

In the Matter of
JOSE RODRIGUEZ, Charging Party,
- and -
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF
NEW YORK, Respondent

Case Nos. U-30747 & U-31421

New York Public Employment Relations Board

February 5, 2013

CORE TERMS: teacher, grievance, unsatisfactory, rating, classroom, grade, disciplinary, school year, protected activity, cross-examination, assigned, excessive, teaching, rated, memorandum, lesson, satisfactory, year-end, leader, animus, retaliation, experienced, supervisor, supervised, e-mail, feedback, posting, verbal abuse, circumstantial, referenced

NOTICE:

NOTICE TO ALL EMPLOYEES

**PURSUANT TO THE DECISION AND ORDER OF THE
NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD**

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Marcellus Central School District in the unit represented by the Marcellus Substitute Teachers Association that the District will:

1. Not retaliate against Rodriguez for his engagement in protected activity;
2. Rescind the December 21, 2010 disciplinary letter issued by Deratus;
3. Rescind the March 3, 2011 evaluation report and unsatisfactory rating issued by Deratus; and
4. Rescind Boursiquot's unsatisfactory year-end evaluation of Rodriguez for the 2010-11 school year.

COUNSEL:

JOSE RODRIGUEZ, Pro se

DAVID BRODSKY, ESQ., DIRECTOR OF LABOR RELATIONS (ALLISON S. BILLER of counsel), for Respondent

JUDGES: ELENA CACAVAS, Administrative Law Judge

OPINION:

DECISION OF ADMINISTRATIVE LAW JUDGE

On January 25, 2011, Jose Rodriguez filed an improper practice charge, Case No. U-30747, alleging that the Board of Education of the City School District of the City of New York (District) violated §§ 209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it targeted him with excessive classroom visits, issued a disciplinary letter to his file, and rated his performance unsatisfactory in his mid-year and year-end evaluations, in retaliation for protected activity. A second charge, Case No. U-31421, was filed on October 21, 2011, after the first day of hearing in Case No.

U-30747, alleging continued retaliatory behavior. In both actions, the District denied that it violated the Act. A consolidated hearing was held on July 27, 2011 and March 6, 8 and 26, 2012, at which the District was represented and Rodriguez appeared *pro se*.ⁿ¹ Both parties filed briefs.

FACTS

Rodriguez is a bilingual teacher assigned to elementary school P.S. 173. He has taught for 32 years and had an unblemished record prior to the incidents described in this charge. He previously served as a UFT chapter leader, but had never filed a grievance on his own behalf before the 2010-11 school year.

On April 20, 2010, Rodriguez submitted his preference sheet for the 2010-11 school year, listing grades five, four and three, in that order. The school's only two bilingual classes to be offered that year, however, were second grade and a combined third/fourth grade class. Both of those options were within Rodriguez's appropriate license area.

In June 2010, Rodriguez was notified that he was assigned to the second grade bilingual class. He testified that because his area of "expertise" is grades four to six, he asked for school support and resources to enhance his performance.ⁿ² In addition, on September 7, 2010 he filed a grievance based on the assignment.ⁿ³ At the grievance conference, the principal of P.S. 173, Dawn Boursiquot, explained that there were no bilingual classes available in the grades he requested and offered, as an alternative to his second grade assignment, the third/fourth grade bridge class. Rodriguez declined that offer. The immediate supervisor for the second grade was, and remains, assistant principal Madrid Deratus. Another assistant principal, Kevin Goodman, supervises the third, fourth and fifth grades and also oversees the school's English Language Arts (ELA) program. Boursiquot had been at the school six or seven years at the time of the hearing, and had previously supervised Rodriguez, while Deratus had become assistant principal in September 2010.

Rodriguez claimed that after filing his grievance, which was on the first day of the 2010-11 school year, he was subjected to an excessive number of classroom visits by both Deratus and Goodman, including 58 unannounced "pop-in" visits for the period September through December. The classroom visits began two days after the grievance was filed. While Deratus disputed the number cited by Rodriguez, claiming she visits classrooms on the average of two times per week, Rodriguez's testimony was supported by written notes as to the times and days when the visits occurred. For example, for the period September 13 through September 30, Deratus visited 22 times. On September 20 alone, she visited four times and also called the classroom. From October 8 through October 29, she made 18 visits. Deratus testified that it is part of her job duties to perform "walk-throughs" of classrooms and that the number of visits she made to Rodriguez's classroom was consistent with her visits to other teachers under her supervision.

Also during the early fall, Deratus sent a memorandum to all first and second grade teachers regarding her expectations and requirements, specifically a required posting of the day's format for each classroom. Rodriguez requested a meeting with Deratus to review the memorandum, and that was held. On October 8, 2010, he filed a grievance, alleging that the memorandum required posting lesson plans in the classroom and following a required format for such. At the step one conference, Boursiquot explained that all teachers were similarly subject to the memorandum's requirements and that lesson plans were not required. The grievance was thereafter withdrawn.

