



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

CALIFORNIA SCHOOL EMPLOYEES
ASSOCIATION, CHAPTER 83,

Charging Party,

v.

VISALIA UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SA-CE-2979-E

PERB Decision No. 2806

February 7, 2022

Appearances: Alex Leenson, Attorney, for California School Employees Association, Chapter 83; Lozano Smith by Gabriela D. Flowers and Allison B. Hernandez, Attorneys, for Visalia Unified School District.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by California School Employees Association, Chapter 83 (CSEA) and the Visalia Unified School District to a proposed decision by an administrative law judge (ALJ). The ALJ concluded that the District violated the Educational Employment Relations Act (EERA) by terminating CSEA Chapter President Gladys Ramirez in retaliation for her protected activities.¹ The District asserts that it terminated Ramirez strictly as the result of her ongoing performance issues.

¹ EERA is codified at Government Code section 3540 et seq. All other statutory references are to the Government Code unless otherwise indicated.

Having reviewed the entire record and the parties' submissions in light of relevant legal authority, we hereby affirm the proposed decision.

PROCEDURAL BACKGROUND

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k) and a school district within the meaning of PERB Regulation 32001, subdivision (c).² CSEA is an employee organization within the meaning of EERA section 3540.1, subdivision (d) and PERB Regulation 32001, subdivision (a). At all times relevant, Ramirez was a District employee within the meaning of EERA section 3540.1, subdivision (j).

On October 7, 2019, CSEA filed the underlying unfair practice charge, alleging that the District terminated Ramirez in retaliation for her protected activities. On July 30, 2020, PERB's Office of the General Counsel (OGC) issued a complaint alleging that the District violated EERA by terminating Ramirez in retaliation for her service as Chapter Vice President and Chapter President, as well as for her advocacy on behalf of CSEA at a Board of Education meeting. On August 19, 2020, the District filed an answer denying all substantive allegations and asserting several affirmative defenses. The District later amended its answer with the ALJ's permission.

OGC held an informal settlement conference on September 2, 2020, but the parties did not resolve the matter.

The parties participated in a virtual formal hearing on January 20, January 21, and February 3, 2021, via PERB's Webex platform. The ALJ issued a proposed

² PERB Regulations are codified at California Code of Regulations, section 31001 et seq.

decision on June 28, 2021. The District and CSEA filed timely exceptions to the proposed decision.

FACTUAL BACKGROUND

Ramirez's Employment History with the District

Ramirez began working for the District in October 1995 as an Administrative Secretary. Ramirez received overwhelmingly positive performance evaluations in 1997, 1998, 2000, 2003, 2005, 2006, 2008, 2010, and 2012. In August 2012, Ramirez became an Administrative Secretary/Office Manager in the District's Special Education Department.

In 2013, Ramirez received a performance evaluation in which her supervisor marked her as "Satisfactory" or "Exceeds Performance Standards" in all but two of 11 categories. Ramirez was given "Needs Improvement/Unsatisfactory" scores in the categories of "Work Quality" and "Analytical and Problem-Solving Skills." Ramirez's 2014 and 2015 performance evaluations were the same as her 2013 evaluation in that she received "Satisfactory" scores or higher in all categories except for the same two, in which her supervisor evaluated her as "Needs Improvement/Unsatisfactory."

Between March and July 2015, the District issued four letters of reprimand to Ramirez regarding her job performance. On December 29, 2015, Ramirez filed a written complaint with the District in which she alleged that her supervisor had discriminated against her and created a hostile work environment. The District subsequently issued dismissal charges against Ramirez.

On May 23, 2016, Ramirez and the District entered into a settlement agreement in which the District agreed to withdraw the dismissal charges. Pursuant to the

agreement, Ramirez would be “transferred on a voluntary basis” from her Administrative Secretary/Office Manager position to a Secretary II position at Visalia Charter Independent Study (VCIS) effective June 6, 2016.³ The agreement provided that the contents of the dismissal charges and a July 2015 letter of reprimand would remain in Ramirez’s personnel file “to be reviewed Only Upon Order of the Court or Administrative Hearing Officer, Mediator or Arbitrator, or by Order of the Superintendent. Nothing in this agreement shall limit the District’s ability to discipline Ms. Ramirez for any misconduct subsequent to the effective date of this Agreement.”

VCIS

VCIS, which operates traditional and online independent study programs, is a dependent charter school, meaning it is part of the District. On June 6, 2016, Ramirez assumed the role of Secretary II for VCIS’s online program. The online program has between 110 to 130 students at any given time. Ramirez’s job duties included serving as a receptionist, registering and holding orientations for new students, maintaining student files, receiving and storing supplies, and entering grades and student attendance into a computer program called PowerSchool.

During the relevant period, Michele Reid was VCIS’s Principal and Tamara Ravalin was the District’s Assistant Superintendent for Human Resources and Development. Ravalin held that position for approximately six years until around August 2019. In Ravalin’s role as Assistant Superintendent, her duties included hiring,

³ The District “y-rated”, i.e., froze, Ramirez’s salary in the transfer to ensure her salary was identical to that which she received in the Administrative Secretary/Office Manager position. Although the parties disagree about whether the transfer constituted a demotion, they agree that the Secretary II classification is typically paid less than the Office Manager classification.

employee discipline and termination, training, and professional development. Ravalin holds a doctorate in education. By the time of the hearing, Ravalin had worked in human resources for approximately 15 years.

VCIS's Attendance Tracking System

At all relevant times, VCIS tracked attendance differently from the District's traditional schools. In independent study courses, teachers meet with students once a week and students receive credit for attendance by completing schoolwork. To enroll at VCIS, students must sign a contract that promises a minimum amount of attendance. Students are allowed up to three "contract violations" before VCIS dismisses them from the school. Accurate attendance reporting is important to VCIS because the amount of state funding it receives is tied to its average daily attendance, or "ADA." One of Ramirez's main responsibilities was entering attendance credit data into PowerSchool. The District trained Ramirez in PowerSchool attendance-keeping in late September 2016.

VCIS teachers record individual students' attendance using Daily Engagement Attendance Record forms (daily engagement forms) that they submit at the end of each month. The form covers a four-week period and tracks attendance on a scale of four to zero hours.⁴ Four hours is considered a full attendance day and signifies that the student completed all assignments for the day. Anything less than four hours is considered an absence. At the bottom of each form is a summary of a student's level

⁴ Reid testified that the daily engagement forms cover six-week intervals; however, the daily engagement forms in the record appear to cover four-week periods. We find that the documentary evidence is more reliable, particularly when considering Reid's testimony that she did not handle attendance.

of participation for each day in the four-week period. Before teachers turn in their daily engagement forms, they must have another employee “buddy check” the forms for accuracy and mark their initials to show that this check was completed. We credit the testimony of Marissa Castro—who, during Ramirez’s tenure at VCIS, served as a Compliance Coach, trained teachers, and oversaw documentation—that Ramirez was permitted to perform the buddy check for teachers.

