STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

LORI E. EDWARDS, Charging Party, v. LAKE ELSINORE UNIFIED SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6118-E PERB Decision No. 2548 February 2, 2018

Appearances: Lori E. Edwards, on her own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Todd M. Robbins, Attorney, for Lake Elsinore Unified School District.

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Lori E. Edwards (Edwards) from the dismissal of her unfair practice charge by PERB's Office of the General Counsel. The charge, as amended, alleged that on December 28, 2015, the Lake Elsinore Unified School District (District), provided inaccurate information to the California State Teachers' Retirement System (CalSTRS) and/or refused to correct inaccurate information previously provided to CalSTRS regarding Edwards' retirement service credit for the 2007-2008 school year because of Edwards' protected activity. According to the third amended charge, the District's inaccurate characterization of Edwards' employment as a substitute, rather than a full-time teacher, for the 2007-2008 school year resulted in her receiving 0.9868 service credit, rather than at least one full year of service credit to which she was entitled by law.

Following several amendments and a warning letter, on January 6, 2017, the Office of the General Counsel dismissed the charge for failure to state a prima facie case of discrimination. The Office of the General Counsel offered two reasons why, in its view, Edwards had not alleged sufficient facts to demonstrate that she had suffered any adverse employment action. First, the Office of the General Counsel determined that the District had calculated Edwards' retirement benefits consistent with an appellate court ruling that she was a substitute teacher during the 2007-2008 school year. According to the Office of the General Counsel, because Edwards did not dispute the accuracy of her benefit accrual for the 2007-2008 school year, as a substitute teacher during that period, she was not entitled to the same retirement service credit as a full-time probationary or permanent employee, and thus suffered no adverse effect on her compensation or employment conditions. Second, the Office of the General Counsel determined that Edwards had not alleged with sufficient specificity how the District had "shorted" her retirement credit by several days, as she had not identified the specific dates at issue and whether such dates were for teaching or tutoring days.

Among the points raised in her appeal, Edwards argues that, in analyzing the charge allegations, the Office of the General Counsel erred by considering her tenure classification, i.e., her status as a substitute rather than probationary or permanent teacher, rather than whether she worked full-time or part-time during the 2007-2008 school year. Edwards contends that her full-time employment during the 2007-2008 school year, regardless of tenure status, is the appropriate criterion for determining her retirement service credit. The District opposes Edwards' appeal on various grounds. In addition to reasserting lack of jurisdiction, statute of limitations, and res judicata arguments raised in position statements previously filed

in response to Edwards' charge, the District urges PERB to reject Edwards' appeal as untimely and for non-compliance with PERB Regulations.[1]

For the reasons explained below, we vacate the dismissal and remand to the Office of the General Counsel for further proceedings in accordance with this Decision.

FACTUAL AND PROCEDURAL BACKGROUND[2]

During the 2007-2008 school year, the District designated Edwards as a substitute teacher and compensated her in accordance with its substitute salary schedule. At the end of the 2007-2008 school year, Edwards objected that she had been misclassified as a substitute, a dispute that was extensively litigated and which eventually resulted in an appellate court decision denying Edwards' petition for a writ of mandamus to compel the District to reclassify Edwards retroactively as a permanent teacher for the 2007-2008 school year. (*Edwards v. Lake Elsinore Unified School Dist.* (2014) 230 Cal.App.4th 1532 (*Edwards v. Lake Elsinore*).) The California Court of Appeals held that, although Edwards was entitled to preferential hiring and one year of teaching credit as a probationary employee based on her year of substitute

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

[2] On review of a dismissal without hearing, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party. (*San Juan Unified School District* (1977) EERB Decision No. 12, p. 4 [Prior to 1978, PERB was known as the Educational Employment Relations Board (EERB)]; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6; *California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.) We may also consider information provided by the respondent, provided it is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M, adopting dismissal letter at p. 1; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994, pp. 12-13; *Riverside Unified School District* (1986) PERB Decision No. 562a, p. 8.)

teaching and subsequent employment as a regular teacher, the Education Code did not provide for retroactive pay or benefits. (*Id.* at p. 1545.)