Rodriguez claimed that the October 8 grievance was followed by continued visits from Deratus and that it appeared to him that every time he filed a grievance, he was targeted by the administration. Nevertheless, he filed another grievance on November 4, 2010, alleging that a special education position was filled without proper posting.

On November 8, 2010, both Goodman and Deratus visited Rodriguez's classroom, as a result of which two letters were issued to him. The letter from Goodman, dated November 16, 2010, addresses Rodriguez's classroom management, classroom environment and teaching techniques based on Goodman's 45 minute visit.ⁿ⁴ The letter from Deratus, dated November 17, 2010, addresses concerns apparently raised by Rodriguez about her classroom visits. She advises, "If on any given day I wish to visit your classroom, I may do so without providing you with any explanation."ⁿ⁵

Rodriguez was formally observed on December 16. On December 21, 2010, he received a disciplinary letter.ⁿ⁶ The three and one-half page, single spaced document was signed by Deratus and issued to Rodriguez at a meeting which she and Boursiquot conducted. Boursiquot said the meeting was to address concerns about Rodriguez's aggressive behavior. The letter outlines incidents alleged by Deratus. One incident concerned Rodriguez allegedly banging on her door and asking to see her, causing her to feel "unsafe." She also referenced earlier, undated, incidents of him "loudly ordering his students" and once walking away from his class in a hall to confront an older student who was laughing at him. She charged him with abandoning his class and "getting in the face of another student." She also cited two incidents where Rodriguez was allegedly not properly supervising his class. On one occasion, Rodriguez was reportedly sleeping while his class took a math test and awoke as she walked around the room. On another occasion, one

month earlier, he had left his class and stood outside the boys' bathroom calling for a student to come out, then returned to his class "minutes later." She charged him with endangering the safety of his students by his brief absence. In the letter, Deratus quotes Rodriguez as saying, "33 years of teaching experience, it is now that I would endanger the students' safety...and now I am jeopardizing their well-being?" He denied that he was sleeping and said he had only closed his eyes while the students were occupied with the test. His momentary absence from the class, he explained, was to check on a student who was too long in the bathroom. In conclusion, Deratus charged him with "sheer negligence" and made numerous references to his jeopardizing students' safety. Deratus also referenced a statement made during an earlier meeting to the effect that he felt harassed and would contact the union. She stated, "Mr. Rodriguez regardless of whatever means you may use as a resort you must be aware that you are to fulfill your professional duties as required." She also warned of an unsatisfactory rating for the school year, which at that point was approximately six months away.

From early January until January 25, there were another ten classroom visits. Similar visits occurred throughout the spring, along with complaints and criticisms about Rodriguez's performance and demeanor as a teacher. On March 8, 2011, Rodriguez received an unsatisfactory rating based on the December 16, 2011 observation by Deratus. The rating was delivered in a six page, single-spaced letter to him.

Rodriguez's second improper practice charge claimed retaliation for an unsatisfactory rating he received for the 2010-11 school year, allegedly in response to both his grievance activity and his initial charge before PERB. That year-end rating was signed by Boursiquot on June 16, 2011 for the period September 7, 2010 to June 30, 2011. In eight of the 23 categories, Boursiquot did not enter any rating; ⁿ⁷ in all others she rated Rodriguez as unsatisfactory. In no category did she rate Rodriguez as satisfactory. She incorporated by reference the March unsatisfactory rating and the December disciplinary letter. According to Rodriguez, throughout the year; he sought assistance to succeed in his assignment and did everything asked of, or suggested to, him even if it required extra hours. Entered into the record is a series of e-mails to Deratus asking for assistance. One, dated May 31, 2011, was sent a few weeks prior to his year-end evaluation. It states:

Ms. Deratus

Earlier this year I requested to you via e-mail a demonstration lesson after having received an unsatisfactory rating on my first formal observation. I received a response from Ms. Boursiquot and a letter from Mr. Goodman, which I forwarded to my UFT representatives due to the nature of its content.

However I never received from you any response either verbally or in written form. Since observations are coming around again, I am requesting, again from you, a model lesson so as to clear up any deficiencies on my part and better service my students. I am asking this since you are my immediate supervisor, or to Ms. Boursiquot should you decide to bring this matter to her attention. Since I am writing to you, can you kindly respond to me what as to my request? ⁿ⁸

Rodriguez testified that in more than three decades he never received a negative evaluation, a disciplinary letter, or notice of deficiencies. While he conceded that no administrator at P.S. 173 directly indicated to him concern with, or objection to, his protected activities, he alleged in his second charge with PERB that there exists a pattern of retaliation and union animus.

