STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC M. MOBERG, Charging Party, v. MONTEREY PENINSULA UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-2830-E PERB Decision No. 2381 June 27, 2014

Appearances: Eric M. Moberg, in propria persona; Lozano Smith by Kimberly L. Gee, Attorney, for Monterey Peninsula Unified School District.

Before Martinez, Chair; Huguenin and Banks, Members.

DECISION

HUGUENIN, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Eric Moberg (Moberg) from the dismissal (attached) of his unfair practice charge filed on March 29, 2010, against the Monterey Peninsula Unified School District (District) pursuant to the Educational Employment Relations Act (EERA).[1]

Moberg alleges in his initial and amended charges that he engaged in activity protected under EERA, and that the District violated EERA section 3543.5(a) by retaliating against him because of his exercise of rights under section 3543, including the filing of grievances and otherwise challenging actions by District administrative staff.

On appeal, Moberg asserts that PERB's Office of the General Counsel mistakenly dismissed his allegations, and urges us to reverse and issue a complaint. The District urges us to affirm.

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

We have reviewed Moberg's unfair practice charge and two amendments, the District's responses thereto, the Office of the General Counsel's warning and dismissal letters, Moberg's appeal, the District's response thereto, and the entire record in light of relevant law. Based on this review, we adopt the warning and dismissal letters as the decision of the Board itself, subject to our discussion below of the issues raised on appeal and we affirm the dismissal.

We turn now to the procedural history, factual background, Moberg's charge and the disposition below, contentions of the parties, and discussion.

PROCEDURAL HISTORY

On March 29, 2010, Moberg filed a charge claiming that he engaged in protected activity and that because of this activity, the District retaliated against him, in various specified ways, including termination of his employment. On May 28, 2010 and February 15, 2011, the District responded with position statements. On March 14, 2011, Moberg filed a first amended charge. On April 15, 2011, May 5, 2011 and August 30, 2011, the District responded with further position statements.

On August 1, 2011, the Office of the General Counsel issued the attached warning letter, informing Moberg that the first amended charge failed to state a prima facie violation of EERA and providing Moberg an opportunity to amend.

On September 15, 2011, Moberg filed a second amended charge. The District filed a further position statement on October 25, 2011.

On March 1, 2012, the Office of the General Counsel issued its dismissal letter.

On August 20, 2012, after being granted three extensions of time, Moberg filed this appeal and a request to present new evidence. On September 10, 2012, the District timely filed its opposition to Moberg's appeal and his request to present new evidence. On September 11,

2012, PERB's Appeals Assistant notified the parties that the filings were complete and that the case was placed on the Board's docket.[2]

FACTUAL BACKGROUND[3]

The Parties

The District is a public school employer within the meaning of EERA section 3540.1(k) and the Monterey Bay Teachers Association (MBTA) is an employee organization and Moberg's exclusive representative within the meaning of EERA section 3540.1(d) and (e). The District

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[2] Since the Appeals Assistant notified the parties that the filings were complete, Moberg has submitted five requests to present new evidence, viz., on March 4, 2013, March 11, 2013, April 15, 2013, December 2, 2013 and June 17, 2014. On March 18, 2013, the District filed an opposition to Moberg's March 4 and 11, 2013 requests. On April 16, 2013, the District notified PERB that it did not object to PERB taking judicial notice of the California Supreme Court's denial of Moberg's petition for review of a decision of the California Court of Appeal for the Sixth Appellate District or of the District's request for publication of the Sixth Appellate District's decision which was the subject of Moberg's petition for review; the District did, however, object to some statements made by Moberg in his April 15, 2013 request. As of the date of this decision, we have not received any opposition from the District regarding Moberg's December 2, 2013 or June 17, 2014 requests. PERB Regulation 32635(d) does not permit a party to present new evidence on appeal unless good cause is shown. Having failed to file the requests within the time frame for filing the appeal or demonstrate good cause why the Board should consider the new evidence notwithstanding the timeliness issue, these documents have not been considered in rendering this decision. We have, however, taken administrative notice that Moberg has exhausted his appeals and the decision regarding his dismissal from the District is now final.

[3] Because this matter comes before the Board on appeal from dismissal for failure to state a prima facie case, we are concerned here, as was the Office of the General Counsel, with whether the charging party alleged a prima facie case, not with making findings of fact or weighing the parties' conflicting allegations. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Golden Plains Unified School District* (2002) PERB Decision No. 1489.) PERB regulations require that the respondent "shall be apprised of the [charging party's] allegations, and may state in its position on the charge during the course of the [Office of the General Counsel's] inquiries." (PERB Reg. 32620(c).) On review of a dismissal, we stand in the shoes of the Office of the General Counsel and thus may consider additional facts, if any, proffered below by a respondent provided that these additional facts were proffered under oath in compliance with PERB regulations, complement without contradicting the facts alleged in the charge, and were undisputed by the charging party. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M; *Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Riverside Unified School District* (1986) PERB Decision No. 562a.)

and the MBTA are parties to a collective bargaining agreement (CBA) which has been in effect at all times relevant herein.

Article VI of the CBA provides a grievance procedure. Article VI(D) states that a conference must take place between the grievant and his or her immediate supervisor prior to the initiation of a grievance. Article VI(E)(1) provides that a grievance must be initiated within 15 days after the circumstances which gave rise to the grievance. Article VI(E)(2) provides that the "grievance shall be initiated in writing using the Grievance form, and shall be filed with the immediate supervisor."

The District has promulgated a policy and regulations regarding use of its internet and e-mail network. District Board Policy (BPE 4040) warns that violations of its use provisions could subject users to denial of internet and e-mail access and possibly subject them to legal and/or disciplinary actions. Among the prohibited uses are the storage or transmission of "defamatory, abusive, harassing or threatening" communications or material. BPE 4040 warns users that e-mail sent through the District's network is not privileged or private and may be reviewed by the District. BPE 4040 also contains a section on "Network Etiquette" which instructs users that they are expected to adhere to "generally accepted rules of network etiquette," including being polite, respecting privacy, not being disruptive, and avoiding personal attacks on other users. Additionally, the District's Employee Procedural Handbook for the 2009-2010 school year contains a section entitled, "District Communications" which includes "E-Mail Protocols" regarding use, content, advice, and etiquette for District e-mail communication.

Moberg was hired by the District to teach special education for the 2009-2010 school year, assigned to the Monterey Adult School, and classified as a probationary certificated employee. As part of his assignment, Moberg interacted with other District personnel,

including Ann Kilty (Kilty), Moberg's supervisor and the principal of the Monterey Adult School; Teresa Poirer (Poirer), program manager of the District's moderate/severe special education program; and Leslie Codianne (Codianne), associate superintendent of student services, who manages the District's special education programs and supervises Poirer.

Moberg alleges that in the Fall and Winter of 2009-2010, he had interactions with Kilty, Poirer and Codianne which constituted protected activity, and because of this protected activity, the District gave him notice in February 2010 that it would terminate his employment. We discuss below Moberg's allegations concerning these interactions, under the following headings: (1) Disputes with Poirer; (2) disputes with Kilty; (3) the Codianne lesson plan directive and grievance; (4) the Codianne reprimand and grievance; (5) the Kilty final evaluation; (6) the non-reelection, suspension and dismissal; and (7) subsequent administrative and judicial proceedings.

1. Disputes with Poirer

Beginning in late September of 2009, problems arose between Moberg and Poirer. The moderate/severe special education program is one of several specialized programs offered by the District's student support services.

a. Poirer's Authority

On September 23, 2009, Poirer wrote, in relevant part, to Moberg:

> Can we please meet soon to discuss some of the proposals you are making for the adult transition program? I am finding out about these things after the fact and as the program manager for your program I need to not only be informed of these things (green house, workability brochure, etc.) but also approve them, along with Ann [Kilty]. Perhaps this was not communicated clearly to you.

On September 24, 2009, Heath Rocha (Rocha), the District's director of student support services, wrote to Moberg in response to a question Moberg had asked him regarding the workability program and Individualized Education Programs (IEPs)[4]:

> Second, I want to clarify that Teresa [Poirer] is the Program Manager and can answer all of your questions related to the budget, IEP's [*sic*], etc. If she cannot answer any question, she is very good about connecting with myself [*sic*] or Leslie [Codianne]. Our Program Managers are responsible for everything in the programs and if something goes awry, they are held accountable by Leslie and I [*sic*], and thus should have the option to answer any question or need.

On September 24, 2009, Codianne wrote to Rocha in response to the e-mail exchange that included the two e-mails cited above, "Hi, I guess we have a problem here?"

b. <u>The Grill Day</u>

On or about October 29, 2009, Moberg's students participated in a "grill day" as part of the program's "Bistro" project which resulted in a profit of $13. In response to an e-mail sent by Moberg on October 29, 2009, announcing the success of the "grill day," Poirer sent the following e-mail:

> I thought it was understood that we were not going forward with new projects until all other elements of the program were fulfilled. In addition, we don't have money in our budget to put towards this project which I don't feel it [*sic*] is aligned with the goals of our program. I felt I made it clear to you that we would wait on developing other projects, besides the greenhouse, until I gave the go ahead.
>
> I have already spoken to Leslie [Codianne] letting her know that we would not be doing the Bistro and she supports me in this. It is also my understanding that Lorraine [Ramirez][5] did not support the

[4] An IEP is a written statement for a student with a disability developed, reviewed and revised by the student's special education instructor or team with input from his or her parents and specifies the student's academic goals and the method to obtain these goals. (See 34 Code of Federal Regs. 300.20 et seq.)

[5] Lorraine Ramirez is another special education teacher in the moderate/severe special education program.

> Bistro idea and has said she and her class would not be participating in it. I am fine with you barbequing on campus if Ann [Kilty] is fine with it, however the Bistro will not be supported financially by our program. Apparently we are having a communication break down and need to meet with Ann and Leslie so we are all clear as to the direction of our program and determine how you and I will work together effectively to provide the students with the best program possible.
>
> Do either of these dates work for everyone to meet?
>
> Friday, Oct. 30th @ 2:30pm
> Wed., Nov. 4th @ 1pm

Responding to Poirer's e-mail concerning the "grill day," Moberg wrote:

> Did you miss Heath's response to the same e-mail?
>
> [¶]
>
> Also, did you miss the part about the project making a profit, not costing money?
>
> Lastly, are you actually suggesting that this is such an important matter that we all need to meet on less than 24 hours notice? [*Sic.*]

On October 30, 2009, in response to the "grill day" e-mail exchange between Poirer and Moberg,

Codianne wrote, in relevant part:

> Eric, I am going to ask you to "STOP" this type of e-mail exchange with staff. I do not see this method of communication a means to solve issues in a positive manner. I have asked Patty[6] to contact you and schedule a meeting with me to discuss the ongoing issues and concerns being shared with me.

Moberg responded to Codianne's e-mail on November 2, 2009:

> I look forward to the meeting I scheduled with you next week. I welcome the opportunity to respond directly to what is some sort of "Swift Boat"[7] operation against me.

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[6] "Patty" is not identified in the pleadings; presumably she is Codianne's assistant.

[7] We understand "swift boat" as used by Moberg to refer to an unfair or untrue political attack. The term derives from the organization "Swift Boat Veterans for Truth" which

> I am not certain what you mean by "this type of e-mail exchange," but I will do my best to comply. I would also point out that my e-mail is a polite response to a less than polite and less than positive e-mail from our program manager. At the same time, I would point out that several weeks ago I requested that we all meet to discuss the repeated unprofessional and misleading e-mails being sent to me, inaccurate verbal accusations made about [*sic*] to other staff and management, and an inaccurate accusation from my supervisor that I was violating the education code, but no one responded to schedule that meeting, which leaves me e-mail.
>
> Additionally, to return to the Swift Boat analogy, I learned from John Kerry's mistake of not responding when someone unfairly attacks you. I will not make that mistake.

c. <u>The Target Account and the Parent Complaint</u>

On November 4, 2009, Poirer wrote to Moberg asking for receipts for items that were purchased at Target. Poirer apparently believed that Moberg had spent $300 beyond his "P.O." limit at Target.[8] In addition, Poirer asked that Moberg provide her with written IEPs at least two days prior to IEP team meetings so they could "discuss goals and make corrections if necessary before the meeting."

In response, on November 4, 2009, Moberg wrote to Codianne, Kilty and Rocha:

> I have never spent one penny at Target.
>
> Can any of you stop Teresa [Poirer] from repeatedly defaming me?
>
> Can any of you stop Teresa from continuing to pretend she is my supervisor and bossing me around? I have written over 300 IEPs

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conducted a widely-publicized campaign against 2004 U.S. Presidential candidate John Kerry. (See Zernike, *Veterans Long to Reclaim the name 'Swift Boat,'* The New York Times Online (June 30, 2008).)

[8] Purchase Order (P.O.) limit was not explained, but, based on the context in which it was used in the e-mails between Moberg and other District employees, we presume that the District has some sort of account at Target stores whereby District employees can purchase items and bill them to the District.

> in my career and acted as Administrative Designee on 100 more. Teresa Poirer has had her PPS credential[9] for a little over a year.

On November 13, 2009, Moberg wrote to Poirer asking if she had informed Codianne that there had been a parent complaint against him. In response, Codianne wrote to Moberg on November 15, 2009, asking:

> Eric, what is the intent of this e-mail? I thought you understood that I have requested that you put an end to e-mail communications which are aimed at "challenging" authority figures and questioning program decisions. I hope this is very clear!

On November 15, 2009, Moberg responded to Codianne, as follows:

> Associate Superintendent Codianne:
>
> My intent was to determine why you asked me if there had been any parent complaints. It occurred to me that this was likely based on some false claim made by Teresa Poirer, who has made many false claims about me to many people lately, including a recklessly false claim that I spent $500 at Target without authorization. Did you ask Teresa to see any receipts?
>
> I think I have every right to ask such a question under such circumstances to any person, regardless of what authority they claim or actually have.
>
> Would I not have a right to ask such a question to the President of the United States? Journalists do every day. I think we both know that I would, so why, then, would I not have the right to ask the question to a psychologist who has no authority over me, by law, since she has no administrative credential?
>
> Teresa has repeatedly reminded me that you two are personal friends and that her husband is your personal carpenter. I have no idea if either claim is true, given the source, but if they are, do you have a conflict of interest here? You don't seem to mind me challenging Ann Kilty and sending copies to the Superintendent and School Board President. After all, Ann Kilty is my actual supervisor and many of my challenges actually relate to program decisions she has made or allowed Teresa to make.

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[9] A PPS credential is a credential which authorizes individuals to provide school services in grades 12 and below, including preschool, and in classes organized primarily for adults as counselors, school psychologists, school social workers, or school child welfare and attendance regulators, according to the specific specialization area and service authorization listed on the credential. (See Ed. Code, § 44266.)