PowerSchool operates on a “negative” reporting system, meaning the program by default credits all students for full attendance, or four hours, for each school day unless the figure is manually altered. Ramirez usually had one week or less to review daily engagement forms and enter the data into PowerSchool once teachers submitted their forms at the end of each month. Upon receiving the forms, Ramirez inspected each one to determine if the score for any day was lower than four and, if so, she changed the default value in PowerSchool from four to “UNX,” the code for an unexcused absence. Thus, Ramirez made an entry into PowerSchool only when a student received less than four hours of credit that day. Because there were approximately 120 students in VCIS’s online program at the time Ramirez was responsible for entering attendance data, over the course of 180 school days each year, she reviewed approximately 21,600 attendance data points. The District did not routinely check Ramirez’s PowerSchool entries.

Ramirez Becomes Chapter Vice President

Ramirez was nominated for CSEA Chapter Vice President around November 2016. Before deciding to run for office, Ramirez informed Reid of her nomination and stated that she would let Reid know the ultimate outcome. According to Ramirez, Reid

asked her not to accept the nomination because Ramirez was the only classified employee at her campus building, and Reid did not have backup coverage for her. Reid testified that while she did not discourage Ramirez from becoming Vice President, she told Ramirez she was concerned that the role could interfere with Ramirez's work. Reid stated that she became concerned about Ramirez assuming additional union duties in December 2016 because of Ramirez's performance issues, including Ramirez's failure to timely order supplies, adequately welcome guests to the office, and properly schedule orientations. Ramirez was elected Vice President and assumed the role in January 2017.⁵

Ramirez's Work Performance at VCIS

Between January and March 2017, Reid met periodically with Ramirez to discuss performance issues including delayed supply orders, errors on student transcripts, and subpar interactions with students and parents. On March 24, 2017, Reid issued Ramirez a generally unfavorable performance evaluation. Reid rated Ramirez as "Meets District Expectations" in five categories and "Needs to Improve to Meet District Expectations" in eight categories. The evaluation commended Ramirez's good attitude and cooperation, but noted several areas which required improvement, including calendaring, tidiness, and professionalism.⁶ Reid recommended that Ramirez be retained with conditions.

⁵ Ramirez served as a job steward and Chapter Treasurer prior to becoming Chapter Vice President.

⁶ Reid testified that she had not previously disciplined an employee for keeping a messy supply cabinet, failing to keep teachers' supplies stocked, and greeting parents in an untimely manner.

Reid testified that she started discovering attendance discrepancies in December 2017 after she received “phone calls” from parents, but her testimony focused on a single parent complaint. According to Reid, sometime in December 2017, a parent called Reid to complain that her son had received a contract violation in error, as he had submitted all his work.⁷ Reid researched the parent’s complaint and agreed to remove the contract violation. Since Ramirez had left for the day, Reid asked another secretary to log into PowerSchool to remove the student’s contract violation from his record. The secretary subsequently discovered that there were other discrepancies between the student’s actual attendance and what was recorded in PowerSchool, and she reported these findings to Reid. Reid “sat on [the findings] for a little while” before deciding she needed to look further into Ramirez’s errors.

In January 2018, at Reid’s direction, Castro reviewed more of Ramirez’s PowerSchool data entries and discovered additional discrepancies where attendance was inaccurately recorded. Reid reported these findings to Ravalin, who directed Reid to investigate further.

Ramirez Publicly Criticizes Senior District Leaders

In January 2018, Ramirez became CSEA Chapter President. On January 9, 2018, Ramirez criticized senior District leaders during the public comment portion of a Board of Education meeting. Ramirez announced that she had conducted a “climate survey” of employees in the Operations Department to solicit their feedback on working conditions. Those employees responded with criticisms of what they

⁷ Kasey Oliver, the then-CSEA Labor Relations Representative, asked the District for a copy of the parent’s complaint. The District said that it had no record of the complaint because it had been verbal.

perceived to be unethical hiring and promotional practices in the department. Ramirez also said that Ravalin demeaned staff who were on administrative leave by requiring them to come to the District Office to read books and write book reports as a correction technique. Two Board members responded to Ramirez's presentation, and one expressed concern about the issues Ramirez raised from the climate surveys. Ramirez promised to conduct further climate surveys in other departments. Ravalin was present at the Board meeting.

The District Investigates Ramirez

On January 22, 2018, Director of Human Resources Development Doug Cardoza hand-delivered to Ramirez a Notice of Paid Administrative Leave. The notice stated that "[t]his administrative leave is not a suspension or disciplinary action; it is simply to permit the District time to conduct and complete the necessary investigation." It further stated that the District was placing Ramirez on leave "pending investigation of personnel matters involving you . . . During this administrative leave, you may not enter District property, contact District personnel [VCIS] or district students as it relates to the investigation without [Cardoza's] express approval." (First bracketed insertion in original.) Ramirez asked Cardoza why the District was placing her on leave and he said he did not know, despite the fact that the letter bore his signature.

The next day, Oliver called Ravalin to express his concerns about the impact of the Notice of Paid Administrative Leave on Ramirez's union activities. Specifically, Oliver took issue with the notice's prohibition on Ramirez contacting District personnel regarding the investigation and entering District property, where CSEA chapter meetings were held. Oliver stated that, because the District did not tell Ramirez why it

was investigating her, Ramirez could not contact anyone connected with the District for fear of interfering with the investigation and generating additional charges against her. Ravalin told Oliver that she could not disclose the subject matter of the investigation and that she would think about allowing Ramirez to attend CSEA chapter meetings.

On March 5, 2018, Ravalin sent an e-mail to Oliver concerning the Notice of Paid Administrative Leave. She stated, in part: “For CSEA meetings, we will allow Gladys Ramirez, CSEA President to attend CSEA meetings while she is on paid administrative leave. She may not go to her school site and may not discuss her work as it pertains to VCIS.”

Reid’s preliminary investigation took approximately two months. Reid directed Castro to review attendance data for every VCIS student since the time Ramirez began working at VCIS. Reid stated that, prior to this investigation, VCIS had never performed an audit looking at every data entry in PowerSchool to determine whether there had been incorrect inputs. The preliminary investigation uncovered multiple errors. Castro logged these errors into charts she created for each semester Ramirez worked at VCIS: Fall 2016, Spring 2017, Fall 2017, and Spring 2018. VCIS was able to correct attendance errors from the 2017-2018 school year, but not those from the previous school year.

Ravalin oversaw the subsequent investigation at the District level, which she called “a stronger investigation to dig more deeply.” As part of the process, Ravalin interviewed site administrators, site staff, District Office administrators, and District Office staff; and she reviewed records including secretary meeting agendas, daily

attendance forms for individual students, PowerSchool records, and the VCIS Policies and Procedures Manual.

In the course of the investigation, Ravalin prepared a spreadsheet that purported to identify a total of 116 instances when Ramirez either entered data indicating a student received attendance credit when the student should not have received credit, or entered data indicating a student did not receive attendance credit when in fact the student should have received credit. For Fall 2016, there were 72 errors involving 12 students.⁸ For Spring 2017, there were 12 errors involving four students. For Fall 2017, there were 25 errors involving 10 students.⁹ And for Spring 2018, there was one error for one student before the District placed Ramirez on administrative leave.