Rodriguez asserted that he was "set up" to get an unsatisfactory rating. He said that on two occasions he requested demonstration lessons from his immediate supervisor, Deratus, and never received any. He also requested that another supervisor observe and rate him, and Goodman and Deratus were sent. Further, he testified that it is common practice for a teacher rated as unsatisfactory to be observed again, which he requested in June 2011, only to receive no response. Rodriguez acknowledged, however, that literacy and math coaches were assigned to him and model demonstrations were provided, though not by Deratus, as he had requested.

Also testifying on Rodriguez's behalf was chapter leader and P.S. 173 teacher David Brophy. He said that Rodriguez contacted him about the preference grievance and then subsequently reported his concerns about Deratus' visits since the grievance had been filed. Brophy said that Rodriguez claimed the visits distracted his students and him and were negatively affecting his teaching.

Brophy testified that he had received a lot of complaints about Deratus giving out unsatisfactory ratings and frequently visiting classrooms. Teachers reported feeling badgered by her. That notwithstanding, the number of visits to Rodriguez were "huge by comparison," Brophy said. He called them, "ridiculous, excessive to an extreme point." ⁿ⁹

Brophy maintained that he received from Boursiquot on February 3, 2011, an e-mail criticizing him for filing a grievance and stating that he is always on the "attack." ⁿ¹⁰ He said that in a meeting with her which followed, she

again referenced the grievance and expressed frustration over it. He countered that the teachers who received unsatisfactory ratings were upset and she should instead try to provide positive reinforcement. Brophy also testified that during that meeting Boursiquot stated that she assigned those teachers to Deratus because she is tough and she knew Deratus would give them unsatisfactory ratings. No mention was made during that meeting or at any other time of Rodriguez's protected activity. For the 2010-11 school year, Brophy received a satisfactory rating.

On cross-examination, Brophy conceded that the UFT never brought a harassment complaint against any of the administrators, though there is a mechanism for doing so. He also estimated that 50 percent of the teachers assigned to Deratus over three years got unsatisfactory ratings, judging from the number of complaints he received about her. Within the second grade, in the 2010-11 school year, six second grade teachers received unsatisfactory ratings from Deratus, of which Rodriguez was one, and two filed improper practice charges thereon. Some of those teachers who got unsatisfactory ratings, Brophy acknowledged, had not filed grievances prior to receiving the poor rating.

Testifying on behalf of the District, Goodman said that his visits to Rodriguez were routine and that his November 16, 2010 letter to him was intended to provide feedback and expectations. He said Rodriguez was not asked to sign the letter because it was not intended as discipline and was not to be included in his personnel file. Though he acknowledged that the letter was critical, he said it was not a reprimand.

Goodman claimed that Rodriguez's grievance activity had no impact on his classroom visits or the letter he issued to Rodriguez. In fact, Goodman said he was aware of the reorganization grievance, but not of any others thereafter. According to Goodman, it is not uncommon that some teachers are visited more frequently than others and three visits a week is not unusual. He claimed that no teacher, including Rodriguez, had complained to him about excessive visits. He added that 50 visits over the course of a school year is not excessive. ⁿ¹¹

He offered that at times Rodriguez appeared unwilling to face some of the challenges that he experienced in his new assignment. On cross-examination, he said he tried to provide feedback to correct deficiencies, but Rodriguez "reached out to the District union representative which brought our effort more or less to support you to a screeching halt." ⁿ¹² Although Goodman could recall very few specifics of his involvement and communications with Rodriguez, he did generally refer to an e-mail to Rodriguez which he said "prompted the intervention of the District UFT representative which then prompted some other issues." ⁿ¹³ He added that after the union became involved, communications between Rodriguez and the administration were "a challenge" because "it demonstrated that [Rodriguez was] not understanding the deficiencies we observed on a regular basis in [this class... He was] struggling to teach effectively." ⁿ¹⁴ Goodman said he discussed that with Boursiquot and Deratus, but could not recall if he and the other administrators together ever discussed it with Rodriguez. He was unable to state, in response to a question, whether the deficiencies were across the board with all core subjects or isolated to one area. ⁿ¹⁵

Regarding the effectiveness of Rodriguez's teaching, Goodman stated that student growth was "limited to nonexistent," during the course of the school year. ⁿ¹⁶ However, Goodman conceded that the entire class was promoted, adding, "We [do not] hold students responsible for the inadequacy of the instruction they receive." ⁿ¹⁷

Goodman also disputed that Rodriguez had complained about certain troublesome students in the classroom during the course of the year. In fact, he claimed to have no awareness of behavioral problems allegedly brought to the attention of administration. He also said he was not aware of Rodriguez's request for another person to observe him besides Goodman or Deratus. He did concede, however, that usually there is a pre-observation conference to discuss the teaching plans for the day and the unit of study, but could not recall if he participated in one with Rodriguez. He also said that he recalled saying he would revisit Rodriguez after he was identified as a teacher in need, but failed to do so. Goodman could not recall Rodriguez ever requesting assistance, but did recall that literacy and math coaches had been assigned to him, as is customary for teachers new to a grade or those identified as being in need of assistance. Entered into evidence is a March 21, 2011 memorandum from Boursiquot to Deratus, copied to Goodman, noting a request by Rodriguez for a "demo" lesson to improve his ELA instruction. ⁿ¹⁸ Goodman said that he advised Boursiquot that time should be provided to help Rodriguez improve his classroom physical environment to make it more conducive to learning.