> Is there some reason that you can't allow Teresa to answer a simple question? If she made the claim then why shouldn't I know what it is? If there were a legitimate parent complaint, shouldn't we all address it?
>
> If, on the other hand, Teresa did not make any such claim to you, then why not just let her answer the question?
>
> How is my asking a psychologist if she has claimed there was a complaint about me "challenging" an "authority figure" or "questioning program decisions"?
>
> The real issue here is honesty--do we have a credentialed psychologist who is consistently dishonest?
>
> [¶ . . . ¶]
>
> After reading your below response [previous e-mail], I conclude that a) Teresa did make such a false claim to you, b) you knew it was likely false, and c) you are now protecting her from herself.
>
> So, if I do not hear from you or Teresa, I will assume that I am correct, and we can move on.
>
> Let's see what our colleague Jill Low thinks about this.[10]

On November 16, 2009, Codianne responded to Moberg, stating that she was "very uncomfortable with the tone and intent" of Moberg's November 15, 2009, e-mail and that she had told Moberg to stop sending "challenging" e-mails to all staff including Kilty.

d. <u>The Nextel Phone</u>

On November 23, 2009, Poirer sent Moberg an e-mail asking for a list of the Nextel phone numbers used in his class.[11] On November 24, 2009, Moberg sent an e-mail to Poirer:

> Thank you for questioning my use of the MPUSD Nextel phones that MCOE sent over with the program.
>
> I looked for you this morning at your office to turn mine in to you personally, but I could not find you, so I gave my Nextel to Sharon Ogawa. She promised to get it to you.

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[10] Jill Low (Low) is the president of the MBTA.

[11] The Monterey County Office of Education (MCOE) provides Nextel phones to District staff members in the moderate/severe special education regional program in which Moberg was assigned.

> The truth is that I never requested the phone and do not want the responsibility of the MPUSD Nextel phone. Some of my fellow staff members feel the same way. I'll get you a list later today.

Also on November 24, 2009, Codianne sent Moberg an e-mail which, in relevant part, stated:

> I am requesting that you utilize the Nextel that the Department provided to you as part of the Regional Program. It is important that you . . . have a District phone available to you to access in emergency situations that require direct and timely communication with outside sources.

On November 30, 2009, Moberg responded to Codianne by e-mail, "I will certainly comply with your directive, which you diplomatically couch in terms of a request, to utilize the MPUSD Nextel."

e. The Cardiopulmonary Resuscitation (CPR) and First Aid Cards

On November 23, 2009, Poirer sent Moberg an e-mail asking for copies of his current CPR and First Aid cards. The District had scheduled a CPR/First Aid training which was mandatory for employees who were not currently certified. In response, Moberg wrote, "It is in HR, and I do not waive my privacy rights for you to access my file."

On November 30, 2009 Poirer wrote back, "That's fine, I just need the dates so we know when they expire."

Moberg never responded to Poirer's request.

f. The Student Files

On or about December 9, 2009, Moberg returned to his classroom after making copies and found Poirer searching for files in a cabinet. Poirer explained that she was looking for records that she needed and has access to as program manager and did not think Moberg would mind since the cabinet was unlocked.

On December 11, 2009, Moberg wrote, in relevant part, to Poirer:

> Thanks for the note and the agreement, and if we ever hold an IEP meeting in your office, I agree not to "help myself" to your files while you step out to make copies.
>
> [¶ . . . ¶]
>
> Lastly, aren't you taking your job title of "psychologist/program manager" a little too seriously? You've had a pupil personnel services credential for what, less than two years?

On December 11, 2009, Codianne wrote to Moberg:

> I have decided to make an administrative decision and effective immediately, I am requesting that ALL questions, concerns, requests, etc. for your classroom and students go directly and immediately to Heath Rocha.

On January 4, 2010, Poirer filed a formal complaint with the District against Moberg. Poirer claimed that Moberg's behavior had become increasingly hostile and disrespectful toward her over the course of the school year and that Moberg frequently refused to work with her. As a result of Moberg's behavior, claimed Poirer, it was becoming impossible for her to perform the duties of her job and "provide a safe supportive environment for our students." Poirer also noted what she viewed as a lack of judgment on Moberg's part because he had stored power tools in his classroom and had transported a "physically fragile, orthopedically impaired student in his own personal vehicle without proper restraint." Poirer also claimed that two of the instructional assistants assigned to Moberg's class had complained about Moberg and one was being transferred to another class because of Moberg's "treatment of her and the lack of organization and structure in his classroom."

On January 25, 2010, Poirer sent an e-mail to several District administrators asking for help in obtaining records pertaining to some of Moberg's students. The e-mail was entitled, "Need info from files, Eric won't give access to files." According to Poirer's e-mail, she needed to update files for several of Moberg's students, and she had sent an instructional

assistant to Moberg's class to make copies from Moberg's files but he refused to give her access to the files.

2. Disputes with Kilty

As the site supervisor of the Monterey Adult School, Kilty was Moberg's immediate supervisor.

a. The Observation Grievance

On September 29, 2009, Kilty observed Moberg's class. Kilty rated Moberg as meeting District standards in two categories and partially meeting District standards in two categories. Overall, Kilty rated Moberg as partially meeting District standards.

On November 6, 2009, Moberg wrote to Codianne asking:

> What are we going to do about Ann Kilty's serially defamatory September 29, 2009 observation critique of my work. [*Sic.*] In other words, do we want such an inaccurate document in my personnel file and subject to subpoena at a Due Process hearing [to assess the appropriateness of an IEP for a particular student]? Wouldn't this leave our attorney with the dilemma of either
> a) allowing the document to impeach my competence or
> b) questioning Ann Kilty in front of the Administrative Law Judge to impeach her honesty?

On November 9, 2009, Kilty again observed Moberg's class. Kilty rated Moberg as meeting District standards in two categories and partially meeting District standards in four categories. Kilty's overall assessment of Moberg was that he partially met District standards.

On November 12, 2009, Moberg sent Kilty an e-mail regarding the September 29, 2009 observation, which Moberg described in the e-mail as a "grievance under the relevant contract language." On November 22, 2009, Moberg e-mailed Kilty to ask her if she was available to meet regarding his grievance over his observation. Kilty responded that she was not available until after the Thanksgiving break. Moberg responded with an e-mail asking Kilty about the

timeline for his grievance and whether Kilty was asking him to waive it. On November 23, 2009, Kilty wrote in response:

> I am not asking for you to waive your timeline for a grievance.
>
> Please refer to MBTA and MPUSD Master Contract pg 10, Item 2.
>
> "A grievance shall be initiated in writing using the Grievance form, and shall be filed with the immediate supervisor." I did receive your email from 11/12 but have not yet received the Grievance Form. . . .
>
> Item 3. Please specify your grievance according to the '. . . the (*sic*) specific Article and section(s) allegedly violated, misinterpreted or misapplied, etc.' I have not yet received the specific sections of violation.

Kilty went on to explain that the first step in the grievance process was a conference and offered Moberg a choice of dates and times when she was available.

On December 7, 2009, Moberg filed a grievance with Kilty alleging twenty six (26) contract violations.[12] The violations that Moberg alleged primarily concerned Kilty's September and November 2009 observations of Moberg's class as well as equipment and repair issues regarding Moberg's class that Kilty, as the site supervisor, had not addressed.

b. Campus Keys

On October 27, 2009, Moberg asked Kilty for a key to the multi-purpose room (MPR) on the Monterey Adult School campus. Kilty informed Moberg that:

> We have limited the check out of keys this year because of some security concerns in the past. Someone is always at the MPR to let you in. Please just call the front office and we'll open the door.

On November 13, 2009, Moberg sent Kilty an e-mail asking her if the real reason she did not give him a key to the gym or submit a work order for a fan and light he had requested for a

[12] Moberg alleged several different filing dates for his "26 point grievance," we find, as did the Office of the General Counsel, that it was filed on December 7, 2009.

diaper changing room was because "you don't want our program on the campus?" Kilty's response e-mail denied Moberg's accusation.

On January 4, 2010, Moberg again asked Kilty for keys, as follows:

> [W]hy don't you just give me and Lorraine [Ramirez] keys to the MPR as President Low suggested so we don't need to bother anyone else?
>
> I know that other Monterey Adult School faculty and non-credentialed staff have keys to the MPR.
>
> You do trust Lorraine and me, don't you?

3. <u>The Codianne Lesson Plan Directive and Grievance</u>

As Associate Superintendent of Student Services, Codianne oversaw several specialized programs within the District, including the moderate/severe and workability programs in which Moberg's students participated.

On January 21, 2010, Codianne observed Moberg while he taught his class. Codianne rated Moberg as meeting District standards in two categories and partially meeting District standards in four categories. Overall, Codianne rated Moberg as partially meeting District standards. During her observation, Codianne asked to see Moberg's lesson plan. In a written recommendation to Moberg following the observation Codianne stated, in relevant part:

> The lack of specific plans that clearly delineate the Instructional Goal; Materials needed for instruction; Expected student outcomes; or, Method of assessment resulted in the lesson being directed by Mr. Moberg and his IAs as being disorganized and disjointed. The lack of documented planning also was observed in transitions from one activity to the next being unclear.

On January 27, 2010, in an e-mail to Ramirez, Moberg asked to see Ramirez's lesson plans explaining that he was "working on a project for Leslie Codianne." Ramirez apparently contacted Codianne, who responded to Moberg:

> I have instructed Lorraine [Ramirez] "NOT" to share her lesson plans with you!!! If you and Lorraine work on a co-planned activity you work together on that lesson plan. At no time in our

> Post Observation Conference did I state that you would be working on a "project" for me. I clearly stated that you were expected to have Weekly Lesson Plans developed as part of your responsibilities as a Credentialed Teacher. You requested from me support in Writing Lesson Plans and I will provide you with that support and identify specifically who will act as your Coach in this matter!

On February 3, 2010, Moberg circulated a "draft" grievance to unspecified District staff asking that they "Please review the below for facts. Let me know if you see any errors. I would like to file it this week, so as not to violate any timelines." The "draft" grievance concerned the increase in Moberg's work day due to the requirement that he produce lesson plans. In this grievance, Moberg claimed that the lesson plan requirement was in retaliation for his December 7, 2009 grievance.

4. <u>The Codianne Reprimand and Grievance</u>

On January 25, 2010, Codianne issued Moberg a letter of reprimand. The letter primarily concerned an incident where one of Moberg's students had "soiled herself" when he had left the classroom to go to Monterey Peninsula College. The letter alleged that school staff were unable to contact Moberg, either on his District Nextel radio/phone or his personal cell phone, and consequently had to transport the student to her group home in the District van. The reprimand noted an incident earlier in November 2009 when the parent of one of Moberg's students was unable to contact Moberg on the Nextel phone. The reprimand cited Codianne's November 24, 2009, directive to Moberg that he use his Nextel "for all communications with Administrators, staff and families during school hours and activities in the community." Codianne had instructed Moberg to always have his Nextel turned on "to ensure you can be readily reached by District staff."

On February 8, 2010, Moberg filed a grievance over the letter of reprimand.

5. The Kilty Final Evaluation

On February 5, 2010, Kilty evaluated Moberg. She rated Moberg as partially meeting District standards in five categories and below District standards in one category, viz., "Developing as a Professional Educator Including Adjunct Duties." As to this category Kilty remarked on the evaluation form:

> Mr. Moberg has had difficult and occasionally adversarial relationships with colleagues including peers and administration as evidenced in numerous email exchanges.
>
> Recommendation:
> Cease email communication that is not respectful of colleagues.

Kilty recommended that Moberg, a probationary employee, not be reemployed.

6. The Non-reelection, Suspension and Dismissal

On February 9, 2010, pursuant to Education Code section 44929.21, the District governing board decided not to reelect Moberg to a second year as a probationary employee of the District, thus severing his employment at the conclusion of the then-current 2009-2010 school year.

In addition, on February 9, 2010, pursuant to Education Code section 44948.3, the District governing board adopted a statement of charges and notice of recommendation for dismissal of Moberg. Concurrently, the District governing board imposed on Moberg an immediate suspension without pay. The statement of charges specified that Moberg was to be dismissed for cause, to wit, evident unfitness for service (Ed. Code, § 44932(a)(5)) and persistent violation of or refusal to obey school laws and regulations (Ed. Code, § 44932(a)(7)), and that he could request a hearing on the charges.

On February 12, 2010, Superintendent Marilyn K. Shepherd (Shepherd) wrote to Moberg, informing him of the governing board's actions, transmitting the charges and

suspension notice, and directing Moberg not to go to any District site, conduct any business on behalf of the District, or attend any District meetings. Moreover, Shepherd wrote:

> We have received complaints from employees about you making contact with them either directly or through their District and personal email accounts. You are hereby directed to respect the wishes of our employees who do not wish to have contact with you. We hope it will not be necessary for us to obtain a restraining order in this regard, but we are informing you that if you ignore the wishes of our employees, we will do so. Any contact to the District should be through me.

On March 3, 2010, Moberg filed a grievance regarding the statement of charges and suspension.

On June 7, 2010, the District added a third charge to the pending administrative hearing on the statement of charges, to wit, dishonesty. (Ed. Code, § 44932(a)(3).)[13]

7. Subsequent Administrative and Judicial Proceedings

a. The Administrative Law Judge's (ALJ) Dismissal

On June 21 and 22, 2010, an ALJ retained by the District conducted a hearing on the District's dismissal charges. The ALJ issued the proposed decision on August 12, 2010. The ALJ concluded that although the District had not proved up evident unfitness for service, the District had cause to dismiss Moberg for dishonesty and persistent violation of or refusal to obey school laws and regulations. The ALJ stated:

> Special education is an area where a team approach is not only desirable, but essential. The evidence demonstrated that during Respondent's brief tenure with the District he was rude and/or disrespectful to various fellow staff members on numerous occasions. Respondent's e-mail messages convey the opposite of

[13] The District averred that a statement in Moberg's employment application was misleading. Moberg had stated that he left prior employment with the San Mateo County Office of Education (SMCOE) to "seek better opportunities and avoid budget and program cuts." The District averred that its investigation had uncovered that Moberg's prior employer had initiated dismissal proceedings which were settled with Moberg's agreement to resign. The District averred that it never would have hired Moberg had it known the circumstances in which he left his prior employment.

> a good faith effort to be a contributing member of a team. The record contains three warnings from his superior to stop using email in the manner that Respondent was using it. Respondent, however, did not stop. In addition, it was proven that Respondent was dishonest, and he presented no real evidence of rehabilitation or even mitigation. By his testimony, Respondent conveyed an attitude consistent with that conveyed in his e-mail communications and consistent with the conclusion that he felt justified in both his persistent violation of directives and in claiming that his reason for leaving the employ of SMCOE was not related to a dismissal proceeding. Accordingly, it is concluded that the District's dismissal of Respondent was warranted.