From May through October 2015, Edwards participated in various PERB unfair practice charges against the District in Case Nos. LA-CE-5098-E and LA-CE-5909-E. She alleges that she also participated in a contractual dispute with the District and represented a fellow employee in an evaluation meeting with a school administrator.

On or about October 19, 2015, Edwards contacted CalSTRS about allegedly incorrect information provided by the District regarding her retirement account. Although not always clearly delineated, Edwards alleges ***both*** that the District misclassified her as a substitute, rather than a probationary teacher during the 2007-2008 school year, ***and*** that it also provided CalSTRS with inaccurate information indicating that Edwards had served as a part-time, rather than full-time, teacher for the purpose of calculating her retirement service credit during the 2007-2008 school year.[3]

On October 23, 2015, Edwards requested that CalSTRS correct her retirement service credit to reflect that she had worked as a full-time teacher during the 2007-2008 school year.

On November 21 and 29, 2015, Edwards filed additional unfair practice charges against the District in Case Nos. LA-CE-6058-E and LA-CE-6088-E.

On or about December 24, 2015, CalSTRS requested records from the District regarding Edwards' employment status during the 2007-2008 school year.

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[3] The former allegation was considered and rejected by the California Court of Appeal in *Edwards v. Lake Elsinore, supra,* 230 Cal.App.4th 1532, and we are therefore concerned with the latter not as a violation of the Education Code or Edwards' retirement benefits, but only to the extent it may serve as an adverse employment action or show a departure from established procedures in support of a discrimination allegation within PERB's jurisdiction.

On December 28, 2015, the District responded to CalSTRS' request with information characterizing Edwards' employment during the 2007-2008 school year as part-time rather than full-time.

On January 16, 2016, CalSTRS responded to the substance of Edwards' complaint that the District had improperly classified her as a substitute rather than full-time teacher for the 2007-2008 school year and that, as a result, she had not received the full retirement service credit to which she was entitled by law. Based on its review of payroll data, CalSTRS determined that the annual pay rate reported by the District for the 2007-2008 school year was consistent with the District's salary schedule for substitute teachers, that Edwards had therefore been accurately credited with a total of 0.9868 year of service credit for her employment as a substitute teacher during the 2007-2008 school year, and that, to the extent Edwards questioned whether she had been accurately classified as a substitute teacher, she would need to resolve that dispute with the District, as it was not within CalSTRS' authority to second-guess a public school employer's classification decisions.[4]

Edwards filed the present charge on March 4, 2016, and filed amended charges on April 21, 2016 (First Amended Charge), and April 29, 2016 (Second Amended Charge).

In its warning letter of August 11, 2016, the Office of the General Counsel advised Edwards that the Second Amended Charge did not state a prima facie case of discrimination. According to the warning letter, the charge did not allege facts demonstrating that the District had taken an adverse employment action against Edwards, inasmuch as she was classified and fully compensated as a substitute teacher for the 2007-2008 school year. Additionally, the Office

[4] As explained in CalSTRS Administrative Directive 96-02, because of changes to the definition of "full-time" teachers under Education Code section 22138.5, effective July 1, 1996, CalSTRS would no longer be able to calculate the compensation earnable for members employed on an hourly or daily basis.

of the General Counsel determined that Edwards had not alleged sufficient facts to demonstrate that any action taken by the District was unlawfully motivated, as the charge alleged no facts demonstrating a departure from established standards or procedures, disparate treatment, inconsistent justifications, hostility toward union or other protected activity or any other nexus factors recognized by PERB decisional law.

On August 31, 2016, Edwards filed her Third Amended Charge, which included a 21-page, single-spaced narrative statement of the charge and 47 pages of exhibits.

In response to Edwards' filings, the District filed position statements on April 18, April 29, May 20, and September 16, 2016 in which it argued that the charge was untimely, failed to state a prima facie case and was subject to various defenses, including res judicata inasmuch as the material allegations had been previously litigated and rejected by the California Court of Appeals and other judicial and administrative tribunals.

On January 6, 2017, the Office of the General Counsel dismissed the charge for failure to state a prima facie case.