Goodman acknowledged that Rodriguez was experienced in teaching fifth and sixth grade, and that 2010-11 was his first assignment to a second grade class. He also acknowledged that he had no awareness, having previously supervised Rodriguez indirectly, of any prior unsatisfactory ratings or disciplinary issues. Goodman added, however, that November 2010 was the first time he had observed Rodriguez as a classroom teacher, as opposed to being in a push-in/push-out role. ⁿ¹⁹

For her testimony, Boursiquot disputed the claim that Rodriguez had students with learning disabilities or behavioral issues. ⁿ²⁰ All were Spanish learners and some were new arrivals to the United States, however. One child did possess a box cutter, but Boursiquot said it was closed and the student did not even understand what it was. She maintained, on cross-examination, that she did not view the incident as "a major problem" or believe that the student had disciplinary problems. She said she was not sure if the student had been suspended a number of times, but when questioned further, recalled that he at least had been temporarily transferred to another class in response to complaints Rodriguez made about managing his behavior. In the class to which he was transferred, which had a special education teacher and a general education teacher, it took some time to acclimate the child, she acknowledged, though she could not recall how long the student was there or whether he eventually was transferred to another school.

Prior to 2010-11, Boursiquot had supervised Rodriguez when he was a push-in/ push-out teacher and had rated him as satisfactory. The nature of that instruction, she claimed, is very different from a classroom teacher. She had also, however, supervised him as a classroom teacher and rated his performance as satisfactory. She said that when Rodriguez was assigned to teach second grade as a classroom teacher, he was provided not only literacy and math coaches, but model lessons and outside consultants, as well as the opportunity for outside professional development. This was customary for teachers changing assignments and was not specific to him. His unsatisfactory rating in 2010-11 was based, according to Boursiquot, on his instruction and letters to the file, which, she added, indicate that a "U rating" could follow. The grievances had no impact on her actions toward Rodriguez, she claimed.

Boursiquot denied stating to Brophy that she assigned Rodriguez to Deratus in order to have him fail. She said that Rodriguez was assigned to a grade, which Deratus happened to be supervising. There were few options available and when she offered Rodriguez an assignment that would have been supervised by Goodman, he declined. She also denied union animus. Entered into the record, however, was an e-mail she sent to Brophy regarding a job posting grievance he filed. She wrote:

Rather than check back with me, you left a grievance with my secretary... It appears that you are unwilling to talk to me about issues before grievances are filed. This approach does not seem to be very productive and professional. I do not believe that we should be adversaries, but you are constantly on the "attack." ... The posting is up and I would have put it up without your grievance. ⁿ²¹

With respect to the excessive visits charged by Rodriguez, Boursiquot said that it is the duty and goal of assistant principals to observe teachers on a daily basis. She did not recall Rodriguez discussing with her the frequency of Deratus' visits.

Boursiquot noted that Rodriguez was not disciplined when he refused to sign and return the December 21, 2010 disciplinary letter he received. She said that employees normally have 48 hours to do so, but Rodriguez had exceeded that and she had to ask Brophy, who had accompanied Rodriguez to the conference, to have Rodriguez sign and return the document.

She also addressed the items raised in the disciplinary letter of December 21, 2010. She said she had received complaints of yelling coming from Rodriguez's classroom and also had heard it herself. She added that contractors had complained about Rodriguez speaking loudly; she further referenced the incident in the hall outside of the lunchroom. On cross-examination, however, she acknowledged that she had never received such complaints regarding Rodriguez before the 2010-11 school year and had never, prior to December 2010, criticized him for yelling. She also acknowledged that while other teachers have been spoken to for raising their voices, none has ever been disciplined for it, but added that Rodriguez was because he did not stop. She believed he had been verbally warned by his supervisors prior to the write-up.

When questioned on cross-examination with respect to the claim that Rodriguez abandoned his class when he went to speak to a student who was laughing at him, or teasing another student, ⁿ²² Boursiquot said that it is "absolutely appropriate" for a teacher to address a student who is teasing another, adding that she "would hope" that would be done. ⁿ²³ She later qualified her response, explaining she would not expect a teacher to abandon his class to accomplish that. She also noted that the disciplinary letter says the other student was laughing at Rodriguez, not another student.