(OAH Case No. 2010031130, pp. 7-8.)

On September 7, 2010, the District governing board adopted the ALJ's proposed decision and voted unanimously to dismiss Moberg. On November 4, 2010, Moberg sought review of the dismissal in Monterey County Superior Court.

b. <u>The Superior Court Decision</u>

On September 15, 2011, the Superior Court issued its judgment, which adopted its statement of intended decision issued on August 23, 2011, upholding the dismissal and denying Moberg's petition for a writ of mandate. (*Moberg v. Monterey Peninsula Unified School District Board of Education* (Super. Ct. Monterey County, September 15, 2011, No. M109124) (*Moberg I*).) The court ruled that the administrative record did not support a finding of dishonesty, but did support a finding of unfitness to teach and of persistent violation of or refusal to obey school laws and regulations. (*Moberg I*, p. 9.) As to persistent violation of or refusal to obey school laws and regulations, the court determined that Moberg's conduct during his employment with the District demonstrated acts which were willful, persistent and repeated, and affected students. (*Moberg I*, p. 12.) As to unfitness to teach, the court found

that Moberg's conduct during his employment with the District demonstrated unfitness for services which was attributable to a defect in his temperament.[14] (*Moberg I*, pp. 14-16.)

Moreover, Moberg's Petition to the Superior Court had alleged that

> The California Education Employees Representation Act (*sic*) protects teachers, such as Petitioner, from retaliation for complaining.

Responding thereto, the court found that the administrative record did "not demonstrate by a preponderance of the evidence that the protected activities were a contributing factor in the alleged retaliation." (*Moberg I*, p. 16.) The court noted: (1) the claimed retaliation was not raised at the administrative hearing; (2) there was no evidence that Moberg's alleged disclosures of mis-management of the special education program or his complaint about the failure to add a fan and light to the diaper changing room were protected under the Reporting by School Employees of Improper Governmental Activities Act (Ed. Code, § 44110 et seq.); and (3) even if the disclosures were protected, there was no evidence that they motivated the dismissal. The court stated: "[T]he administrative record suggests that the dismissal of petitioner was motivated by his inability to work with other staff members, which negatively affected the special education program." (*Moberg I*, p. 17.) Additionally, the court dismissed summarily Moberg's claim that he was subjected to disparate treatment, observing that Moberg had not raised this claim as a defense at the administrative hearing and that the evidence suggested that the District was motivated to dismiss Moberg because of his inability to work with others. (*Ibid.*)

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[14] Citing *Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429 (evident unfitness for service connotes a fixed character trait, presumably not remediable merely on receipt of notice that one's conduct fails to meet the expectations of the employing school district); *Morrison v. State Board of Education* (1969) 1 Cal.3d 214 (listing factors used in determining whether a teacher's conduct indicates unfitness to teach).

Moberg appealed.

c. The Appellate Court Decision[15]

On January 11, 2013, the California Court of Appeal, Sixth Appellate District issued its unpublished decision in *Moberg v. Monterrey Peninsula Unified School District Board of Education* (Jan. 11, 2013, H037865) (*Moberg II*). The appellate court concluded that substantial evidence supported the lower court's decision to sustain the dismissal on the ground of persistent violation of or refusal to obey school laws or regulations. The appellate court wrote:

> [T]hese emails demonstrate Moberg's repeated sending of abusive and attacking email communications to District staff during his employment with the District and constitute evidence demonstrating his persistent violation of or refusal to obey school rules regarding email etiquette and network etiquette as stated in the Employee Procedural Handbook and the "Employee Use Of Technology" policy. Accordingly, we conclude that the trial court's ruling that Moberg was properly dismissed for cause on the ground of persistent violation of or refusal to obey school laws or regulations (§ 44932, subd. (a)(7)) due to his repeated violation of the District's email rules and policy is supported by substantial evidence.
>
> Having reached this conclusion, we need not consider Moberg's additional claims that the trial court erred in finding that the weight of the evidence supported his dismissal for evident unfitness for service [Ed. Code,] § 44932, subd. (a)(5)).

(*Moberg II,* p. 29.) As to Moberg's retaliatory dismissal and disparate treatment claims, the appellate court concluded that Moberg had waived them by failing to raise them at the administrative hearing. Moberg unsuccessfully sought both rehearing and Supreme Court review. On February 4, 2013, the Sixth Appellate District denied Moberg's petition for rehearing. On April 10, 2013, the California Supreme Court denied both Moberg's petition for review of the Sixth Appellate District's decision and the District's publication request.

[15] We here mention the outcome of the Appellate Court decision for the sake of clarity. We do not rely on the Appellate Court's decision in reaching our conclusions.

(*Moberg v. Monterrey Peninsula Unified School District Board of Education* (Apr. 10, 2013, S208518).

MOBERG'S CHARGE AND THE DISPOSITION BELOW

1. Initial and First Amended Charge

On March 29, 2010, Moberg filed his initial unfair practice charge alleging that the District retaliated against him for filing a "26 point" grievance. The District's May 28, 2010, position statement denied Moberg's allegations and any violation of EERA. The District urged that there was no nexus between Moberg's protected conduct and the adverse actions taken by the District. The District submitted a further response on February 15, 2011 which included, inter alia, the ALJ's proposed decision from Moberg's Education Code dismissal hearing and the District governing board's resolution adopting the ALJ's proposed decision. The District also raised the issue of collateral estoppel of Moberg's retaliation claims.

On March 15, 2011, Moberg filed his first amended charge. In his amended charge, Moberg alleges that several e-mails from November 2009 through January 2010, were in furtherance of the grievance process.

On April 15, 2011, the District submitted a supplemental response, addressing the instant charge as well as four other unfair practice charges which Moberg had filed. As to the instant charge, the District denied Moberg's allegations, claimed that Moberg mischaracterized the District's evaluations and observations of his work, and claimed that it brought the supplemental dismissal charge against Moberg in June 2010, because of Moberg's dishonesty, not in retaliation for Moberg's protected conduct.

Warning Letter

The Office of the General Counsel issued a warning letter on August 1, 2011, notifying Moberg that his first amended charge did not state a prima facie case of retaliation. The Office

of the General Counsel relied on *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).

a. Protected Conduct and Employer Knowledge

Applying the *Novato, supra,* PERB Decision No. 210 test, the Office of the General Counsel determined that Moberg had engaged in protected conduct by filing grievances. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.) The Office of the General Counsel also determined that the District had knowledge of this protected conduct since the grievances would have likely been filed with a District manager and the District did not deny that it knew of the grievances. (*Oakland Unified School District* (2009) PERB Decision No. 2061.)

The Office of the General Counsel concluded, however, that Moberg's e-mail messages of November 2, 4, 6, 15, 2009 and January 4, 2010, were not protected activity because the e-mails did not constitute group activity, being undertaken for the sole benefit of Moberg himself, a single employee. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552 (*Los Angeles*).) Nor did Moberg's merely sending a copy of one of the e-mails to his union rep rise to a solicitation of union assistance or otherwise implicate EERA protections. (*Oakland Unified School District* (2007) PERB Decision No. 1880.)

b. Adverse Action

The Office of the General Counsel noted that Moberg's initial and first amended charge set forth seven (7) allegedly adverse actions by the District: (1) the requirement that Moberg prepare lesson plans; (2) a directive that Moberg only speak with Codianne; (3) the decision to non-reelect Moberg for the 2010-2011 school year; (4) the adoption of the statement of charges; (5) a directive that Moberg only speak with District Superintendent Shepherd; (6) the

adoption of the supplemental charge of dishonesty for dismissal; and (7) the resolution to adopt the ALJ's proposed decision of dismissal.

The Office of the General Counsel determined that the notice of non-reelection and the adoption of the statement of charges constituted adverse actions by the District. The Office of the General Counsel concluded that the March 14, 2011, allegation concerning the District's September 7, 2010, resolution to adopt the ALJ's proposed decision of dismissal was untimely. Similarly untimely were the March 14, 2011, allegation concerning the June 2010 adoption of the dishonesty charge, and the March 14, 2011, allegation concerning a directive that Moberg speak only with Codianne which although not dated in Moberg's amended charge, was not alleged in the initial charge and thus likely occurred more than six months prior to the filing of the first amended charge. The Office of the General Counsel concluded that as to the directive to speak only with Shepherd, there was an insufficient showing, and as to the directive that Moberg prepare written lesson plans, Moberg did not allege how this duty applicable to all District teachers was adverse as to him.

c. Nexus

The Office of the General Counsel concluded that although Moberg had established a close temporal proximity between his protected conduct and the District's adverse actions, he had failed to allege facts demonstrating a sufficient causal nexus. The Office of the General Counsel concluded that Moberg had failed to establish that he was treated disparately from similarly situated employees and, that, contrary to Moberg's allegations, the observations and evaluation did not demonstrate that he met District standards. The Office of the General Counsel concluded that Moberg had failed to provide evidence of union animus and that the District's statement of charges and resolution of dismissal set forth numerous specific reasons justifying Moberg's dismissal under the Education Code and were not exaggerated.

d. Interference with Moberg's Right to Collect Evidence

The Office of the General Counsel concluded that under EERA an employer's duty to provide information runs only to the exclusive representative and does not extend to individual employees. (*Antelope Valley Hospital District* (2011) PERB Decision No. 2167-M.)

2. Second Amended Charge

On September 15, 2011, Moberg filed his second amended charge. Therein Moberg set forth allegations regarding the court proceedings arising out of his dismissal, and claimed that several e-mails that were the basis for his dismissal were either "informal grievances" under the CBA or requests for union assistance. Moberg also alleged that the District exaggerated and misrepresented the causes for dismissal against him, that he had begun complaining about racial discrimination, mis-management of funds and false statements by his immediate supervisor on September 24, 2009, and that the District interfered with his due process rights under the dismissal proceedings.

The District responded with its second supplemental position statement on October 25, 2011. In it, the District: (1) argued that Moberg's retaliation allegations were barred by the doctrine of collateral estoppel; (2) provided the District's version of the various court proceedings arising from and after its dismissal of Moberg; (3) responded to Moberg's retaliation claims; and (4) urged that Moberg's November 2009 and January 2010 e-mails were not protected conduct.

3. The Office of the General Counsel's Dismissal Letter

On March 1, 2012, the Office of the General Counsel determined that Moberg's second amended charge did not cure the deficiencies noted in the warning letter and dismissed his charges.

a. Protected Activity

The dismissal letter noted that Moberg characterized his November 2, 4, 6, 15, 2009 and January 4, 2010, e-mails as "informal grievances." The Office of the General Counsel rejected that characterization, stating "there does not appear to be any connection between these e-mail messages and any collective concerns of the bargaining unit." (Dismissal Ltr., p. 8.) Moreover, because Moberg had alleged for the first time in his second amended charge filed on September 15, 2011, that in the Fall of 2009, he had complained to the District about racial discrimination against his students, mis-management of funds by the District and false statements made by Kilty on her observations of him in September 2009, the Office of the General Counsel dismissed these allegations as untimely.

b. Adverse Action

The Office of the General Counsel addressed Moberg's contention that his allegation in March 2011 of the District's adoption in September 2010 of the ALJ's proposed decision of dismissal was timely because the action was an extension of the February 9, 2010, statement of charges which he had alleged in March 2010. The Office of the General Counsel disagreed, ruling that under PERB's precedents the notice of intent to dismiss and the subsequent dismissal itself, are separate adverse acts, each of which triggers separately the six-month limitations period. (*Regents of the University of California* (2004) PERB Decision No. 1585-H (*Sarka*); *Los Banos Unified School District* (2009) PERB Decision No. 2063.)

c. Nexus

The Office of the General Counsel concluded that since the November 2009 and January 2010 e-mails were not protected conduct, they could not form the basis of a prima facie case for retaliation. Moreover, noted the Office of the General Counsel, even if the e-mails were protected, in the Education Code dismissal proceeding the District objected to the

number and tone of the e-mails, which allegedly transgressed the District's e-mail policy and regulations, rather than to the content of the e-mails which concerned Moberg's workplace concerns. Therefore, even if the e-mails were protected, Moberg had failed to establish a nexus between this allegedly protected activity and the notice of dismissal.

The Office of the General Counsel also concluded that the factual allegations failed to establish a nexus between Moberg's conduct and the District's actions. The Office of the General Counsel rejected Moberg's contentions that: the District had misrepresented his work performance; the District decided to non-reelect him for vague and insufficient reasons; the District made a cursory investigation of the events that led to Codianne's January 25, 2010 letter of reprimand; the District had a practice of always re-electing first-year probationary teachers who met District standards, from which it departed in Moberg's case; the District treated Moberg differently from other teachers; and the District unlawfully suspended Moberg without pay while his dismissal hearing was pending.

The Office of the General Counsel did not address the District's contention that Moberg was collaterally estopped to raise the retaliation allegations in his second amended charge because Moberg had litigated these claims in superior court.

CONTENTIONS OF THE PARTIES ON APPEAL

On appeal, Moberg contends that the Office of the General Counsel mistakenly concluded that: (1) Moberg's November 2, 6, 15, 2009 and January 4, 2010, e-mails were not protected activity; (2) the District's September 7, 2010, resolution to dismiss Moberg did not relate back to his timely filed allegation challenging the February 2010 notice of intent to dismiss; (3) the District's directive not to speak with anyone other than Shepherd was not adverse; (4) the requirement that he produce lesson plans was not adverse; (5) there was no direct or circumstantial evidence of nexus between his protected conduct of filing grievances

and the District's termination of his employment; and (6) the February 2010 immediate suspension without pay did not indicate unlawful motivation.

Moberg also claims on appeal that the Office of the General Counsel mis-stated and omitted several essential factual allegations and that the Office of the General Counsel improperly relied on the superior court's decision in *Moberg I*, because it was then still pending before the appellate court. Additionally, Moberg urges that misconduct by the District and its law firm is evidence of unlawful motivation.[16] Lastly, Moberg urges that PERB should reject the District's contention that he is collaterally estopped to bring his retaliation charge before PERB.

The District responds that Moberg's appeal should be denied because he has failed to demonstrate that the Office of the General Counsel erred in dismissing his charges. In addition, the District again argues that Moberg's retaliatory dismissal allegation is barred under the doctrine of collateral estoppel.

DISCUSSION

We review briefly the prima facie case of retaliation under EERA and then address the parties' contentions on appeal.

