch-Garcia was assigned to the contract pool at South Gate High School. She held that assignment from August 2010 through November 2010. Sometime in November 2010, Fritsch-Garcia took disability leave presumably related to her injury earlier that year.

Fritsch-Garcia was on leave from November 2010 until March 2012. Under District policy, whenever an employee is on leave for more than one year, the employee's previous assignment is not reserved. The District contacted Fritsch-Garcia at some point shortly before her anticipated return to duty to inform her that she was to be assigned to Huntington Park High School. Fritsch-Garcia attended a meeting with the principal of Huntington Park High School, Lupe Hernandez, where Fritsch-Garcia was informed that the school could not accommodate Fritsch-Garcia's request to periodically sit while teaching because of a recently enacted school policy requiring teachers to stand during instruction.[19] Fritsch-Garcia interpreted this refusal to accommodate her medical condition as a sign that the District was trying to keep her away. However, Fritsch-Garcia admitted that the District increased her disability compensation because it did not offer modified work within a required timeframe. Fritsch-Garcia never reported to Huntington Park High School. Instead, she was reassigned to the contract pool at Maywood Academy upon her return to work in early March 2012.

[19] Hernandez did not testify at the PERB hearing.

Layoff Notification

In the 2009-2010, 2010-2011, and 2011-2012 school years, the District determined the need to reduce its workforce due to declining budget and student enrollment, which resulted in several thousand employees being laid off in each of those years. Leanne Hannah, assistant director of certificated human resources, testified that her office is responsible for compiling and analyzing data regarding teacher seniority and assignments that are used to determine the particular kinds of services that need to be reduced. At the secondary (as opposed to elementary) teaching level, the need to reduce teachers by distinct classroom subject area is determined.

Specifically, Hannah's office looks at budget reports and then meets with various departments to evaluate how many teachers are on active duty, will return from leave, and are retiring from employment. Hannah's office annually sends staffing verification rosters to each school site in October, wherein teachers and principals confirm teachers' assignment and seniority information and report back to the District. Contract pool teachers' staffing verification rosters are compiled and maintained separately from school sites' rosters in human resources.[20] Based on student enrollment projections and its budget, the District determines how many total teachers, and also within each department or subject area, for which it does not have a position. For the particular kinds of services determined to be reduced, teachers are selected for layoff eligibility in order of inverse seniority within their subject area, District-wide. Some subject areas, such as, physics, are considered to be in shortage. In shortage areas, even during RIF periods resulting in the layoff of other teachers, a properly credentialed teacher could be newly hired by the District. Health is not a shortage area.

[20] Fritsch-Garcia maintains that she was unable to verify the accuracy of her seniority placement since she was in a contract pool.

The Education Code requires that certificated employees be sent written notification by the employer no later than March 15 if their services will not be needed for the following school year, and therefore will be eligible to be laid off at the end of the current school year. (See Ed. Code, §§ 44949, 44955.)

Health was a particular kind of service that needed to be reduced in the 2010-2011 layoffs. That year, 53 health teachers were notified that they would be laid off for the following school year. Fritsch-Garcia, however, did not receive any notification from the District that she would be eligible for layoff during the 2010-2011 school year, and was not laid off at that time.

Health was also determined to be a particular kind of service in need of reduction during the 2011-2012 layoff cycle. On February 14, 2012, the District's governing board took action to approve the issuance of layoff notices to 4,105 permanent certificated employees, including 67 health teachers. These 67 health teachers included both roster-carrying teachers and contract pool teachers. Prior to the March 15, 2012 deadline, Fritsch-Garcia received written notifications via regular and certified mail from the District that she was to be laid off from employment for the following school year.[21] Upon returning to work at Maywood Academy in early March 2012 after her disability leave, she was also verbally informed by a school administrator and a UTLA representative that she was going to be laid off.