After requesting and receiving an extension of time, Edwards filed her appeal on February 27, 2017, and the District filed its opposition to the appeal on March 20, 2017.

On March 24, 2017, in response to the District's contention that her appeal was untimely, Edwards requested that the Board take administrative notice of the extension of time granted to her for filing her appeal and of various administrative regulations and statutes cited in Edwards' appeal.[5]

[5] PERB may take administrative notice of matters included in its own files, including materials from other cases. (*County of Santa Clara* (2015) PERB Decision No. 2431-M, p. 5, fn. 5.) However, the Board reviews a dismissal/refusal to issue a complaint de novo (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 47), and Edwards' request for an extension of time in which to file her appeal and the Appeals Assistant's decision to grant that request are

THE PARTIES' POSITIONS

The essence of Edwards' appeal is that the Office of the General Counsel incorrectly relied on Edwards' tenure classification as a substitute teacher, rather than her full-time status based on the number of days and hours worked during the 2007-2008 school year, to determine the appropriate amount of Edwards' retirement service credit. According to Edwards, a certificated employee's tenure classification as a substitute, temporary, probationary or permanent employee has no bearing on retirement service credit, which is based instead on the number of hours and days worked in a school year. Edwards' appeal argues that, pursuant to the Education Code, "full-time" employment entails working at least 75 percent of the 180 day academic year as specified by Article 2 of the collective bargaining agreement governing her employment with the District. (Ed. Code, §§ 22138.5, 22106.5, 22115, see also § 44924.) Because she worked 189 full-time equivalent days or 1228.5 hours in one position during the 2007-2008 school year, she contends she was a "full-time" employee, regardless of her tenure status as a substitute teacher, and that she was therefore entitled to at least one full year of

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already part of the present case file. Therefore, there is no need for the Board to take administrative notice of these documents as they are already part of the matters before the Board on appeal.

Additionally, the purpose of administrative notice is to permit consideration of certain categories of facts which are "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy." (*City of Alhambra* (2010) PERB Decision No. 2139-M, p. 10.) Although federal, state and local statutes, constitutions, charters, resolutions, ordinances and regulations are considered "universally" or "commonly known" or "readily determinable facts" (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16), when cited *as legal argument or authority*, they are not regarded as "facts" that must be admitted into the record at all. (See, e.g., *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 4, fn. 4.) For these reasons, we consider it unnecessary to rule on Edwards' request for administrative notice or to address the arguments included therein.

retirement service credit instead of the 0.9868 service credit reported by the District to CalSTRS for the 2007-2008 school year. (CalSTRS AD 96-02.)

The District's opposition raises two procedural arguments against Edwards' appeal. First, because the charge was dismissed on January 6, 2017, and Edwards did not file her appeal until February 27, 2017, the District argues that the appeal should be rejected as untimely, as it was not filed within 10 days following service of the dismissal, pursuant to PERB Regulation 32360, subdivision (b), governing appeals from administrative determinations. Second, the District argues that Edwards' appeal should be rejected for non-compliance with PERB Regulation 32615 "insofar as [Edwards' 49-page] filing completely fails to include a clear and concise statement of the facts and conduct alleged to constitute an unfair practice."

The District's opposition also incorporates by reference arguments made in its previous position statements in this matter. There, the District argued, among other things, that PERB lacks jurisdiction to consider Edwards' allegations of Education Code violations; that the material allegations of Edwards' charge relating to her employment status in the 2007-2008 school year have previously been litigated and repeatedly resolved against her in various judicial and administrative proceedings; that the charge does not contain a clear and concise statement of the facts constituting an unfair practice as required by PERB Regulations, and consequently that some or all of Edwards' allegations are insufficiently specific to allow the District to respond; that the conduct allegedly constituting an adverse employment action, the District's alleged misclassification of Edwards' 2007-2008 employment status, predates by almost nine years her protected activity and therefore cannot have been the "but for" cause of any misclassification or underpayment, and, moreover, that Edwards' claim is not a timely continuing violation because

the adverse action alleged in the charge, i.e., the District's computation of pay and benefits for the 2007-2008 school year, merely confirms or reiterates a position taken by the District and previously communicated to Edwards well outside PERB's six-month limitations period. The District also argues that because this charge does nothing more than recycle the same meritless allegations that have been rejected in other administrative and judicial fora, pursuant to Educational Employment Relations Act (EERA)[6] section 3541.3, subdivisions (i) and (n), Government Code section 11455.30 and PERB decisional law, PERB should sanction Edwards as a vexatious litigant by ordering her to cease and desist bringing the same allegations previously decided against her and to pay the District's reasonable attorneys' fees and costs in defending against this matter.