On cross-examination, Rodriguez questioned why, if these alleged incidents were of such concern to the administration, they were not reported on a computerized District-wide database which requires reports of conduct that is abusive or endangering the safety of another. Boursiquot said that the charge of abandoning the class was not reported since kids were not in danger because Deratus was covering the class for Rodriguez. Nevertheless, the disciplinary letter's referenced Rodriguez "endangering the well-being of students." ⁿ²⁴ The disciplinary letter sufficiently memorialized

the incident, she added. She also stated that "minor incidents" do not have to be reported. Introduced into evidence is a memorandum from District Chancellor Joel Klein on school safety. ⁿ²⁵ It states, in pertinent part:

It's essential that schools report all infractions -- from the most minor to the most serious. We, as a system, cannot tolerate schools' failure to report incidents. We need to know which schools are keeping students and educators safe...."

Also introduced is a chancellor's regulation prohibiting verbal abuse of students, which includes "language that tends to cause fear or physical or mental distress" or "that tends to belittle or subject students to ridicule." ⁿ²⁶ It warns that student behavior must never be punished by verbal abuse and specifically proscribes verbal abuse of students by District employees. It directs that all allegations of verbal abuse of students must be immediately reported to designated online reporting systems. ⁿ²⁷

The disciplinary letter also accused Rodriguez of sleeping in class, which he denied. Although Deratus was quoted as saying that Rodriguez admitted to dozing off, she said on cross-examination that he did not make such an admission. Regarding the allegation of Rodriguez raising his voice, Boursiquot admitted on cross-examination that teachers or supervisors outside the lunchroom, which has the noise of dozens of children talking, may have to raise their voices to get the attention of the students.

Cross-examination also delved into the administration's failure to comply with guidelines for evaluations and observations in a document issued by the District in conjunction with the UFT, entitled "Teaching for the 21st Century." ⁿ²⁸ The document provides a model for performance reviews which requires that the school principal make a formal observation of a teacher in danger of receiving an unsatisfactory rating. Boursiquot never did. Also, where a teacher gets an unsatisfactory rating on the first observation of the school year, the teacher is to get a second formal observation later in the year to be able to show improvement. That too was not afforded to Rodriguez. Although Boursiquot said that she is not versed in the requirements of the document and attributed Rodriguez's treatment to oversight, she acknowledged that other teachers who were at risk for an unsatisfactory rating for the year did get a second observation. She added, however, that in those cases the unsatisfactory rating was based solely on instruction, whereas Rodriguez's rating was based on instruction as well as the other cited incidents. An unsatisfactory rating, for any reason, is not appealable under the Agreement.

The District's third witness was Deratus. Deratus has served as assistant principal for four years and in 2010-11 supervised 12 teachers in grades one and two, as well as the English as a Second Language (ESL) program for all grades. Prior to the 2010-11 school year, she had little exposure to Rodriguez. She reports to Boursiquot.

Deratus adamantly disputed Rodriguez' claimed frequency of visits, stating it is very hard to be in every classroom each day, much less multiple times in a given day. Visits of three times a day, she said, would be limited to teachers against whom there are specific complaints and would be very rare.

In contradiction of Rodriguez's claim that he had troubled students, Deratus called his students capable learners who had the benefit of prior learning experience. ⁿ²⁹ Within a matter of weeks, however, she felt they were not progressing and were not engaged in the classroom. She said that as the year progressed, there was no indication that the students were receiving adequate instruction to move to the third grade, acknowledging, however, on cross-examination, that all were promoted at year's end. She further asserted that no student had learning or behavioral problems and that the one student who was removed from the classroom experienced no issues upon reassignment to another teacher.

Deratus stood by her letter to Rodriguez and its documentation of a number of issues, and challenged Rodriguez's testimony relating to each incident noted therein. She disputed, for example, that he was in the immediate vicinity of the cafeteria when he raised his voice to a student, but later acknowledged that he was by the exit door. She also said she observed Rodriguez sleeping, but used the term "dozing off" interchangeably, noting his eyes were closed and his hand was under his chin. She acknowledged during cross-examination, however, that Rodriguez did not admit to sleeping; rather, he said his eyes were closed while students took a test. Deratus stated that Boursiquot had no input into the disciplinary letter.

Although Deratus agreed on cross-examination that with progressive discipline a verbal warning usually precedes a write-up, she admitted that such was not provided to Rodriguez. She also acknowledged that he was not given a second observation, because she felt that he had gotten a lot of support and feedback and another observation would have been fruitless. During her weekly walk-through of Rodriguez's classroom, she would have noted improvement, she asserted.

