

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



WENJIU LIU,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (EAST BAY),

Respondent.

Case No. SF-CE-995-H

PERB Decision No. 2391-H

September 2, 2014

Appearances: Wenjiu Liu, on his own behalf; Dawn S. Theodora, University Counsel, for Trustees of the California State University (East Bay).

Before Martinez, Chair; Huguenin, and Winslow, Members.

DECISION

WINSLOW, Member: This case comes before the Public Employment Relations Board (PERB or Board) on exceptions filed by Wenjiu Liu (Liu) to a proposed decision (attached) by a PERB administrative law judge (ALJ). The PERB complaint alleged that Trustees of the California State University (East Bay) (CSUEB or University) violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by denying Liu tenure and promotion, restricting him from campus grounds, and suspending and terminating him for engaging in the protected activity of filing grievances, participating in a grievance hearing, and filing an unfair practice charge.

CSUEB denied committing any unfair practices, and, as an affirmative defense, contended that the complaint should be deferred to arbitration pursuant to PERB

¹ HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Regulation 32620(b)(6).² The portions of the PERB complaint related to CSUEB's suspension and termination of Liu were eventually deferred to final and binding arbitration, which resulted in an arbitration award. The ALJ issued a proposed decision dismissing the remaining allegations. In his exceptions to that proposed decision, Liu challenged the ALJ's order deferring the suspension and termination matters to arbitration, and he challenged the arbitration award on the grounds that it was repugnant to the purposes of HEERA.

The Board has reviewed the entire record in this case, including the ALJ's findings of fact and conclusions of law, Liu's exceptions, and CSUEB's response thereto. The ALJ's findings of fact are supported by the record. Accordingly, we adopt the ALJ's findings of fact as the findings of the Board itself, augmented by our discussion below.

The ALJ's conclusions of law with regard to Liu's allegation that CSUEB retaliated against him by denying him tenure and promotion and by restricting him from campus grounds are well reasoned and in accordance with applicable law. We therefore adopt the ALJ's conclusions, as supplemented by our discussion below of issues raised by Liu's exceptions. We also address Liu's five-part motion to the Board, filed after the evidentiary record in this case was closed.

For reasons discussed below, we also affirm the ALJ's interlocutory order deferring Liu's allegations concerning his suspension and dismissal to arbitration and the ALJ's determination that the arbitrator's award was not repugnant to HEERA.

² PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

PROCEDURAL HISTORY

Charge and Complaint

Liu filed the initial charge in the present matter on September 30, 2011.³ Liu filed an amended charge on or about January 9, 2012. On March 27, 2012, the Office of the General Counsel issued a complaint alleging that CSUEB violated HEERA section 3571(a) by denying Liu tenure and promotion, restricting him from campus grounds, and suspending and terminating him for engaging in the protected activities of filing approximately 15 grievances between April and June 2011, participating in a May 9, 2011, grievance meeting and filing an unfair practice charge on or about September 30, 2011.

Answer and Motion to Defer to Arbitration

On April 20, 2012, CSUEB answered the complaint, denying any violation of HEERA and including affirmative defenses. Specifically, CSUEB contended that the entire complaint

³ The ALJ found that Liu “e-filed” his unfair practice charge on September 30, 2011, but that the effective filing date was October 17, 2011, the date that PERB received an original hard copy of the charge. Prior to July 1, 2013, charging parties were permitted to file their unfair practice charge using “on-line filing” as defined by former PERB Regulation 32613. As of September 30, 2011, PERB Regulation 32135(b) stated, in relevant part:

All documents . . . shall also be considered “filed” when received during a regular PERB business day by . . . on-line filing as defined in Section 32613.

Therefore, Liu’s charge was considered “filed” as of September 30, 2011. The filing date was not affected by the requirement in the version of PERB Regulation 32135(c) in effect at the time, which stated, in relevant part:

A party filing documents by . . . on-line filing must also deposit the original, together with the required proof of service and the required number of copies, in the U.S. mail or with a delivery service for delivery to the appropriate PERB office.

We conclude, contrary to the ALJ, that the effective filing date of the charge was September 30, 2011 at 4:24 p.m., as time stamped on the charge by PERB’s “on-line filing” service.

should be deferred because Article 10.36 of the collective bargaining agreement (CBA) between CSUEB and the California Faculty Association (CFA), (Liu's exclusive representative), provides: "No reprisals shall be taken against any employee for the filing and processing of any grievances."

CSUEB filed a pre-hearing motion to defer the allegations in the complaint to the arbitration procedures, to which Liu objected.

CSUEB asserted that Liu had filed grievances on each of the alleged retaliatory acts alleged in the unfair practice charge and agreed that it would allow Liu to amend each of his grievances to allege violations of CBA section 10.36 or would allow for the filing of grievances under CBA section 10.36. CSUEB waived any procedural objection to proceed to arbitration.

The ALJ set a pre-hearing conference for May 18, 2012 to respond to the motion to defer. At the end of the pre-hearing conference, the ALJ granted the motion, and issued a written ruling on May 22, 2012, deferring the allegations in the PERB complaint to arbitration.⁴ The unfair practice case was thereafter placed in abeyance.

By June 19, 2012, CFA decided not to represent Liu at his arbitration regarding: (1) the denial of tenure and promotion; and (2) the issuance of the Penal Code section 626.4 order banning him from campus grounds. As CFA controlled access to arbitration on these two issues, and Liu could not proceed to arbitration without CFA's concurrence, the ALJ scheduled September 11-14, 2012, for formal hearing on these two issues—denial of

⁴ Four of Liu's grievances covered the same allegations in the PERB complaint, i.e., the denial of his promotion and tenure, his suspension and termination and his temporary exclusion from the CSUEB campus pursuant to Penal Code section 626.4. The factual scenario regarding the denial of tenure and promotion and the issuance of the Penal Code section 626.4 order banning him from campus grounds are discussed in further detail below.

promotion and tenure, and the Penal Code section 626.4 ban. The suspension and termination issues remained deferred to arbitration.

An arbitration hearing was conducted on August 21-24, and September 17-18, 2012.

The details of this hearing are described below.

Quashing of Liu's Subpoena

During the PERB formal hearing, Liu sought a subpoena to obtain a memorandum entitled "Report on Review of Dean Terri Swartz" (Report), which was sent by the "Review Committee for the Dean and Associate Dean, College of Business and Economics, 2010-2011" (Review Committee) to CSUEB President Mohammad Qayoumi (Qayoumi) on May 12, 2011.

The ALJ reviewed the Report in camera and quashed the subpoena, on the grounds that the material contained in the Report was irrelevant to determining whether Qayoumi's decision to deny Liu tenure and promotion was affected by Liu's grievance-filing activity.

The ALJ proceeded with the evidentiary hearing. Post-hearing briefs were submitted on November 8, 2012, and the proposed decision issued on May 8, 2013. Timely exceptions were filed by Liu and a timely response to those exceptions was filed by CSUEB.

FACTUAL SUMMARY

Tenure and Promotion Process at CSUEB

The retention, tenure and promotion (RTP) process, set forth in the CBA and in CSUEB's RTP Policy and Procedures, is a multi-step process where an assistant professor is evaluated at the department and college levels as to retention, and the department, college and university levels as to tenure and promotion (TP). At each level, a faculty committee, consisting of rank-and-file, full-time, tenured professors, elected by their peers, evaluates the assistant professor. After the three-member department RTP faculty committee (Department

Faculty Committee) conducts its evaluation, it prepares a recommendation report and forwards it to the department chair. The department chair then issues his/her recommendation.

At the college level, the five-member college TP faculty committee (College Faculty Committee) evaluates the candidate and forwards its recommendation report to the college dean. The college dean similarly prepares a recommendation report and forwards it to the university level. At the university level, the five-member university TP faculty committee (University Faculty Committee) prepares and forwards its report to the university president. The final decision as to tenure and/or promotion belongs to the university president.

The faculty recommendation reports are prepared after the committees review the assistant professor's working personnel action file (WPAF), dossier and student evaluations. Each committee level reviews the same source documents presented by the assistant professor and the prior recommendation reports submitted by the prior committees and department chair/college dean. The candidate being reviewed receives a copy of each recommendation report and may submit a letter of rebuttal to each negative recommendation.

All faculty committees and the department chair/college dean/university president are charged with making their recommendation/decision without professional or personal bias. The University Faculty Committee is charged with determining whether bias played a role in the recommendation(s) at the lower level(s). Each faculty committee reviews the candidate in five areas: (1) possessing the requisite degree; (2) instructional achievement (teaching); (3) academic achievement (publications, papers, speaking engagements, etc.); (4) university service (participating in various university committees, etc.); and (5) community service (participating in local or state government boards and supervising community service projects). These five areas are usually reduced to three areas: instructional achievement, academic achievement, and university and community service.

Liu's Employment at CSUEB

CSUEB hired Liu as an assistant professor to work in the college of business and economics, department of management and finance⁵ in the 2005-2006 academic year.

For each year until the 2010-11 academic year, the faculty committee unanimously recommended Liu's retention, although beginning in the 2008-2009 academic year, he was warned that his relative lack of published working papers rendered him not "academically qualified/professionally qualified." Liu attempted to obtain "early tenure," but this was denied. In May 2008, Dean Teresa Swartz (Swartz) "reluctantly" supported retention for Liu for the 2008-2009 academic year. She cited student complaints about his attitude and behavior in the classroom and the lack of progress in his journal productivity, despite the fact that he had been given a "significant block of time to facilitate his research activities." However, a year later in May 2009, Swartz supported Liu for retention and commended him for progress in his academic achievement and university and community service.

On November 15, 2010, the Department Faculty Committee voted unanimously to recommend against promoting Liu to associate professor. Two days later, Liu filed his first grievance. This grievance, filed with the office of the provost,⁶ alleged that Liu's dean

⁵ The department's name was later changed to the department of accounting and finance.

⁶ The record does not indicate why Liu initially filed his grievances with the office of the provost. Article 10 of the CBA ("Grievance Procedure"), subsections 10.3 and 10.4, state that a grievant "may file a Level I grievance with the President . . ." (Respondent Exh. 202, p. 2), and that the "appropriate administrator may refuse consideration of a grievance not filed on a grievance form required by this Article." (*Id.*) According to subsection 10.2(d), the term "appropriate administrator" means "the individual who has been designated by the President to act pursuant to the procedures set forth in this Article." (*Id.*) The record does not indicate whether or not the CSUEB president designated the office of the provost to receive Liu's grievances. Subsection 10.11 ("Appeal to the Faculty Hearing Committee") states, in relevant part, that "[i]n the event the grievance is not settled to the grievant's satisfaction at the Level I meeting or by the Level I response by the appropriate administrator, the individual employee grievant . . . may file a grievance appeal with the Academic Vice President/Provost President

(Swartz) allegedly made it difficult for Liu to obtain teaching releases for the Winter 2010 academic term.

On December 17, 2010, the Department Faculty Committee issued its 16-page “Subsequent Tenure Recommendation” and “Subsequent Promotion Recommendation” after consideration of Liu’s rebuttal. The committee revised its vote to a unanimous recommendation against tenure and upheld its original unanimous recommendation against promotion. The committee stated other deficiencies which Liu failed to address including: Liu’s high grading scale and distribution and unfavorable student comments in their evaluations. Swartz was not part of this committee.

On January 4, 2011, Liu filed a second grievance with the office of the provost complaining about the department faculty report recommendation against his tenure and promotion.

On January 13, 2011, Department Chair Micah Frankel (Frankel) issued two memoranda, respectively, agreeing with the Department Faculty Committee to recommend against granting tenure and promotion to Liu. Frankel went into more detail when reviewing the comments of student evaluations, both positive and negative. The negative student comments covered cancelling class early; inappropriate sexual jokes; and difficulty in understanding Liu’s English. Some of these negative comments were repeated over multiple classes and years.

Frankel’s memo also cited a number of concerns set forth in other faculty committees, as well as his prior reports/recommendations. Frankel mentioned his observations of how Liu systematically attempted to intimidate faculty through bullying behavior. Frankel admitted that he issued Liu prior favorable retention recommendations, but distinguished between the

or designee . . .” (*Id.* at p. 4) The record does not indicate whether Liu believed his initial grievances were governed by subsection 10.11.

RTP procedural standards for retaining an assistant professor and granting tenure and/or promoting to an assistant professor.

Frankel testified that he could not state whether he knew Liu had filed any grievances at the time he issued his recommendation. He admitted that at some time, he found out that Liu filed grievances, but it never factored into any of his decision-making.