DISCUSSION

Initially, we consider the two grounds argued in the District's opposition for summarily rejecting Edwards' appeal: untimeliness of the appeal and non-compliance with PERB Regulations governing appeals.

The District argues that, because the charge was dismissed on January 6, 2017 and Edwards did not file her appeal until February 27, 2017, the appeal was not filed within 10 days following service of the dismissal, pursuant to PERB Regulation 32360, subdivision (b), governing appeals from administrative determinations. The problem with this argument is two-fold. First, the District incorrectly relies on PERB Regulation 32360, subdivision (b), governing administrative appeals, rather than PERB Regulation 32635 governing appeals from a dismissal/refusal to issue a complaint on an unfair practice charge. PERB Regulation 32350 defines the scope of an administrative appeal to apply to "any

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

determination made by a Board agent *other than*" certain circumstances set forth in the regulation, including "a refusal to issue a complaint in an unfair practice case pursuant to Section 32630" or "a dismissal of an unfair practice charge." (PERB Reg. 32350, subd. (a)(1), (2), emphasis added.) By contrast, PERB Regulation 32635, subdivision (a), governing appeals from dismissal/refusal to issue a complaint, expressly provides that "[w]ithin *20 days* of the date of service of a dismissal, the charging party may appeal the dismissal to the Board itself." (Emphasis added.)

Second, even if the plain language of the regulations did not clearly indicate that Edwards' appeal was subject to a 20-day, rather than 10-day timeline, the District ignores the fact that Edwards timely requested and received from PERB's Appeals Assistant an extension of time in which to file her appeal. From the proof of service forms, it appears that both Edwards' request for an extension of time, and the Appeals Assistant's decision to grant that request were served on the District. Since the District does not contend otherwise, it is unclear how it could logically conclude or plausibly argue that Edwards' appeal was not timely filed.

Next, the District complains that because Edwards has provided a 49-page, single-spaced "manifesto" to PERB's two-page dismissal letter, her appeal should be summarily rejected for non-compliance with PERB Regulation 32615 "insofar as [Edwards'] filing completely fails to include a clear and concise statement of the facts and conduct alleged to constitute an unfair practice." Once again, however, the District has relied on the wrong regulation for the situation at hand. PERB Regulation 32615 governing the contents of an unfair practice *charge*, requires, among other things, that *the charge* include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." However,

as indicated by its express language, this regulation applies to the contents of *a charge*, not an appeal from dismissal/refusal to issue a complaint.

By contrast, PERB Regulation 32635 governing Board review of a dismissal/refusal to issue a complaint provides that an appeal must: (1) state the specific issues of procedure, fact, law or rationale to which the appeal is taken; (2) identify the page or part of the dismissal to which each appeal is taken; and (3) state the grounds for each issue stated. (PERB Reg. 32635, subd. (a)(1), (2), (3); *United Teachers – Los Angeles* (1989) PERB Decision No. 738, p. 2.) While clarity and conciseness are always appreciated, the regulation governing appeals does not expressly require a "clear and concise statement" of the appeal. Despite its highly repetitive and often misplaced or entirely irrelevant arguments, Edwards' appeal identifies the asserted error by the Office of the General Counsel in dismissing her charge, and thus substantially complies with PERB Regulation 32635.

We therefore consider whether Edwards' charge states a prima facie case and also address the jurisdictional, timeliness and res judicata arguments raised in the District's opposition.