[21] Fritsch-Garcia received more than one notice, which she argued was evidence of a departure from established procedures. One of these notices stated that she was assigned to Huntington Park High School, one of the 45 specified schools wherein roster-carrying teachers were protected from RIF regardless of seniority level under the order of a superior court judge in the case of *Sharail Reed et al. v. State of California* (Los Angeles Superior Court, Case No. BC432420 (*Reed*).) Fritsch-Garcia did not carry a roster at Huntington Park High School or Maywood Academy. Both notices informed Fritsch-Garcia that she was eligible to be laid off. All teachers at *Reed*-protected schools who were otherwise eligible for layoff still received a notice. Whether they were actually to be skipped was determined at the layoff hearing.

Fritsch-Garcia timely submitted in writing to the District a Request for Hearing to determine whether cause existed to lay off her employment. In response, the District mailed to Fritsch-Garcia what was referred to as an "Accusation Packet" dated March 30, 2012.[22] The packet included relevant sections of the Education and Government Codes pertaining to the layoff process and informed Fritsch-Garcia that she must submit a Notice of Defense in writing or the District could effectuate the layoff without holding a hearing. Fritsch-Garcia was further informed that she could inspect and copy witness lists and documents in control of the District by contacting attorneys in the LAUSD Office of the General Counsel. She was also informed of her right to conduct discovery upon filing the Notice of Defense. Fritsch-Garcia timely submitted to the District her Notice of Defense. She then received notification from the District about the date, time, and location of the hearing. She never requested discovery or to inspect and/or copy District records regarding the layoff process.

The Layoff Hearing and Decision

The layoff hearing was conducted by ALJ Eric Sawyer from the state Office of Administrative Hearings (OAH) over approximately 20 days between April and June 2012. Fritsch-Garcia appeared and was present as a respondent in the case on only the first day of that hearing. She did not testify. Some employee respondents, including Fritsch-Garcia, elected to be represented by UTLA legal counsel at the layoff hearing. Seniority lists per individual subjects, including the "Main Seniority List for Health," and other exhibits introduced in evidence in the layoff hearing were available for viewing by parties and observers in the main hearing room as well as in a room reserved for use by UTLA. There

[22] The term "accusation," as used in the context of the layoff process simply means that an employee is "accused" of not having enough seniority to survive the RIF, and therefore cause exists for the employee to be laid off.

were 165 teachers on the main health seniority list, which represented the total number of health teachers employed by the District at that time. The first teacher on the list was the least senior, and the 165th was the most senior. Fritsch-Garcia's name appeared on the list at number 42. Thus, Fritsch-Garcia fell within the range of 67 health teachers selected for layoff by inverse seniority.

Fritsch-Garcia testified at the PERB hearing that she wanted to testify at the layoff hearing, but was informed by UTLA counsel that her testimony was not needed. She testified that she did not really understand that the layoff hearing represented her opportunity to challenge the grounds for her own layoff. She also did not realize that she had the opportunity to view seniority lists at the layoff hearing.

At the PERB hearing, Fritsch-Garcia testified to her belief that if she had never been displaced from Elizabeth Learning Center in 2010, she would not have been subjected to layoff in 2012, and that Sweet had engaged in a retaliatory campaign to end her employment with the District. However, Fritsch-Garcia produced no evidence showing that Sweet was involved in the general decision to lay off several thousand employees in 2011-2012, to select health as particular kind of service to be reduced that year, or to specifically include Fritsch-Garcia within the seniority range of health teachers to be laid off.

ALJ Sawyer issued his proposed decision regarding the 2012 layoff process on or about June 6, 2012. Relevant to this matter, ALJ Sawyer found that the District's method of determining seniority for RIF purposes was valid and that its seniority lists were accurate, except as specifically noted in his proposed decision. RIF seniority was defined by the District as an employee's first date of service under a contract for employment. No inaccuracies as to Fritsch-Garcia's seniority were noted in ALJ Sawyer's proposed decision.