DISCUSSION

In order to show retaliation under subsections (a) and (c) of § 209-a.1 of the Act, a charging party must prove, by a preponderance of the evidence, that the affected person was engaged in protected activity under the Act, that such activity was known to the person who effectuated the adverse action, and that the action complained of would not have been taken "but for" the protected activity. ⁿ³⁰ That third element, requiring a showing of unlawful motivation, can be proven through direct evidence, such as oral statements or documents, or through circumstantial evidence. ⁿ³¹ Circumstantial evidence may include disparity of treatment, the timing and context of the employment action, or a pretextual rationale for adverse actions taken. ⁿ³² Regardless of its form, circumstantial evidence must be sufficient to give rise to an inference that unlawfully motivated interference or discrimination was a factor in the employer's conduct. If the respondent establishes a legitimate, non-discriminatory reason, the burden then shifts back to the charging party to prove that to be pretextual. ⁿ³³

Rodriguez's engagement in protected activity is not at issue. "Protected activity" is that identified by the Act as activity in pursuit of protected rights. The grievances which Rodriguez filed on September 7, October 8, and November 4, 2010 clearly fall into this category, as does his referral of issues to the union and his having Brophy, as chapter leader, interface with administration on his behalf. In finding that his protected activity commenced on September 7, however, I must reject any claim that his assignment to a second grade bilingual class for the 2010-11 school year was in any way violative of his rights under the Act. The assignment which was made in the late spring of 2010 was well before his protected activity commenced. As such, the statement alleged to have been made by Boursiquot, that she assigned Rodriguez to Deratus knowing that she would rate him unsatisfactorily, has no bearing on the retaliation analysis. ⁿ³⁴

What are within the scope of potential retaliatory action are the excessive classroom visits, the two letters in November 2010, the disciplinary letter of December 21, his unsatisfactory performance rating in March 2011, and his unsatisfactory rating for the 2010-11 school year.

Pursuant to the second prong of the *City of Salamanca* test, I must next consider whether the person or persons responsible for the adverse actions had knowledge of Rodriguez's protected activity. The record establishes that Goodman knew of at least the first grievance, as well as Rodriguez's involving the union in his dealings with the administration as of December 2010. Goodman's knowledge is relevant since he participated in the frequent classroom visits as the supervisor of the ESL program and his November 8 visit resulted in the November 16, 2010 letter he authored.

The record also establishes that Boursiquot clearly knew of Rodriguez's grievance activity. Her knowledge is relevant since she participated in the discipline meeting of November 29, 2012 and was the supervisor responsible for the year-end unsatisfactory evaluation.

Deratus claimed she did not know of Rodriguez's grievance activity. Although I do not find her testimony to be credible, based on her demeanor, her reluctance to answer questions directly, and inconsistencies, Rodriguez failed to introduce into the record any evidence, direct or circumstantial, to establish that she did indeed have knowledge. That notwithstanding, she did know that Rodriguez said he was contacting the UFT and would file a charge against her for harassment. In fact, she specifically noted that in the disciplinary letter which she issued on December 21, 2010.

The last prong of the standard of proof looks to the nexus between the protected activity and the adverse action taken. Where the first two elements of the *City of Salamanca* test have been met, as is the case here, the analysis then considers whether the action resulted from the employee's involvement in protected activity. Essentially, Rodriguez must establish that "but for" his grievances and enlistment of a union representative he would not have been the subject of such frequent visits, negative documentation, a disciplinary letter and two unsatisfactory evaluations. ⁿ³⁵

The record in this case establishes animus both circumstantially and through direct statements evidencing Goodman's and Boursiquot's displeasure with Rodriguez's protected activity. Goodman, despite often being evasive and not credible, admitted on cross-examination his belief that any efforts by the District to help Rodriguez were brought to a "screeching halt" when the UFT was brought in. In this regard, he referred to the period approximately six weeks after his November 16, 2010 letter to Rodriguez, at which time Goodman sent Rodriguez an e-mail with further feedback on his teaching. He specifically noted the intervention of the UFT representative on Rodriguez's behalf, adding that once the union became involved communications were challenged. ⁿ³⁶

While Goodman's comments were made after his letter of November 16, 2010, they evidence animus which is significant in evaluating other direct and circumstantial proof in this case. As for Goodman's letter, however, I do not find that Rodriguez has established that "but for" his protected activity prior to November 16, 2010, namely his first grievance, that letter would not have been issued. This was still quite early in the school year and was feedback, not intended

as discipline or for the file, on a teacher in a new grade and classroom setting. While it is critical of Rodriguez's teaching and classroom management, there is insufficient evidence to establish that it was motivated by animus or to rebut Goodman's claims that it was issued for the legitimate business purpose of providing feedback to help a teacher improve in a new assignment.

Goodman's testimony as to his on-going involvement with Rodriguez after the November 16, 2010 letter, however, evidences extreme impatience with Rodriguez's use of the UFT to defend himself against what he and his chapter leader viewed as an attack by the administration. Although Goodman participated in visits to Rodriguez's classroom at this time, he was not responsible for a formal observation, evaluation or discipline of Rodriguez. His testimony, however, is relevant in evaluating the circumstantial proof, including the air of animus that existed in the school among administrators as the year progressed.