Ravalin's spreadsheet also included a column entitled "ADA by Fiscal Year," listing the annual amounts the District received in funding from the state, per student, for each semester that Ramirez worked at VCIS. For the 2016-2017 school year (Fall 2016 and Spring 2017), the annual ADA amount was \$9,089. For the 2017-2018 school year (Fall 2017 and Spring 2018), the annual ADA amount was \$9,350. Ravalin

⁸ The District's witnesses offered conflicting testimony as to whether each error represented one student, or whether each error merely represented one incident. Considering the evidence as a whole, we find that the latter is correct. For instance, in Fall 2016, Ramirez made 72 errors, but did not make errors for 72 different students. Ramirez's errors were instead confined to 12 students' attendance records (one of whom appeared twice on the chart), and in most cases Ramirez made multiple incorrect entries for an individual student.

⁹ The ALJ found that there were 31 errors for Fall 2017, but a tally of the District's chart specific to Fall 2017 shows that there were 25 errors. Thus, the total number of errors for the four semesters Ramirez worked at VCIS should have been 110, not 116.

then multiplied the number of errors by the annual ADA amount, yielding “Overall Financial Impact” amounts in the final column that ranged from \$9,350 to \$508,984. The alleged financial impact of ADA received incorrectly was \$906,075, and the alleged financial impact of ADA that could have been claimed was (–)\$156,601. The claimed net financial impact for all semesters combined was listed as \$749,474 after deducting the unclaimed ADA from the incorrectly received ADA.

The District Notifies Its Auditors of the Errors

At some point after Ravalin discovered the attendance discrepancies, she contacted Chief Business Officer Nathan Hernandez to inform him of the data entry errors. Hernandez, in turn, shared this discovery with the District’s external audit firm. He told the auditors that VCIS had been able to correct the errors in the then-current fiscal year, 2017-2018, but that it had been unable to do so for the 2016-2017 fiscal year. The auditors advised Hernandez that there was no mechanism for the District to correct or report errors from prior fiscal years because the errors did not meet the District’s “materiality threshold.” This meant that the attendance errors were not sufficiently significant for the auditors to make any findings about them and adjust the District’s revenues for the prior fiscal year. Hernandez did not contact the state Department of Education to advise it of the attendance data entry errors. Although Hernandez testified that he did not know whether there would be a fiscal impact from the errors at the time Ravalin contacted him, the District was not ultimately penalized for any of the reporting errors in the 2016-2017 and 2017-2018 school years.

The District's Internal Audits

Hernandez also testified regarding the District's internal audit procedures for attendance. The District conducts an audit annually to ensure that its reporting to the Department of Education corresponds to its attendance records. Rather than auditing every student in the District, the District checks a random sampling of student records from different schools. Hernandez stated that it is possible past mistakes in attendance reporting could have gone undetected by the District because its audits do not review every student record.

The District's Investigation Findings and Conclusion

On June 4, 2018, Ravalin served Ramirez with the District's Investigation Findings and Conclusion regarding "the falsification of attendance records discovered by site administration in January, 2018." The report detailed six allegations and findings, five of which concerned Ramirez's PowerSchool data entry errors. The report also stated that Ramirez had made "numerous transcript errors" and failed to provide adequate directions to students and parents regarding the need for a properly executed contract when a student enrolls at VCIS. Ravalin sustained all the allegations and concluded, "[T]he weight of the evidence reviewed during the course of this investigation supports a finding that you falsified attendance records and other student records, thereby jeopardizing the funding of the school." The report concluded that Ramirez would remain on paid administrative leave while the District determined its next steps.

At the formal hearing, Ravalin was asked to explain her understanding of the word "falsification." Ravalin stated, "Well, false means inaccurate, so there were

inaccuracies” and added that falsification does not require intent. Nonetheless, Ravalin was not aware of the District having terminated any other employee for unintentionally misreporting attendance during her time with the District. When Reid was asked at the formal hearing whether she believed Ramirez had deliberately made the reporting errors, she stated, “Oh, absolutely not. I would hope not. That was never my thought.”

District Serves Ramirez with a Proposed Notice of Intent to Dismiss

Ravalin recommended Ramirez’s termination. On October 8, 2018, the District served Ramirez with a Proposed Notice of Intent to Dismiss and Statement of Charges (Proposed Notice). The Proposed Notice listed seven grounds for Ramirez’s termination: falsifying information supplied to the District, including, but not limited to, information supplied on application forms, employment records, or any other school district record; incompetency; inefficiency; neglect of duty; insubordination; discourteous treatment of the public, students, or other employees; and violation of District, Board, or departmental rules, policies, or procedures. The District stated that the “net financial impact” of Ramirez’s attendance reporting errors totaled \$749,474 and that the District would be required to report any overpayment to its auditors and the Department of Education. In the Factual Allegations section of the Proposed Notice, the District stated: “In late January 2018, the District received a complaint from a parent that her student received contract violations for missing assignments, despite the student turning in all assignments.” Notably, this alleged timing of the parent’s complaint differed from Reid’s account of the timing, which she placed in December 2017.

When asked during direct examination why she recommended termination, Ravalin stated that Ramirez was guilty of a longstanding pattern of disciplinary issues over many years and the District had already given Ramirez a second chance when it transferred her to VCIS:

“A: Well, a variety of factors based on there was many, many disciplinary issues going on at VCIS. And many or most of those had been a long pattern and many of those things were the same things that we saw when she was the office manager for Special Education. And the settlement agreement where she was moved but y-rated into a lower paying position was really a second chance. And to see these same types of conduct issues continue and arise either meant she was unwilling or unable to improve, you know. And so, it was a long-standing pattern that had been going on for years and Ms. Reid had given her continual verbal warnings on other issues and wasn't seeing improvement as well.”

Ramirez's Unpaid Leave and Termination

On November 30, 2018, the District suspended Ramirez without pay pending termination proceedings, including her right to ask for a hearing on her dismissal. Ramirez requested a hearing, which took place on February 7, 2019. The hearing officer, whom the District chose unilaterally to hear the case, issued a decision on April 1, 2019, concluding that the falsification charge was unsubstantiated but upholding the remainder of the charges. On April 9, 2019, the Board of Education adopted the hearing officer's decision in its entirety and voted to dismiss Ramirez from employment.

DISCUSSION

The Board reviews exceptions to a proposed decision de novo. (*Sacramento City Unified School District* (2020) PERB Decision No. 2749, p. 6.) Under this

standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City and County of San Francisco* (2021) PERB Decision No. 2757-M, p. 8.) However, the Board need not address issues that the proposed decision has adequately addressed or that would not impact the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5; *Hartnell Community College District* (2018) PERB Decision No. 2567, p. 3.) With this standard in mind, we proceed to address the parties' exceptions.

I. Statute of Limitations Defense

Absent a recognized exception, PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077 (*Coachella*).) 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.) Before a complaint issues, charging party bears the burden to allege facts that would, if proven, establish timeliness. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, pp. 3 & 30.) After a complaint issues, respondent must plead untimeliness as an affirmative defense (respondent otherwise waives the defense), and respondent bears the burden of proving that the statute of limitations bars the charge. (*Id.* at p. 30.)

The District claims that the complaint relies on events outside the six-month statute of limitations. The ALJ rejected this argument, as do we. The District

terminated Ramirez on April 9, 2019. On October 7, 2019, CSEA filed the unfair practice charge alleging a single adverse action: Ramirez's termination. Similarly, the complaint alleged Ramirez's termination as the sole adverse action at issue. Because CSEA filed the charge within six months of the termination, the unfair practice charge was timely.