ALJ Sawyer also found reasonable and upheld the District's competency criteria, which determined bumping rights for teachers subjected to layoff. In order for an employee currently assigned to a position subject to layoff to bump a less senior employee holding a position that was not subject to layoff, the employee was considered "competent" to render service if (1) she was fully credentialed in the other subject area, and (2) had worked one year within the last five years in the other subject area. ALJ Sawyer also deemed correct and upheld the District's contention that it had no duty to execute MSAs so that employees could bump into other positions to avoid layoff under California law. Thus, an employee otherwise subject to layoff but teaching in another subject area pursuant to a MSA was not found to have met the District's competency criteria, which required a full credential, and had no right to be retained.

Finally, ALJ Sawyer concluded that the District was entitled under the Education Code to reduce the particular kinds of service it had identified for RIF, including health, and that its decision was not arbitrary, but a proper exercise of discretion. Thus, the accusation against Fritsch-Garcia was sustained and her services were not required by the District for the 2012-2013 school year. (See ALJ Sawyer's proposed decision, p. 42, para. 9.)

Fritsch-Garcia admitted that she received both a copy of ALJ Sawyer's proposed decision and notification that it had been adopted by the District's governing board. Fritsch-Garcia did not challenge or appeal the District's adoption of the proposed decision in superior court. Accordingly, that decision is now final. Fritsch-Garcia was laid off as of June 30, 2012.[23]

[23] After the layoff was final, in July 2012, Fritsch-Garcia exchanged a number of emails with Faulkner and another certificated human resources administrator, Marjorie Josephat, complaining that she should be able to bump less senior and allegedly less competent employees, like McIver. Josephat did not testify at the PERB hearing. Fritsch-Garcia continued to allege that Sweet had acted improperly and requested information regarding

## ISSUE

Did the District retaliate against Fritsch-Garcia by selecting her for layoff eligibility in March 2012 and laying off her employment in June 2012 because she filed and pursued an unfair practice charge against the District?

## CONCLUSIONS OF LAW

To prevail in an unfair practice case, the burden of proof at hearing rests on the charging party to prove all of the elements of a prima facie case. (PERB Regulation 32178; *Oakland Unified School District* (2009) PERB Decision No. 2061.) The party having the burden of proof must offer evidence so that the trier may have a basis for finding in his favor. (9 Wigmore, Evidence (Chadbourne ed. 1981) § 2487, p. 293.)

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*).) In determining whether an employer's action is objectively adverse, the Board considers whether a reasonable person in the same circumstances would find the action adverse to the employee's employment interests. (*Newark Unified School District* (1991) PERB Decision No. 864.)

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bumping. In response, Faulkner and Josephat reiterated that Fritsch-Garcia's concerns regarding displacement issues had been previously addressed by the District, but noted that Fritsch-Garcia continued to disagree. They also responded that the proposed decision by the ALJ regarding layoffs spoke to her other concerns and was final.

The final, critical element of a prima facie case is whether there is a causal connection, or nexus, between adverse action 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 order to assist in assessing circumstantial evidence of unlawful motive, PERB has developed a set of nexus "factors." In addition to close timing between protected conduct and adverse action, one or more other factors demonstrating unlawful motivation must be present to adequately show nexus: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's

unlawful motive (*North Sacramento School District* (1982) PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

Protected Activities and Adverse Action

As to the threshold requirement of protected activity, filing and pursuing to resolution an unfair practice charge, as Fritsch-Garcia did here, is protected by EERA. (*Los Angeles Unified School District* (2012) PERB Decision No. 2244.) It was also revealed during the hearing, but was not included in the PERB complaint, that Fritsch-Garcia had previously filed a grievance against Sweet, complained about Sweet to District administration, and enlisted the assistance of UTLA in those matters. Such activities are also protected by EERA. (*Ibid*; *California State University, Long Beach* (1987) PERB Decision No. 641-H[24].)