On February 7, 2011, the College Faculty Committee, consisting of Professors Gary McBride (McBride), Ching-Lih Jan, Anthony Lima, Kenneth Pefkaros, and Norman Smothers, issued its reports recommending by four votes to one that Liu be denied tenure and promotion. The reports were almost identical in content. The reports noted Liu's overall positive ratings by student evaluations, but that on average he gave higher grades than the department average and he sometimes cut class short and told inappropriate jokes. The majority believed that Liu's dossier did not contain enough evidence to substantiate performance and promise into the future in the area of instructional achievement. In regards to academic achievement, the committee noted that Liu had three published articles and one article in submission, which did not contain enough evidence to substantiate performance and promise into the future. The majority believed Liu's university and community service to be minimal. The one dissenting committee member strongly objected to the majority's conclusions and reasoned that Liu should be granted tenure "because he has shown promise and will likely continue to contribute into the future to the development of the University in the areas of instructional achievement, professional achievement, university service, and community service." (Respondent Exh. 226, p. 4.) The dissenting member reasoned that Liu should be promoted because "Dr. Liu has shown effectiveness in the areas of instructional achievement, professional achievement, university service, and community service, and that promotion to the rank of Associate Professor should be granted." (Respondent Exh. 227, p. 4.)

On February 18, 2011, Liu filed a grievance alleging that Frankel and Professors Nancy Mangold (Mangold) and McBride violated college policy by not holding office hours in accordance with that policy. Liu filed another grievance on the same day alleging that Frankel manipulated the summary sheet of the Fall of 2010 teaching evaluation statistics “out of self-interest.” (Respondent Exh. 230.)

On March 8 and March 15, 2011, Swartz affirmed the recommendations of the lower levels of review that Liu not be granted promotion or tenure.

Between April 1 and April 26, 2011, Liu filed three more grievances alleging that Frankel continued to violate the office hours policy; that Swartz “spoke to him in a firm tone” when Liu was checking his e-mails at a computer; and that Swartz awarded her “favorite” professors a grant of \$13,999 for publications which Liu described as “ill-made research policy.”

On April 27, 2011, the University Faculty Committee voted 4-1 that Liu be granted tenure, but denied promotion by a vote of 3-2. From May 5 to 27, 2011, Liu filed six more grievances, most of which were directed at Frankel and Swartz, complaining about their assignment of non-finance professors to teach finance courses, permitting McBride to engage in a full-time business in exchange for his allegedly false statements against Liu in the RTP process, Swartz’ appointment of a friend of hers to a directorship at CSUEB, Frankel’s failure to conduct meaningful academic research in years, and the purchase of a 30-inch monitor for the dean’s office. On May 31, 2011, Liu e-mailed Qayoumi informing him that Liu believed he was going to be investigated by CSUEB because he had been documenting alleged corruption.

On June 1, 2011, Qayoumi issued a letter stating that he was denying Liu tenure, because Liu’s WPAF demonstrated that he did not meet the university standards in the areas of

instructional achievement, academic achievement and university and community service. Liu was also notified that his next academic year (2011-2012) would be his final year of service (terminal year notice). Liu was informed that if he wanted to have his denial of tenure reconsidered, he should provide new evidence in the three areas. On June 8, 2011, Qayoumi issued a letter stating he was not approving Liu for promotion to associate professor as Liu did not meet the university standards in the areas of instructional achievement, academic achievement and university service. Qayoumi testified without contradiction that he actually made the decisions regarding denial of tenure and promotion about a week before the issuance of the June 1, 2011 and June 8, 2011 letters, respectively.⁷

Liu filed five more grievances between June 9 and 30, 2011, alleging that he had been unfairly denied tenure and promotion.

In addition to the grievances, Liu filed the unfair practice charge in this case on September 30, 2011, which alleges that CSUEB violated HEERA section 3571(a) by denying him tenure and promotion, restricting him from campus grounds, and disciplining him for engaging in the protected activities of filing grievances and participating in a grievance hearing. On January 9, 2012, Liu amended his unfair practice charge to include allegations that his termination from employment in November, 2011 also constituted retaliation for his grievance filings, although he did not specifically allege that his termination was done in retaliation for filing this unfair practice charge. On March 27, 2012, the Office of the General Counsel issued the complaint in this case, which included the allegation that Liu's termination was done in retaliation for his filing the original unfair practice charge.

⁷ The ALJ credited Qayoumi's testimony on this subject, and Liu presented no evidence to discredit Qayoumi's testimony and articulated no reason the ALJ's crediting this testimony should be disturbed.

Employee Complaints About Liu

Beginning March 1, 2010, CSUEB received complaints from other employees about Liu's conduct, including verbal altercations and related invasion of personal space, as well as stating that he would "fight to the death" over the right to teach a finance course. Campus police were called in on some of these complaints, and Liu received a reprimand for misconduct on September 20, 2010.

On January 6, 2011, CSUEB Police Chief Jan Davis (Davis) convened a threat assessment team meeting to discuss whether to order Liu to a fitness-for-duty examination.⁸ CSUEB Interim Associate Provost Linda Dobb (Dobb) explained how Liu was nervous about his tenure status, which was making the rest of the staff "nervous and jumpy." Dobb recounted some of Liu's past behavior as reported by various CSUEB employees, including kicking an office door, slamming something on his desk, taking photographs of staff offices, getting too close to people, suddenly appearing in hallways and bathrooms and asking, "[i]sn't [it] strange we are both here," requesting to record meetings, and loitering in the parking lot. Swartz stated that other staff were seeking employment elsewhere because of Liu's behavior, and she was frightened over Liu's statement that he would "fight to the death" over the right to teach a finance course. Davis wanted to increase university police presence when Liu received the next negative letter related to his tenure. Liu was also accused of harassment by other faculty. Dobb played no role in any level of review of Liu's tenure or promotion.

⁸ The record does not indicate whether the threat assessment team issued a particular recommendation and, if so, to whom.

In July 2011, CSUEB provost office staff contacted the president's office and stated that they were frightened of Liu and did not want Liu to come to the provost's office again.⁹ The president's chief of staff directed Dobb to "handle it." Dobb discussed the matter with the director of human resources and they agreed that Liu could bring his grievances to the department of human resources, and human resources staff would take the grievance(s) upstairs to the provost's office. On July 15, 2011, Dobb sent Liu a written notification stating that CSUEB had received a complaint of Liu's behavior from the provost's office staff, and that if he was to deliver anything to the office of the provost, he was to use the campus mail or personally deliver it to the receptionist at the human resources office.

On August 24, 2011, Provost James Houpis (Houpis) suspended Liu from September 19 to December 13, 2011, because of the conduct described above and additional charges, including intimidating a faculty member, attaching a global positioning system tracking device to the automobile of a faculty member to monitor his whereabouts, and taking photos of students without justification.

On September 28, 2011, Liu dropped off a grievance package at the president's office and then walked over to the office of the provost to drop off a copy of the same documents. The door was locked, and when employee Gina Traversa came to the door, she told Liu to go to the human resources office and not to come to the provost office. Liu's actions were in violation of Dobb's July 15, 2011, directive to him to refrain from delivering materials in person to the office of the provost.

On Friday, September 30, 2011, Liu sent an e-mail to the human resources director that addressed the human resources staff and made a reference to "killing" them. Campus police believed that Liu's e-mail was attempting to intimidate the human resources staff. CSUEB

⁹ Dobb was unaware at the time that her staff contacted the president's office about Liu. The record does not specify why the staff said they were frightened.

Police Chief James Hodges (Hodges)¹⁰ convened a threat assessment team meeting¹¹ on September 30, 2011, between 2:00 p.m. and 3:00 p.m., at which time the team decided that immediate action needed to be taken pursuant to Penal Code section 626.4 to order the withdrawal of the University's consent for Liu to be on campus for 14 days.¹²

Chief Hodges contacted CSUEB Chief of Staff Don Sawyer (Sawyer) to discuss getting authorization for the Penal Code section 626.4 exclusion order. Chief Hodges discussed all of the details of the basis for the order with Sawyer. As President Leroy Morishita¹³ (Morishita)

¹⁰ Hodges had replaced Davis as Police Chief.

¹¹ Present were eight team members: Nyassa Love of Risk Management, Human Resources Manager Andre Johnson, Director of Accessibility Services Katherine Brown, University Police Department Commander Kirk Gaston, Associate Vice President of Student Affairs Stan Hebert, Director of Student Health and Counseling Andrea Wilson, Chief Hodges and Dobb. Dobb was present telephonically and contributed as a team member.

¹² Penal Code section 626.4 states, in relevant part:

(a) The chief administrative officer of a campus or other facility of a community college, a state university, the university, or a school, or an officer or employee designated by the chief administrative officer to maintain order on such campus or facility, may notify a person that consent to remain on the campus or other facility under the control of the chief administrative officer has been withdrawn whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of such campus or facility.

(c) Consent shall be reinstated by the chief administrative officer whenever he or she has reason to believe that the presence of the person from whom consent was withdrawn will not constitute a substantial and material threat to the orderly operation of the campus or facility. In no case shall consent be withdrawn for longer than 14 days from the date upon which consent was initially withdrawn.

¹³ President Qayoumi left CSUEB on July 1, 2011.

was out-of-town, Sawyer telephoned President Morishita who gave authorization to issue the order. Sawyer then communicated the authorization to Chief Hodges.¹⁴

University police department officers served Liu with the Penal Code section 626.4 order near his office at approximately 4:33 p.m., on September 30, 2011. Liu was informed that he was forbidden to return to campus, and if he returned during the 14-day period, he would be arrested.

On November 3, 2011, Houpis issued the final disciplinary letter terminating Liu's employment effective November 21, 2011, for threatening other faculty members, unauthorized distribution of materials in other professors' classrooms, communicating with the office of academic affairs despite previous admonishments to refrain from such conduct, writing harassing and threatening e-mails to the human resources staff, disrupting the orderly operation of the CSUEB campus by the aforementioned conduct, lurking outside of other professors' offices during their office hours, identifying another professor as a faculty member whose students have a low average "GPA," and using e-mail to threaten the health and safety of Liu's fellow employees in violation of the CSUEB Acceptable Computing Use Policy and Workplace Safety and Security Policy.

Liu appealed his dismissal by letter to CSUEB President Morishita on November 5, 2011, invoking Article 19.10a of the CBA.¹⁵ He reiterated his intent to arbitrate his suspension

¹⁴ Chief Hodges explained that he had authority to issue the Penal Code section 626.4 order without the University president's authorization in exigent circumstances, but whenever he can, he receives authorization from the University president.

¹⁵ The record also contains an Individual Grievance Form dated November 19, 2011 which also alleges that Morishita terminated Liu's employment in retaliation for Liu's exercise of grievance rights. On this form Liu checked a box indicating that he elected the "faculty hearing committee (the statutory procedure)" as the method to determine the merits of his grievance. However, subsequent events show that Liu and CSUEB intended to submit this grievance to binding arbitration as provided in Articles 19.13 and 19.14, which prescribes a procedure for agreeing to an arbitrator, or seeking assistance from the American Arbitration

and dismissal on May 18, 2012, in the pre-trial hearing conducted by the ALJ regarding CSU's motion to defer.

Arbitration of Deferred Grievances

Liu represented himself at the arbitration hearing, with Attorney Mark Hostetter (Hostetter) present on some days as his advisory attorney. The arbitration hearing occurred on August 21, 22, 23, and 24, and September 17 and 18, 2012.

The issues presented to the arbitrator were as follows:

- (1) whether there was just cause for Liu's suspension; and
- (2) whether there was just cause for Liu's termination.

Both sides acknowledged in opening argument that Liu would be raising the argument that CSUEB retaliated against Liu because he had engaged in HEERA protected activity. Arbitrator Catherine Harris (Harris) indicated that Liu's argument that his pre-termination grievance filing activity may have had a bearing on his termination had potential relevance. Liu raised the issue of his filing of the instant unfair practice charge as protected activity in his opening statement, and he engaged in cross-examination of CSUEB's witnesses at multiple times regarding his filing of the unfair practice charge, without objection from CSUEB's attorney. It is also clear from the ALJ's pre-hearing order deferring the unfair practice complaint to arbitration, that the parties believed the arbitrator was to consider the question of whether Liu was terminated because he filed an unfair practice charge on September 30, 2011.

From a review of the official arbitration transcript, the ALJ found that during the first four days of the arbitration hearing, Liu caused delay in the proceedings by constantly interrupting CSUEB's direct examination to make an argument in support of his case; providing unsworn testimony to contradict witnesses; asking questions about the City of Bell;

Association (AAA), and striking from a list provided by the AAA. By February, 2012, Liu and CSUEB were in correspondence with AAA about the selection process.

prolonging witness testimony by editorializing; summoning the California Highway Patrol to take a report against California State University's (CSU) counsel; refusing to proceed with the hearing for a three-hour period, because he needed to speak to Hostetter; voicing objection to testimony he believed to be inaccurate; and arriving an hour late for the hearing. The arbitrator later determined in her final award that these actions by Liu unduly prolonged the hearing and interfered with CSUEB's presentation of its case-in-chief.