The District nonetheless argues that the ALJ erred by relying on evidence of motive from outside the six-month statute of limitations. However, a statute of limitations applies to allegedly wrongful acts, not to evidence regarding motive. (*State of California (California Correctional Health Care Services)* (2019) PERB Decision No. 2637-S, p. 17; *City of Oakland* (2014) PERB Decision No. 2387-M, pp. 34-35; see also *County of Ventura* (2021) PERB Decision No. 2758-M, p. 35 [applying analogous rule to allow evidence of bad faith conduct from prior to limitations period].) Indeed, the District's evidence regarding its motive, like CSEA's evidence, involved numerous events predating the limitations period.

For these reasons, we join the ALJ in finding that the District has not established a statute of limitations defense.

II. Retaliation

Except for cases involving alleged facial discrimination, PERB considers a charging party's discrimination or retaliation claim under the framework set forth in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and its progeny. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 12 & fn. 6.) Under the *Novato* framework, a prima facie case requires a charging party to establish each of the following four elements: (1) one or more employees engaged in

activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action “because of” the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 26; *City and County of San Francisco* (2020) PERB Decision No. 2712-M, p. 15.)

A. Protected Activity

The ALJ found that Ramirez engaged in protected activities by serving as Chapter Vice President and Chapter President, as well as by speaking at the January 9, 2018 Board of Education meeting regarding members’ working conditions. While the District did not except to these findings, it argues that the ALJ erred by finding close temporal proximity between Ramirez’s January 9, 2018 comments and her termination 14 months later. We address this contention *post*, in considering the fourth element of the *Novato* test. Before reaching that discussion, however, it is important to note that the District focuses too narrowly on just one aspect of Ramirez’s protected activity, overlooking her status as a union officer from January 2017 until her termination in April 2019.

The Board’s foundational decision examining union leadership as protected activity is *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M (*Santa Clara*), which arose under the Meyers-Milias-Brown Act (MMBA), section 3500 et seq. There, the Board detailed several reasons for concluding that the charging party engaged in protected activity by being a union leader. First, the Board relied on MMBA

section 3502.1, which provides: “No public employee shall be subject to punitive action or denied promotion, or threatened with any such treatment, for the exercise of lawful action as an elected, appointed, or recognized representative of any employee bargaining unit.” Second, the Board explained that “[e]ven without the statutory directive of section 3502.1,” the same principle would prevail. (*Santa Clara, supra*, PERB Decision No. 2349-M, p. 28.) Indeed, earlier in *Santa Clara*, the Board held that “by enacting section 3502.1, the Legislature did not create a new or separate category of unfair practice,” but merely clarified and punctuated the protections which “were *already* afforded to employee bargaining unit representatives” under MMBA provisions protecting the right to participate in union activities and prohibiting interference with or discrimination against such activities. (*Id.* at pp. 21-22 [italics in original].) All California labor relations laws contain such provisions. Thus, while *Santa Clara* overruled contrary MMBA precedent such as *County of Orange* (2011) PERB Decision No. 2155-M, it also called into question precedent interpreting the other statutes we enforce, such as *Trustees of the California State University* (2009) PERB Decision No. 2038-H (*Trustees of CSU*), which held that merely alleging one’s status as a union leader did not demonstrate sufficient participation in protected activity. (*Santa Clara, supra*, PERB Decision No. 2349-M, p. 29.) Ultimately, we “reserve[d] for another day” whether statutes other than the MMBA protect an employee’s service as a union leader. (*Ibid.*)

Today’s decision requires us to return to the issue and resolve it. We overrule *Trustees of CSU* and similar decisions to the extent they hold that an employee must allege “something more” than holding union office to show that he or she has engaged

in protected activity under any PERB-administered statute. (See *Santa Clara*, *supra*, PERB Decision No. 2349-M, p. 29.) We reach this conclusion even as section 3502.1 is unique to the MMBA, because the substance of section 3502.1 codifies existing law protecting the right to participate in union activities, which is common across the public sector statutes under PERB's jurisdiction.¹⁰

Because MMBA section 3502.1 merely reinforces existing statutory provisions, and given that EERA and the MMBA mirror one another in their main provisions protecting the right to participate in union activities, we find the Legislature did not intend to prescribe differing rules and instead intended unfair practices under the differing statutes to be interpreted in a comparable manner. (*Coachella*, *supra*, 35 Cal.4th at pp. 1089-1090 [the Legislature intended to establish “a coherent and harmonious system of public employment relations laws”].) While including statutory language in only one of several laws dealing with the same general subject can demonstrate an intent to create differing rules, that principle does not apply universally and is not helpful or controlling where, as here, it would create an “inexplicable anomaly.” (*Id.* at p. 1090 [harmonizing statute of limitations across statutes despite absence of language in MMBA]; see also *City of Bellflower* (2021) PERB Decision No. 2770-M, pp. 14-21 [following *Coachella* and finding right to form, join, and participate in union activities must mean the same thing across statutes even though some statutes explicitly protect the confidentiality of union authorization cards and

¹⁰ See, e.g., §§ 3543.5, subdivision (a) (EERA); 3506 (MMBA); 3519, subdivision (a) (Dills Act); 3524.71, subdivision (a) (Judicial Council Employer-Employee Relations Act); 3571.1, subdivision (b) (Higher Education Employer-Employee Relations Act); 71635.1 (Trial Court Act); 71822 (Court Interpreter Act).

others do not]; *Omnitrans* (2009) PERB Decision No. 2030-M, pp. 13-15 [following *Coachella* and harmonizing access rights across statutes despite differing language].)

Here, Ramirez served as Chapter Vice President beginning in January 2017 and as Chapter President the following January. We thus find that Ramirez was engaged in protected activities from January 2017 until her termination in April 2019.

B. Employer Knowledge

The District did not except to the ALJ's finding that District leaders were aware of Ramirez's protected activities. We accept that finding as true.

C. Adverse Action

The District did not except to the ALJ's finding that termination of Ramirez's employment was adverse. We accept that finding.

D. Nexus

"To establish the final element of the prima facie case, the charging party must show that the employee's protected activity was a motivating factor in the employer's decision to impose the adverse action." (*Omnitrans* (2010) PERB Decision No. 2121-M, p. 9.)

While PERB considers all relevant facts and circumstances in assessing an employer's motivation, we have identified the following factors as being the most common means of establishing a discriminatory motive, intent, or purpose: (1) timing of the employer's adverse action in relation to the employee's protected conduct; (2) disparate treatment; (3) departure from established procedures or standards; (4) an inadequate investigation; (5) a punishment that is disproportionate based on the relevant circumstances; (6) failure to offer a contemporaneous justification, or offering

exaggerated, questionable, inconsistent, contradictory, vague, or ambiguous reasons; (7) employer animosity towards union activists; and (8) any other facts that might demonstrate the employer's unlawful motive. (*City and County of San Francisco, supra*, PERB Decision No. 2712-M, p. 21.)

As to the timing factor, if an employer takes adverse action shortly after an employee's protected activities, this tends to suggest more strongly that the two are linked, and the inference of discrimination weakens as the gap in time grows. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, p. 45.) However, timing alone is typically not determinative, and there is no bright line rule for determining how close in time the protected activity must be to the retaliatory conduct. (*Id.* at p. 46.) Thus, while a charging party typically needs more than just timing evidence to prevail, if the timing inference is weak a charging party will normally need to marshal a stronger array of other, non-timing facts. (*Ibid.*) We turn to the relevant factors herein.