With respect to Boursiquot, her disdain for Brophy's grievance activity is evidenced by her response to the posting grievance in early February 2011. Rodriguez also testified that in a heated meeting with Boursiquot on November 4, she engaged in discussion about his grievance and asserted that it was not winnable.

In addition to the foregoing, and with respect to the actions of both Boursiquot and Deratus, other circumstantial evidence supports Rodriguez's assertion of retaliation. While the Board has instructed that timing alone is not sufficient to satisfy the nexus requirement, it has also acknowledged that timing and context may be sufficient to establish an inference of improper motivation which would shift the burden of persuasion to the respondent to demonstrate the legitimacy of its action. ⁿ³⁷ In the instant case, the record establishes a spotless employment record over a 32-year career with the same employer. And, during some of those years, Boursiquot was the supervisor who rated Rodriguez as a satisfactory employee. It was in the wake of Rodriguez's grievance activity and the involvement of an aggressive chapter leader that dissatisfaction with his performance was noted and rose to the level that he received a disciplinary letter and was labeled unsatisfactory in his performance. In fact, the classroom visits began very soon after a grievance was filed and escalated as the year progressed. While Rodriguez said he had filed grievances previously on behalf of others as a chapter leader, he had never filed one, much less multiple grievances, on his own behalf. Nor had he before enlisted the aid of a UFT representative to challenge the administration.

I am also influenced by the frequency and nature of the visits paid to Rodriguez. Despite claims to the contrary by Deratus, I credit Rodriguez's and Brophy's testimony as to excessive visits. Whereas Goodman claimed that 50 or more visits over the course of a school year is not excessive, Rodriguez experienced 50 or more visits in a three month period. In January alone, Goodman made ten visits in a three-week period. Never in 32 years had Rodriguez experienced such frequency. Circumstantial evidence may also include disparity of treatment. The District did not effectively dispute Rodriguez's and Brophy's claim that Rodriguez was visited far more than any other teacher.

Finding that Rodriguez proved his *prima facie* case, I must now consider whether the District effectively established that it acted for legitimate business reasons. I find that it did not. The District witnesses were not consistent or credible in their claims that Rodriguez was suddenly engaging in inappropriate, threatening, dangerous, and/or negligent conduct. I also do not credit Deratus' testimony as to the various incidents which were documented. As to all of those, which formed, in part, the basis for both the disciplinary letter and the unsatisfactory evaluations of Rodriguez, no action was taken beyond the school level. While, on the one hand, Deratus and Boursiquot asserted that his conduct inspired fear and/or endangered the welfare of his students, on the other hand they ignored guidelines and regulations which, on their face, require reporting of actions having exactly that effect. ⁿ³⁸ Specifically, Deratus said Rodriguez was verbally abusive and threatening to students, yet no report was made pursuant to Chancellor's Regulation A-421 which prohibits the use of verbal abuse toward students and requires reporting of all such incidents. ⁿ³⁹ Similarly, the school's failure to report actions which it considered serious, such as Deratus feeling threatened by Rodriguez or believing that the children were endangered, runs afoul of the directive of then-Chancellor Joel Klein. In fact, Klein's memorandum underscores the importance of reporting even minor infractions.

The District's criticism of Rodriguez's pedagogy is also suspect. Though Goodman, Deratus and Boursiquot all claimed that his teaching was subpar and his students made no progress and actually regressed, the students were all advanced to the next grade at the completion of the school year. Goodman's response that students cannot be penalized for the failings of a teacher, and its implication that unqualified children were passed onto the next grade wholesale without being academically prepared for that, is at best suspect. That, combined with his failure to follow up with observations, and his defensive and inconsistent testimony, serve to discredit him.

It is also troubling that procedures in place for teachers who were evaluated as unsatisfactory during the school year were not followed for Rodriguez. That included something as critical as a follow-up formal observation prior to the is-

suance of a year-end rating. Deratus' response that a second formal observation would have been fruitless and she would have noticed improvement during her walk-through visits does not effectively refute the negative implications raised by Rodriguez's proof.

The legitimate business defense is also undermined by Boursiquot's year-end evaluation. While many categories are marked as unsatisfactory, several are not marked at all and in no category is Rodriguez rated as satisfactory. This stands in sharp contrast to 32 years of satisfactory ratings. In addition, despite allegedly serious and broad concerns about Rodriguez's performance, the evaluation contained no written comments and merely incorporated the December 21, 2010 disciplinary letter and the March 8, 2011 observation report.