On September 16, 2012, the day before the September 17, 2012, hearing date, Liu sent an e-mail to CSUEB Vice Chancellor of Human Resources Gail Brooks accusing CSUEB witnesses of perjury. He sent copies of this e-mail to some of the witnesses, some of whom were scheduled to testify at the arbitration hearing. After this, Liu e-mailed some of these addressees asking for their physical addresses so that he could serve a legal document related to a perjury charge. He demanded a response by the afternoon of September 18, 2012.

At the September 17, 2012 hearing, Arbitrator Harris expressed concern over Liu's e-mail sent the day before. Harris stated that she was concerned that witnesses subpoenaed to testify at the arbitration would feel insecure about presenting themselves to give their testimony. Harris ordered Liu to refrain from sending additional e-mails to witnesses, and allowed the hearing to proceed.

Liu eventually walked out of the arbitration hearing on September 18, 2012, after the arbitrator refused to allow him to put on his case-in-chief before CSUEB had completed its case-in-chief.

On September 19, 2012, Liu wrote the arbitrator that he had no intention of returning to the arbitration at any time. He asked the arbitrator to find in his favor based upon the evidence presented in his cross-examination of the CSUEB witnesses and voluminous documents that he left with her on September 18, 2012. The arbitrator replied to Liu that absent an agreement to

conclude the matter in a manner which would allow both parties the right to have a full opportunity to present their cases, the arbitrator would entertain a motion to dismiss the appeal or allow CSUEB to complete its case. On October 2, 2012, CSU filed a motion to dismiss Liu's appeal of his suspension and dismissal. Liu filed his written opposition to this motion on October 16, 2012 and urged Harris to rule in his favor based on the evidence he brought forth on his cross-examination of CSU witness and on the material he left with her when he left the arbitration hearing.

On November 15, 2012, Harris issued her "Arbitrator's Rulings on Cross Motions of Parties and Final Award." The arbitrator dismissed Liu's appeals of the discipline imposed on him. She found that Liu failed to adhere to AAA Labor Arbitration Rules 19 and 26¹⁶; interfered with the CSUEB's presentation of its case; defied the arbitrator's directives and rulings; and undermined the integrity of the arbitration hearing. The arbitrator specifically declined to resolve the "just cause" issue as it pertains to Liu's suspension and termination. Nor did she resolve the statutory issue: whether Liu was retaliated against for engaging in protected activities.

¹⁶ According to Harris' award, AAA Labor Arbitration Rule 19, stated as of the date the award was issued:

The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to established deadlines and hearing schedules.

According to Harris' award, AAA Labor Arbitration Rule 26, stated as of the date the award was issued:

The arbitrator may vary the normal procedure under which the initiating party first presents its claim, but in any case shall afford full and equal opportunity to all parties for the presentation of relevant proofs.

PROPOSED DECISION

The ALJ framed the issues before him as follows:

1. Did CSUEB retaliate against Liu by denying him tenure and promotion because of the grievances he filed and grievance meetings he attended?
2. Did CSUEB retaliate against Liu by issuing a Penal Code section 626.4 order restricting him from campus grounds for 14 days because of the grievances he filed and grievance meetings he attended?
3. Should Arbitrator Harris's award be deemed repugnant to HEERA?

Applying the *Novato* test (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*)),¹⁷ the ALJ first identified the protected activities Liu engaged in—filing grievances and attending meetings attendant to the grievance process. Without dispute, these are protected activities under HEERA section 3565. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H.)

Liu also claimed that his sending numerous e-mails very critical of his Department Chair (Frankel) and College Dean (Swartz) constituted protected activity. These e-mails included: a February 1, 2010, e-mail to Qayoumi and Houpis criticizing Swartz for hiring “low-quality candidates,” paying them above-market salaries, and treating her friends favorably; June 1 and 29, 2010, e-mails to Houpis that Liu was treated unfavorably by not being assigned to teach an options and futures course; a September 17, 2010, e-mail to Dobb expressing Liu's personal views that Swartz pushed staff to file false police reports against

¹⁷ Under *Novato, supra*, PERB Decision No. 210, to succeed in a charge alleging that an employer discriminated or retaliated against an employee on the basis of protected activity, the charging party must show that: (1) the employee exercised rights protected under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; (4) the employer took action because of the exercise of protected rights.

him, played favorites, was unfair to him in the RTP process, and jeopardized accreditation based on the candidates she hired; and a May 31, 2011, e-mail contending that he was being investigated for his disclosure of office-hour policy violations and the finance department's purchase of a 30-inch monitor.

The ALJ held that Liu's e-mails to CSUEB staff did not constitute protected activity under HEERA, because they were more in the nature of "a complaint undertaken for his own benefit versus a continuation of group activity." (Proposed Dec., p. 58.)

1. Retaliation By Denying Tenure And Promotion To Liu

With regard to the protected grievance-filing activity, the ALJ found that the relevant decision-makers were unaware of Liu's grievance activity before denying him tenure/promotion. Qayoumi's decision to deny tenure/promotion was based upon Liu's marginal performance in the three areas of instructional achievement, academic achievement and university and community service. The ALJ found that Liu failed to demonstrate a prima facie case of retaliation for the denial of tenure/promotion and dismissed this allegation.

The ALJ also found no evidence of subordinate bias liability under *County of Riverside* (2011) PERB Decision No. 2184-M (*Riverside*).¹⁸ He noted that the concerns cited by Qayoumi in his decision to deny tenure and promotion (lack of recent published papers,

¹⁸ In *Riverside, supra*, PERB Decision No. 2184-M, the Board held, in relevant part:

These facts present a classic scenario that triggers application of the subordinate bias liability theory. Under this theory, a supervisor's unlawful motive may be imputed to the decisionmaker when: (1) the supervisor's recommendation, evaluation, or report was motivated by the employee's protected activity; (2) the supervisor intended for his or her conduct to result in an adverse action; and (3) the supervisor's conduct caused the decisionmaker to take adverse action against the employee.

(*Riverside*, p. 15, citations omitted.)

minimal involvement in university and community service) had been raised by the Department Faculty Committee before Liu filed his first grievance on November 17, 2010. Moreover, the ALJ concluded that Liu failed to demonstrate that the members of the two faculty committees were motivated by Liu's protected activity.

2. Retaliation By Issuing A Penal Code Section 626.4 Order

The ALJ held that, although the proximity of Liu's grievances and the related grievance meetings on May 31, 2011 (Grievance One); March 9, 2011 (Grievance Two); May 9, 2011 (Grievance Six, informal meeting); and May 31, 2011 (Grievance Ten) are sufficiently close in time to establish a temporal proximity between the protected activity and the Penal Code section 626.4 order on September 30, 2011, Liu failed to demonstrate that CSUEB's threat assessment team's recommendation to issue the order or Morishita's confirmation of the issuance of the order was unlawfully motivated by his protected activities. The ALJ determined that Liu failed to demonstrate the actual decision-makers' knowledge of his protected activity or subordinate bias liability, and concluded that Liu failed to demonstrate a prima facie case of retaliation with respect to the University's issuance of a Penal Code section 626.4 order. The ALJ dismissed the retaliation allegation.

3. Repugnancy Review

As the proposed decision notes, PERB Regulation 32620(b)(6) requires the Board agent to place an unfair practice charge arising under HEERA in abeyance if the dispute is subject to final and binding arbitration and to dismiss the charge at the conclusion of the arbitration process "unless the party demonstrates that the . . . arbitration award is repugnant to the purposes of . . . HEERA."

Based on the standards set forth in *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a (*Dry Creek*), in which the Board adopted the post-arbitration deferral

standard enunciated by the National Labor Relations Board (NLRB) in *Spielberg Manufacturing Company* (1955) 112 NLRB 1080 (*Spielberg*), the ALJ found it appropriate to defer to the arbitrator's award dismissing Liu's appeals of his suspension and termination. (*Santa Ana Unified School District* (2008) PERB Decision No. 1951 (*Santa Ana*)). Under this standard, the Board will exercise its discretionary jurisdiction to dismiss and defer a complaint to the arbitrator's award if: (1) the unfair practice issues were presented to and considered by the arbitrator; (2) the arbitral proceeding was fair and regular; (3) the parties agreed to be bound; and (4) the decision of the arbitrator was not "clearly repugnant to the purposes and policies of the Act." (*Id.* at p. 6.)

The ALJ noted that Liu's suspension and termination retaliation issues were never fully adjudicated at the arbitration hearing. However, the ALJ found that all four of the *Santa Ana, supra*, PERB Decision No. 1951 repugnancy elements weighed in favor of deferring to the arbitration process. He addressed each of Liu's objections to the arbitration process.

a. Selection/Appointment of Arbitrator Harris

The ALJ dismissed Liu's allegation that he was never allowed to participate in the CBA procedure in selecting an arbitrator, noting that he was allowed to do so, but did not do so in a timely manner. (ALJ's Proposed Dec., p. 69.)

b. Arbitration Hearing-Related Allegations

Regarding Liu's decision to walk out of the arbitration hearing before presenting his case-in-chief, the ALJ wrote:

A policy question therefore arises as to whether Liu should be able to avoid the deferral order by walking out of a hearing for which he was unhappy in how it was proceeding and, as a result, the deferral issue was not "fully presented." To allow Liu to escape the deferral order by his obstructionist and contumacious conduct would be to put the control of the enforcement of the deferral order in his hands rather than the ALJ issuing the order. While Liu was not happy with the speed of the arbitration

proceedings, he greatly contributed to its delay. Additionally, the two disciplinary actions involved multiple charges and witnesses. The arbitration record supports the assertion that the arbitrator was willing to hear his protected activity defense and rule on it. In light of the unusual circumstances surrounding the conclusion of these proceedings, and the arbitrator's willingness to hear his defense, the element that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice has been met.

(Proposed Dec., p. 68.)

Addressing Liu's contention that the arbitration proceedings were not fair and regular because they were unduly time-consuming, the ALJ noted that the disciplinary actions included multiple charges and several witnesses. Because Liu himself interfered with the arbitrator's ability to provide both parties with an equal opportunity to present evidence, the ALJ concluded that "any irregularity of the proceeding was caused by Liu." (Proposed Dec., p. 69.)

c. Post-Arbitration Hearing Events

The ALJ dismissed Liu's contention that because the arbitrator's November 15, 2012 award was untimely issued, it should not be binding. The ALJ held that the arbitrator's award (which ruled on CSUEB's motion to dismiss Liu's action and Liu's responsive opposition/motion) was timely, since the governing CBA did not dictate a time deadline for the issuance of awards based upon motions. (ALJ's Proposed Dec., pp. 70-71.)

The ALJ also dismissed Liu's contention that the arbitrator could not dismiss his appeals, but could only order the hearing to continue in his absence. Relying on Voluntary Labor Arbitration Rule 27 of the AAA,¹⁹ the ALJ concluded that although it was within the arbitrator's authority to proceed in the absence of a party, the arbitrator's decision to dismiss Liu's case was "not palpably wrong," given the "continuum of interference and misconduct"

¹⁹ Rule 27 allows an arbitration to proceed in the absence of a party if a party fails to appear at the arbitration hearing after it has been noticed.

which culminated in Liu's ultimatum to the arbitrator demanding that she allow him to put on his case then and there, or he would walk out.

The ALJ concluded that Liu had not met his burden to show that the arbitration proceedings and the award were repugnant to the purposes of HEERA.

LIU'S EXCEPTIONS

Liu filed 37 pages of exceptions, along with a 56-page supporting brief. These exceptions can be summarized as follows:

- The ALJ indicated his desire to reduce his caseload, and dismissed the case to reduce his caseload;
- None of the charges should be deferred to arbitration;
- CSUEB's attorney coached CSUEB's witnesses to lie, and CSUEB's witnesses committed perjury on the stand;
- Harris was not selected according to the AAA rules;
- CSUEB's attorney bullied Liu on the stand at the arbitration hearing;
- The ALJ excluded grievance documents introduced by Liu;
- Harris violated AAA's rules and CBA provisions, followed the CSUEB attorney's hand signals, needlessly dragged out the duration of the arbitration hearing, and missed the deadline to issue the arbitration award;
- The ALJ chose the date of issuance of his proposed decision to deprive Liu of the opportunity to file exceptions;
- The ALJ's proposed decision is contrary to the preponderance of the evidence;
- Liu's e-mails to the CSUEB administration are a logical continuation of protected group activity of attempting to oust Swartz;

- The relevant decision-makers in charge of denying Liu’s tenure and promotion had full knowledge of Liu’s grievances at each level of Liu’s tenure and promotion review, and they retaliated against Liu because of the filing of his grievances;
- Harris’ award is repugnant to the purpose of HEERA;
- The Penal Code section 626.4 exclusion order constituted retaliation against Liu for filing grievances and “working with PERB”; and
- The ALJ did not address the status of the instant unfair practice charge as protected activity with regards to CSUEB’s Penal Code section 626.4 order.