1. Timing

The District contends that there is no temporal proximity between Ramirez's termination and her protected activities because they were separated by almost nine months. We disagree.

As we explained *ante*, Ramirez engaged in protected activities from January 2017 until her termination in April 2019 by serving first as Chapter Vice President and then as Chapter President. Thus, her protected activities preceded the District's issuance of Notice of Paid Administrative Leave, investigation, and decision to terminate her. In reaching this conclusion, we necessarily reject the District's

argument that the ALJ improperly focused on issuance of the Notice of Paid Administrative Leave to find close temporal proximity.

Even aside from Ramirez's status as a union official, we, like the ALJ, find temporal proximity between Ramirez's critiques of senior District leaders at the January 9, 2018, Board of Education meeting and issuance of the January 22, 2018, Notice of Paid Administrative Leave. The District argues that the timing does not indicate unlawful motive because it began its investigation before Ramirez made her critical remarks on January 22. We are not convinced.

Reid testified that she first learned in December 2017 that Ramirez had input incorrect attendance data in PowerSchool. However, the Proposed Notice alleged that the District received the parent complaint in "late January 2018." The timing of Reid's initial discovery—whether it was in early, mid, or late December 2017 or late January 2018—and each subsequent event is unclear. Reid testified that after first learning of the errors, she then "sat on [the findings] for a little while" before deciding she needed to look further into Ramirez's errors. At some point thereafter, Reid directed Castro to review more of Ramirez's PowerSchool data entries. Castro started her review in January 2018 and found additional discrepancies where student attendance was credited inaccurately. Reid reported these findings to Ravalin, who directed Reid to investigate further.

We find that this timeline is hardly exculpatory. The record offers no clear conclusions as to when the parent called Reid to complain about the disputed contract violation, when Reid began to research the possible additional errors by Ramirez, when Reid asked Castro to conduct such research, and when Reid reported her

findings up the chain to Ravalin. In the face of these uncertainties, we find that the ALJ's conclusion was the correct one, i.e., that the District more likely than not decided to investigate Ramirez after she spoke at the Board of Education meeting. This finding is supported by the District's own statement that it received the parent complaint in "late January 2018."

We therefore find close timing supports a finding of nexus.

Before analyzing additional evidence, it is important to note that cases such as this one, in which an employer likely would not have undertaken an investigation (here, the District's full-scale audit) absent protected activity, generally preclude the employer from relying on information it would not have otherwise uncovered. (*Regents of the University of California* (2020) PERB Decision No. 2704-H, pp. 35, 42 (*Regents*); *State of California (California Correctional Health Care Services)*, *supra*, PERB Decision No. 2637-S, pp. 20-21; *California Virtual Academies* (2018) PERB Decision No. 2584, pp. 33-34.) We nonetheless analyze all available information below and show that, as an alternate holding, the full scope of information equally demonstrates that the District decided to summarily terminate Ramirez because of her protected activity.

2. Exaggerated Justifications

An employer's exaggerated reasons for its actions may be evidence of unlawful motive. (*Novato*, *supra*, PERB Decision No. 210, p. 13.)

a. Financial Impact of Ramirez's Mistakes

The District argues that the ALJ erred in finding that it exaggerated the financial impact of Ramirez's mistakes. We sustain the District's exception to the ALJ's factual

finding regarding the number of PowerSchool entries Ramirez was responsible for making each school year. Because VCIS operated on a negative reporting system, Ramirez was not required to input data for each student for each school day every month. Rather, she only entered attendance data for a student if the score on any given day of the month was less than four. While the parties did not present any evidence as to Ramirez's average frequency for entering data into a student's profile each month, we conclude that it was less than 18,000 times, as the record reflects that some students received full attendance credit for particular months. This finding does not alter our conclusion that Ramirez was nonetheless responsible for reviewing attendance data for approximately 110 to 130 students for 180 school days per year. Assuming an average of 120 students enrolled at VCIS each school year during Ramirez's employment, Ramirez reviewed approximately 21,600 attendance scores per year, even if she needed to make fewer actual entries.

However, we reject the remainder of the District's exceptions on this count. Like the ALJ, we find that the District exaggerated the financial impact of Ramirez's mistakes. The District did this in multiple ways. The June 4, 2018 Investigation Findings and Conclusion stated that Ramirez "had a total of 99 students for whom you recorded attendance credit (did not make an entry in PowerSchool) when the students should have received an 'UNX' in PowerSchool. This resulted in a fiscal impact of \$906,075.00 falsely reported to the state (attendance that was over-reported to the California Department of Education as positive)." The Investigation Findings and Conclusion also stated that Ramirez "had a total of 17 students for which you entered 'UNX' into PowerSchool, when you should have not made an entry. This resulted in a

fiscal impact of negative (-)\$156,601.00 marked incorrectly, as a result of attendance that was not reported to the California Department of Education as positive.” But the claim of 116 students affected was significantly inflated. As explained *ante*, the District conflated the total number of errors with the total number of students affected, resulting in a purportedly much larger group of students affected that was not, in fact, accurately portrayed. The total number of errors was 110, whereas the total number of students affected across all four semesters Ramirez worked at VCIS was 27. This amounts to less than a quarter of the District’s original claim. Besides reflecting exaggerated allegations, this reality also reflects a rushed or otherwise inadequate investigation, which is further evidence of improper motive. (*Regents, supra*, PERB Decision No. 2704-H, p. 24.)

The ALJ was also correct in finding that the District exaggerated the fiscal impact of Ramirez’s mistakes by using *annual* ADA amounts the District received in funding from the state per student for each semester instead of *daily* ADA amounts. The June 4, 2018 Investigation Findings and Conclusion stated that the District’s liability per error was either \$9,089 or \$9,350, depending on the school year. When Ravalin was asked on cross-examination about these numbers, she stated, “[O]ur understanding was that that is the potential liability that the state could impose upon us.” Ravalin testified that her understanding was based on information from Chief Business Officer Hernandez. However, Hernandez himself said that he did not know the fiscal impact of the errors at the time he learned about them from Ravalin.

The District also exaggerated the financial impacts of Ramirez’s mistakes in the way it calculated its alleged liability for her attendance errors. The District took the

total number of errors for each semester and multiplied that figure by the annual ADA, regardless of whether multiple errors were tied to an individual student. The problem with this methodology is that the District could only receive a fixed ADA per student annually, either \$9,089 for the 2016-2017 school year or \$9,350 for the 2017-2018 school year. Accordingly, even if Ramirez made multiple errors on an individual student's attendance record, the District's maximum potential liability could have only been \$9,089 or \$9,350 for an individual student. The District's miscalculations resulted in inflated amounts for overall financial liability, making Ramirez's conduct appear significantly worse. Moreover, at the time the District issued the Proposed Notice, the District asserted its liability was actual rather than potential. In reality, any fiscal impact was potential and much less than the District claimed. Again, these facts reflect both exaggerated allegations and a rushed or otherwise inadequate investigation.