It is appropriate to consider additional protected activities not specifically alleged in the complaint when (1) adequate notice and opportunity to defend has been provided to the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged issue has been fully litigated; and (4) the parties have had an opportunity to examine and cross-examine on the issue. (*Lake Elsinore Unified School District*, *supra*, PERB Decision No. 2241, p. 8.) The District had the full opportunity to, and did, cross-examine Fritsch-Garcia regarding the additional instances of protected conduct. The District had the opportunity to address these instances in its argument supporting its motion to dismiss. For these reasons, I conclude that the issues have been fully litigated. Additionally, these issues were among the underlying subject matter of Case No. LA-CE-5516-E, the protected conduct alleged in the PERB complaint. For this reason, there

[24] 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.)

was adequate notice and opportunity to defend afforded the District. These activities are also related to Fritsch-Garcia's theory of the case, namely, that Sweet orchestrated her ouster from employment. Thus, they will be considered in the proposed decision.[25]

The District argued that layoff is not a true adverse action because no employee wrongdoing is required or implied. That argument fails. A reasonable person would consider the severance of the employment relationship that necessarily occurs through layoff to be adverse to the employee's employment interests. (See *Klamath-Trinity Joint Unified School District* (2005) PERB Decision No. 1778 [holding that the elimination of a position and resulting layoff is an adverse action].) Accordingly, the first and third elements of the *Novato* test for retaliation set forth above are not in serious dispute in this case and are met. However, as discussed more fully below, Fritsch-Garcia has failed to show by a preponderance of evidence that the relevant District decision-makers in this case had any knowledge of her protected activities, and thus, that they could have taken any action in response to those activities.

The Employer's Knowledge of Protected Activities and Nexus

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, supra,* 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.) Without factual support,

[25] The Board has also found it appropriate to consider events that fall outside of the statutory limitations period as relevant background information when they may shed light on timely alleged violations. (*San Diego Unified School District* (1991) PERB Decision No. 885.)

knowledge of protected activity cannot simply be presumed and imputed to the employer's decision-maker in the action at issue. (See *City & County of San Francisco* (2011) PERB Decision No. 2207-M, dismissal letter, p. 5.)

Here, the record demonstrates that the decision to lay off 67 health teachers, including Fritsch-Garcia, was made based on recommendations from Hannah's division of certificated human resources to the District's governing board. Hannah testified that she had no knowledge of Fritsch-Garcia's pending unfair practice charge against the District at the time the layoff recommendation was made to the governing board in February 2012. Hannah testified that her office does not routinely respond to unfair practice charges and only becomes involved in such matters when asked to investigate specific issues regarding certificated assignments by other District administrators. Likewise, there was no evidence that the members of the District's governing board had any specific knowledge of Fritsch-Garcia's pending PERB charge. Fritsch-Garcia also presented no evidence that Hannah or other administrators within her office, or members of the governing board, were aware of Fritsch-Garcia's earlier grievance and other complaints against Sweet.

According to PERB's records in Case No. LA-CE-5516-E, Fritsch-Garcia specifically complained about Sweet's and Faulkner's conduct in the unfair practice charge, so it can be assumed that they were aware of this protected conduct despite the fact that Fritsch-Garcia failed to call them as witnesses to testify to their knowledge of the issues in this case.[26] This is

[26] Because they were not called as witnesses, any written or verbal statements attributed to Sweet and Faulkner that are offered to prove the truth of the matter asserted are hearsay. Hearsay may not be used to form the basis of factual finding unless it would be admissible over objection in civil court. (PERB Regulation 32176.) For purposes of discussion, since Sweet and Faulkner are District administrators, it is presumed that their out of court statements are admissible under a party admission exception to the hearsay rule. Such an exception to the

also a reasonable assumption regarding Fritsch-Garcia's protected conduct that was not included in the PERB complaint, since that conduct also specifically involved them.