The Prima Facie Case of Retaliation

To establish a prima facie case of retaliation in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights guaranteed by EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took action against or adverse to the interest of the employee; and (4) the employer acted

[16] We conclude that Moberg's allegations regarding misconduct in other cases by the law firm hired by the District are not necessarily indicative of misconduct by that law firm in Moberg's case. Therefore, we find that this allegation lacks relevance.

because of the employee's exercise of the guaranteed rights. (*Novato, supra*, PERB Decision No. 210.)

Unlawful motive is "the specific nexus required in the establishment of a prima facie case" of retaliation. "[D]irect proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus . . . unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Novato, supra*, PERB Decision No. 210, p. 6; *Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*); *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793; *Radio Officers' Union v. NLRB* (1954) 347 U.S. 17, 40-43.)[17]

To assist with assessing circumstantial evidence of unlawful motive, PERB has developed a set of "nexus" factors. Although the timing of the employer's action in close temporal proximity to the employee's protected activity is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), it does not, without more, demonstrate the necessary nexus between the employer's action and the protected activity. (*Moreland Elementary School District* (1982) PERB Decision No. 227.)

Along with suspicious timing, facts establishing one or more of the following factors must also be present for a prima facie case: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of*

[17] When construing California Public Sector Labor Relations statutes, California courts and PERB rely on National Labor Relations Board (NLRB) and judicial decisions construing similar language in the National Labor Relations Act. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850; *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608.)

California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560; (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento, supra,* PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Where the employer's motive is the central issue, the fact finder must often rely heavily on circumstantial evidence and inferences. Only rarely will there be probative direct evidence of the employer's motivation. (*Shattuck Denn Mining Corp. v. NLRB* (9th Cir. 1966) 362 F.2d 466 (*Shattuck Denn*).) An illegal purpose harbored by a discriminating employer may be inferred from the circumstances surrounding the discipline or discharge. These may include anti-union animus exhibited by the employer or its agents; the pretextual nature of the ostensible justification; or other failure to establish a business justification. (*Shattuck Denn.*) In such cases, the Board is free to draw inferences from all the circumstances, and need not accept an employer's self-serving declarations of intent, even if they are uncontradicted. (*NLRB v. Walton Mfg. Co.* (1962) 369 U.S. 404; *NLRB. v. Mrak Coal Co.* (9th Cir. 1963) 322 F.2d 311; *NLRB v. Pacific Grinding Wheel Co., Inc.* (9th Cir. 1978) 572 F.2d 1343; *NLRB v. Warren L. Rose Castings, Inc.* (9th Cir. 1978) 587 F.2d 1005; *Royal Packing Co. v. Agricultural Labor Relations Bd.* (1980) 101 Cal.App.3d 826.)

Moberg's Prima Facie Case

There is no dispute that Moberg engaged in protected conduct by filing grievances. There is no dispute that the District knew that Moberg filed grievances. There is no dispute that the District took adverse action against Moberg. Therefore, Moberg has successfully alleged the first three requirements for a prima facie case of retaliation under EERA. The crucial issue is whether Moberg demonstrated a nexus between his protected activity and the District's adverse actions. We conclude, with the Office of the General Counsel, that he did not.

The E-mails

The Office of the General Counsel dismissed Moberg's allegations that his November 2, 6 and 15, 2009 and January 4, 2010, e-mails were protected activity because they were not a "logical continuation of group activity." (*Los Angeles, supra,* PERB Decision No. 1552 [where an employee's complaints are undertaken alone and for his or her sole benefit, that individual's conduct is not protected].) In his appeal, Moberg asks that we consider the e-mails in question as either "informal grievances" or as requests for union assistance. Moberg claims that the fact these e-mails were part of the case for dismissal against him demonstrates the District's retaliatory motive.

According to Moberg, these e-mails are a required precursor to the filing of a formal grievance under the CBA. Article VI(D) of the CBA states:

> **Conference.** In keeping with the parties' commitment to resolve issues prior to the initiation of a grievance, the potential grievant must first meet with his/her immediate supervisor and attempt to resolve the unit member's issues.

Thus, by its very terms, the CBA mandates that a conference occur prior to the filing of a grievance. In addition, Article VI(E) of the CBA mandates that a grievance "be initiated" no later than fifteen (15) days after the circumstances giving rise to the grievance. Moberg filed a

"26 point grievance" with the District on December 7, 2009 which was more than two months after Kilty's observation.

Neither Moberg's November 2009 e-mail correspondence with the District, nor Article VI of the CBA, supports Moberg's contention that these e-mails constitute either an informal grievance or a request for union assistance. We explain.

The CBA specifically calls for a "conference" prior to the filing of a formal grievance, which the CBA describes as a "meeting." No e-mail correspondence prior to November 12, 2009, mentions a grievance by Moberg. The meeting discussed in the November 2, 4 and 6, 2009, e-mails was initiated not by Moberg but by Codianne, and it addressed not Moberg's concerns, but Codianne's concerns arising from complaints about Moberg by other District employees. We thus conclude that neither the November 2, 2009 nor the November 6, 2009, e-mail was part of a collectively bargained-for grievance procedure, nor addressed the collective concerns of the bargaining unit, nor sought to enforce rights stated in the CBA. The correspondence concerned complaints about Moberg's behavior and his defense of his behavior was undertaken alone and for his sole benefit. (See *Los Angeles, supra,* PERB Decision No. 1552.) Therefore, neither e-mail was protected activity under EERA.

Moberg contends that his November 15, 2009, e-mail is protected as a request for union assistance. The Office of the General Counsel concluded that because the e-mail did not refer to a grievance, did not appear to address a contract violation and was not on the grievance form required under Article VI, the "tangential reference" in the e-mail to the MBTA president was insufficient to provide a connection to any collective concerns of the bargaining unit. Moreover, we note that the e-mail evidence indicates that it was Codianne, not Moberg, who brought the MBTA president into the picture. On November 15, 2009, Codianne wrote to MBTA President Low: "Hi, can you give me a call tomorrow to discuss Erik's (*sic*) continued

use of "challenging" e-mails? (*Sic.*)" Thus, we conclude, with the Office of the General Counsel, that Moberg's e-mail of November 15, 2009, concerns an issue undertaken by himself and for his sole benefit. As such, it is not a "logical continuation of group activity" and is not protected under EERA.

Lastly, Moberg claims that his January 4, 2010, e-mail wherein he asked Kilty to give him and Ramirez keys to the MPR on the campus where they taught was protected as an informal grievance. Again, we are not persuaded. The fact that the MBTA president "suggested" that Moberg and Ramirez receive keys indicates that there was no right for them to have keys and the issue was not grievable. On October 27, 2009, Moberg was informed by Kilty that the Monterey Adult School was limiting the check-out of keys due to security concerns. In and of itself, a system for securing the possession of keys

> is not logically and reasonably related to wages, hours, or other enumerated terms of employment. An employer has the right to secure school property, especially when there is a history of theft and vandalism.

(*Inglewood Unified School District* (1987) PERB Decision No. 624, p. 9.) Absent any demonstration that Moberg and Ramirez had a right to a key to the MPR under the CBA or that their hours of employment were altered because of Kilty's key system, Moberg has failed to demonstrate that his request for his and Ramirez's own keys to the MPR was EERA protected conduct.

Because Moberg has not shown that he and Ramirez had a statutory right to a key, we distinguish this case from those where employees jointly prosecute alleged violations of workplace rights that are not contained in the CBA, but contained in external law. (*Jurupa Unified School District* (2012) PERB Decision No. 2283 [joining with another employee or employees to enforce external law regarding workplace rights, is itself group activity, seeking

individually to enforce provisions of a collectively-bargained agreement is "a logical continuation of group activity" and both are protected under EERA].)

District's September 7, 2010 Dismissal of Moberg

The Office of the General Counsel dismissed allegations in Moberg's first amended charge, filed on March 14, 2011, pertaining to events occurring more than six months earlier, viz., prior to September 14, 2010. Among these allegations was the claim that the District terminated Moberg's employment on September 7, 2010, when it adopted an ALJ's proposed decision sustaining the charges brought by the District in February 2010. Moberg claims on appeal that the termination in September 2010 relates back to the charges filed in February 2010, and thus the termination allegation is not untimely. Moberg's claim raises an issue concerning the proper application of our statutory limitations period and the relation back doctrine to allegations involving disciplinary and dismissal proceedings, to which we now turn.

The Board has long held that the limitations period for a termination of employment or imposition of lesser discipline, commences on the date the termination or lesser discipline becomes effective, not on the earlier date on which an employer may provide an employee notice of its intention to terminate or impose the discipline. (*Sarka, supra,* PERB Decision No. 1585-H; *Romano v. Rockwell International, Inc.* (1996) 14 Cal.4th 479 (*Romano*).) This policy recognizes that the question of whether a public employee may be terminated or disciplined is frequently subject to due process procedures under a CBA or memorandum of understanding, or under other regulatory or statutory procedures, and, consequently, there may be a significant delay between an employer's announcement of the intent to terminate or discipline, and the parties' ensuing completion of applicable due process procedures.

However, the Board has recognized that our statutes protect employees not only from termination or discipline for an impermissible reason, but also from the threat thereof.

Accordingly, an employer giving an employee notice of the intent to terminate or discipline (viz., a threat of termination or discipline) for an unlawful reason would also violate employees' statutory protections and thus by itself constitute an unfair practice. (*Sarka, supra,* PERB Decision No. 1585-H.)

Because of this duality, we announce today a clarification of our limitations rule. Where a charging party challenges as unlawful under our statutes an employer's notice of intent to terminate or discipline, and thereafter, upon completion of the dismissal proceedings terminates or disciplines the employee, a timely filed charge, alleging that the notice of termination or discipline either was unlawfully motivated or interfered with the exercise of employee rights, will be deemed sufficient notice to the employer that the notice of termination or discipline, and any action taken thereafter by the employer based on that notice, are subject to review by this Board. We explain.

The facts here are illustrative. The District gave Moberg two notices on February 9, 2009. One stated that the District would non-reelect him at the conclusion of the academic year. The non-reelection was not subject to review under due process procedures. We therefore set it aside for the purpose of the analysis which follows.

The second notice stated that the District would terminate Moberg prior to the conclusion of the academic year, unless within a specified time he requested a hearing to determine whether cause existed for the termination. In addition, the second notice imposed an immediate suspension. Due process procedures, including a hearing, were available to Moberg to contest the termination and immediate suspension. Moberg opted to utilize the procedures, which included a hearing before an ALJ on the issue of whether cause existed. Additionally, on March 29, 2010, Moberg timely filed an unfair practice charge, challenging

the District's termination and suspension actions as unlawfully motivated because of his protected activity.

Moberg's hearing on the District's termination and suspension occurred over the summer of 2010. On September 7, 2010, the District's governing board adopted an ALJ's proposed decision sustaining the termination and suspension, and provided Moberg notice thereof, thus imposing the termination. Thereafter, Moberg challenged the District's termination action by filing suit.

In addition, on March 14, 2011, Moberg filed a first amended charge, which included, inter alia, supplemental allegations regarding his termination, including actions taken by the District in the course of the termination proceedings, and the District's September 7, 2010, adoption of the ALJ's proposed decision and imposition of the termination.

On August 1, 2011, the Office of the General Counsel issued Moberg a warning letter notifying him that his first amended charge failed to state a prima facie violation of the EERA. Among the bases for the Office of the General Counsel's conclusions was the limitations period, which the Office of the General Counsel construed to commence on September 14, 2010, six months prior to the filing date of Moberg's first amended charge. As a consequence, the Office of the General Counsel deemed untimely all of Moberg's allegations not included in the initial charge and occurring prior to September 14, 2010, including without limitation the District's September 7, 2010, imposition of the termination.

In his initial charge filed on March 29, 2010, Moberg had challenged the District's February 9, 2010 notice of non-reelection as a probationary employee, as well as the District's February 9, 2009 suspension, statement of charges and notice of dismissal. Moberg urges that his first amended charge was timely as to events prior to September 14, 2011, relying on

PERB's doctrines of "relation back" and "continuing violation" to bring prior and otherwise untimely allegations within PERB's statutory authority. We review our authorities.

In *Romano, supra,* 14 Cal.4th 479, the California Supreme Court held that the statute of limitations in a wrongful discharge case begins to run on the date that employment is actually terminated. PERB adopted the *Romano* decision in *Sarka, supra,* PERB Decision No. 1585-H. Noting, however, that the statutes administered by PERB prohibit both the threat to take an adverse action as well as the imposition of an adverse action, the Board concluded

> where an employer threatened to terminate an employee and then actually terminated the employee, both the threat and actual termination constitute violations of HEERA and each action triggers the running of the limitations period.

(*Sarka, supra,* PERB Decision No. 1585-H, p. 8.)

PERB's relation-back doctrine has long permitted amendments to charges after more than six months, providing that

> amendments are appropriately filed even after the six-month period if the amended charges are closely related to the actions in the original charge.

(*Gonzales Union High School District* (1984) PERB Decision No. 410, pp. 19-20.) In *Temple City Unified School District* (1989) PERB Order No. Ad-190, the Board determined that the relation-back doctrine allowed an amendment to allege conduct that fell outside of the six-month statutory period if the amendment "simply added another legal theory based on the same set of facts contained in the original charge." (See also *Inglewood Unified School District* (1990) PERB Decision No. 792 [motion to amend allowed where new theory based on same set of facts as alleged in original complaint where no prejudice demonstrated to respondent].) In addition:

> Where the conduct alleged in the original charge is the same conduct or factual allegation contained in the amended charge, and where the second charge or amended charge either clearly

> indicates a legal theory for the first time or merely alleges another theory on the same facts already before the Board, the doctrine of relation back has been applied to allow timely filing of the amended charge.

(*The Regents of University of California* (1990) PERB Decision No. 826-H, p. 6.) The relation back doctrine does not apply where the amended charge raises new factual allegations, separate conduct or acts not sufficiently related to or raised in the original charge. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.)

This appears to create a conflict between *Sarka, supra,* PERB Decision No. 1585-H and PERB's relation back doctrine in a situation such as we have here, where a subsequent adverse action is both a separate violation under our statutes, yet based on precisely the same set of facts and, indeed, is a natural consequence of the previous adverse action.

In resolving this apparent conflict it is helpful to consider the purposes for permitting and limiting amended charges. PERB Regulation 32621 regarding amendments before the issuance of a complaint offers little guidance. However, PERB Regulation 32648 regarding amendments made during hearing states:

> If the Board agent determines that amendment of the charge and complaint is appropriate, the Board agent shall permit an amendment. In determining the appropriateness of the amendment, the Board agent shall consider, among other factors, the possibility of prejudice to the respondent.