Finally, we find that the District exaggerated the potential financial impact of Ramirez's mistakes because it was able to correct those from the 2017-2018 school year. The only potential liability it faced was the errors from 2016-2017, but even those were not significant enough for the auditors to make findings and adjust revenues for that fiscal year. Despite stating that it would have to report any overpayments to the Department of Education, the District did not contact the Department of Education to report the attendance errors, nor did the Department of Education penalize the District for the errors. For the foregoing reasons, we find that the District exaggerated the financial impact of Ramirez's errors and conducted a rushed or otherwise inadequate investigation.

b. Falsification Charge

The District contends that the ALJ wrongly focused on its falsification allegation against Ramirez given that the hearing officer found it to be unsubstantiated and the District had ample other grounds for terminating Ramirez. We do not so find.

The June 4, 2018 Investigation Findings and Conclusion and the Proposed Notice primarily focused on how Ramirez allegedly falsified information supplied to the District. We agree with the ALJ that Ravalin's explanation for her use of the word "falsify" was not credible given her extensive education and experience. On redirect examination, the District's counsel asked Ravalin, "When you think of the word, falsification, what does that mean to you?" Ravalin replied, "Well, false means inaccurate, so there were inaccuracies." Ravalin further stated that falsification does not involve intent.¹¹

As the ALJ found, "falsification" usually refers to altering with an intent to mislead.¹² We share the ALJ's view that Ravalin, who was unaware of any prior case in which inadvertent errors were deemed to be falsification, more likely than not understood that she was not offering the most reasonable interpretation of the

¹¹ Reid, who testified that she thought Ramirez made only inadvertent errors, did not recommend Ramirez's termination.

¹² The ALJ cited Black's Law Dictionary; most other sources are in accord. (See Oxford Languages Dictionary <https://www.google.com/search?q=falsify+definition&rlz=1C1GCEB_enUS961US961&oq=falsify+definition&aqs=chrome.0.69i59j0i22i30l5j69i60l2.3294j1j7&sourceid=chrome&ie=UTF-8> ["alter information or evidence so as to mislead"] [as of Jan. 20, 2022]; Cambridge Dictionary <<https://dictionary.cambridge.org/us/dictionary/english/falsify>> ["to change something, such as a document, in order to deceive people"] [as of Jan. 20, 2022]; Dictionary.com <<https://www.dictionary.com/browse/falsify>> ["to make false or incorrect, especially so as to deceive"] [as of Jan. 20, 2022].)

District's own regulations but felt compelled to give an unreasonable explanation to cover for her overreach. The plainly exaggerated falsification allegation was the catalyst for the District to begin investigating Ramirez, showing how unlawful motivation permeated the District's actions against Ramirez early on. (*Sacramento City Teachers Association* (2010) PERB Decision No. 2129, p. 12 [employer's inflation of the seriousness of employee's misconduct suggested its justification for adverse action was pretextual].)

In sum, Ravalin summarily ruled out reasonable explanations for Ramirez's PowerSchool errors, such as human error resulting from working under time pressure, and instead came to rest upon the most extreme conclusion: that Ramirez had falsified attendance data. We therefore have no barrier in finding that the District exaggerated the import of Ramirez's errors by alleging they were the result of an intent to mislead or deceive.

c. Insubordination Charge

The District alleges that it terminated Ramirez for insubordination, in addition to the grounds it proffered *ante*. We find any such evidence lacking in the record.

Insubordination "implies a general course of mutinous, disrespectful or contumacious conduct . . . [and] carries a volitional coloration which excludes the notion of accidental or even negligent conduct . . . insubordination, equally with willful misconduct, requires proof of intent or willfulness. The latter elements imply that the person knows what he is doing and intends to do what he is doing." (*Coomes v. State Personnel Bd.* (1963) 215 Cal.App.2d 770, 775; see *Flowers v. State Personnel Bd.* (1985) 174 Cal.App.3d 753, 759-760 ["insubordination may only be founded upon proof

of intentional or willful conduct”].) Thus, proving insubordination, like proving falsification, requires showing willful conduct. The District did not come close to doing so here. Despite its allegation that Ramirez was insubordinate, at no point in Ramirez’s termination proceedings did the District argue that Ramirez’s performance issues were intentional, much less provide evidentiary support for such a claim. Thus, we find that the District’s insubordination allegation was exaggerated.

For the foregoing reasons, we conclude that the ALJ was correct in finding the District exaggerated justifications for Ramirez’s termination.

3. Disproportionate Punishment

PERB may infer unlawful intent from a penalty that is disproportionate to an employee’s alleged transgression. (*City of South Pasadena* (2020) PERB Decision No. 2692, p. 14 & adopting proposed decision at p. 19; *San Joaquin Delta Community College District* (1982) PERB Decision No. 261, p. 7.) We find that to be true here.

Ravalin did not seriously explore any intermediate discipline for Ramirez, instead opting for summary termination over any form of progressive discipline. Such conduct is significant evidence of improper motive. (*Regents, supra*, PERB Decision No. 2704-H, p. 28; *City of South Pasadena, supra*, PERB Decision No. 2692-M, adopting proposed decision at pp. 19-21; *California Virtual Academies, supra*, PERB Decision No. 2584, pp. 26-28; *San Joaquin Delta Community College District, supra*, PERB Decision No. 261, pp. 8-9.)

Although Ravalin claims that the District utilized progressive discipline with Ramirez, we do not find the evidence supports this assertion as it is almost entirely based upon Ramirez’s discipline in her previous position as Administrative

Secretary/Office Manager. Not only did the District rely on evidence it was not permitted to cite based on the parties' previous agreement—itself a substantial deviation from accepted norms that strongly confirms the District's unlawful motive (see *Woodland Joint Unified School District* (1987) PERB Decision No. 628, adopting proposed decision at p. 42)—but some of the evidence on which the District relies predated Ramirez's overall positive performance evaluation from May 2015. Moreover, the District's use of progressive discipline in her Secretary II role included informal verbal warnings and multiple written warnings. While the District is largely misplaced in relying on that as evidence of progressive discipline for its 2019 termination, that history does show the District's standard approach to correcting performance deficiencies, which Ravalin failed to follow. For these reasons, we find that the District subjected Ramirez to disproportionate punishment.

4. Disparate Treatment

An employer's disparate treatment of similarly situated individuals may be evidence of an unlawful motive. (*City of South Pasadena, supra*, PERB Decision No. 2692-M, adopting proposed decision at p. 19; *San Joaquin Delta Community College District, supra*, PERB Decision No. 261, pp. 5-8.) The District avers that it did not treat Ramirez disparately compared to other employees. According to the District, the ALJ's finding in this regard was solely based on hearsay evidence.

We agree with the District that the ALJ impermissibly relied upon hearsay evidence to find payroll employees had not been disciplined for payroll errors as

CSEA did not offer any non-hearsay evidence to support this specific finding.¹³

However, other, non-hearsay evidence shows that the District treated Ramirez disparately. First, during Ravalin's tenure, the District had not terminated any other employee for unintentionally misreporting attendance. And, prior to its investigation of Ramirez, the District had never performed an audit looking at every data entry in PowerSchool to determine whether an attendance clerk had made incorrect entries. Hernandez conceded the possibility that the District could have missed past mistakes in attendance reporting because it does not conduct exhaustive audits of the like that it performed for Ramirez's work.