In opposition to the District's motion to dismiss the complaint, Fritsch-Garcia argued that it is widely understood among teachers that site-level administrators, like Sweet, frequently talk to District-level administrators about specific teachers. She asserted that Sweet is an experienced administrator who certainly would know how to get rid of someone that she did not like, and that Sweet engaged in a retaliatory campaign against Fritsch-Garcia because of her various complaints and protected activity. Thus, Fritsch-Garcia argues that both knowledge of her protected conduct and animus should be imputed to the District decision-makers here.[27]

Fritsch-Garcia's arguments are based on her sincerely-held beliefs, but were not supported by any objective facts in the record. Beliefs, without factual foundation, comprise "mere speculation, conjecture, or legal conclusions" that are insufficient to prove a prima facie case. (*Regents of the University of California* (2005) PERB Decision No. 1771-H, p. 4; see also *Pleasant Valley Elementary School District* (2004) PERB Order No. Ad-333, p. 10 [mere conjecture, without evidence, does not prove wrongdoing].) There was simply no evidence that Sweet, or Faulkner for that matter, had any input over the decision to lay off 67 health

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hearsay rule does not apply to the hearsay statements of teachers, like McIver, or union representatives, like Boyd and George, however.

[27] Although not applicable in this case because of a dearth of evidence to support it, under a subordinate bias theory, a supervisor's unlawful motive may be imputed to the decision-maker when: (1) the supervisor's recommendation, evaluation, or report was motivated by the employee's protected activity; (2) the supervisor intended for his or her conduct to result in an adverse action; and (3) the supervisor's conduct caused the decision-maker to take adverse action against the employee. (*County of Riverside* (2011) PERB Decision No. 2184-M, p. 15.)

teachers, including Fritsch-Garcia, or that they communicated with the layoff decision-makers regarding Fritsch-Garcia's protected conduct. As it has not been shown that the District administrators who were responsible for deciding that Fritsch-Garcia was eligible for layoff were aware of her various protected activities, it is not possible that they could have been unlawfully motivated by them.

Moreover, even assuming that the knowledge element had been adequately demonstrated, purely for the sake of discussion, there is no evidence of unlawful motivation by the District.

Most of Fritsch-Garcia's arguments regarding nexus concern her claims of inconsistencies, mistakes, and disparate treatment surrounding the layoff process. As an initial point, these claims rest on issues that have already been fully litigated during the layoff hearing conducted by ALJ Sawyer, and thus, Fritsch-Garcia is collaterally estopped from relitigating those issues before PERB. Collateral estoppel is applicable to decisions of administrative agencies, like OAH, when (1) the agency is acting in a judicial capacity; (2) it resolves disputed issues of fact properly before it; and (3) the parties have had an adequate opportunity to litigate the disputed issues. (*State of California (Department of Corrections)* (1995) PERB Decision No. 1104-S, p. 4 (*Department of Corrections.*) The issues must also be identical, have been actually litigated by the same parties, and the decision in the prior proceeding must be final and decided on the merits. (*Lucido v. Superior Court* (1990) 51 Cal.3d. 335, 341.)

All of those elements are met here, despite Fritsch-Garcia's claimed misunderstanding regarding her rights as a respondent at the layoff hearing. The fact that Fritsch-Garcia did not fully educate herself regarding her rights and obligations as a litigant in that matter does not diminish that she possessed "adequate opportunity to litigate the disputed issues."

(*Department of Corrections, supra*, PERB Decision No. 1104-S, p. 4; see also *People v. Sims* (1982) 32 Cal.3d 468, 484 [issues actually litigated include those that are properly raised by the pleadings or otherwise submitted for determination and determined; such determinations may be based on a failure of proof].) Additionally, there is no dispute that the decision is now final and was decided on the merits, that Fritsch-Garcia was a respondent in that case, or that the administrative agency acted in a judicial capacity. Thus, Fritsch-Garcia may not argue that the District's (1) double notification of her eligibility for layoff, (2) calculation of her seniority, (3) determination of her lack of competency to bump other employees not subject to layoff, (4) failure to grant MSA waiver to shield her from layoff, or (5) assignment at Maywood Academy rather than *Reed*-protected Huntington Park High School amount to disparate treatment or a departure from procedures, because all of those issues were actually litigated and conclusively decided by ALJ Sawyer. PERB may not revisit those issues now.

Most importantly, the lynchpin of Fritsch-Garcia's theory of wrongdoing in this case rests on at least two unsupported and ultimately faulty premises, namely, that her displacement in 2010 was designed by Sweet, who was allegedly hostile to her protected conduct (the 2009 grievance),[28] and because she was displaced, she was then exposed to layoff vulnerability in 2012. None of these theories were proven by the evidence in the record.[29]

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[28] Sweet could not have been influenced by Fritsch-Garcia's unfair practice charge, because that was filed after displacement occurred.