CSUEB’S RESPONSE TO EXCEPTIONS

CSUEB filed its response to Liu’s exceptions on July 8, 2013. CSUEB contends that Liu’s exceptions are based on conjecture, most of the brief is unintelligible and based on hearsay allegations, and Liu raises matters that he either did not raise during the evidentiary hearing or that were not admitted into evidence.²⁰

DISCUSSION

We note that Liu’s exceptions fail to cite to any part of the record that contradicts either the ALJ’s proposed decision or CSUEB’s arguments. We find that CSUEB has demonstrated that it had, and acted because of, the alternative non-discriminatory reason based on Liu’s improper workplace conduct. We find that Liu’s improper workplace conduct gave the employer cause for non-discriminatory discipline, and that CSUEB has proved through independent and competent evidence both the existence of such improper workplace conduct and that this conduct motivated its response. We explain our reasons for our findings and address other matters raised by Liu’s exceptions in the discussion that follows.

²⁰ Pursuant to PERB Regulation 32300(b) (8 CCR, § 32300(b)), during the Board’s consideration of this matter, we have disregarded any matters outside the hearing record.

Denial of Tenure and Promotion

As the ALJ did, we apply the *Novato, supra*, PERB Decision No. 210 test in reviewing Liu's exceptions to the ALJ's conclusion that Liu failed to establish that he was denied tenure and promotion in retaliation for his protected activities. It is incontrovertible that invoking the procedures and protections of a collective bargaining agreement by filing grievances is protected activity. (*Jurupa Unified School District* (2012) PERB Decision No. 2283.)

We agree with the ALJ that Liu failed to establish that any of the decision-makers in the tenure/promotion process knew of his protected activity.²¹ A review of the timing of several of his grievances shows that Liu often filed grievances after he received notice of an adverse decision by a Department Faculty Committee or College Faculty Committee. His first grievance was filed on November 17, 2010, two days after the department committee recommended against tenure. This grievance was not directed at any professor who served either on the Department Faculty Committee or on the College Faculty Committee, but instead complained that Swartz did not grant Liu sufficient teaching releases. This grievance, like virtually every subsequent grievance, was filed with the office of the provost, and the record is

²¹ Liu excepts to the ALJ's conclusion that the relevant decision-makers did not know of his protected grievance filing activity prior to taking adverse action against his employment, but he cites to no evidence in the record that supports this exception. Instead, he cites to documents he appended to his exceptions (viz. "Exhibits E1 to E5").

PERB Regulation 32300 (8 CCR, § 32300) states, in relevant part:

(c) Reference shall be made in the statement of exceptions only to matters contained in the record of the case.

(d) An exception not specifically urged shall be waived.

An excepting party's failure to comply with PERB's regulations renders the appeal "fatally defective." (*Temecula Valley Unified School District* (1990) PERB Decision No. 836, p. 4). We therefore need not consider this exception. However, even if we were to consider this exception, the record does not support Liu's assertion.

devoid of facts showing who was notified of the filing of the grievance, or allegations included in any grievance, or when they were notified, if they were notified.

Liu's second grievance, filed on January 4, 2011, with the office of the provost, complains about the Department Faculty Committee report of December 7, 2010, recommending denial of tenure. The individuals who participated in that committee did not participate in any further consideration of Liu's tenure, promotion, or subsequent adverse actions. There is no credible evidence in the record that the actual decision-makers responsible for denying Liu's tenure and promotion and imposing disciplinary action against Liu (none of whom were members of the Department Faculty Committee) took such actions in retaliation for Liu's grievance filed against the Department Faculty Committee.

On January 13, 2011, Frankel supported the recommendation of the Department Faculty Committee that Liu be denied tenure and promotion. On February 8, 2011, Liu filed the first of several grievances in which he alleges that Frankel did not keep office hours according to University policy and unfairly categorized student evaluations.

Liu also filed several grievances against Swartz. His first grievance, filed on November 17, 2010, complained that she did not give him adequate teaching releases. She was also identified in his January 4, 2011, grievance alleging that she and the Department Faculty Committee misrepresented aspects of his academic work in their tenure reports. The record is devoid of facts showing that Swartz was notified of these grievances or of their allegations, and if so, when she was notified. Liu has therefore failed to demonstrate employer knowledge with respect to any adverse action attributable to Swartz.

The next grievance by Liu identifying Swartz was filed on April 25, 2011. This grievance alleged that she spoke to him in a firm tone. The following day, Liu filed a grievance against her alleging that she displayed favoritism toward certain professors by awarding them

cash grants for undeserving research. Yet Swartz issued her recommendations against Liu's tenure and promotion on March 8 and 15, 2011. She, therefore, could not have been motivated to take this adverse action because of these April 2011 grievances Liu filed against her.²²

Liu also criticized Swartz in complaints beginning on February 1, 2010, when Liu wrote to Qayoumi requesting that Swartz be replaced as dean, because she hired "low-quality" candidates and over-paid them, divided the faculty, and exhibited unwarranted favoritism toward her friends on the faculty. The record does not show that Swartz was aware of this criticism. We note that after this communication to Qayoumi, on May 5, 2010, Swartz supported the department's recommendation that Liu be retained for the following academic year.

Absent from the proposed decision is a discussion of Swartz' motivation or knowledge. Swartz was not called as a witness in this case, so we do not have a first-hand account of what she knew about Liu's grievance claims and when she knew of them in relation to her decision to support the faculty committee recommendations denying Liu tenure and promotion. Nevertheless, we affirm the ALJ's discussion of subordinate bias liability. Swartz was not the final decision-maker here. Qayoumi was, and the facts in the record support the ALJ's finding that Qayoumi did not know of any of Liu's grievances when he determined that Liu should not be granted tenure.

The facts also support the ALJ's conclusion that Qayoumi based his decision to deny Liu's tenure/promotion on CSU's assessment that Liu's performance in the areas of instructional achievement, academic achievement and university and community service was marginal. We affirm the ALJ's findings and conclusions that Liu failed to establish that any of

²² The formal level 1 meeting on the January 4, 2011, grievance occurred on March 9, 2011, but the record does not indicate whether she was present at this meeting.

the faculty committee members who generated the detailed recommendations against tenure/promotion were aware of his grievances or were motivated by this protected activity when they made their recommendations. We note, for example, that some of the same concerns about Liu's performance had been raised as early as March 1, 2010, eight months before he filed his first grievance.²³ In sum, Liu has failed to establish any factual or legal basis to attribute to Qayoumi any bias that may have been harbored by any of his subordinates, let alone that any subordinates harbored bias based on Liu's grievance activities. For these reasons, we agree with the ALJ's conclusion that Liu failed to establish a prima facie case for retaliation or discrimination on the basis of his protected activities.

Even assuming, arguendo, that Liu did establish a prima facie case for retaliation in CSUEB's denial of tenure/promotion, we join with the ALJ in concluding that CSUEB established that it had a legitimate non-discriminatory reason for denying Liu tenure/promotion and that it acted because of that non-discriminatory reason and not because of Liu's protected activity.

In adjudicating a charge of employer discrimination or retaliation where the employer alleges it was justified in its actions because of the charging party's misconduct, PERB uses the following burden-shifting analysis, articulated most recently in *Palo Verde Unified School District* (2013) PERB Decision No. 2337:

Our analysis of the prima facie case and the affirmative defense accords to each party certain burdens. Once the charging party establishes that the responding party was motivated in whole or part by statutorily protected conduct, the burden shifts to the

²³ In March 2010, the Department Faculty Committee recommended 2-1 to retain Liu for the 2010-2011 academic year, but the committee report noted that he exaggerated his accomplishments, and that the grade point averages in his classes were higher than those of other instructors. Liu did send a memo to Qayoumi on March 10, 2010, complaining that the Department Faculty Committee was prejudiced against him, but this was not a grievance. Because this memorandum raised only individual, as opposed to collective concerns, we do not consider it to be activity protected under HEERA.

respondent to demonstrate that the employer had, and acted because of, an alternative non-discriminatory reason. Where such alternative reason is alleged to be improper workplace conduct of the charging party, which is claimed to give the employer cause for non-discriminatory discipline or discharge, the employer must prove through independent and competent evidence both the existence of such improper workplace conduct and that this conduct it [*sic*] motivated the employer's response.

(*Id.* at p. 23)

We agree with the ALJ that CSUEB demonstrated that it had, and acted because of, an alternative, non-discriminatory reason for denying Liu tenure and promotion. The record supports the ALJ's factual finding that Qayoumi based his decision on Liu's performance in the areas of instructional achievement, academic achievement and university and community service. Qayoumi cited student evaluations that noted Liu's ending classes early, sexual joking and cancelling classes. Qayoumi also believed that Liu had only minimal involvement in university and community service and in fact quit one committee because Liu believed it was too much work. As for academic achievement, Qayoumi noted that Liu did not have any recently-published papers and had none in the pipeline. All of these concerns had been noted by faculty committees as early as March 2010, prior to Liu's grievances.

These facts taken as a whole, demonstrate that CSUEB had, and acted upon, a non-discriminatory reason for denying Liu tenure and promotion.

Penal Code Section 626.4 Order

The ALJ's conclusion that the individuals who decided to exclude Liu from the university campus pursuant to Penal Code section 626.4 (*viz.*, the threat assessment team members and Morishita) were unaware of his grievances and participation in grievance meetings is fully supported by the facts in the record. Liu excepts to this finding, and in support of this exception cites only to a document that he appended to his exceptions (*viz.* "Exhibit H"), without citation to the record. The only evidence in the record to which he

cites is a section of the PERB formal hearing transcript in which the ALJ refers to Liu as “a peaceful person.” For reasons discussed above at page 26, we will not consider documents that were not admitted into the record as supportive of any exception. The fact that the ALJ referred to Liu as a “peaceful person” has no bearing on whether those who decided to impose the Penal Code section 626.4 exclusion order knew of his protected activity.

The ALJ did not discuss whether Liu’s unfair practice filing motivated CSUEB’s decision to exclude him from campus. Liu’s only reference in the exceptions to this issue consists of a statement, “[r]etaliations on working with PERB should not be deferred to arbitration.”²⁴ Besides this statement, he claims that the arbitrator refused to consider the PERB filing activity. We do not read this statement as one that complies with PERB Regulation 32300(c) for the purpose of excepting to the ALJ’s failure to consider whether the filing of the unfair practice charge caused CSUEB to issue the Penal Code section 626.4 exclusion order.²⁵

Even had Liu properly excepted on this ground, based on our review of the record, we conclude that there is no evidence to support a finding that CSUEB’s exclusion order was issued in retaliation for Liu’s filing this unfair practice charge. Although Liu’s exceptions allege retaliation by CSUEB because of the filing of the instant PERB unfair practice charge, the charge was filed approximately nine minutes before the Penal Code section 626.4 exclusion order was served on him. While the charge was technically filed prior to the service of the order, the charge was clearly filed after Hodges convened the threat assessment team meeting which led in quick succession that day to the issuance of the order. More importantly, Liu has

²⁴ PERB Regulation 32300 (8 CCR, § 32300) states, in relevant part:

- (c) An exception not specifically urged shall be waived.

²⁵ We address, *infra*, Liu’s challenge to the deferral to arbitration of his allegation that he was retaliated against for filing an unfair practice charge.

not proven that Hodges knew that the charge had been filed minutes before he served the order. For this reason, we find that Liu has not sustained his burden of proving that his protected activity of filing the unfair practice charge could have motivated CSUEB's adverse action of issuing the Penal Code section 626.4 order.

The day before the Penal Code section 626.4 order was issued, Liu sent a September 29, 2011 e-mail with a "cc:" line that includes the name "Leroy Morishita," but that does not include an actual e-mail address for Morishita. The e-mail states: "I am currently working with [*sic*] California Public Employment Relations Board regarding the unfair labor practices at CSUEB, i.e. illegal manipulations by Linda Dobb of the grievance hearing process." However, Liu introduced neither evidence of the e-mail address that corresponded to the "Morishita" reference, nor evidence that Morishita or any other relevant decision-maker saw or learned of the contents of this e-mail prior to the issuance of the Penal Code section 626.4 exclusion order, or prior to the convening of the threat assessment meeting that led to the exclusion order. In the absence of such evidence, we deny Liu's exceptions.