Jurisdiction

To avoid acting in excess of its authority, PERB has an obligation to determine whether it has jurisdiction over a dispute, regardless of whether the parties themselves have raised the issue. (*County of Santa* Clara, *supra*, PERB Decision No. 2431-M, p. 14; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 391-392.) The Office of the General Counsel correctly determined that while PERB has no authority to enforce or order remedies for violations of the Education Code, the Board and its agents may interpret the provisions of the Education Code or other matters of external law where necessary

to administer EERA or to harmonize it with external law. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 865; *Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 13.) Although Edwards' charge relies extensively on the Education Code and other matters outside PERB's jurisdiction and special expertise, to the extent her charge alleges that the District denied her retirement or other employment benefits to which she was legally entitled because of her protected activity, the matter constitutes an unfair practice allegation that "falls squarely within PERB's legislatively designated field of expertise." (*Cumero v. Public Employment Relations Bd.* (1989) 49 Cal.3d 575, 586; EERA, § 3543.5, subd. (a); see also *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 8.)

Having determined that PERB jurisdiction here is proper, we turn to the elements of the prima facie case of discrimination under EERA.

Discrimination

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), p. 6.) PERB uses an objective test to determine whether the respondent's action constituted an adverse action to the charging party's employment conditions. (*Palo Verde Unified School District* (1988) PERB Decision No. 689 (*Palo Verde*), p. 12.) Under *Palo Verde*'s objective test, the appropriate analysis is not whether the charging party considered the respondent's action to be adverse, but whether a reasonable person under

the same circumstances would regard it as such. (*Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

Because discriminatory or retaliatory conduct is inherently volitional in nature, where it is alleged that an employer has taken action in reprisal against one or more employees for participation in protected activity, evidence of unlawful motive is the specific nexus required to establish a prima facie case. (*Novato, supra,* PERB Decision No. 210, p. 6.) However, since motivation is a state of mind which is often difficult to prove by direct evidence, a charging party may establish unlawful motivation by inference from the entire record. (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*), p 8.) Through its decisional law, PERB has developed several "nexus factors" to identify circumstances which may support an inference of unlawful intent. The first of the nexus factors is the timing of the employer's decision to take adverse action. Although close temporal proximity between the employee's protected conduct and an adverse action is important (*North Sacramento, supra,* adopting proposed decision at p. 23), timing alone is typically not determinative but goes to the strength of the inference of unlawful motive. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 9; *Moreland Elementary School District* (1982) PERB Decision No. 227, p. 13.)

Along with suspicious timing, facts establishing one or more of the following factors may also be used to establish a prima facie case of discrimination/retaliation: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation), supra,* PERB Decision No. 459-S, pp. 6, 27-33); (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, p. 15); (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, pp. 12-15); (4) the employer's cursory investigation of the employee's alleged misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M, pp. 17-19; *Coast Community College District* (2003) PERB Decision No. 1560 (*Coast*), adopting proposed decision at p. 36); (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, p. 10), or the offering of exaggerated, vague, shifting or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786, p. 12; *Novato, supra*, PERB Decision No. 210, pp. 12-13); (6) employer animosity towards union activists or protected employee activity (*City of Oakland* (2014) PERB Decision No. 2387-M, pp. 28-31; *Coast, supra*, adopting proposed decision at pp. 41-42); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento, supra*, PERB Decision No. 264; *Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M, p. 1).

Here, the dismissal turns on the Office of the General Counsel's determination that Edwards had not alleged facts establishing that she had suffered any adverse employment action within the meaning of PERB decisional law, and/or establishing nexus between any adverse employment action and her protected activity inasmuch as there was no evidence of disparate treatment or a departure from established procedures. However, from the discussion in the warning and dismissal letters, it appears this determination was based on the tenure classification issue decided by the appellate court in *Edwards v. Lake Elsinore, supra,* 230 Cal.App.4th 1532, i.e., that Edwards was classified as a substitute teacher during the 2007-2008 school year, and not on the separate issue raised by Edwards' charge and appeal of whether she was a full-time employee in 2007-2008 for retirement service credit purposes.