As the Board explained with regard to amendments submitted after the issuance of a complaint, but prior to hearing:

> Certainly, potential prejudice to the opposing party is a major consideration in determining whether an amendment is to be allowed. [Citations omitted.] Absent undue prejudice to the opposing party, where a timely amendment is closely related to the allegations in the pending complaint, the amendment should be allowed. However, where a timely amendment has only a tenuous relation to the pending complaint or is wholly unrelated, prejudice is more likely because the respondent would have to defend against an unanticipated claim. Where new allegations

> arise out of the same facts and circumstances as those in a pending complaint, the allowance of an amendment serves the principles of economy and finality.

(*Riverside Unified School District* (1985) PERB Decision No. 553, pp.6-7.)[18]

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[18] California's courts have grappled with this issue. California Code of Civil Procedure (CCP) section 472 allows a party to file an amended pleading, once as a matter of right, at any time before an answer or demurrer is filed. CCP sections 473 and 576 allow a party to make further amendments at the court's discretion. The amended complaint supersedes the original complaint while maintaining the time of filing of the original for purposes of the statute of limitations unless it set forth "wholly" or "entirely" different cause of action. (*Jones v. Wilton* (1938) 10 Cal.2d 493, 498; *Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146, 151 [amended complaint relates back to the original complaint and thus avoids the statute of limitations bar if it rests on same general set of facts as the original and refers to the same accident or injury].)

In contrast, "a supplemental complaint differs from an amended complaint in two chief respects: it deals only with matters occurring after commencement of the action and it only sets up matter consistent with and in aid of the case made by the original complaint." (5 Witkin, California Procedure (4th ed. 1997) Pleading, § 1174, p. 641.) CCP section 464 permits a party "on motion, to make a supplemental complaint or answer, alleging facts material to the case occurring after the former complaint or answer."

The courts are split on whether a supplemental pleading relates back to the original pleading for purposes of the statute of limitations. (*ITT Gilfillan, Inc. v. City of Los Angeles* (1982) 136 Cal.App.3d 581, 589 [supplemental complaints, categorically, do not relate back to the original complaint, because, by definition, supplemental complaints are based strictly on newly accrued causes of action]; but see, *Bendix Corp. v. City of Los Angeles* (1984) 150 Cal.App.3d 921, 925-926 (*Bendix Corp.*) [for purpose of relation back there is little basis to distinguish an amended pleading from a supplemental pleading, if defendant had notice of the subject matter of the dispute and was not prejudiced in preparing its defense].) The *Bendix Corp.* court observed:

> [W]hether the supplemental complaint may encompass the entire period following commencement of the suit, despite the statute of limitations, will depend upon the nature of the claims raised in the supplemental pleading. If those claims are unrelated to those alleged in the initial complaint, or rely on conduct or events different from those involved in the original action, the statute of limitations should be applied. [Citations omitted.] Where, however, the original pleading gave notice that the alleged wrongful conduct was of a continuing nature, supplemental pleadings addressed to the same conduct should not encounter statute of limitations questions.

(*Bendix Corp., supra*, 150 Cal.App.3d 921, 926.)

Clearly, a responding party is not prejudiced by having to defend against the allegation that a notice of dismissal or discipline (viz., the threat to dismiss or discipline) and an actual imposition of dismissal or discipline are related violations. The second action, imposition, is but the implementation of the first. Here, Moberg alleges two adverse actions which, on the one hand, allege independent violations of EERA, yet, on the other hand, arise from precisely the same set of facts and the same conduct. While these two acts do not constitute a "continuing violation," they are logical and sequential manifestations of the same course of conduct and therefore the respondent cannot claim that it has been prejudiced in preparing a defense.

We conclude that where a charging party timely alleges that an employer's notice of intent to terminate or discipline is unlawful under our statutes, and thereafter, following utilization by the parties of due process procedures, the employer does in fact either terminate or discipline the employee, an amended charge alleging that the termination or discipline itself either was unlawfully motived or interfered with the exercise of employee rights, will be deemed to relate back to the timely-filed charge.

We thus deem Moberg's timely filed initial charge of March 29, 2010, challenging the notice of termination, when coupled with the amendment filed on March 14, 2011, is sufficient to bring within our jurisdiction the District's actions in furtherance of that notice of termination, including without limitation, the District's action of September 7, 2010 imposing the termination noticed in February 2010.

Directive to Communicate Only with Shepherd

We affirm the Office of the General Counsel's determination that Moberg's allegation (that his constitutional due process rights were violated by Shepherd's directive that Moberg respect the wishes of District employees who did not wish to have contact with him and that

Moberg contact the District only through Shepherd) did not constitute an adverse action. We explain.

Moberg alleges that the District's directive interfered with his constitutional due process rights to investigate his case and to call witnesses for his dismissal hearing. The dismissal proceeding was governed by the Education Code[19] and Government Code administrative adjudication procedures,[20] which afforded Moberg the statutory right to call witnesses in his defense, and to compel by subpoena the testimony of employee witnesses who might be disposed not to assist Moberg with case preparation or to testify in Moberg's defense. The District's directive only forbade Moberg to contact employees who wished not to have such contact. Since no employee was obliged to assist Moberg with his defense, and since Moberg could compel testimony even from recalcitrant employee witnesses by subpoena, we discern no adverse impact upon Moberg's dismissal defense arising from the District's directive. Moreover, and in any event, constitutional due process rights are beyond PERB's remit to enforce. (*Los Angeles Unified School District* (1990) PERB Decision No. 835 [PERB only has jurisdiction to enforce the statutes it is charged with administering and has no jurisdiction to enforce constitutional protections].)

Although a directive that an employee not contact other employees may conceivably interfere with employee rights explicitly protected by EERA to "form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation" (EERA, §3543(a)) or rights arguably protected under EERA for mutual aid and

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[19] Education Code Section 44948.3.

[20] Government Code section 11500 et seq.

protection[21], we conclude that Moberg has failed to allege a prima facie case for interference under EERA.

To establish a prima facie case of interference, a charging party must allege that the employer's conduct does or tends to result in some harm to employee EERA rights.[22] By its very terms, Shepherd's directive did not prohibit all communication between Moberg and District employees nor did it prohibit his attendance at grievance meetings. Moreover, the District's unrebutted evidence[23] shows that on February 22, 2010, Shepherd clarified her February 12, 2010 directive to Moberg, explaining that the District: (1) was not trying to

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[21] See *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 306-307 [suggesting that mutual aid and protection rights guaranteed by section 7 of the National Labor Relations Act may also be protected, although not specifically mentioned, by EERA].

[22] Under *Carlsbad, supra,* PERB Decision No. 89, PERB's test for an interference violation is:

> 2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
>
> 3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
>
> 4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
>
> 5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

(Op. Cit., pp. 10-11.)

[23] See footnote 3 above.

prohibit him from attending MPUSD board meetings; (2) was prohibiting him only from using the District's e-mail and voice mail systems, but not prohibiting him from communicating with District employees in a non-threatening, non-harassing manner, outside of their work hours; (3) was not prohibiting him from communicating with MBTA officers; and (4) was not prohibiting him from attending grievance meetings held at the offices of the District's attorneys. We conclude, with the Office of the General Counsel, that Moberg failed to allege a prima facie interference with his EERA rights.

Lesson Plans

We affirm the Office of the General Counsel's determination that the District's requirement that Moberg produce lesson plans is not an adverse action. As stated by the Office of the General Counsel, requiring employees to meet the requirements of their profession is not an adverse action. (*State of California (Department of Transportation)* (2005) PERB Decision No. 1735-S; *City of Torrance* (2008) PERB Decision No. 1971-M.) While disparate enforcement of any work rule by an employer would be circumstantial evidence of improper motive, we agree with the Office of the General Counsel that Moberg provided no evidence, other than mere speculation, that other District teachers were not required to produce lesson plans.

Nexus

We have concluded that Moberg's e-mails were not protected under EERA. Thus, there is no further nexus analysis to be made. Nevertheless, even if some of Moberg's e-mails had been protected, Moberg alleged insufficient nexus between those e-mails and the District's subsequent action. "[T]he basis for Moberg's dismissal was not the content of his e-mail messages but rather their number and their tone." (Dismissal Ltr., p. 10.) The Superior Court determined that Moberg's

> emails were rude and disrespectful and eroded team dynamics; they constituted more than a mere difference of opinion over the direction of the special education class and questioning of authority. . . . [Moberg] used email in an abusive and condescending manner which was clearly calculated to antagonize. He used language which belittled the Special Education Program Manager. [Moberg's] emails imply that he was angry when he wrote them, and they were certainly disrespectful.

(*Id.* quoting *Moberg I*, p. 13.)[24]

The Superior Court held that Moberg's e-mails warranted his dismissal for "Refusal to Follow School Laws and Regulations." The abusive e-mails continued long after District officials told Moberg to stop sending inflammatory e-mails which violated the MPUSD policy regarding "District Communications." The tangential relationship that some of these e-mails may have to Moberg's grievances do not cloak these e-mail messages under the protection of EERA.

Moberg argues that the inclusion of some of his arguably protected e-mails as evidence against him in his dismissal proceedings demonstrates that the District retaliated against him for the grievances he filed. Yet none of the e-mails sent by the District regarding Moberg's improper use of its e-mail system concerns Moberg's grievances or restricts his ability to use e-mail to exercise his EERA protected rights. The e-mails sent by the District directing Moberg to stop sending improper or abusive e-mails invariably address the tone and intent of those communications. None of the District's directives interfere in any way with Moberg's right to file grievances or participate in MBTA activities and none of the District's communications with Moberg object to any speech which could be considered representational.

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[24] At the time the Office of the General Counsel issued its dismissal of Moberg's unfair practice charge, *Moberg I* was still under appeal to the 6th Appellate District. Since that time, *Moberg I* has been affirmed by the Appellate Court and made final by the California Supreme Court's denial of Moberg's petition for review.

Moberg argues that "number and tone" has never been used by PERB to find cause for discipline based on an employee's communications with his employer. According to Moberg, "employee speech loses its protected status only if it is so opprobrious or disrespectful of the employer as to seriously impair maintenance of discipline." (Appeal, p. 18; citing *Rio Hondo Community College District* (1982) PERB Decision No. 260.)

We disagree with Moberg that the Office of the General Counsel determined that Moberg's e-mails were not protected because of their number and tone. The dismissal letter clearly points out that the e-mails in question lack EERA protection, because they were not undertaken as group activity or a logical continuation thereof. The dismissal letter merely points out that the Monterey County Superior Court found that the number and tone of Moberg's e-mail communications were sufficient to form the basis for dismissal on the grounds of persistent refusal to obey school laws or regulations, a basis for dismissal under the Education Code, not EERA. The Office of the General Counsel determined that there was no direct nexus between the District's adverse actions and Moberg's e-mails, because they were not protected activity under EERA and "[t]herefore, they cannot form the basis of a prima facie case for retaliation." (Dismissal Ltr., p. 10.)

Moberg's Suspension Without Pay

According to Moberg, since he and the District disagreed on whether or not he was entitled to pay while the dismissal hearing was pending, there exists a legal and factual dispute which must result in a complaint being issued. In his appeal, Moberg claims he was not informed of the withholding of his pay until April 22, 2010. However, Moberg's second amended charge, which he filed on September 15, 2011, alleges that the District began withholding his pay on March 18, 2010. In addition, the District's February 12, 2010, letter informing Moberg that the District had adopted the charges for dismissal also informed him

that he was placed "on immediate suspension without pay." Regardless of whether Moberg knew or should have known of the District's intent to withhold his pay on February 12, March 18, or April 22, 2010, Moberg's initial allegation of this adverse act on September 15, 2011 is clearly untimely.

Moberg also asks that we view the withholding of pay as evidence of the District's unlawful motive. We are not persuaded that a possible contract violation is necessarily indicative of unlawful motive. Moberg implies in his appeal that the District took this action in retaliation for filing his initial charge on March 29, 2010, and that the fact the District "backdates the withholding of pay by over one month" on April 22, 2010. From the evidence submitted it is clear that the District notified Moberg on February 12, 2010, of its plan to suspend him without pay. Therefore, the withholding of pay could not have been in retaliation for Moberg's filing of the instant charge on March 29, 2010.

Collateral Estoppel

Lastly, since Moberg's charges are hereby dismissed for failure to state a prima facie case, we find no occasion to address the District's claim that he is collaterally estopped from bringing forth his allegations.

ORDER

The unfair practice charge in Case No. SF-CE-2830-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chair Martinez and Member Banks joined in this Decision.

STATE OF CALIFORNIA EDMUND G. BROWN JR., Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

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March 1, 2012

Eric M. Moberg

Re: *Eric M. Moberg v. Monterey Peninsula Unified School District*
Unfair Practice Charge No. SF-CE-2830-E
DISMISSAL LETTER

Dear Mr. Moberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 29, 2010. Eric M. Moberg (Moberg or Charging Party) alleges that the Monterey Peninsula Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by retaliating against him for his protected activity.

On March 14, 2011, Moberg filed a First Amended Charge.[2] The District provided position statements and/or information dated May 28, 2010, February 15, 2011, April 15, 2011 and May 5, 2011.

Moberg was informed in the attached Warning Letter dated August 1, 2011, that the above-referenced charge did not state a prima facie case. Moberg was advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, the charge should be amended. Moberg was further advised that, unless the charge was amended to state a prima facie case or withdrawn on or before August 17, 2011, the charge would be dismissed. Subsequently, an extension of time was granted.

On September 15, 2011, Moberg filed a Second Amended Charge. The District filed further position statements on August 30, 2011 and October 25, 2011. The Second Amended Charge does not cure the deficiencies set forth in the Warning Letter. Therefore, the charge is hereby dismissed based on the facts and reasons set forth below and in the August 1, 2011 Warning Letter.

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[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

[2] Moberg has also filed four related charges against the District: SF-CE-2834-E, SF-CE-2842-E, SF-CE-2851-E, and SF-CE-2872-E.

Summary of Second Amended Charge

The Second Amended Charge is 69 pages long (single-spaced) with approximately 500 pages of attachments. The Second Amended Charge contains a detailed summary of all the allegations Moberg previously advanced in this charge, as well as in the other four unfair practice charges (which were subsequently dismissed). The Second Amended Charge also summarizes facts underlying actions Moberg has brought in several other forums: (1) the administrative hearing process which upheld Moberg's dismissal from employment from the District; (2) multiple civil complaints and writs Moberg has filed with the Superior Court for Monterey County; and (3) an appeal with the Sixth District Court of Appeals. Much of the Second Amended Charge is devoted to disputing the District's performance reviews and to challenging the grounds the District asserted as a basis for dismissing him.

Moberg alleges the following relevant additional facts and/or clarifications of existing facts, in addition to those facts summarized in the Warning Letter.