Nor can we conclude that Liu's e-mails discussed above, at pages 19-20, motivated CSUEB to retaliate against Liu by issuing the exclusion order. Of the two e-mails that were arguably protected, only one was sent by Liu prior to the issuance of the Penal Code section 626.4 order.²⁶ Despite its timing, this e-mail does not affect our decision to affirm the

²⁶ One e-mail, dated August 10, 2011, and addressed to Houpis, acknowledged receipt by Liu of "discipline package," and asserts that "you may have directly violated California Faculty Association (CBA) Article 19." There is no indication that this email was sent or forwarded to anyone other than Houpis, who was not on the threat assessment team which recommended Liu's exclusion from the campus under Penal Code section 626 and who was not involved in the decision to issue the exclusion order.

A second e-mail, dated October 12, 2011, and addressed to Hodges, asserts that Liu's right to the grievance process "should not be affected by the illegal 626 thing." This post-dates the exclusion order.

ALJ's proposed decision, as Liu points to no evidence that any relevant decision-makers were aware of this e-mail prior to the issuance of the Penal Code section 626.4 order.

For these reasons, we find that the ALJ's decision with regard to the Penal Code section 626.4 order is fully supported in the record. Liu presented no evidence to support his conjecture that the relevant decision-makers behind the Penal Code section 626.4 order had any knowledge of his grievance activities, unfair practice charge filing, or other protected activity prior to making their respective decisions.

Other Protected Activity

In addition to his grievance activities and this unfair practice charge, Liu claims that he engaged in other protected activity that caused CSUEB to deny him tenure and promotion in retaliation for that activity. He asserts that he was a part of faculty group activity to oust Swartz (and that such protected activity motivated CSUEB to impose adverse actions against him). The evidence Liu cites to in support of his claim consists of his own testimony at the hearing in which he recounted that in the Fall of 2009, he spoke to ten to fifteen other CSUEB professors whom he believed were organizing an early review of Swartz to have her ousted.²⁷ (Transcript, Vol. II, 108:3-10.) He also cites to his own testimony stating that he e-mailed and spoke to Mangold about Swartz being "no good," and that he e-mailed and told Dobb and Frankel that Swartz was "bad." (Transcript, Vol. II, 107:16 to 114:1.)

For Liu's remaining allegations of participation in this alleged group activity, he cites only to documents he appended to his exceptions (viz. Exhs. D1 to D8), without citations to exhibits that were entered into the record. The CSUEB exhibits to which he cites (viz. CSUEB Exhs. 76, 81 and 160) do not appear in the record, as the CSUEB exhibits start at number 200. The Liu exhibit to which he cites (viz. Liu Exh. 147) also does not appear in the record, as

²⁷ In the same section of the transcript, Liu described his intent to "compare data" with the other professors, without elaborating on the meaning of this phrase.

Liu's exhibits only reach Exhibit 42. Liu has failed to prove by a preponderance of admissible and reliable evidence that his criticisms of Swartz were part of a group effort or that such activity motivated the CSUEB's decision to deny him promotion and tenure.

Liu's charge also alleges that a series of e-mails he sent to various faculty members constituted protected activity for purposes of his retaliation charge. After reviewing the exhibits admitted into the record in this matter, we could discern only two e-mails which could conceivably amount to protected activity as an extension of collective activity. (See fn. 26.) However, both e-mails were sent subsequent to CSUEB's denial of Liu's tenure or promotion. Therefore, neither e-mail affects our decision to affirm the ALJ's proposed decision with respect to the denial of Liu's tenure and promotion. Also, nothing in the record shows that those who made the decision to exclude Liu from campus either knew of these two e-mails, or if they did, that the content of the e-mails motivated their decision to invoke Penal Code section 626.4.

Although Liu's exceptions argue that by CSUEB retaliated against him because of the filing of the instant PERB unfair practice charge, Liu's charge filing date of September 30, 2011, was subsequent to the June 2011 denial of tenure and promotion.

In sum, we affirm the ALJ's findings of fact and conclusions of law regarding Liu's denial of tenure/promotion and the Penal Code section 626.4 order for the reasons discussed above.

We turn now to the question of deferral. Liu excepts both to the ALJ's decision of May 22, 2012, to defer all of Liu's unfair practice allegations to arbitration (the pre-arbitral deferral decision) and to the ALJ's refusal to consider the arbitrator's award repugnant to HEERA (post-arbitral deferral).

Pre-Arbitral Deferral

Unlike the Educational Employment Relations Act (EERA),²⁸ HEERA contains no specific provision directing PERB when to defer unfair practice charges to arbitration.²⁹ Nevertheless, PERB Regulation 32620(b)(6) and our case precedents apply the deferral doctrine to HEERA. (*Regents of the University of California (San Francisco)* (1984) PERB Order No. Ad-139-H; *Dry Creek, supra*, PERB Order No. Ad-81a.) These cases, in turn, make clear that PERB looks to the deferral doctrine as developed by the NLRB in assessing both pre-arbitration deferral and post-arbitration repugnancy claims. (*Dry Creek.*)

When considering whether to defer an unfair practice charge to arbitration, the Board, following *Collyer Insulated Wire* (1971) 192 NLRB 837 (*Collyer*), applies a three-part test: (1) whether the dispute arises within a stable collective bargaining relationship; (2) whether the respondent is willing to waive contract-based procedural defenses to the grievance or arbitration and is willing to arbitrate the dispute; and (3) whether the contract and its meaning lie at the center of the dispute. In our recent decision, *Claremont Unified School District* (2014) PERB Decision No. 2357 (*Claremont*), we formalized an additional requirement: that the exclusive representative be willing to arbitrate the dispute if the parties to the unfair practice case are not the same as the parties to the collective bargaining agreement.

²⁸ EERA is codified at Government code section 3540 et seq.

²⁹ Cf. EERA section 3541.5(a)(2) provides, in pertinent part:

[T]he board shall not . . . [¶] Issue a complaint against conduct also prohibited by the provisions of the agreement between the parties until the grievance machinery of the agreement, if it exists and covers the matter at issue, has been exhausted, either by settlement or binding arbitration. . . . The board shall have discretionary jurisdiction to review the settlement or arbitration award reached . . . solely for the purpose of determining whether it is repugnant to the purposes of this chapter.

In considering CSUEB's motion to defer all of Liu's allegations contained in the instant unfair practice complaint to arbitration, the ALJ determined that the relevant collective bargaining relationship, which is between CSU and the CFA, was stable. CSUEB was willing to waive any procedural defenses and permit Liu to file additional grievances challenging the adverse actions under Article 10.36 of the CBA, prohibiting reprisals for filing grievances. As to the third prong of the *Collyer* test, the ALJ determined that retaliation for filing grievances, an allegation contained in the unfair practice complaint, is also prohibited by Article 10.36 of the CBA. Thus, the contract covered Liu's allegations that he was denied tenure/promotion, suspended from employment, and was excluded from the campus pursuant to Penal Code section 626.4 because these actions were allegedly motivated by Liu's filing grievances.

With respect to Liu's allegation that he was terminated for filing grievances and for filing this unfair practice charge, the ALJ noted that this adverse action is also covered by the CBA because Article 19.16 requires that all disciplinary actions be taken for "cause." Thus, according to the ALJ, the arbitrator who is presented with the issue of whether discipline was supported by "cause," must also evaluate evidence of anti-union animus. On that basis, the ALJ deferred all allegations contained in PERB's unfair practice complaint to arbitration, including the allegation that Liu was retaliated against for utilizing PERB's remedies, i.e., filing this unfair practice charge.

The ALJ issued his written ruling on pre-arbitration deferral on May 22, 2012, in the form of a notice of abeyance, and denominated it as an interlocutory order. The ruling included instructions for a party to object to an interlocutory order pursuant to PERB Regulation 32200.³⁰

³⁰ PERB Regulation 32200 provides:

As noted above, the denial of tenure/promotion and the Penal Code section 626.4 issue returned to PERB, as CFA refused to arbitrate these issues. But Liu excepts generally to the ALJ's pre-arbitration deferral order and specifically asserts that it was an error for the ALJ to defer to an arbitrator his claim that he was retaliated against for filing the unfair practice charge. This claim has merit.

Under the National Labor Relations Act (NLRA),³¹ unfair labor practice charges alleging that employees have been retaliated against for filing unfair labor practice charges are not deferred for important policy reasons explained in *Filmation Associates, Inc.* (1977) 227 NLRB 1721 (*Filmation*):

The prohibition expressed in Section 8(a)(4) . . . is a fundamental guarantee to employees that they may invoke or participate in the investigative procedures of this Board without fear of reprisal and is clearly required in order to safeguard the integrity of the Board's processes. In our view the duty to preserve the Board's processes from abuse is a function of this Board and may not be delegated to the parties or to an arbitrator. Accordingly, as we conclude that issues involving Section 8(a)(4) of the Act are

A party may object to a Board agent's interlocutory order or ruling on a motion and request a ruling by the Board itself. The request shall be in writing to the Board agent and a copy shall be sent to the Board itself. Service and proof of service pursuant to Section 32140 are required. The Board agent may refuse the request, or may join in the request and certify the matter to the Board. The Board itself will not accept the request unless the Board agent joins in the request. The Board agent may join in the request only where all of the following apply:

- (a) The issue involved is one of law;
- (b) The issue involved is controlling in the case;
- (c) An immediate appeal will materially advance the resolution of the case.

³¹ The NLRA contains an explicit provision in Section 8(a)(4) defining as an unfair labor practice an employer's discharge or other discrimination "against an employee because he has filed charges or given testimony under this Act."

solely within the Board's province to decide we will not apply the *Spielberg* doctrine to such issues.

(*Id.* at p. 1721, emphasis in original.) (See also *McKinley Transport Limited* (1975) 219 NLRB 1148.)

Although HEERA does not specifically replicate NLRA section 8(a)(4), it is beyond doubt that filing unfair practice charges under HEERA and any of the other statutes PERB administers, and participating in PERB processes, are protected conduct. (*Regents of the University of California* (1984) PERB Decision No. 403-H [appearing as a witness in a PERB unfair practice hearing was deemed protected]; *Los Angeles Unified School District* (1992) PERB Decision No. 957; *Trustees of the California State University* (2008) PERB Decision No. 1970-H, ALJ Proposed Dec., p. 19.) The same policy considerations articulated in *Filmation, supra*, 227 NLRB 1721 apply with equal force to PERB proceedings.

Parties are implicitly guaranteed access to PERB without fear of reprisal or discrimination, and safeguarding that access is a function that more appropriately lies with the Board, rather than an arbitrator. PERB has adjudicated retaliation claims since its inception, has developed and refined a workable test for assessing such claims, and applies the test uniformly to all the statutes it administers. Even if a retaliation claim could arguably fall within an arbitrator's jurisdiction where, as in this case, the CBA contains a just cause clause, the meaning of the CBA does not generally lie at the center of the dispute in such cases. The third prong of the *Collyer* test is therefore not satisfied where the question to be decided is whether an employee was retaliated against because he or she filed an unfair practice charge or otherwise participated in PERB's processes.

Unlike a typical contract interpretation matter, for which arbitration is uniquely suited and bargained for, retaliation cases do not require the trier of fact to discern the meaning of a CBA. These cases are more appropriately handled by the expert agency that is charged with

not only administering statutes under its jurisdiction, but with protecting access to its own remedial procedures.

Additionally, providing adequate and speedy remedies for cases in which retaliation for using PERB processes is proven is critical for PERB to perform its function of preserving those processes from abuse. The only assurance PERB and the parties have that an arbitrator correctly applies the statutory standard in judging retaliation claims is through the repugnancy process, which adds a layer of delay onto cases that should be decided without delay.

For these reasons, we determine that we will henceforth follow the rule enunciated in *Filmation, supra*, 227 NLRB 1721, and not defer unfair practice charges filed under HEERA that allege retaliation for filing PERB charges or otherwise participating in PERB processes. We see no reason to make this rule retroactive. (*Healdsburg Union High School District and Healdsburg Union School District/San Mateo City School District* (1984) PERB Decision No. 375, p. 49.)

We do not believe that a remand to the Division of Administrative Law to determine whether Liu was dismissed because he filed this unfair practice charge is appropriate. As noted earlier, the ALJ initially deferred the entire complaint in this case to arbitration, having determined that the CBA covered all the matters alleged in the unfair practice complaint (denial of promotion and tenure, Penal Code section 626 exclusion order, and the suspension and termination). When CFA refused to arbitrate the tenure/promotion and the Penal Code exclusion order, the ALJ determined that those matters must return to PERB for a determination of Liu's claims under HEERA.

This Board recently held in *Claremont, supra*, PERB Decision No. 2357: "in cases where the affirmative defense of deferral is asserted and the charging party cannot invoke binding arbitration independent of the exclusive representative, the Office of the General

Counsel, . . . shall determine . . . whether the exclusive representative is ready and willing to proceed to arbitration before deferring the matter to arbitration.” (*Id.* at p. 2.) In re-asserting PERB’s jurisdiction over Liu’s claims regarding promotion and tenure and the Penal Code 626.4 exclusion order once CFA declined to arbitrate those issues, the ALJ’s order preserved Liu’s right to have his claims adjudicated as *Claremont, supra*, PERB Decision No. 2357 requires.