Notably, Edwards' discrimination allegation and, in particular, whether the District took an adverse employment action against Edwards, turns on a matter of law outside PERB's traditional expertise, i.e., whether the District complied with state law and/or regulations governing certificated employee retirement credit. Generally, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing to test a novel theory or competing theories of law, so long as the theory advanced is "viable," i.e. non-frivolous. (*Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*), p. 7; *City of Pinole* (2012) PERB Decision No. 2288-M, pp. 11-12; *City of San* Jose, *supra*, PERB Decision No. 2341-M, pp. 44-45, 49.) Moreover, the Board is necessarily cautious about rejecting allegations involving statutory, decisional, regulatory, or other authority outside PERB's jurisdiction and special expertise in labor relations, particularly when the area of external law is itself unsettled. (*City of San Jose, supra,* at p. 45.) When an unfair practice allegation turns on a matter of external law, the appropriate question is not which of two competing interpretations is the more plausible, but whether the language in dispute is reasonably susceptible of the charging party's interpretation and whether that interpretation supports a viable, i.e., non-frivolous, legal theory of an unfair practice or other violation of a PERB-administered statute. (*County of Santa Clara*, *supra*, PERB Decision No. 2431-M, pp. 21-23; *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 6.)

Although not always clearly delineated, the Third Amended Charge alleges that the District misclassified Edwards as a substitute, rather than probationary teacher during the 2007-2008 school year, ***and*** that it also provided CalSTRS with inaccurate information indicating that Edwards had served as a part-time, rather than full-time, teacher for retirement

service purposes during the 2007-2008 school year. Because the former allegation has been disposed of by the California Court of Appeal, we are concerned here only with the latter.

The Education Code defines "Full time" as "the days or hours of creditable service the employer requires to be performed by a class of employees in a school year in order to earn the compensation earnable as defined in Section 22115 and specified under the terms of a collective bargaining agreement or employment agreement." (Ed. Code, § 22138.5, subd. (a)(1).) Moreover, the CalSTRS Administrative Directive relied on by Edwards expressly contemplates that certificated employees, regardless of their tenure classification as substitutes or temporary employees, may be eligible for retirement benefits as "full-time" employees. (CalSTRS AD 96-02.)

Because these and other authorities cited by Edwards appear to determine retirement service credit on the percentage of full-time employment worked, i.e., the number of days and hours worked in a school year, rather than tenure classification as a permanent, probationary, temporary, or substitute employee, and because this issue was not addressed by the Court of Appeal in *Edwards v. Lake Elsinore, supra,* 230 Cal.App.4th 1532, we agree with Edwards that the Office of the General Counsel erred in relying on the appellate court's decision to dismiss the present charge. (*Alameida v. State Personnel Bd.* (2004) 120 Cal.App.4th 46, 58 [cases are not authority for propositions not therein considered].)

In so concluding, we also reject the District's collateral estoppel argument. The doctrine of collateral estoppel precludes a party to an action from re-litigating in a second proceeding matters which were litigated and decided in a prior proceeding. (*State of California (Department of Industrial Relations)* (1998) PERB Decision No. 1299-S (*State of CA*), citing *People v. Sims* (1982) 32 Ca1.3d 468, 477). Collateral estoppel is an aspect of, but not

co-extensive with, the broader concept of res judicata. (*State of CA.*) That is, whereas "res judicata operates to prevent relitigation of a cause of action once adjudicated, collateral estoppel operates . . . to obviate the need to relitigate issues already adjudicated in the first action." (*State of CA*, quoting *Lockwood v. Superior Court* (1984) 160 Cal.App.3d 667, 671.)

Collateral estoppel may bar the re-litigation of issues before PERB, which have been heard and decided in a prior proceeding, where all the elements of the doctrine are present. (*Kern County Office of Education* (1987) PERB Decision No. 630.) The five elements of collateral estoppel are: (1) the issue is identical to that decided in a former proceeding; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the doctrine is asserted against a party to the former action or one who was in privity with such a party; and (5) the former decision is final and was made on the merits. (*Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1339.) However, because the issue decided in prior litigation between Edwards and the District concerned her tenure classification as a substitute teacher, but not necessarily whether she qualified as a full-time employee for retirement credit purposes, collateral estoppel is inapplicable here.

We likewise disagree with the Office of the General Counsel's determination that the charge fails to state in a clear and concise manner how the District deprived Edwards of retirement credit because the charge does not identify any specific dates at issue or indicate whether such dates were for teaching or tutoring.