Beginning on September 24, 2009, Moberg complained to the District about racial discrimination against students, the District's mismanagement of funds, and false statements made by a supervisor on his evaluations.

Moberg alleges that an e-mail message he sent to District Associate Superintendent Leslie Codianne (Codianne) on November 2, 2009 was "an informal grievance" under the CBA and set an agenda for a meeting on November 12, 2009. A union representative attended the meeting with Moberg on November 12, 2009.

The November 2, 2009 e-mail message[3] from Moberg to Codianne states as follows:

> I look forward to the meeting I scheduled with you next week. I welcome the opportunity to respond directly to what is some sort of "Swift Boat" operation against me.
>
> I am not certain what you mean by "this type of e-mail exchange," but I will do my best to comply. I would also point out that my e-mail is a polite response to a less than polite and less than positive e-mail from our program manager. At the same time, I would point out that several weeks ago I requested that we all meet to discuss the repeated unprofessional and misleading e-mails being sent to me, inaccurate verbal accusations made about to other staff and management, and an inaccurate accusation from my supervisor that I was violating the [E]ducation [C]ode, but no

[3] The November 2nd e-mail message is attached to the Second Amended Charge at Exhibit A, page 60.

> one has responded to schedule that meeting, which leaves me e-mail.
>
> Additionally, to return to the Swift Boat analogy, I learned from John Kerry's mistake of not responding when someone unfairly attacks you. I will not make that mistake.

Moberg sent an e-mail message to Codianne and others dated November 4, 2009,[4] that states:

> Leslie, Ann, and Heath:
> I have never spent one penny at Target.
> Can any of you stop Teresa from repeatedly defaming me?
> Can any of you stop Teresa from continuing to pretend she is my supervisor and bossing me around? I have written over 300 IEPs in my career and acting as Administrative Designee on 100 more. Teresa Poirier has had her PPS credential for a little over a year.

Moberg also sent an e-mail message to Codianne dated November 6, 2009,[5] that states:

> Please forward me an agenda for our meeting next Thursday at 4 pm.
> In other words, who raised what 'concerns' when? And, did my detractor (s) offer any substantiation?
> If we have time, I would like to discuss the following:
> 1. What is the status of my contract? I have yet to receive one.
> 2. What is the status of the work order to install a fan and light in the diaper changing room – I first requested this in July.
> 3. What is MPUSD policy on teachers administering emergency medications, such as Mary's Lorazepam? I assume you are aware that our MPUSD nurse asserts that she is prohibited by law from training me.
> 4. What are we going to do about Ann Kilty's serially defamatory September 29, 2009 oberservation critique of my work. In other words, do we want such an inaccurate document in my personnel file and subject to subpoena at a Due Process hearing? Wouldn't this leave our attorney with the dilemma of either a) allowing the document to impeach my competence or b)

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[4] The November 4, 2009 e-mail message is attached to the Second Amended Charge, Exhibit A, page 1254.

[5] The November 6, 2009 e-mail message is attached to the Second Amended Charge, Exhibit A, page 63.

> questioning Ann Kilty in front of the Administrative Law Judge to impeach her honesty?

Moberg alleges that his e-mail messages of November 15, 2009 and January 4, 2010 complained of working conditions and were used to contact union representatives for assistance. The November 15, 2009 e-mail message was intended to solicit union assistance and the January 4, 2010 e-mail message was for Moberg to represent another teacher regarding a workplace issue. These two e-mail messages are quoted, in their entirety, in the Warning Letter.[6] In the November 15, 2009 e-mail message, Moberg accuses another employee of lying about him and accuses Codianne of believing her and backing her up. In the January 4, 2010 e-mail message, Moberg asks for a key for himself and another employee.

Moberg alleges that the District gave him a written reprimand on approximately January 27, 2010.[7] The written reprimand was not for leaving his classroom on January 12, 2010, but rather for not being available by cellular phone while he was gone. Moreover, no urgent situations occurred while Moberg was absent on that day.

Moberg alleges that his February 5, 2010, performance evaluation was supposed to summarize five previous observation evaluations, however it did not.

Moberg alleges that the District did not require of any other similarly situated teacher the highly detailed level of written lesson plans that Codianne required of Moberg. Moberg contends that requiring him to spend additional time preparing lesson plans is "wage theft."

Moberg alleges that his performance evaluation dated January 20, 2010, rated him "as meeting the overall standards of the teaching profession." The January 20, 2010 document is titled "observation form" with an overall rating of "partially meets standards" (the box checked off on the last page of the observation form). There is also an observation form dated January 21, 2010, also with an overall rating of "partially meets standards." Moberg alleges that his final overall evaluation dated February 5, 2010, constitutes dishonest misrepresentation. The February 5, 2010 evaluation has an overall rating of "partially meets standards." The February 5, 2010 evaluation recommends that Moberg be non-reelected for the next school year. The evaluation states in part: "Mr. Moberg has had difficult and occasionally adversarial relationships with colleagues including peers and administration as evidenced in numerous email exchanges."

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[6] The November 15, 2009 e-mail message is attached to the Second Amended Charge at Exhibit A, pages 67-68. The January 4, 2010 e-mail message is attached to the Second Amended Charge at Exhibit A, page 76.

[7] The Second Amended Charge clarifies that this Letter of Reprimand was dated January 25, 2010, and issued on January 27, 2010.

Moberg alleges that the District has never non-reelected any teacher who was rated as meeting overall standards. The District employs over 500 teachers and non-re-elects 10 to 20 teachers every year.

In a February 12, 2010 letter, District Superintendent Marilyn Shepherd (Shepherd) allegedly directed Moberg not to speak to anyone except her. In a letter dated February 12, 2010, Shepherd notified Moberg of the charges for immediate suspension and dismissal.[8] Moberg was directed to stay away from District premises, to not conduct any business on behalf of the District and to not attend District meetings. The letter further states that the District has received complaints about Moberg from other employees, that the other employees do not wish to have contact with Moberg, and that the District wishes to avoid having to seek a restraining order against Moberg. Moberg argues that this directive interfered with his right to collect evidence regarding his dismissal case.

On September 7, 2010, the District adopted a Resolution to adopt a proposed decision by Administrative Law Judge Anderson (ALJ Anderson) from the Office of Administrative Hearings (OAH).[9] The ALJ upheld Moberg's dismissal on the following grounds: (1) persistent violation of or refusal to obey school laws or regulations, and (2) dishonesty. Moberg appealed this decision to the Superior Court of Monterey County. The Superior Court's Statement of Decision, filed on August 23, 2011, upheld Moberg's dismissal on the grounds of persistent refusal to follow school laws or regulations. The Court's Statement of Decision also finds grounds to dismiss Moberg on the basis of evident unfitness for service.

Moberg argues that the District's September 7, 2010 Resolution to Adopt Proposed Decision was merely a clarification of the Statement of Charges (issued by the District on February 9, 2010). The Statement of Charges was at issue in another unfair practice charge filed by Moberg.

Position of the Respondent

On approximately February 22, 2010, Moberg filed a Petition for Writ of Mandate and Injunctive Relieve in the Monterey County Superior Court (Case No. M104096) against Shepherd and Doe defendants. The Petition concerned, in part, Moberg's claim that on February 22, 2010, the District directed him to not engage in harassing and unwelcome communications using District e-mail or voicemail, and that these directives violated his rights under the state and federal Constitutions. On November 24, 2010, following a hearing, the

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[8] A copy of the February 12, 2010 letter is attached to the Second Amended Charge at Exhibit A, page 3.

[9] The Resolution and proposed decision are attached to the District's February 15, 2011 position statement as Exhibit 83. PERB may consider non-conflicting facts alleged by a Respondent. (*Service Employees International Union #790 (Adza)* (2004) PERB Decision No. 1632-M.)

Superior Court issued an Order denying the Petition because the controversy raised by the pleadings was determined to be moot due to subsequent events.

On April 12, 2010, Moberg filed a verified Complaint and demand for jury trial in the Monterey County Superior Court, (Case No. M105057) against the District and multiple named defendants for: (1) violation of civil rights, (2) retaliation in contravention of public policy, (3) defamation, and (4) intentional infliction of emotional distress. The District filed a demurrer. On August 12, 2010, the Court issued a ruling on the demurrer. The demurrer was sustained without leave to amend on all but the third cause of action, for defamation. With respect to Plaintiff Moberg's cause of action for retaliation in contravention of public policy, the Court stated "Plaintiff has failed to state a cause of action for retaliation because he has not and cannot allege exhaustion of his administrative remedies as the administrative proceedings are still pending."

Notwithstanding this ruling, Moberg subsequently filed a first amended complaint for: (1) violation of civil rights, (2) defamation, (3) interference with a contract, (4) invasion of privacy, (5) wrongful termination, and (6) breach of contract. Defendant then filed a demurrer, general Motion to Strike, and an anti-SLAPP Motion to Strike. On December 13, 2010, following a hearing, the Court dismissed the entire action with prejudice. Moberg appealed to the Court of Appeal for the Sixth Appellate District, which remanded the action for the limited purpose of allowing the defendants to bring a noticed motion to dismiss.

On November 4, 2010, Moberg filed a Petition for Writ of Mandate with the Superior Court for Monterey County (Case No. M109124) to set aside the District's decision to dismiss him. One basis for the writ petition is "Disparate treatment re: e-mails." On September 15, 2011, the Court issued its Judgment adopting its Statement of Intended Decision dated August 23, 2011, denying the Writ of Mandate and upholding Moberg's dismissal. The Court found that the administrative record did not support the ALJ's finding of dishonesty, but that it did support a finding of cause to dismiss on the basis of evident unfitness to teach. The Court upheld the ALJ's determination that good cause existed for dismissal on the basis of persistent refusal to follow school laws or regulations. The Court further found that Moberg's alleged protected activities concerning disclosures of racial discrimination, mismanagement of the Workability program, and failure to provide a light or fan in a bathroom were not a contributing factor towards the District's decision to dismiss. The Court held that, even assuming these were protected disclosures under the Education Code, there is no evidence that they motivated the dismissal.

The District argues that the doctrine of collateral estoppel bars relitigation of the claims raised by the Second Amended Charge.

Retaliation on the Basis of Protected Activity

As stated in the Warning Letter, the standard for retaliation on the basis of protected activity is as follows.

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210.)

A. Protected Activity

Moberg alleges that he engaged in protected activity within the meaning of EERA by filing grievances between October 29, 2009 and February 5, 2010. The Collective Bargaining

Agreement (CBA) between the District and the Monterey Bay Teachers Association provides at Article VI that "a grievance shall be initiated in writing using the grievance form, and shall be filed with the immediate supervisor."[10] Documents provided in connection with this charge show that Moberg submitted a written grievance on December 7, 2009 concerning approximately 26 alleged contract violations.[11] Moberg submitted a written grievance dated February 4, 2010, concerning assignment of extra work.[12] Moberg submitted a written "draft" grievance to Codianne on February 8, 2010, concerning the January 27, 2010, letter of reprimand.[13] Moberg submitted a written grievance on March 4, 2010, for retaliation following the District's issuance of the February 9, 2010 Statement of Charges.[14] It does not appear from the information provided that Moberg filed a written grievance under the CBA prior to December 7, 2009.

Moberg also alleges that he engaged in protected activity by sending e-mail messages dated November 2, 4, 6 and 15, 2009, and on January 4, 2009. As stated in the Warning Letter, these e-mail messages do not constitute protected activity because they are not a "logical continuation of group activity." (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) In the Second Amended Charge, Moberg characterizes these e-mail messages as "informal grievances." However, as discussed in the Warning Letter, the e-mail messages only address Moberg's individual concerns and, therefore, they are not protected activity within the meaning of the Act. The e-mail messages do not refer to a grievance, do not appear to address a contract violation and are not on a grievance form required by CBA Article VI. The e-mail messages accuse other employees of incompetence or defamation. Aside from a tangential reference to union representative Jill Low in one of the e-mail messages, there does not appear to be any connection between these e-mail messages and any collective concerns of the bargaining unit.

In the Second Amended Charge, Moberg alleges that in September 2009 he began complaining of racial discrimination against his students, the District's mismanagement of funding, and false statements made by his supervisor on performance evaluations. These allegations were not raised in Moberg's initial charge or in his First Amended Charge. As discussed in the

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[10] Portions of the CBA are attached to the District's October 25, 2011 Position Statement, Exhibit A, page 638.

[11] The December 7, 2009 grievance is attached to the District's October 25, 2011 Position Statement at Exhibit A, tab 10.

[12] The February 4, 2010 grievance is attached to the District's May 28, 2010 Position Statement at Exhibit D.

[13] The draft February 8, 2010 grievance is attached to the Second Amended Charge, Exhibit A, page 1514.

[14] The March 4, 2010 grievance is attached to the Second Amended Charge, Exhibit A, page 1594

Warning Letter, the statute of limitations for a new allegation contained in an amended charge begins to run based on the filing date of the amended charge, not the original charge. (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458.) The Second Amended Charge was filed on September 15, 2011. The allegations concerning Moberg's September 2009 complaints occurred more than six months prior to the filing of the Second Amended Charge and are therefore untimely.

B. Adverse Action

As stated in the Warning Letter, Moberg has alleged sufficient facts to show that the District took adverse action against him when it: (1) on February 9, 2010, notified Moberg of the District's decision to non-reelect him; and, (2) on February 9, 2010, issued Moberg a Statement of Charges.

Three other purported adverse actions were discussed in the Warning Letter and found to be untimely filed under the relation back rule discussed above. (See, e.g., *Sacramento City Teachers Association (Marsh)*, *supra*, PERB Decision No. 1458.) These are: (1) the District's Resolution of Dismissal, adopted on September 7, 2010; (2) the District's adoption of supplemental charges, issued on June 7, 2010, and (3) a Letter of Reprimand issued on approximately January 27, 2010. Moberg does not allege any facts in the Second Amended Charge which would render these allegations timely filed. Moberg argues that the Resolution of Dismissal adopted on September 7, 2010 is merely an extension of the February 9, 2010. PERB has held that the notice of intent to dismiss an employee and the confirmation of the dismissal of an employee may both be adverse acts under EERA. (*Los Banos Unified School District* (2009) PERB Decision No. 2063; *Regents of the University of California* (2004) PERB Decision No. 1585-H.) These allegations are dismissed because they are untimely filed.

1. Directive to Speak Only to Superintendent Shepard

Moberg alleges that Shepherd's February 12, 2010 letter, directing Moberg to communicate only with her regarding District issues, affects his employment by interfering with his Constitutional Due Process right to call witnesses for his dismissal proceeding. Protected employee rights under EERA do not include the right to call witnesses for a hearing under the Education Code concerning an employee's proposed dismissal for cause. PERB does not have jurisdiction over the Constitutional Due Process rights of public employees. (*Los Angeles Unified School District* (1990) PERB Decision No. 835.) This allegation does not constitute an adverse action under EERA.