However, we reject Liu’s argument that the suspension and dismissal matters, which he claims should not have been deferred to an arbitrator in the first instance, should now be remanded to PERB for a formal hearing.

At the time of the ALJ’s May 18, 2012 deferral decision, Liu had already elected to submit his appeal of his suspension and termination to arbitration under the CBA, and the parties had already selected an arbitrator through the AAA. At the May 18, 2012 pre-hearing conference, the ALJ asked Liu to choose between pursuing his discrimination allegations in the PERB unfair practice case or through arbitration. Liu responded that he intended to arbitrate the matter. Thus, at the time of the deferral order, Liu had already elected arbitration and had participated in AAA procedures to select an arbitrator. He re-affirmed his election to arbitrate his suspension and dismissal at the pre-hearing conference in this case.

In this procedural posture, the ALJ properly deferred to arbitration Liu’s claims regarding his suspension and dismissal.

This matter is analogous to *Dubo Manufacturing Corp.* (1963) 142 NLRB 431 (*Dubo*), which held that in situations such as the present matter, where parties’ disputes are pending resolution through the arbitration procedure and the dispute has been submitted voluntarily to that procedure, deferral to that arbitration procedure is appropriate.

Because Liu elected to arbitrate his suspension and dismissal claims, *Dubo, supra*, 142 NLRB 431 would not require the ALJ to rescind his deferral order, thus undoing the agreement to arbitrate, simply because the tenure/promotion denial and Penal Code exclusion order were later rendered non-deferrable by CFA's refusal to arbitrate those matters. Moreover, we note that the *Dubo, supra*, 142 NLRB 431 deferral rule is not absolute. For example, *Dubo* does not preclude the Board from reviewing an arbitration award to assure the dispute was resolved in a manner consistent with the criteria of *Spielberg, supra*, 112 NLRB 1080, i.e., the unfair practice issue must have been presented and considered by the arbitrator; the arbitral proceedings appear to have been fair and regular; the parties agreed to be bound by the arbitral award; and the award is not clearly repugnant to the purposes and policies of the NLRA. (*Chapin Hill at Red Bank & Local 707, Health Employees Alliance Rights & Trades (H.E.A.R.T.)* (2013) 359 NLRB 125.)

At the time the ALJ deferred Liu's charges and when some of those charges returned to PERB jurisdiction, there was no reason to believe the arbitration procedure would not resolve Liu's disputes in a manner consistent with the *Spielberg* criteria. Thus, the ALJ did not err either in his May 22, 2013 pre-arbitration deferral ruling or in his decision to re-assert jurisdiction over Liu's tenure and exclusion order claims.

For similar reasons, our new rule adopting *Filmation, supra*, 227 NLRB 1721 does not require a remand to the ALJ for consideration of whether Liu was suspended and terminated from his employment because he filed an unfair practice charge. Because Liu elected to arbitrate his appeal of his suspension and termination, and because his claim that his termination was motivated by his filing this unfair practice charge was clearly presented to the

arbitrator for consideration, Liu could have received a decision on that issue from the arbitrator. *Dubo, supra*, 142 NLRB 431 thus supports our refusal to remand.³²

Additionally, as a matter of equity, we are not willing to afford Liu another opportunity to litigate his claim that he was disciplined because of his protected activity. He was provided that opportunity before the arbitrator. But by his own conduct, Liu thwarted the arbitration process, most particularly by walking out of the hearing in the middle of the proceedings. He cannot now come before PERB and seek to benefit from his own forfeiture of that procedure.

Post-Arbitral Repugnancy Review

We also reject Liu's exception to the ALJ's conclusion that the arbitration award was not repugnant to the purposes of HEERA. Liu may not, by his own conduct, defeat deferral by refusing to participate in the arbitration, and then claim the arbitration award was repugnant to HEERA. To hold otherwise and permit Liu a second opportunity to litigate his discipline case would undermine the balance struck by the deferral policy.

This holding is supported by relevant PERB authority. (*Trustees of the California State University (Long Beach)* (2011) PERB Decision No. 2201-H, p. 8: "A party cannot avoid deferral simply by failing to pursue available contractual procedures.")

Neither may a party avoid deferral by abandoning the process by walking out of the arbitration hearing. By this conduct, Liu prevented the arbitrator from reaching a decision on the merits of his claims. He, therefore, waived his right to claim the award against him was repugnant to HEERA.

³² By this decision we do not intend that *Dubo, supra*, 142 NLRB 431 will necessarily be applicable in all situations in which a party (either a party to a collective bargaining agreement or an individual) has elected to move a grievance to arbitration. Instead, we rely on *Dubo* to explain why under the facts of this particular case, a remand is not required. In the future, we will examine the applicability of *Dubo* on a case-by-case basis.

Decision To Quash Subpoena

Liu excepts to the ALJ's decision to quash Liu's subpoena for the report which was sent by the "Review Committee for the Dean and Associate Dean, College of Business and Economics, 2010-2011" to CSUEB President Qayoumi on May 12, 2011. However, Liu fails to explain how the ALJ's decision to quash had any prejudicial effect on the proposed decision.

For this reason, we deny this exception.

Miscellaneous Exceptions

Liu alleges in his exceptions that the CSUEB attorney coached the employer's witnesses to lie and that they committed perjury in the PERB hearing. Yet Liu points to no basis in the record supporting such a claim.

With respect to the arbitration proceeding, Liu claims in his exceptions that CSUEB's attorney "bullied" him on the witness stand, that the arbitrator was not selected in accordance with the AAA rules, and that the arbitrator violated the CBA and AAA rules and needlessly dragged out the hearing and was late in issuing the award. We interpret these claims to be in the nature of a complaint that the arbitration hearing was not fair and regular and that the award should therefore be deemed repugnant. We reject these claims for the reasons discussed above, at p. 42 in our discussion of Liu's repugnancy claim.

Liu also raised additional claims: that the ALJ excluded grievance documents proffered by Liu; that the ALJ chose the date of the issuance of the proposed decision to deprive Liu of an opportunity to file exceptions; and that the ALJ dismissed this case in order to reduce his workload. None of these contentions has merit. We consider each of them.

Liu does not indicate in his exceptions how the proffered documents were relevant to the issues the ALJ had to decide. This exception fails to comply with PERB

Regulation 32300(a)(4), which requires the excepting party to state the grounds for each exception, so we deny it.

Liu's assertion that the ALJ purposely chose the date to issue the proposed decision to deprive Liu of the right to file exceptions is belied by the fact that he filed voluminous exceptions accompanied by a 56-page brief. Liu was also granted an extension of time to file these exceptions. Therefore, we deny this exception.

Regarding Liu's assertion that the ALJ dismissed his case in order to reduce the ALJ's workload, we find no basis in the record to support this allegation. The ALJ thoroughly analyzed the voluminous record in this case and produced a 73-page decision. Such effort indicates the opposite of what Liu contends. Moreover, the ALJ's task is complete when the proposed decision issues, regardless of whether the charges are upheld or dismissed. This exception is also denied.

LIU'S OCTOBER 31, 2013 FIVE-PART MOTION

On October 31, 2013, Liu filed with PERB by facsimile a motion requesting that PERB order the following: (1) re-open the record in the instant case for the purpose of receiving new evidence; (2) make public the Report regarding Dean Swartz; (3) impose perjury charges on Dobb; (4) issue an immediate order regarding PERB Charge No. SF-CE-1009-H; and (5) consolidate this case with SF-CE-1009-H.³³

³³ We note that the proof of service for the motion omits the county in which the declarant is employed or resides. This omission violates PERB Regulations 32140(a) which states, in relevant part:

All documents required to be served shall include a "proof of service" declaration signed under penalty of perjury which contains the following information: . . . (2) the county and state in which the declarant is employed or resides.

PERB Regulation 32135 states, in relevant part:

This Motion lists in its caption both Case Nos. SF-CE-995-H and SF-CE-1009-H. Liu bases his motion on PERB Regulation 32320, which states, in relevant part:

(a) The Board itself may:

(1) Issue a decision based upon the record of the hearing, or

(2) Affirm, modify or reverse the proposed decision, order the record re-opened for the taking of further evidence, or take such other action as it considers proper.

We address each request in order:

Request To Re-Open the Record in Case No. SF-CE-995-H

PERB has determined that the standard to be applied to motions to reopen the record and take new evidence is the same as that which governs requests for reconsideration. (*County of Riverside* (2010) PERB Decision No. 2132-M.) The PERB regulation governing requests for reconsideration is set forth in PERB Regulation 32410(a) which states, in relevant part:

Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . The grounds for requesting reconsideration are limited to claims that: (1) the decision of the Board itself contains prejudicial errors of fact, or (2) the party has newly discovered evidence which was not previously available and

All documents . . . must also be accompanied by proof of service pursuant to Section 32140.

We also note that the facsimile filing of the motion did not include the telephone number of the agent transmitting the document. This omission violates PERB Regulation 32135(d)(1) which states, in relevant part:

A facsimile or electronic mail filing shall include the following information: (1) The name of the party serving or filing papers and the name and telephone number of the agent transmitting the document.

(Emphasis added.)

For these reasons, the motion was not appropriately filed under PERB's regulations. Notwithstanding the procedural defects of the motion, we address each request in order.

could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

Liu's request does not include a declaration in compliance with PERB Regulation 32410(a) that any of the new evidence he wishes to introduce into the record was newly discovered, was not previously available, or could not have been discovered with the exercise of reasonable diligence.

Notwithstanding the omission of such a declaration, neither of the two documents that Liu seeks to introduce satisfies the standard in PERB Regulation 32410(a). The first document that Liu seeks to introduce is entitled "Jerry³⁴ Liu's June 25, 2013 <RECONSIDERATION OF PERB Order No. IR-56-H ON INJUNCTIVE RELIEF REQUEST> [*sic*]." Liu's request states: "Due to the [many events in] this case, it was very difficult to discuss every important detail in the 4-day hearing. . . . This 180-page document contains [extensive] evidence related to my leading role in a faculty group campaign to oust the rogue dean." (Motion, p. 2.) With respect to this document, the request fails to demonstrate that the document meets the requirements under PERB Regulation 32410(a).

The second document that Liu seeks to introduce is entitled "Jerry Liu's September 17, 2013 Whistleblower Letter to the State Auditors," which Liu claims "documents CSU Lawyer Theodora's illegal bribing of the Arbitrator with a large amount of state [funds]. On September 17, 2013, the letter was submitted to both the PERB Board and CSU Chancellor

³⁴ "Jerry" is Liu's nickname.

Tim White.” (Motion, p. 3.) With respect to this document, the request fails to demonstrate that the document meets the requirements under PERB Regulation 32410(a).

For these reasons, we deny Request No. 1.³⁵

Request to Disclose the Swartz Report

This request asks that the Board reverse the ALJ’s refusal to make the Report public. The ALJ quashed Liu’s subpoena for the Report after reviewing it in camera. In his motion, Liu does not assert that the ALJ erred in making this evidentiary decision that the Report was not relevant to the issues before the ALJ. Instead, Liu argues that the Report is somehow a public record and PERB has an obligation to release it.

PERB’s jurisdiction does not extend to public records disclosure issues, unless such documents are part of the official records of PERB unfair practice or representation cases. Because the ALJ quashed Liu’s subpoena for this document and did not admit it into the record, the Report is not part of the record in this or any other PERB case, and therefore it is not a document that PERB has the power or authority to disclose.

Liu does not argue that the ALJ’s decision to quash the subpoena had any prejudicial effect on the proposed decision. Nor does he cite to any statutory or regulatory basis for making this request. Nor does he establish that in quashing the subpoena, the ALJ abused his discretion.

For all these reasons, we deny Request No. 2.

Impose Perjury Charges Against Linda Dobb

This request asks that the Board contact the District Attorney’s office and press perjury charges against Dobb. Liu cites to no statutory or regulatory basis for making this request.

³⁵ On July 15, 2014, Liu submitted another request to the Board to re-open the record for consideration of a memo to President Morishita dated July 14, 2011, signed by four assistants to the CSUEB Provost. We deny this request for the same reasons we discuss above. This request fails to comply with PERB Regulation 32410(a).

Liu, as an individual who believes he has been harmed, has the right to notify the District Attorney's office of alleged perjury.