Under PERB's "fact pleading" standard, the charging party's duty is to provide a clear and concise statement of facts with sufficient specificity to permit the investigating Board agent to determine whether "the facts as alleged in the charge state a legal cause of action and [whether] the charging party is capable of providing admissible evidence in support of the

allegations." (*Eastside, supra*, PERB Decision No. 466, p. 7; *National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M (*NUHW*), pp. 14-15.) Where liability turns on a novel theory or competing theories of law, the charging party's burden is to advance a viable, i.e., a non-frivolous legal theory and allege sufficient facts to state a prima facie violation of one of the PERB-administered statutes. (*Trustees of the California State University* (2014) PERB Decision No. 2384-H, pp. 3, 38; *City of San Jose, supra*, PERB Decision No. 2341-M, pp. 44-45, 49.) While mere legal conclusions are insufficient to state a prima facie case, PERB does not require the charging party to identify or provide all of its evidence in the charge. (*County of Inyo* (2005) PERB Decision No. 1783-M, p. 2.) Additionally, where a material factual dispute turns on the respondent's state of mind or other matters which are uniquely within knowledge or possession of the respondent and its agents and which can often only be established through indirect or circumstantial evidence, the absence of pre-hearing discovery and considerations of fairness dictate that such matters may be left for the trier of fact to resolve through PERB's formal hearing process. (*City of Roseville* (2016) PERB Decision No. 2505-M, p. 13; *County of Inyo, supra*, PERB Decision No. 1783-M, p. 2.)

We understand the Third Amended Charge to allege, among other things, that in reporting Edwards' service credit to CalSTRS, the District misrepresented her employment status as a part-time, rather than full-time teacher for the entire 2007-2008 school year. That is, Edwards appears to argue that by designating her as part-time, the District applied the wrong mathematical formula to every day she worked during the 2007-2008 school year, not that it omitted or neglected to include specific dates on which Edwards worked in either a teaching or tutoring capacity. In this respect, the Office of the General Counsel appears to have required

Edwards to provide specific facts, which were not necessarily germane to the allegations and theory of liability asserted in her charge.

In any event, Edwards contends that the 0.9868 balance of creditable service for the 2007-2008 school year was incorrectly calculated, resulting in a loss of pay and/or benefits to which she was entitled by law. Assuming, as we must at this stage of the proceedings, the accuracy of this contention, the specific methodology used to arrive at the 0.9868 figure, including whether specific teaching and/or tutoring days were discounted and, if so, by how much, is a matter within the exclusive knowledge of the District and its agents, rather than Edwards. It is not, however, incapable of being established through admissible evidence at hearing and is therefore not the proper basis for dismissing her charge. (*NUHW, supra*, PERB Decision No. 2249-M, pp. 14-15; *City of Roseville, supra*, PERB Decision No. 2505-M, p. 13.)

We conclude that Edwards has alleged sufficient facts to show protected activity and that she suffered an adverse action in close temporal proximity thereto. The District's alleged failure to correct an error in calculating Edwards' retirement benefits may, arguably, also serve as evidence of nexus, insofar as it demonstrates a departure from established procedures or disparate treatment. However, because it is not clear, at least in the current posture of the case, whether Edwards has alleged sufficient facts to demonstrate the timeliness of her allegations, we turn next to the District's contention that the material allegations of the charge must be dismissed as untimely.

Timeliness of Edwards' Discrimination Allegation

As part of the prima facie case, the charging party must allege sufficient facts to establish the timeliness of the material allegations in the charge. (*The Regents of University of California* (1990) PERB Decision No. 826-H, p. 5, fn. 6.) PERB is prohibited from

issuing a complaint with respect to any charge based on an alleged unfair practice occurring more than six months before the charge was filed. (EERA, § 3541.5, subd. (a)(1); *Coachella Valley Mosquito and Vector Control Dist. v. Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1090.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4; *San Dieguito Union High School District* (1982) PERB Decision No. 194, p. 14.) In addition to those facts necessary to establish the elements of an unfair practice, at the charge investigation stage, the charging party also bears the burden of alleging facts demonstrating that the charge is timely. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 3.)