We find some relevance in the District's provision of a buddy check for daily engagement forms, which suggested that the District anticipated a certain amount of human error in completing the forms. Indeed, per District policy, teachers' files were required to have an 85 percent accuracy rate in Fall 2018, with the goal of 90 percent accuracy. The District argues that teachers are not similarly situated to secretaries and therefore not rightful comparators to Ramirez. The District refers to its policy regarding teachers' files as a mere "standard for an organizational tool" whereas attendance records have "consequential financial implications for VCIS and the District." This distinction only goes so far, however. While the District is entitled to insist on a greater degree of accuracy for its secretaries, we see no evidence that it ever established or communicated such a standard before it summarily terminated Ramirez. And, though we accept that teachers and secretaries perform different

¹³ Hearsay evidence is admissible in a PERB hearing but is not sufficient in itself to support a finding unless it is subject to a statutory exception. (PERB Reg. 32176; *County of Santa Clara* (2019) PERB Decision No. 2670-M, p. 21, fn. 23.)

duties, both roles require accurate documentation and record-keeping. District witnesses repeatedly testified at the formal hearing to the centrality of accurate paperwork to VCIS's functioning. Hence, even recognizing differences between teachers and secretaries, the District's decision to treat Ramirez very differently from others—including by choosing termination as its first and only level of discipline—is another indication of unlawful motive.

5. Union Animus

The District argues that the ALJ wrongly found evidence of union animus based upon its January 22, 2018 Notice of Paid Administrative Leave. The District asserts that the notice was simply a form letter, and therefore we cannot infer from it any specific animus toward Ramirez's union activity. Like the ALJ, we find this argument unconvincing.

We find that Reid's comment regarding Ramirez's nomination for CSEA Chapter Vice President supports an inference of union animus. Ramirez testified that when she told Reid about her nomination for CSEA Chapter Vice President, Reid asked Ramirez not to accept it. Reid stated that Ramirez was the only classified employee at her building site and that Reid did not have backup coverage for her. Somewhat in contrast, Reid testified that she did not discourage Ramirez from running for Vice President, but she told Ramirez she was concerned that the role could interfere with Ramirez's work. We do not need to decide whose testimony to credit. Whether Reid expressly or impliedly asked Ramirez not to accept the nomination, in either instance her conduct exhibited hostility towards Ramirez's union activity. (See, e.g., *State of California (Correctional Health Care Services)* (2021) PERB Decision

No. 2760-S, p. 24 (judicial appeal pending) [supervisor demonstrates unlawful animus toward union activity by resisting requests for union-related leave or otherwise refusing to consider union duties as a protected category that may legitimately cause employee to have less time for other tasks] [citing *State of California (California Correctional Health Care Services)*, *supra*, PERB Decision No. 2637-S, pp. 15-16].)

Moreover, employees have a protected right to discuss disciplinary matters with coworkers, such as by investigating allegations, contacting potential witnesses, and seeking help preparing their defense. (*Claremont Unified School District* (2019) PERB Decision No. 2654, pp. 20-21; *County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 9.) As the ALJ found, the District's Notice barred Ramirez from entering District property, where it knew CSEA held its meetings, and from contacting District employees about the investigation, which would undermine Ramirez's ability to prepare for her investigatory interview and mount her own defense. Oliver pointed out to Ravalin on January 23, 2018, that the Notice was problematic for these very reasons. Rather than immediately modify the prohibitions, Ravalin instead kept them in place for almost six weeks. Ravalin ultimately allowed Ramirez to attend CSEA meetings, but the District continued to prohibit Ramirez from speaking with other employees about her work at VCIS. The District's contention that it only barred Ramirez from entering District property or contacting any District employee "as it relate[d] to the investigation," also rings hollow. Because the District did not inform Ramirez or CSEA as to the subject of the investigation, it effectively gagged Ramirez from speaking to anyone else at the District on any matter.

We thus find that the District's actions indicated animus toward Ramirez's protected activity.

6. Inadequate Investigation

As noted above, an inadequate investigation supports an inference of unlawful motive because it reveals an employer's disinterest in whether misconduct truly occurred and thus that the stated reasons for the adverse action are not the actual motivating reasons. (*Regents, supra*, PERB Decision No. 2704-H, p. 24.) We have already noted, *ante*, several respects in which the District's exaggerated allegations against Ramirez also reflect an inadequate investigation.

Moreover, the District accused Ramirez of making multiple attendance errors in students' records in August and September 2016, including failing to properly record absences and confirm buddy checks. Yet, Ramirez received specific training for PowerSchool attendance-keeping at the end of September 2016 and the secretary who trained Ramirez appears to have failed to catch these errors. Furthermore, whereas Reid testified that she could not recall whether Ramirez was permitted to perform a buddy check if one had not been done already, Castro cleared that up in Ramirez's favor; the District would have learned of this exculpatory factor if it had thoroughly interviewed Castro as part of an unrushed, adequate investigation.

We therefore conclude the District's cursory investigation indicated unlawful motive.

E. Affirmative Defense

If the charging party meets its burden to establish a prima facie case of retaliation, certain fact patterns nonetheless allow a respondent the opportunity to

prove, by a preponderance of the evidence, that it would have taken the same action even absent protected activity. This affirmative defense is most typically available when, even though the charging party has established that protected activity was a substantial or motivating cause of the adverse action, the evidence also reveals a non-discriminatory motivation for the same decision. In such “mixed motive” or “dual motive” cases, the question becomes whether the adverse action would not have occurred “but for” the protected activity. (*City of Santa Monica, supra*, PERB Decision No. 2635a-M, pp. 40-41; *NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402; *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *San Diego Unified School District* (2019) PERB Decision No. 2634, pp. 12-13; *Wright Line* (1980) 251 NLRB 1083, 1086-1089.) The District challenges the ALJ’s conclusion that it did not prove its affirmative defense. We disagree.

The District claims that it would have terminated Ramirez regardless of her protected activities because of her ongoing performance issues. The District’s leading assertion in this regard is that “Ramirez’s errors had a negative impact on students enrolled [at] VCIS, damaging the core function of the District.” In support for its sweeping statement, the District states only, “*The error was brought to the District’s attention by a parent because a student was being treated improperly and at risk of being removed from the VCIS program because of Ramirez’s error.*” (Italics original.) We are not convinced. While the District’s concern with the impact of Ramirez’s errors on students is a legitimate one, we find that the District failed to prove it would have

terminated Ramirez for this reason. For instance, the District refers to students in the plural, yet provided only a single example. It cannot cite any other ways in which students were negatively impacted. Moreover, the specific example the District cites did not ultimately have a negative impact on the particular student because the mistake was corrected.

Next, the District argues that Ramirez had ongoing performance issues following her March 24, 2017 evaluation. But the District's evidentiary support on this count refers to issues preceding Ramirez's evaluation—Ramirez's failure to timely order supplies, keep the supply cabinet organized, greet guests in a friendly manner, and schedule orientations using the proper protocol—all of which were listed in Ramirez's March 24, 2017 evaluation. None of these issues warranted Ramirez's termination or even discipline as of her March 2017 evaluation, and the record is inadequate to show the extent to which Ramirez continued or corrected these performance issues thereafter.