Regarding Deratus, I am mindful that she rated a number of teachers under her charge as unsatisfactory. As to those persons, I have no knowledge of their circumstances or skills. The fact of those other ratings, while noted, is overshadowed by the evidence in this record as to her treatment of Rodriguez. Based on her demeanor, her reluctance to answer, and her inconsistent testimony, I do not credit her account of the incidents underlying the disciplinary letter of December 21, 2010 or the unsatisfactory rating delivered in March 2011. The fact that he was not again formally observed and evaluated for the rest of the year, combined with the promotion of his students, further undermines the District's defense.

On the basis of the foregoing, I find that the District's reasons for its actions toward Rodriguez were not based on legitimate business concerns; rather, they were motivated by animus and "but for" his protected activity, would not have occurred.

For the reasons set forth herein, I find that the District violated §§ 209-a.1(a) and (c) of the Act by its excessive visits to Rodriguez's classroom, its issuance of the December 21, 2010 disciplinary letter, its March 3, 2011 unsatisfactory rating of his performance, and its unsatisfactory rating of him for the 2010-11 year. Therefore, the District is hereby ordered to forthwith:

1. Cease retaliating against Rodriguez for his engagement in protected activity;
2. Rescind the December 21, 2010 disciplinary letter issued by Deratus;
3. Rescind the March 3, 2011 evaluation report and unsatisfactory rating issued by Deratus; and
4. Rescind Boursiquot's unsatisfactory year-end evaluation of Rodriguez for the 2010-11 school year.
5. Sign and post notice in the form attached, at all locations ordinarily used to communicate in writing and electronically with unit employees.

Dated at Buffalo, New York this 5th day of February, 2013

FOOTNOTES:

n1 Rodriguez was assisted in presenting his case by chapter leader David Brophy; Brophy was not acting on behalf of the United Federation of Teachers (UFT), however, which is the bargaining agent for the unit Rodriguez is in.

n2 Previously, Rodriguez taught second graders only as a "pull out" program and not on a daily basis.

n3 The grievance was subsequently withdrawn prior to a hearing. As to this withdrawal and others, there is no evidence that they were other than voluntary.

n4 Administrative Law Judge's (ALJ's) Exhibit 1(D).

n5 Charging Party's Exhibit 1.

n6 ALJ's Exhibit 1(E).

n7 The categories are: attendance and punctuality, personal appearance, planning and preparation of work, pupil participation, care of equipment, attention to records and reports, good relationships with parents, and willingness to accept special assignments.

n8 Charging Party's Exhibit 3. He testified that he specifically wanted Deratus to model a lesson since she had rated him unsatisfactory.

n9 Transcript, p. 109.

n10 Charging Party's Exhibit 4.

n11 Rodriguez, however, testified that he experienced more than 50 visits over a three month period.

n12 Transcript, p. 235.

n13 Transcript, p. 266.

n14 Transcript, p. 266-67.

n15 Transcript, p. 267.

n16 Transcript, p. 236.

n17 Transcript, p. 249.

n18 Employer's Exhibit 3.

n19 A "push-in/push-out" teacher is not assigned to one classroom, but goes into various classrooms or takes students out of class to offer targeted instruction.

n20 On cross-examination, she claimed that her testimony was intended to mean that there was no student in the class with "identified" learning disabilities.

n21 Charging Party's Exhibit 4.

n22 Rodriguez testified in both respects.

n23 Transcript, p. 387.

n24 ALJ's Exhibit 1(E).

n25 Klein is no longer in the position.

n26 Charging Party's Exhibit 10.

n27 District witness Les Matuk, who is a consultant and former employee in the area of special education and student suspensions, testified that the Chancellor's regulations, as well as Klein's memorandum, apply only to student conduct.

n28 Charging Party's Exhibit 9. This document provides a framework for a new performance review and professional development plan pursuant to the 1993-95 Collective Negotiations Agreement (Agreement) between the UFT and the District.

n29 Transcript, pp. 436-37.

n30 *City of Salamanca*, 18 PERB P3012 (1985).

n31 *Town of Hempstead*, 19 PERB P3022 (1986); *County of Nassau*, 35 PERB P3045 (2002), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 2 AD3d 1197, 36 PERB P7019 (3d Dept 2003).

n32 *County of Cattaraugus and Sheriff of Cattaraugus County*, 24 PERB P3001 (1991); *Hudson Valley Community Coll*, 25 PERB P3039 (1992); *County of Wyoming*, 34 PERB P3042 (2001).

n33 *Id.*, at 3101.

n34 I also note that it is established in the record that Rodriguez was given the option of a different assignment that was not under Deratus' supervision and he rejected it.

n35 *City of Salamanca*, *supra* note 15.

n36 Transcript, pp. 266-67.

n37 *State of New York (SUNY at Buffalo)*, 33 PERB P3020 (2000).

n38 To the extent Matuk's testimony is inconsistent with the clear language of the guidelines and regulations, I do not credit it.

n39 Charging Party's Exhibit 10.