[29] Fritsch-Garcia also repeatedly alleged that when she requested clarification regarding the District's displacement and layoff decisions, the District did not respond in good faith to her questions and concerns, suggesting that the District provided her with vague and ambiguous reasons for its actions. This was not demonstrated by the record. A review of the various correspondence between Fritsch-Garcia and District administrators implies not that the District failed to respond to Fritsch-Garcia's questions, but that she was dissatisfied with or did not accept their answers.

First, other than Fritsch-Garcia's belief, there was no evidence that Sweet was actually responsible for determining that Fritsch-Garcia was to be displaced. And even if Sweet was involved in the decision, then it would stand to reason that she also selected McIver for displacement from Elizabeth Learning Center at the same time. That severely undercuts Fritsch-Garcia's theory that McIver was one of the teachers favored by Sweet at Fritsch-Garcia's expense. Furthermore, although Fritsch-Garcia opined that she was displaced because Sweet did not renew the MSA that allowed her to teach life science, that too was not supported by any evidence. It was not shown that displacement occurred because Fritsch-Garcia was no longer authorized to teach life science.[30] Such a theory is especially dubious since it is undisputed that, at the same time, McIver was teaching science, was listed as a member of the science department, and yet, was also displaced.

To the extent that Fritsch-Garcia attempts to demonstrate animus by claiming Sweet allegedly blocked her from returning to Elizabeth Learning Center in 2011 by telling her there was no opening in health, and instead hiring McIver to teach health, this was not demonstrated by competent evidence. The record did not clearly reflect what McIver's complete teaching assignments at Elizabeth Learning Center were at that time, or that there was actually an opening in health in 2011. Fritsch-Garcia's belief on this point was based on uncorroborated hearsay accounts by a UTLA representative. Thus, there is no basis to make a factual finding on this point. Most importantly, even if it was shown that Sweet did mask an opening at the

[30] Notably, none of Fritsch-Garcia's other suppositions about the propriety of the District's or Sweet's decision to cover sections of health classes at Elizabeth Learning Center with existing science teachers, or whether that actually occurred, were proven by competent evidence in the record.

school, such a fact does nothing to prove that Sweet was connected to the layoff decision in 2012, which is the only alleged adverse action in instant PERB complaint.

Finally, the record did not show that Fritsch-Garcia's displacement, and resulting contract pool assignments rather than a regular, roster-carrying classroom assignment, had any causal connection to her eligibility for layoff in 2012. Rather, the record showed that out of a total of 165 health teachers, the 67 least senior were subjected to layoff, regardless of whether they were roster-carrying or in a contract pool. Thus, it was total District-wide seniority among all heath teachers that determined layoff eligibility, not whether the health teacher had regularly assigned students or seniority within particular school sites. There was no showing that displacement had any effect whatsoever on Fritsch-Garcia's overall District-wide seniority placement.

Moreover, if displacement had really made Fritsch-Garcia susceptible to layoff and the District was unlawfully motivated, then it easily could have laid off Fritsch-Garcia during the 2010-2011 layoff cycle. Health was also a particular kind of service reduced in that year and those layoffs happened after displacement and after the filing of Fritsch-Garcia's unfair practice charge and other protected activities. The fact that the District did not select Fritsch-Garcia to be laid off at its earliest opportunity strongly suggests that its motivation an entire year later had nothing to do with Fritsch-Garcia's EERA-protected conduct.

For all of the reasons discussed herein, Fritsch-Garcia failed to meet her burden of showing that relevant District decision-makers knew about, and therefore that they could have been motivated by, her protected activities when they determined that she was one of several thousand teachers who must be laid off in 2012. For that reason, the District's motion to dismiss the case for failure to state a prima facie case was granted.

## 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-5779-E, *Carmen Fritsch-Garcia 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).)