Moreover, even if the Board were amenable to Liu's request, he does not cite to evidence in the record of Dobb's alleged perjury. His only reference to the record in support of his request is an extended section of the ALJ hearing transcript, for which he cites to page and line numbers, but not to volume number.³⁶ In the referenced portion of the transcript, Dobb repeatedly testifies that she received e-mails from Liu that allegedly mention "murder and rape." Liu argues that the e-mails to which Dobb refers in her testimony did not contain mention of murder or rape. However, Liu fails to cite to the exhibits in the record where these e-mails exist, thus preventing us from determining if Dobb's allegations are consistent or not with those e-mails.

For these reasons, we deny Request No. 3.

Grant Remedies Requested in Case No. SF-CE-1009-H

This request asks the Board to make the following three orders: (1) order CSU Chancellor Tim White to immediately write Liu a letter of apology; (2) order an audit to be conducted immediately by an outside auditing firm; and (3) order CSU to immediately conduct hearings for Liu's Grievances Nos. 29, 42, and 43.

Liu cites to no statutory or regulatory basis for this request. Moreover, we have not yet considered the merits of SF-CE-1009-H and have previously refused to consolidate that case with the instant matter. It is, therefore, premature to grant a remedy at issue in Case No. SF-CE-1009-H.

For these reasons, we deny Request No. 4.

³⁶ On our own examination, we have determined the quoted section appears in Volume IV of the transcript.

Reconsideration of PERB's Decision Regarding Consolidation of Case Nos. SF-CE-995-H and SF-CE-1009-H

This repeats a request Liu made previously to consolidate the instant case with his other unfair practice case in Case No. SF-CE-1009-H. The Board's Appeals Assistant declined Liu's prior request to consolidate the two cases and notified Liu of that decision by letter from the Appeals Office on December 2, 2013.³⁷ Liu did not appeal that determination pursuant to PERB Regulation 32360. He therefore waived review of this determination. Moreover, we decline to construe the present motion to be an appeal pursuant to PERB Regulation 32360.

For these reasons, we deny Request No. 5.

CONCLUSION

Having reviewed the record in its entirety, we affirm the ALJ's dismissal of the charges that CSUEB violated HEERA section 3571(a) by retaliating against Liu, because of his protected activity when it denied him tenure and promotion and issued a Penal Code section 626.4 exclusion order. Under the limited and unique facts of this case, we likewise affirm the ALJ's orders regarding pre-and post-arbitration deferral on the basis of Liu's own conduct, which constituted a waiver of his right to challenge those determinations. We deny the remedies that Liu requests in his statement of exceptions. We likewise deny Liu's October 31, 2013, motion in its entirety.³⁸

³⁷ PERB has generally declined a motion to consolidate two or more cases filed after submission of the cases to the Board without citation or comment. (See, e.g., *Trustees of the California State University (San Marcos)* (2004) PERB Decision No. 1584-H, p. 2.)

³⁸ We note that in the ALJ's proposed decision in Case No. SF-CE-995-H, the ALJ's citation to an e-mail from California Faculty Association President Brian McKenzie to CSUEB Qayoumi (marked as Charging Party Exhibit 20) was in error, as this document was not admitted into the formal record. However, the Board did not consider this document while reaching its determination in this matter.

ORDER

Based upon the foregoing findings of fact and conclusions of law, the complaint and underlying unfair practice charge in Case No. SF-CE-995-H are hereby DISMISSED.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



WENJIU "JERRY" LIU,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (EAST BAY),

Respondent.

UNFAIR PRACTICE
CASE NO. SF-CE-995-H

PROPOSED DECISION
(May 8, 2013)

Appearances: Wenjiu "Jerry" Liu, in propria persona; Dawn S. Theodora, University Counsel, for Trustees of the California State University (East Bay).

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

PROCEDURAL HISTORY

This case alleges that a higher education employer denied tenure and promotion, restricted from campus grounds, suspended, and terminated an employee for filing grievances, participating in a grievance hearing, and filing an unfair practice charge. The employer denied committing any unfair practices, and, as an affirmative defense, contended that the complaint should be deferred to arbitration pursuant to PERB Regulation 32620(b)(6).¹

On October 17, 2011,² Wenjiu "Jerry" Liu (Liu) filed an unfair practice charge (charge) against Trustees of the California State University (East Bay) (CSUEB). On March 23, 2012, Liu filed a partial withdrawal of a number of allegations in the charge including, but not

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

² While the unfair practice charge was efiled on September 30, 2011, the originals were not received until October 17, 2011. PERB Regulation 32135(a) provides:

All documents shall be considered "filed" when the originals, and the required number of copies, if any, are actually received by the appropriate PERB office during a regular PERB business day.

(Emphasis added.)

limited to allegations concerning: conduct occurring outside of the six-month statute of limitations period; national origin discrimination, sexual harassment and whistleblower retaliation;³ and a September 20, 2010 reprimand and violation of confidentiality. The notice of partial dismissal was issued on March 27, 2012.

On March 27, 2012, the Office of the General Counsel of the Public Employment Relations Board (PERB) issued a complaint alleging that CSUEB violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a)⁴ by denying Liu tenure and promotion, restricting him from campus grounds, suspending him, and terminating him for filing approximately 15 grievances between April and June 2011, participating in a May 9, 2011 grievance meeting and filing an unfair practice charge on or about September 30, 2011.

On April 20, 2012, CSUEB answered the complaint, denying any violation of HEERA and including affirmative defenses. Specifically, CSUEB contended:

The Complaint and the Charge should be deferred to the grievance and arbitration procedures of the applicable Collective Bargaining Agreement on the basis that the provisions of the Collective Bargaining Agreement cover the matter at issue. Charging Party has filed grievances asserting similar allegations, which are currently awaiting processing. Charging Party has also filed appeals of his disciplinary actions, which are pending determination by binding arbitration.

³ Some of the incidents for which Liu claimed he was retaliated against during the hearing were not protected activities under HEERA, but more akin to “protected disclosures” under the California Whistleblower Protection Act, Government Code section 8547, et seq. Retaliation for such protected disclosures is not covered as an unfair practice under HEERA. (*Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S.) Liu’s allegations are to be restricted by PERB’s limited jurisdiction.

⁴ Unless otherwise indicated, all statutory references are to the Government Code. HEERA is codified at section 3560 et seq.

Motion to Defer to Arbitration

On April 20, 2012, CSUEB filed a motion to defer the allegations in the complaint to the arbitration procedures set forth in the Collective Bargaining Agreement (CBA).

Specifically, the CBA between the California State University (CSU) and the California Faculty Association (CFA), section 10.36, provides:

No reprisals shall be taken against any employee for the filing and processing of any grievances.

The motion included multiple attachments and grievances filed by Liu. On April 30, 2012, the Administrative Law Judge (ALJ) wrote the parties seeking that CSUEB clarify statements made in its motion, including the extent to which CSUEB was willing to waive its procedural defenses. On May 7 and 11, 2012, Liu filed objections to the motion. On May 11, 2012, CSUEB answered the ALJ questions stating Liu had filed grievances on each of the alleged retaliatory acts. CSUEB agreed that it would allow Liu to amend violations of CBA section 10.36 in each of the grievances or would allow for the filing of grievances under CBA section 10.36 and waive any procedural objection to proceed to arbitration. CSUEB stated that although CFA was not going to be representing Liu at his grievance/arbitrations, Liu was proceeding forward and had a pending disciplinary arbitration scheduled for August 21 through 24, 2012.

A prehearing conference was set for May 18, 2012, to discuss the motion and its opposition and to rule on the motion. At the end of the prehearing conference, the ALJ granted the motion.

The ALJ issued a written ruling on May 22, 2012 deferring all four grievances to arbitration. The case was placed in abeyance. The ruling stated:

Accordingly, the motion to defer to arbitration is granted. This complaint is deferred to arbitration and is placed in abeyance. After 90 days has passed from the issuance of this ruling, the ALJ will determine the status of the grievance/arbitration proceedings,

and whether the parties are meeting their obligation to process the grievances/arbitrations and what action, if any, should be taken. The June 7 and 8, 2012 hearing dates are cancelled. The parties are strongly encouraged to take all permissible actions which advance grievances concerning the denial of tenure and promotion and the issuance of the Penal Code section 626.4 order to the arbitration level.

(Emphasis added; fn. omitted.)

By June 19, 2012, CFA decided not to represent Liu at his grievances regarding the denial of tenure and promotion and the issuance of the Penal Code section 626.4 order banning him from campus grounds. As CFA controlled the grievance on these two issues and Liu could not proceed to arbitration without CFA's concurrence, the ALJ scheduled September 11 through 14, 2012, for formal hearing on these two issues and the suspension and termination issues remained deferred to arbitration.

On September 11 through 14, 2012, formal hearing was held. During the hearing, Liu sought to obtain an investigation regarding Dean Swartz's treatment of staff. The ALJ reviewed the document in camera and quashed the subpoena as the material contained in the investigative report was irrelevant in determining whether the President's decision to deny Liu's tenure and promotion was affected by Liu's grievances.

Post-hearing briefs were submitted on November 8, 2012.

On November 15, 2012, Arbitrator Harris issued her "Arbitrator's Rulings on Cross Motions of Parties and Final Award." In short, Arbitrator Harris dismissed Liu's appeal from suspension and termination and declared the disciplinary actions final. Although not utilizing the proper terminology, Liu objected to the ruling and award as repugnant and requested that PERB schedule hearings to adjudicate the reprisal actions of suspension and termination. The ALJ set forth briefing dates for the parties to argue whether the arbitration award should be deemed repugnant. The parties submitted their briefs by December 14, 2012. On

December 24, 2012, the ALJ asked the parties to provide him the emails⁵ between the parties and the American Arbitration Association (AAA) regarding the selection/appointment of the arbitrator. Those documents were provided by January 18, 2013, and on that day the matter was deemed submitted for proposed decision.

FINDINGS OF FACT

Jurisdiction

The Trustees of the CSU are a higher education employer under HEERA section 3562(g). CSUEB is a university within the CSU system. CFA is the exclusive representative of an appropriate bargaining unit of employees, which includes Assistant Professors, under HEERA section 3562(i). Liu was a higher education employee under HEERA section 3562(e).

Retention, Tenure and Promotion at CSUEB

An Assistant Professor has a probationary period of six years. After Assistant Professors are hired, they must be evaluated yearly to determine whether they are to be retained for the next school year (retention). At the beginning of the sixth year, an evaluation process begins which determines whether an Assistant Professor should be granted tenure and promoted to the classification of Associate Professor (promotion). The retention, tenure and promotion (RTP) process is set forth in the CBA between CFA and CSU and more comprehensively in the CSUEB RTP Policy and Procedures.

The RTP process is a multi-layered process where an Assistant Professor is evaluated at the department and college levels as to retention, and the department, college and university levels as to tenure and promotion. At each level, a faculty committee, consisting of rank and

⁵ Liu primarily uses emails as his preferred mode of communication.

file, full-time, tenured professors, elected by their peers,⁶ evaluate the Assistant Professor. After the Department RTP Faculty Committee (Department Faculty Committee), consisting of three members, conducts its evaluation, it prepares a recommendation report and forwards it to the Department Chair. The Department Chair then issues his/her recommendation. At the college level, the College TP⁷ Faculty Committee (College Faculty Committee), consisting of five members, prepares and forwards its recommendation report to the College Dean. The College Dean similarly prepares a recommendation report and forwards it to the university level. At the university level, the University TP Faculty Committee (University Faculty Committee), consisting of five members, prepares and forwards its report to the University President. The final decision as to tenure and/or promotion belongs to the University President.

The faculty recommendation reports are prepared after the committees review the Assistant Professor's working personnel action file (WPAF), dossier and student evaluations. Each committee level reviews the same source documents presented by the Assistant Professor and the prior recommendation reports submitted by the prior committees and Department Chair/College Dean. The candidate being reviewed receives a copy of each recommendation report and may submit a letter of rebuttal to each negative recommendation.

All faculty committees and the Department Chair/College Dean/University President are charged with making their recommendation/decision without bias. The University Faculty Committee is charged with determining whether professional or personal bias played a role in the recommendation(s) at the lower level(s). Each faculty committee reviews the candidate in five areas: possessing the requisite degree; instructional achievement (teaching); academic

⁶ Each faculty member elected on a committee elects the chair of that committee.

⁷ The College and University level committees are primarily for tenure and promotion only, but may be asked to evaluate applications for retention.

achievement⁸ (publications, papers, speaking engagements, etc.); university service (participating in various university committees, etc.); and, community service (participating in local or state government boards and supervising community service projects). These five areas are usually reduced to three areas: instructional achievement, academic achievement and university and community service.

The RTP Policy and Procedures provide in pertinent part:

5.0 RETENTION

5.1 Expectations

Reappointment of an untenured faculty member is not routine; an untenured faculty member must demonstrate to the University that he or she is worthy of retention. A recommendation for retention carries no obligation for future award of tenure. However, it assumes that the candidate meets not only the criteria in Section . . . , but also shows promise of satisfying the criteria for tenure and promotion as described in Sections . . . There shall be greater evidence of achievement the closer the candidate is to being considered for tenure.