Because Edwards' filed her charge on March 4, 2016, unless subject to tolling or some other exception to the six-month limitations period, to be timely, any unfair practice must be based on conduct occurring on or after September 4, 2015. (EERA, § 3541.5, subd. (a)(1); *North Orange County Community College District* (1998) PERB Decision No. 1268, adopting warning letter at p. 3; cf. *City & County of San Francisco* (2017) PERB Decision No. 2536-M, pp. 14-15.)

The District's position statements argue that the charge must be dismissed as untimely, because it is based entirely on conduct allegedly occurring more than six months before the charge was filed. In particular, the District's classification of Edwards and related decisions in 2007-2008 comprise the entirety of the substantive facts of the charge, including the adverse action on which her discrimination allegation turns.

In fact, Edwards' charge does not allege any new conduct on the part of the District with respect to calculating her retirement benefits. Rather, Edwards alleges that on or about

December 28, 2015, the District provided evidence of its previous decision in response to an inquiry by CalSTRS, which itself was prompted by Edwards' request to correct her records. Thus, Edwards appears to argue that she only became aware of the District's alleged miscalculation of her retirement benefits and/or its refusal to correct its error in late December 2015. However, absent from the statement of the charge and supporting materials is any indication of *how* or *when* Edwards became aware of an employment decision the District apparently made as early 2007-2008. The absence of such facts seems significant, given that the closely-related issues of Edwards' tenure classification during the 2007-2008 school have been extensively litigated and, presumably, were previously available to Edwards through discovery requests. Whether Edwards obtained discovery or otherwise was previously made aware of the District's calculation of her retirement benefits for the 2007-2008 school year, and/or whether she reasonably should have been aware of these facts, given her protracted litigation with the District over her classification and tenure status, are therefore relevant to whether the adverse action she alleges is timely.

The District also points out that it made its decision regarding Edwards' classification for the 2007-2008 school year during that year. Edwards' protected activity, as alleged in the charge, stemmed from PERB proceedings and contractual disputes occurring from May through October 2015, meaning that the District's decision to classify Edwards for the 2007-2008 school year occurred long before this protected activity. Generally, employer actions that predate an employee's protected activity cannot serve as either adverse actions or as evidence of unlawful motive in a discrimination case, because they could not have been motivated by protected activity which had not yet occurred. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, adopting proposed decision at p. 22, citing *Trustees of the California*

State University (2004) PERB Decision No. 1697-H.) Thus, according to the District, it is impossible for Edwards to establish any nexus as it relates to the District's computation of her retirement benefits for 2007-2008, because the alleged adverse action pre-dates the charging party's protected activity by several years.

However, our Regulations generally prohibit dismissal of any allegation in a charge without notice to the charging party of any deficiencies. (PERB Reg. 32620, subd. (d); *Hartnell Community College District* (2015) PERB Decision No. 2452, p. 31; *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 8; *County of Alameda* (2006) PERB Decision No. 1824-M, pp. 4-5.) Although the District's position statement argued that the charge was untimely and that, even if timely, there could be no logical nexus between Edwards' protected activity in 2015 and an adverse action occurring in 2007-2008, these points were not mentioned or addressed in the warning letter. Consequently, even if we agreed with the District on these points, because they were not included in a warning letter, they cannot be used to justify dismissal of the charge in the current posture of this case. We therefore vacate the dismissal and remand the matter to the Office of the General Counsel for further proceedings.

In addition to any other issues necessary for the resolution of this charge, on remand, we direct the Office of the General Counsel to investigate the timeliness of Edwards' discrimination allegation, including when and how Edwards became aware of the District's characterization to CalSTRS of her 2007-2008 employment status as part-time, and whether Edwards can allege facts establishing nexus between her protected activity in 2015 and any adverse action within the limitations period.

ORDER

The dismissal of the unfair practice charge in Case No. LA-CE-6118-E is hereby VACATED and REMANDED to the Office of the General Counsel for further proceedings in accordance with this Decision.

Chair Gregersen and Member Winslow joined in this Decision.