Third, the District argues that Ramirez failed to complete rudimentary job duties. This assertion simply reiterates the District's preceding claims that Ramirez failed to keep cabinets organized, properly schedule orientations, and accurately report attendance. Reid testified that she had never disciplined an employee for keeping a messy supply cabinet, failing to keep teachers' supplies stocked, and greeting parents in an untimely manner. We reject this argument for the same reasons stated above.

Finally, the District refers to Ramirez's PowerSchool entry errors, which we have already concluded were exaggerated and which improved markedly after

Fall 2016. The District would likely have been entitled to choose a lower level of discipline and warn Ramirez that further improvement was needed. But, having neither sent Ramirez a disciplinary warning letter nor suspended her—both standard steps in progressive discipline for unintentional performance problems—the weight of the evidence simply does not show that the District would have chosen termination as its disciplinary level absent her protected activity.

III. Interference

Interference can be either an independent violation or derivative of another violation, depending upon whether the facts at issue permit a charging party to establish interference without establishing any other violation. (*County of Santa Clara* (2021) PERB Order No. Ad-485-M, p. 9, fn. 8.) An independent violation is one that can be proven without also proving another alleged violation, while a derivative violation depends entirely on proving another violation. (*Id.* at p. 9.) Here, the ALJ was correct in finding that the District, by terminating Ramirez in retaliation for her protected activities, also interfered with CSEA's right to represent its members under EERA section 3543.5, subdivision (b). (*City of Santa Maria* (2020) PERB Decision No. 2736-M, adopting proposed decision at p. 47; *Newark Unified School District* (1991) PERB Decision No. 864, pp. 17-18.) Because this interference finding was derivative of CSEA's retaliation claim, the ALJ was not required to conduct an independent analysis. The ALJ's finding that the District derivatively violated EERA section 3543.5, subdivision (b) was therefore proper.

IV. Remedy

Both parties except to the ALJ's remedy. The District contends that backpay and reinstatement are inappropriate because CSEA did not state a prima facie case of retaliation and, even if it did, the District proved that it would have terminated Ramirez regardless of her protected activity. In light of our finding that CSEA proved its retaliation claim and that the District failed to establish an affirmative defense, we reject this exception. For its part, CSEA asserts that backpay should begin on the date the District placed Ramirez on paid administrative leave, rather than the date the Board of Education upheld Ramirez's termination, as the ALJ ordered. Citing *County of Riverside* (2018) PERB Decision No. 2591a-M, CSEA argues that an appropriate make-whole remedy would compensate Ramirez for additional amounts she could have earned during her paid leave period, including overtime pay, shift differentials, and holiday pay. CSEA overlooks a key distinction between that decision and the instant one.

In *County of Riverside* (2018) PERB Decision No. 2591-M, unlike here, the complaint explicitly challenged both the employer's decision to place an employee on administrative leave and the resulting termination. (*Id.*, adopting proposed decision at p. 2.) The Board found against the employer as to both actions, but initially ordered make-whole relief beginning only from the termination date forward. After the charging party filed a request for reconsideration, contending that make-whole relief should have included the period of administrative leave, we granted the request and adjusted the remedial order. (*County of Riverside, supra*, PERB Decision No. 2591a-M, p. 4

[Board acknowledged that it “mistakenly failed to take into account the earliest date of adverse action”].)

Unlike *County of Riverside, supra*, PERB Decision No. 2591a-M, the complaint in the instant matter alleged only that the employer took adverse action against Ramirez by upholding her termination from employment. The proposed decision likewise found only the termination to have violated EERA. While we have found the District was unlawfully motivated in placing Ramirez on administrative leave, CSEA has failed to raise, much less brief, whether this meets the requirements of the unalleged violation doctrine. We have discretion to consider the unalleged violation doctrine sua sponte, but we decline to do so in these circumstances. Accordingly, we do not disturb the ALJ’s decision to commence backpay on the date of Ramirez’s termination.¹⁴

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Visalia Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3543.5,

¹⁴ Nothing in our decision alters the general rule that all categories of losses (including, but not limited to, overtime pay, shift differentials, and holiday pay) are fully compensable based on reasonable estimates. (*County of Riverside, supra*, PERB Decision No. 2591a-M, p. 2; *City of Pasadena* (2014) PERB Order No. Ad-406-M, p. 14 & adopting proposed decision at p. 8; *San Jacinto Unified School District* (1994) PERB Decision No. 1078, p. 4 & adopting proposed decision at pp. 38-39.) In cases in which PERB either sustains a complaint allegation challenging imposition of paid leave or finds such a violation based on the unalleged violation doctrine, all losses are compensable during the unlawful paid leave. In this case, however, such categories are compensable only after the date of termination.

subdivisions (a) and (b), by terminating Gladys Ramirez in retaliation for her protected activities.

Pursuant to EERA section 3541.5, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against Ramirez because of her protected activities.
2. Denying California School Employees Association, Chapter 83

(CSEA) its rights guaranteed by EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF THE ACT:

1. Rescind Ramirez's termination.
2. Within 30 days after this decision is no longer subject to appeal,

offer Ramirez reinstatement to her former Secretary II position or, if that position no longer exists, then to a substantially similar position.

3. Make Ramirez whole for any financial losses suffered as a result of her termination, including backpay at the rate she was paid prior to her termination, subject to any raises experienced by her classification since that time, and augmented by interest at the rate of 7 percent per annum from the date of termination to the date she is reinstated or declines reinstatement. The back pay order is subject to offset for wages earned during the relevant period that Ramirez would not have earned if she had remained a District employee.

4. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations in the Visalia Unified School District, where notices to District employees customarily are posted, copies of the Notice attached hereto as

an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.¹⁵ In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with classified employees in the bargaining units represented by CSEA. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

5. Within 30 workdays after this decision is no longer subject to appeal, notify the PERB General Counsel or designee in writing of the steps taken to comply with the terms of this Order. Continue to report in writing to the General

¹⁵ In light of the ongoing COVID-19 pandemic, the District shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the District so notifies OGC, or if CSEA requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all relevant parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the District to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the District to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the District to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

Counsel, or designee, periodically thereafter as directed. All reports regarding compliance with this Order shall be served concurrently on Ramirez and CSEA.

Chair Banks and Member Krantz joined in this Decision.



**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California**

After a hearing in Unfair Practice Case No. SA-CE-2979-E, *California School Employees Association, Chapter 83 v. Visalia Unified School District*, in which all parties had the right to participate, it has been found that the Visalia Unified School District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by terminating Gladys Ramirez in retaliation for her protected activities.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against Ramirez because of her protected activities.
2. Denying California School Employees Association, Chapter 83 its rights guaranteed by EERA.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF EERA:

1. Rescind Ramirez's termination.
2. Within 30 days after this decision is no longer subject to appeal, offer Ramirez immediate reinstatement to her former Secretary II position or, if that position no longer exists, then to a substantially similar position.
3. Make Ramirez whole for any financial losses suffered as a result of her termination, including backpay at the rate she was paid prior to her termination, subject to any raises experienced by her classification since that time, and augmented by interest at the rate of 7 percent per annum from the date of termination to the date she is reinstated or declines reinstatement. The back pay order is subject to offset for wages earned during the relevant period that Ramirez would not have earned if she had remained a District employee.

Dated: _____

Visalia Unified School District

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.