2. Requirement of Extra Work

Moberg alleges that on January 27, 2010, Codianne sent him an e-mail message stating that she had instructed "Lorraine" not to share her lesson plans with Moberg. Moberg asserts that this was because Lorraine Ramirez (Ramirez), the teacher in the classroom next door to Moberg, did not have any lesson plans and Codianne did not want Moberg to know that Ramirez did not have any lesson plans. This is pure speculation and lacks any factual basis to establish a prima

facie case. (*United Teachers – Los Angeles (Wyler)* (1993) PERB Decision No. 970.) The fact that Codianne directed other teachers not to give their lesson plans to Moberg does not mean that no teachers were required to prepare lesson plans or that other teachers had not prepared lesson plans. Moberg alleges that Codianne told him, on another occasion, that "lesson plans are standard requirements for teachers." Requiring teachers to meet the requirements of their job is not an adverse action. (*State of California (Department of Transportation)* (2005) PERB Decision No. 1735-S [clarification of employee job duties is not adverse action]; *City of Torrance* (2008) PERB Decision No. 1971-M [order that employee produce log book held not adverse action].)

C. Nexus

As discussed in the Warning Letter, there is no nexus established between Moberg's protected conduct in filing grievances and the District's notification of its decision to not re-elect him for the following school year and to simultaneously issue him a Statement of Charges for dismissal for cause.

1. Direct Nexus

Moberg alleges that he was dismissed from his employment because of the e-mail messages he sent in November 2009 and January 2010. He alleges that the fact that these e-mail messages were cited in the Statement of Charges constitutes direct evidence of retaliation. As discussed above, there are no facts to establish that the e-mail messages were protected activity under EERA. (*Los Angeles Unified School District, supra*, PERB Decision No. 1552.) Therefore, they cannot form the basis of a prima facie case for retaliation under EERA.

It should be noted that the basis for Moberg's dismissal was not the content of his e-mail messages but rather their number and their tone. As explained by the Monterey County Superior Court (in its decision dated September 15, 2011) upholding the decision of ALJ Anderson to dismiss him on the grounds of persistent refusal to obey school laws or regulations: "[Moberg's] emails were rude and disrespectful and eroded team dynamics; they constituted more than a mere difference of opinion over the direction of the special education class and questioning of authority. ... [Moberg] used email in an abusive and condescending manner which was clearly calculated to antagonize. He used language which belittled the Special Education Program Manager. [Moberg's] emails imply that he was angry when he wrote them and they were certainly disrespectful." Accordingly, even if the e-mail messages constituted protected activity under EERA, there is no direct nexus established between these e-mail messages and the subsequent adverse action.

2. Circumstantial Evidence of Unlawful Motivation

a. Alleged Misrepresentation of Work Performance

Moberg alleges that the District misrepresented his job performance when it found that he "partially met standards" on his performance evaluations. He alleges that the District's

performance evaluations do not accurately reflect his performance, which he alleges was entirely positive. He alleges that the District subsequently failed to establish that his dismissal was justified on the basis of poor performance.

Moberg alleges in detail that his performance was satisfactory and he should not have been dismissed. However, the District's Statement of Charges—and Moberg's subsequent dismissal for cause—was not based upon performance, but on statutory cause for misconduct. ALJ Anderson found that the District had sufficient cause to dismiss Moberg, and this decision was upheld on appeal, albeit on different statutory grounds. Both decisions contained specific grounds for dismissal and a detailed analysis of the charges. Therefore, the facts do not show that the District moved to dismiss Moberg for vague or exaggerated reasons, or that it failed to offer him justification at the time it took action.

b. Basis for Non-Reelection or Dismissal

Moberg alleges that the District decided not to re-elect him for a second probationary year based on his "adversarial relationships with administration." Therefore, Moberg alleges, the District did not give sufficient reasons for its decision to not re-elect him. Education Code 44929.21 provides a District may decide to not re-elect a probationary certificated employee without cause. (*McFarland Unified School District v. Public Employment Relations Board* (2007) 228 Cal.App.3d 166, 169.) The District did give Moberg numerous reasons why it was moving to dismiss him for cause. Therefore, the facts do not show that the District took action for vague or insufficient reasons.

Moberg also argues that the District did not prevail on all of the grounds for which it asserted Moberg ought to be dismissed. The District moved to dismiss based upon four of the available statutory grounds for dismissal for cause, and ALJ Anderson found that dismissal was proper based upon only two of the grounds. Nonetheless, the dismissal for cause was upheld. The dismissal for cause was not for vague or insufficient reasons, and it cannot be determined how these facts would otherwise demonstrate unlawful motivation by the District.

c. Basis for Reprimands and Complaint

Moberg alleges that the January 25, 2010, letter of reprimand contains several false statements of fact. Moberg further alleges that at his dismissal hearing the District did not provide him with a copy of a complaint from a co-worker which led to a formal complaint against him by Teresa Poirer (Poirer). These facts do not establish that the employer engaged in a cursory investigation of Moberg's misconduct leading to his dismissal or that the District failed to offer justification at the time it took action. These facts are not sufficient to establish unlawful motive.

d. District Practice of Re-election of Teachers

Moberg alleges that the District decides to not re-elect between ten and twenty employees per year. Moberg alleges that the District has re-elected every first year probationary special

education teacher who was rated as "meeting the overall standards of the teaching profession." Moberg alleges that he was not re-elected for a second probationary year despite having been rated as "meeting the standards of the teaching profession." However, the evaluation documents from January and February 2010 state that Moberg was found to have only *partially* met standards. "Meeting the standards of the teaching profession" is not listed as a criteria on the observation forms or on the overall evaluation form.[15] Therefore, these facts do not show that Moberg was treated differently from similarly-situated employees because of his protected activity.

e. Disparate Treatment

Moberg alleges that another District employee, Poirier, complained about Moberg on several occasions and that this created a hostile work environment for Moberg. However, Poirier was not disciplined for this conduct. Poirier was not Moberg's supervisor, however she was in charge of the program under which Moberg taught. Moberg believes that the District improperly gave Poirier the authority to give him directions. The facts alleged do not show that Poirier and Moberg were similarly situated such that disparate treatment because of protected activity is established. (See, e.g., *San Mateo County Office of Education* (2008) PERB Decision No. 1946.)

f. Due Process Rights

The District has taken the position that pursuant to Article XX of the applicable CBA, Moberg was not entitled to continued pay after the District's Governing Board adopted the February 9, 2010 Statement of Charges, but while his dismissal hearing was pending. Moberg believes the applicable CBA provision is Article XIX, under which he asserts he would be entitled to pay pending the dismissal hearing. It cannot be determined how this dispute, which apparently arose after the District adopted the Statement of Charges, demonstrates unlawful motivation on the part of the District.

Right to Appeal

Pursuant to PERB Regulations,[16] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, § 32635, subd. (a).) Any document filed with the

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[15] The February 5, 2010 evaluation is attached as Exhibit 3 to the District's May 28, 2010 position statement. The January 20, 2010 observation form signed on January 25, 2010 is attached as Exhibit 16 to the District's May 28, 2010 position statement. The January 21, 2010 observation form, signed January 26 and 27, 2010, is attached as exhibit 17 to the District's May 28, 2010 position statement. These documents are also supplied elsewhere in the record.

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

Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

M. SUZANNE MURPHY
General Counsel

By _____
Laura Davis
Regional Attorney

Attachment

cc: Judd Jordan
Kim Gee

PUBLIC EMPLOYMENT RELATIONS BOARD

San Francisco Regional Office
1330 Broadway, Suite 1532
Oakland, CA 94612-2514
Telephone: (510) 622-1021
Fax: (510) 622-1027

August 1, 2011

Eric M. Moberg

Re: *Eric M. Moberg v. Monterey Peninsula Unified School District*
Unfair Practice Charge No. SF-CE-2830-E
WARNING LETTER

Dear Mr. Moberg:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on March 29, 2010. Eric M. Moberg (Moberg or Charging Party) alleges that the Monterey Peninsula Unified School District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by retaliating against him for his protected activity.

On March 14, 2011, Moberg filed a first Amended Charge (Amended Charge). The District has provided position statements and/or information dated May 28, 2010, February 15, 2011, April 15, 2011 and May 5, 2011.

Moberg has filed four related charges against the District: SF-CE-2834-E, SF-CE-2842-E, SF-CE-2851-E, and SF-CE-2872-E.

Summary of the Original Unfair Practice Charge

The original unfair practice charge Moberg filed on March 29, 2010, alleges as follows.

On November 7, 2009, Moberg filed a 26-point grievance, covering District conduct since September 2009. The District denied the grievance. Moberg subsequently filed four more grievances.

During the time that Moberg pursued his grievances: (a) the District made false accusations about Moberg in evaluations and in a January 27, 2010, letter of reprimand; (b) the District used these false accusations as a basis for a Statement of Charges submitted to the District's Governing Board on February 9, 2010; (c) the District's Governing Board, after meeting in closed session on February 9, 2010, voted to non-reelect Moberg for the following school year; (d) the District's Governing Board adopted the Statement of Charges and decided to not re-

[1] EERA is codified at Government Code section 3540 et seq. The text of the EERA and PERB Regulations may be found at www.perb.ca.gov.

elect Moberg without reading Moberg's response; (e) the District altered five pieces of evidence before serving Moberg with the Statement of Charges; and (f) the District violated timelines resulting in delaying Moberg's dismissal hearing before the Office of Administrative Hearings (OAH) until late June 2010.

On January 27, 2010, the District directed Moberg to work an additional two to four hours each day without choice and without compensation on an administrative project that is not mandatory for other similarly situated teachers.

On February 12, 2010, the District Superintendent (presumably District Superintendent Dr. Marilyn Shepherd [Shepherd]) directed Moberg not to communicate with any District personnel who are potential witnesses in the OAH dismissal hearing and not to communicate with his elected Union president. Instead, Moberg could communicate solely with Shepherd herself on any matters related to the District. Shepherd also directed Moberg not to attend Governing Board meetings or upcoming grievance meetings.

Summary of the First Amended Charge

An investigation of the facts provided by the Amended Charge and the District's multiple responses revealed the following.

The District hired Moberg in the Fall of 2009 as a probationary certificated employee. In February 2010, the District began proceedings to dismiss Moberg because of his poor work performance.

The District and Moberg's exclusive representative, the Monterey Bay Teachers Association (MBTA), are signatories to a Collective Bargaining Agreement (CBA) covering the dates July 1, 2005 through July 2008 and extended by mutual agreement through the 2010-2011 school year. Article VI of the CBA provides that bargaining unit members may file grievances in their own name regarding violations of the CBA. However, the grievance may proceed to binding arbitration only if the exclusive representative is the grievant.

In the first amended charge, Moberg alleges that on October 29, 2009, he "began a grievance process under Articles VI.B.1 and VI.D of the Master Contract" and supplemented the grievance on multiple dates: November 2, 4, 6, 13, 15, 2009; December 6 and 11, 2009; and January 4, 2010.

Moberg alleges that he filed another grievance on February 5, 2010. The District alleges that Moberg filed additional grievances on February 4, 2010 and February 5, 2010.

On November 2, 2009, Moberg sent an e-mail message to District Associate Superintendent Leslie Codianne (Codianne), asking to set a meeting to discuss what Moberg believes were inaccurate and unsubstantiated complaints about his communications to others. On November 6, 2009, Moberg sent a further e-mail message to Codianne, proposing an agenda for the meeting.

On November 15, 2009, Moberg sent another e-mail message to Codianne. The e-mail message states as follows:

> My intent was to determine why you asked me if there had been any parent complaints. It occurred to me that this was likely based on some false claim made by Teresa Poirier, who has made many false claims about me to many people lately, including a recklessly false claim that I spent $500 at Target without authorization. Did you ask Teresa to see any receipts?
>
> I think that I have every right to ask such a question under such circumstances to any person, regardless of what authority they claim or actually have.
>
> Would I not have a right to ask such a question to the President of the United States? Journalists do every day. I think we both know that I would, so why, then, would I not have the right to ask the question to a psychologist who has no authority over me, by law, since she has no administrative credential?
>
> Teresa has repeatedly reminded me that you two are personal friends and that her husband is your personal carpenter. I have no idea if either claim is true, given the source, but if they are, do you have a conflict of interest here? You don't seem to mind me challenging Ann Kilty and sending copies to the Superintendent and School Board President. After all, Ann Kilty is my actual supervisor and many of my challenges actually relate to program decisions she has made or allowed Teresa to make.
>
> Is there some reason that you can't allow Teresa to answer a simple question? If she made the claim then why shouldn't I know what it is? If there were a legitimate parent complaint, shouldn't we all address it?
>
> If, on the other hand, Teresa did not make any such claim to you, then why not just let her answer the question?
>
> How is my asking a psychologist if she had claimed there was a complaint about me 'challenging' an 'authority figure' or 'questioning program decisions'?
>
> The real issue here is honesty – do we have a credentialed psychologist who is consistently dishonest?

> I accepted the job thinking I would be working with Heath and you primarily. Instead I find myself in an extremely hostile work environment with Teresa and Ann regularly sabotaging my hard work, and making false statements to me and about me. I suggest you direct some of your passionate indignation toward those two 'team' members.
>
> I have sabotaged no one's work, nor made any false statements about anyone since I have come to MPUSD, nor will I.
>
> After reading your below response, I conclude that a) Teresa did make such a false claim to you, b) you knew it was likely false, and c) you are not protecting her from herself.
>
> So, if I do not hear from you or Teresa, I will assume that I am correct, and we can move on.
>
> Let's see what our colleague Jill Low thinks about all of this.

Jill Low (Low) is the MBTA president.

The next day, Codianne replied to the e-mail message, stating:

> I am very uncomfortable with the tone and intent of this e-mail. I have asked you to stop the 'challenging' e-mails to all staff including Ms. Kilty. We will be scheduling a meeting with you, myself and Ms. Kilty and that will be the arena in which your concerns and allegations will be discussed.

On January 4, 2010, Moberg sent an e-mail message to Kilty, stating:

> I'll look at the calendar when I return, but why don't you just give me and Lorraine keys to the MPR as President Low suggested so we don't need to bother anyone else?
>
> I know that other Monterey Adult School faculty and non-credential staff have keys to the MPR.
>
> You do trust Lorraine and me, don't you?

Both e-mail messages were copied to Low.

The District conducted classroom observations of Moberg on approximately September 29, 2009, November 9, 2009, January 20, 2010, and January 21, 2010.

According to the District, Moberg had performance problems from September 2009 through January 2010, and continuing. In February 2010, the District decided to pursue a mid-year dismissal of Moberg. The District prepared a Statement of Charges and Notice of Recommendation for Dismissal pursuant to Education Code section 44948.3 (Statement of Charges) and sent it to Moberg via e-mail on February 5, 2010. Also on February 5, 2010, the District conducted a performance evaluation of Moberg, and concluded that he only partially met standards. The District then sent Moberg a notice of non-reelection for the following school year. On February 9, 2010, the District's Governing Board adopted the proposed charges against Moberg.

The February 9, 2010, Statement of Charges proposes that Moberg be dismissed for cause, upon the grounds of: (A) evident unfitness for service and (B) persistent violation of or refusal to obey rules. The Statement of Charges enumerates numerous e-mail messages and other communications sent by Moberg to various District personnel which the District characterized as disrespectful, insulting, inappropriate and unprofessional.

The November 12, 2009 e-mail message quoted above is attached as an exhibit to the Statement of Charges, in support of the District's contentions that "From November 6, 2009 through November 15, 2009, you [i.e., Moberg] sent Ms. Codianne a series of e-mail messages accusing District employees Teresa Poirier and Ann Kilty of defaming and spreading false rumors about you." The January 4, 2009 e-mail message quoted above is also attached as an exhibit to the Statement of Charges, in support of the District's contentions that Moberg had sent an unprofessional e-mail on that date.

Moberg alleges that, on January 26, 2010, the District issued a Letter of Reprimand to him for failing to comply with Codianne's directive regarding use of a District radio. The District has supplied a Letter of Reprimand dated January 25, 2010, and signed by Moberg on January 27, 2010. Moberg was reprimanded for leaving his classroom and being unreachable by District-issued Nextel device, in violation of District policy, during which time several urgent situations occurred in the classroom.

Moberg alleges that on February 12, 2010, Superintendent Shepard wrote to him directing that he speak to no one in the District other than her.

On June 7, 2010, the District filed a Supplemental Statement of Charges adding a charge of dishonesty. This further charge involved Moberg's alleged failure to disclose the true reason he had left his previous position with the San Mateo Unified School District.

A termination hearing was held before Administrative Law Judge Mary-Margaret Anderson (ALJ Anderson) from OAH on June 21 and 22, 2010. On September 7, 2010, the District's Governing Board adopted her proposed decision that the dismissal of Moberg was warranted and that he was dismissed from his position.

Moberg contends a complaint should issue for the District's retaliatory conduct in non-reelecting his employment, for adopting the Statement of Charges, and for adopting the

Dismissal Resolution based upon his protected activity. Moberg also states that a complaint should issue for the District's interference with his right to collect evidence.

Retaliation For Protected Activity

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

> The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210.)

A. Protected Activity

1. Filing Grievances

Moberg alleges that he engaged in protected activity by filing grievances. It appears undisputed that Moberg filed multiple grievances, although the dates of the various grievances are not entirely clear. From the facts available, Moberg filed grievances between October 29, 2009 and February 5, 2010. The filing of grievances under a labor agreement is protected activity. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129.) It is presumed herein that the District would have been aware of the grievances since Moberg would likely have filed them with a District manager and the District does not allege that it lacked knowledge of the grievances. (*Oakland Unified School District* (2009) PERB Decision No. 2061.) Accordingly, it appears that Moberg engaged in protected activity by filing grievances between October 29, 2009 and February 5, 2010.

2. E-Mail Messages

Moberg alleges that he engaged in protected activity by sending e-mail messages on November 2, 4 and 6, 2009, in which he attempted to set an agenda for a meeting scheduled by the District at which Moberg requested union representation. A copy of the November 4, 2009 e-mail message is not provided by either party. The District has supplied copies of the November 2, 2009 and November 6, 2009 e-mail messages. Moberg also alleges that he engaged in protected activity by sending the e-mail messages of November 15, 2009 and January 4, 2010, in which he complained about adverse conditions of employment, sought union representation, and/or attempted to negotiate grievances and working conditions for himself and another teacher. Copies of these e-mail messages were supplied by the District and are quoted above.

The facts are insufficient to show that these e-mail messages were protected. "Copying a union representative on correspondence, without more, neither rises to the level of protected conduct nor establishes an intent to solicit union assistance." (*Oakland Unified School District* (2007) PERB Decision No. 1880.) Employee complaints may be considered protected activity if they are "a logical continuation of group activity" and address concerns impacting employees generally. (*Los Angeles Unified School District* (2003) PERB Decision No. 1552.) Complaints undertaken for the benefit of a single employee, however, are not protected activity. (*Ibid.*) Moberg's single statement at the end of a lengthy e-mail message to "see what our colleague Jill Low thinks about all of this" does not appear to be a request for union representation or an attempt to address issues impacting employees generally. Moberg's e-mail messages sent to set an agenda for a meeting or discuss other aspects of his employment likewise appear to be undertaken for his benefit alone and do not constitute protected activity. Accordingly, these e-mail messages do not constitute protected activity for the purposes of a prima facie case.

B. Adverse Action

Moberg alleges that the District took adverse action against him when it (1) decided to non-reelect him for the subsequent school year; (2) adopted its Statement of Charges, (3) issued its Resolution to adopt the proposed decision of dismissal; (4) adopted Supplemental Charges as a basis for dismissal; (5) directed Moberg to speak only to Codianne; (6) subsequently directed Moberg to speak only to Superintendent Shepard; and (7) required him to perform additional work in preparing lesson plans.

1. Notice of Non-Reelection

Moberg alleges that on February 9, 2010, the District notified him of its decision to non-reelect him for the subsequent school year. An employer's notice to a probationary employee that it has decided not to re-elect the employee for the following school year is an adverse action, if done for a retaliatory reason. (*Golden Plains Unified School District* (2002) PERB Decision No. 1489; *Santa Maria-Bonita Elementary School District* (1992) PERB Decision No. 924; *McFarland Unified School District* (1990) PERB Decision No. 786.) Therefore, the District allegedly took adverse action against Moberg on February 9, 2010 when it notified him of its decision to non-reelect him.

2. Adoption of Statement of Charges

Also on February 9, 2010, the District adopted its proposed Statement of Charges to terminate Moberg for cause. An employer's notification of its firm intention to terminate an employee constitutes adverse action. (*Regents of the University of California* (2004) PERB Decision No. 1585-H.) Therefore, the Statement of Charges issued on February 9, 2010, constitutes an adverse action.

3. Resolution of Dismissal

The charging party's burden includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) 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 and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) 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.)

Where a charging party alleges a new legal theory in an amended charge, based upon the same set of facts as alleged in the initial charge, the new legal theory is said to "relate back" and be timely filed. (*Sacramento City Teachers Association (Franz)* (2008) PERB Decision No. 1959.) New factual allegations, however, do not relate back if they are not mentioned in

the initial charge. (*Ibid.*) An amended charge relates back to the original charge only when it clarifies facts alleged in the original charge or adds a new legal theory based on facts alleged in the original charge. (*Ibid.*) The statute of limitations for a new allegation contained in an amended charge begins to run based on the filing date of the amended charge, not the original charge. (*Sacramento City Teachers Association (Marsh)* (2001) PERB Decision No. 1458.)

Here, the Amended Charge was filed on March 14, 2011. Therefore, new factual allegations occurring prior to September 14, 2010, are untimely filed.

On September 7, 2010, the District adopted its Resolution to adopt the proposed decision of dismissal by ALJ Anderson. PERB has held that, where an employee challenges a termination via administrative procedures, the termination is final as of the issuance of an administrative decision. (*Los Banos Unified School District* (2009) PERB Decision No. 2063.) Based upon the facts available, it appears that Moberg's termination for cause became effective on September 7, 2010.

This fact was raised for the first time in the Amended Charge filed on March 14, 2011, more than six months after it occurred, and therefore it is untimely. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board, supra*, 35 Cal.4th 1072.) This allegation was not mentioned in the original charge and therefore does not relate back. (*Sacramento City Teachers Association (Marsh), supra*, PERB Decision No. 1458.) Therefore, the allegation that the District issued its Resolution of Dismissal on September 7, 2010, is not timely filed.

4. Adoption of Supplemental Charges

On June 7, 2010, the District filed Supplemental Charges against Moberg, alleging dishonesty as a further basis for dismissal. The decision of the hearing officer, adopted by the District's Governing Board on September 7, 2010, found that these supplemental allegations were not a basis for dismissal. Facts concerning the Supplemental Charges are not included in the original charge, and occurred more than six months prior to the filing of the Amended Charge on March 12, 2011. Therefore, they do not relate back to the filing of the original charge. (*Sacramento City Teachers Association (Marsh), supra*, PERB Decision No. 1458.) Accordingly, Moberg's allegations regarding the Supplemental Charges are untimely filed.

5. Directive to Speak only to Associate Superintendent Codianne

Moberg alleges that on January 26, 2010, Codianne issued him a Letter of Reprimand for falsely claiming that he had failed to comply with Codianne's earlier directions regarding the use of a District radio. Moberg alleges that the District took adverse action against him by directing that he speak only to Codianne while he was processing grievances and collecting evidence to defend himself against the dismissal process. Moberg does not specify when this directive was given, nor does he allege how this directive is connected to the January 26, 2010, Letter of Reprimand. The charging party's burden includes alleging the specific dates on which unlawful conduct allegedly occurred. (*City of Santa Barbara* (2004) PERB Decision

No. 1628-M.) Neither party has supplied a January 26, 2010, Letter of Reprimand. Codianne did issue Moberg a Letter of Reprimand dated January 25, 2010, but it does not contain a directive to not speak to anyone else. In short, the basis for this allegation of adverse action cannot be determined from the information supplied. The allegation that the District directed him to speak only to Codianne is not in the original charge, and therefore is likely untimely filed as occurring more than six months prior to the filing of the First Amended Charge. (*Sacramento City Teachers Association (Marsh), supra,* PERB Decision No. 1458.)

6. Second Directive to Speak Only To Superintendent Shepard

Moberg alleges that "on February 12, 2010, Superintendent Shepard wrote to me directing that I speak to no one in the District other than herself. I had two grievances pending at the time and the Employer had brought a dismissal case against me at the time."[2] Moberg does not supply a copy of this directive, nor could it be located in any of the documents supplied by the District. Insufficient facts are alleged to establish that this alleged conduct by the District had an objectively adverse impact upon Moberg's employment. The case cited by Moberg, *Desert Community College District* (2007) PERB Decision No. 1921, held that an employer violated union access rights by attempting to modify an agenda item for a union meeting, and is inapposite. Accordingly, Shepard's February 12, 2010 directive, as presently alleged, does not constitute adverse action for purposes of a retaliation charge.

7. Requirement of Extra Work

On January 21, 2010, Codianne wrote to Moberg directing him to write detailed daily lesson plans addressing each Individualized Education Plan (IEP) goal for his students. The District made this directive in light of a finding that Moberg's teaching was "disorganized and disjointed" during a classroom observation. Moberg alleges that this took an additional two to three hours per day, and that the CBA in effect between the District and his exclusive representative provided for a 7.5 hour work day. Moberg alleges he was already working eight to nine hours per day. The District alleges that it has a long-standing practice of requiring teachers to maintain adequate lesson plans for their students. During the January 21, 2010 classroom observation, the District evaluator found that Moberg's lesson plans were inadequate and this was reflected in a disorganized classroom presentation. Accordingly, the District instructed him to develop lesson plans, as was required of all other teachers at the District. Although Moberg alleges that developing the lesson plans took him an additional two to three hours per day, he does not allege facts sufficient to establish that the District was imposing upon him an onerous requirement or one not required of other employees, and therefore taking action with an objectively adverse impact upon his employment. Accordingly, these facts, as alleged, do not establish adverse action.

[2] Moberg made similar factual allegations in the initial unfair practice charge.

C. Nexus

In order to state a prima facie case for retaliation, Moberg must establish that the District decided, on February 9, 2010, to non-reelect him for the forthcoming year, and/or issued the Statement of Charges on February 9, 2009, *because of* his protected activity in filing and pursuing grievances between October 29, 2009 and February 5, 2010. It appears that close temporal proximity is established, however the facts alleged do not otherwise demonstrate a causal nexus.

Moberg alleges that he was the only teacher who was non-reelected in the 2009-2010 school year after being rated as having met the overall standards of the teaching profession. Moberg's January 20, 2010 classroom observation evaluation includes an overall determination that he "meets standards," however, it also includes areas where he "partially meets standards." The same is true of previous classroom observation evaluations dated September 29, 2009 and November 9, 2009. Moberg's January 21, 2010, classroom observation rates him "partially meets standards" overall. His summary evaluation dated February 5, 2010 also rates him "partially meets standards" overall. Moberg does not allege facts to show that other employees were "similarly situated" such that it is established that he was treated in a disparate fashion from other employees who received similar evaluations. (*San Mateo County Office of Education* (2008) PERB Decision No. 1946 [no disparate treatment when employees are not similarly situated].)

Moberg contends that it is inconsistent with District practice to non-reelect a teacher who had been evaluated as "meets standards" or had received occasional praise for his/her performance. However, Moberg offers no facts to show that the District always re-elected probationary employees who had received occasional praise for their performance. Moreover, the facts do not establish that Moberg had been evaluated as meeting standards, as shown by the February 5, 2010, summary evaluation.

Moberg also contends that the District demonstrated animosity towards union activity and exaggerated reasons its for dismissing him for complaining about employment conditions, filing grievances, and other protected matters. However, nothing in the notice of non-reelection conveys union animus. While a few of the e-mail messages exchanged by Moberg and the District prior to his suspension and dismissal refer to union representatives and the grievance process, there is nothing which clearly suggests union animus or a direct nexus between the adverse actions and protected activity. The Statement of Charges and Resolution of Dismissal set forth numerous specific reasons for Moberg's dismissal for evident unfitness for service and persistent violation of or refusal to obey school laws or regulations, and therefore Moberg's contention that the District sought to dismiss him for exaggerated reasons lacks factual support.

Interference With Right To Collect Evidence

PERB Regulation 32615(a)(5)[3] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

PERB does not recognize an unfair practice charge of interfering with an employee's right to collect evidence. An employer's duty to provide information to the exclusive representative does not extend to individual employees. (*Antelope Valley Hospital District* (2011) PERB Decision No. 2167-M.) Moberg does not allege any facts to support such a violation. It is unclear on what basis Moberg believes the District interfered with his right to collect evidence—presumably in connection with pursuit of his defense at the OAH hearing—and therefore a prima facie case on this issue has not been stated.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be

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

[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before August 17, 2011,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Laura Davis
Regional Attorney

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[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)