[¶...¶]

6.0 TENURE

6.1 Expectations

Tenure constitutes more than recognition of past teaching performance and scholarly work. It is a judgment by the faculty that the candidate will continue to contribute into the future to the development of the University. Tenure is a commitment (into the future) in anticipation of contributions to the University in the areas of instructional achievement, [academic] achievement, university service, and community service, and should only be granted within this framework.

[¶...¶]

⁸ In retention evaluations, the committee may look to “substantial progress toward” academic achievement to qualify or satisfy this requirement.

7.0 PROMOTION FROM ASSISTANT TO ASSOCIATE PROFESSOR

7.1 Expectations

The Assistant Professor in the early stages of his or her appointment is typically facing a full teaching load for the first time. It is necessary to combine teaching with the continuance of scholarly interest and contribution. Additional University responsibilities may include committee work and administrative assignments. An Assistant Professor should have completed the Doctorate, or the normal terminal degree, or, in exceptional cases, the equivalent thereof, to be eligible for promotion to Associate Professor. Effectiveness in teaching, [academic] contributions, university service, and community service should be the general criteria for promotion to Associate Professor rank.

Academic Background of Liu

Liu received his Bachelor's Degree in Economics at Nankai University in 1989. He obtained a Master's Degree in Economics from the University of California Santa Barbara in 1996; a Master's Degree in Mathematical Finance and a doctorate in Business Administration from the University of Wisconsin-Madison. He had been employed as a visiting Assistant Professor in the Department of Finance with the University of California Riverside for the 2001-2002 academic year; University of Notre Dame for the 2002-2003 academic year; and the prestigious Purdue University Krannert School of Management for the 2003-2004 and 2004-2005 academic years. He was a nominee of the Non-Senate Distinguished Teaching Award in April 2002 and received the Dean's Recognition of Excellence in Teaching in August 2003.

CSUEB hired Liu as an Assistant Professor to work in the College of Business and Economics (CBE or College), Department of Management and Finance⁹ in the 2005-2006

⁹ The department's name was later changed to the Department of Accounting and Finance.

academic year. At the time, Sam Basu was the CBE Interim Dean and Joyendru Bhadury (Bhadury) was the Department Chair.

Retention for the 2006-2007 Academic Year

On November 28, 2005, the Department Faculty Committee unanimously recommended Liu for retention as an Assistant Professor for the 2006-2007 academic year. The recommendation noted that he was currently working on five papers to be submitted for publication in the future and that he had developed an insurance curriculum at CSUEB. On December 6, 2005, Department Chair Bhadury expressed his concurrence in the retention of Liu, but advised Liu to concentrate on getting more published works in his first year.

Retention for the 2007-2008 Academic Year

On December 1, 2006, the Department Faculty Committee unanimously voted to recommend Liu for retention for the 2007-2008 academic year. It was noted that he had excellent teachers evaluations and three papers in the publication process. He also served on the Technology and Instruction Subcommittee and was working to develop an insurance curriculum. On December 6, 2006, Department Chair Bhadury concurred with the committee's recommendation. Bhadury noted that the department awarded him a Summer Research Grant in Summer 2006 and allowed him to defer or "bank" his Fall 2006 teaching to Summer 2007 in order to provide him with an uninterrupted block of time for research.

On February 5, 2007, Dean John Kohl agreed with the recommendations to retain Liu for the 2007-2008 academic year, but encouraged him to maintain his efforts to publish in refereed/peer reviewed journals in the upcoming year. On February 15, 2007, Interim Provost Fred Dorer notified Liu that he was reappointed as an Assistant Professor for his 2007-2008 academic year. Teresa Swartz (Swartz) took over as the CBE Interim Dean in July 2007.

Retention for the 2008-2009 Academic Year

On February 28, 2008, the Department Faculty Committee of Professors Nancy Mangold (Mangold), Ching-Lih Jan (Jan) and Frank Lowenthal (Lowenthal) issued a unanimous recommendation to retain Liu for the 2008-2009 academic year. The recommendation report noted that Liu received the Excellence in Teaching Award for 2006 from the Office of Faculty Development and Faculty Center for Excellence at Teaching at CSUEB. Regarding the academic achievements section of the report, the committee summarized:

Based on his recent accomplishments in research and publications in 2007, Dr. Liu has shown that he has been very productive in research. While recognizing Dr. Liu's achievement in publishing his paper in the top insurance journal in 2007, the committee wishes to caution Dr. Liu that the criteria for promotion and tenure in the area of [academic] achievement require greater productivity than what is currently presented in the dossier. The committee encourages Dr. Liu to pursue publishing his working papers in finance journals in 2008 and believes that Dr. Liu will continue to produce important scholarly work and make significant contributions in research and publications.

(Emphasis added.)

The faculty committee noted Liu's university service contributions with the CBE Curriculum Committee and the Technology and Instruction Subcommittee. He also worked on the Division of Continuing Education Committee to set up a CSUEB insurance program and organized two meetings for the Bay Area Chinese Finance Seminar group reflecting his university and community service contributions.

On March 6, 2008, Department Chair Christopher Lubwama (Lubwama) concurred with the recommendation that Liu be retained for the 2008-2009 academic year. Lubwama also encouraged Liu to increase his efforts in getting his working papers published. Lubwama stated that under CBE classification criteria, Liu was not "academically

qualified/professionally qualified” (AQ/PQ) as he had only one peer-reviewed article published since he obtained his Ph.D. over five years ago.

On March 13, 2008, Liu prepared a memo to Department Chair Lubwama and Dean Swartz explaining how he met AQ status under the CBE classification status, based on other criteria than publication. The memo was thoroughly documented.

On May 9, 2008, Dean Swartz submitted her retention recommendation as “reluctantly” supporting Liu for his retention for the 2008-2009 academic year. Specifically, Dean Swartz expressed the following reservations of Liu:

However, there are no reported peer reviews of his teaching, which are a necessary and required part of the evaluation of instructional achievement. Further, on more than one occasion I have had complaints from different students regarding Dr. Liu’s behavior and attitude in the classroom. As a result I have a mixed view of his teaching effectiveness. The complaints are such that I do have concern and have talked with Dr. Liu regarding some of these issues. . . .

[¶ . . . ¶]

In the past, Dr. Liu received both college and university grants and banked his teaching (Fall 2006 shifted to Summer 2007) to provide him with a significant block of time to facilitate his research activities. **Unfortunately, based on the dossier, Dr. Liu’s journal review pipeline is no different than it was in December 2005, as is also true with his journal acceptances.** This 2 ½ year lapse is not consistent with the expectations at the CBE. Dr. Liu currently identifies four manuscripts to be submitted at varying times during the first half year of 2008, as well as a number of research projects to be completed later this year. I strongly encourage him to keep his research pipeline flowing. Given the time from submission to publication at quality journals, he is encouraged to get his working papers in the review pipeline as soon as possible. Further, I encourage him to continue his focus on quality, not quantity. **While Dr. Liu shows research promise, this has been the case in his last two annual reviews with no change in journal productivity. Given this, I am hesitant to recommend retention to a fourth year, although I am doing so.**

(Bolding in original.)

On May 30, 2008, Provost Michael Mahoney (Provost Mahoney) reappointed Liu as an Assistant Professor for the 2008-2009 academic year.

Retention for the 2009-2010 Academic Year

On February 26, 2009, the Department Faculty Committee of Professors Mangold, Jan and Gary McBride (McBride) issued its unanimous recommendation to retain Liu for the 2009-2010 academic year. After complimenting Liu on his ability as an effective instructor, the report noted that in 2008 Liu had two additional papers published in top-ranked finance journal. He also had a working paper, "The Manipulation of Google Stock," which had been published in the San Francisco Chronicle. He was also active in paper presentations. The report noted that Liu was also on the University Writing Skills Subcommittee, although he was no longer on the CBE Curriculum Committee, the Technology and Instruction Subcommittee, and the Division of Continuing Education Committee.

On March 10, 2009, Department Chair Lubwama concurred with the faculty's recommendation. Regarding the category of academic achievement, Lubwama summarized:

Dr. Liu has worked very hard in the area of [academic] achievement in his 4th year of being retained as an Assistant Professor at CSUEB. He is entering his 5th year of retention standing on strong [academic] achievement. In terms of our CBE AQ/PQ classification criteria, Dr Liu is AQ. I congratulate him on his hard work and encourage him to keep up the good work.

On May 11, 2009, Dean Swartz supported Liu for retention for the 2009-2010 academic year. Dean Swartz commended Liu for his progress in his academic achievement and that Liu more than satisfied his requirements for university and community service for someone at his stage of his career. On June 9, 2009, Provost Mahoney reappointed Liu to the 2009-2010 academic year.

Liu's Request for New Leadership at CBE

On February 1, 2010, Liu sent an email to CSUEB President Mohammad "Mo" Qayoumi (Qayoumi) and Provost James Houpis (Houpis) requesting that they look for new leadership in the CBE and replace Dean Swartz as she hired "low-quality" candidates and paid them above-market salaries; divided faculty into "friends" and "enemies"; and treated her friends favorably in granting them class release for scholarly work. Liu did not receive a response.

Retention for the 2010-2011 Academic Year

On March 1, 2010, the Department Faculty Committee of Professors McBride, Jan and Diane Satin (Satin) voted two to one to recommend retaining Liu for the 2010-11 academic year. The report expressed a number of reservations concerning Liu representations of his academic achievements. The first reservation was that Liu listed one of his publications on the Social Science Research Network (SSRN) as being from the more prestigious Krannert School of Management at Purdue University rather than from CSUEB. Additionally, Liu represented that the Securities Exchange Commission (SEC) was looking into his article regarding the manipulation of Google, Inc., stock. The committee stated that while Liu may have sent his article to the SEC, the SEC could not confirm or deny whether it was investigating the matter. Liu was admonished not to sensationalize his Google, Inc., article. Liu was also admonished for exaggerating his accomplishments as he stated he was the "driving force" leading the effort to combine the finance and accounting groups as forming a new department, quit the CBE Curriculum Committee as it was too much work, and stated that he helped set up an insurance program at CSUEB when it actually never started due to a lack of enrollment. Additionally, the mean Grade Point Average (GPA) of students in Liu's classes was high compared to other instructors. The minority vote to deny retention cited to Liu's false and misleading statements or omissions in his dossier.

On March 10, 2010, Liu sent a memo to President Qayoumi, Provost Houpis and Associate Vice Provost Linda Dobb (Dobb), complaining of prejudice by the Department Faculty Committee. He contended there was one other professor who gave a higher GPA than his in the Finance 3300 course and the report left out some of his contributions in university service.

On March 15, 2010, Department Chair Micah Frankel (Frankel) concurred with the two to one vote recommending that Liu be retained. Frankel opined that Liu's Google, Inc., article was a good quality paper, but cautioned that Liu should not sensationalize it. Frankel opined that Liu's university service was limited and noted that Liu's teaching evaluations were very good and enrollment in his courses was excellent. Liu was encouraged to actively participate in college and university level committees.

On May 5, 2010, Dean Swartz supported the recommendation for Liu's retention for the 2010-2011 academic year. While Dean Swartz commended Liu on his efforts in teaching a significant number of students, she commented on Liu making joking comments in a class such as making the class tough as he did not want to see many students in the class. Dean Swartz commented that she expected to see Liu more actively engaged in university service as he was currently only involved in the University Writing Skills Committee. In sum, Dean Swartz found that Liu met the requirements for retention of his sixth year. On June 1, 2010, Provost Houpis reappointed Liu for the 2010-11 academic year.

Request to Teach Options and Futures Course

On June 1, 2010, Liu emailed Provost Houpis that Professor Scott Fung (Fung) had received special treatment over him in the past and therefore Liu should be assigned to teach the Options and Futures course instead of Professor Fung. Liu copied President Qayoumi on the email.

On June 29, 2010, Liu emailed Dean Swartz stating that he was “appalled” to discover that he was not assigned to teach the Options and Futures course. He copied President Qayoumi, Provost Houpis, Department Chair Frankel and CFA Representative Jennifer Eagan (Eagan).

September 17, 2010 Letter to Associate Vice Provost Dobb

On September 17, 2010, Liu sent an email to Associate Vice Provost Dobb entitled “Criminal Actions of Dean Swartz and [t]he Damages [s]he [b]rought to CBE.” The lengthy email qualified that Liu’s views in the email were his personal views and he went on to request that CSUEB investigate Dean Swartz for her actions against him. The email complained that Dean Swartz was “pushing” staff to file false police reports against him; was unfair to Liu in the RTP process; played favorites with some staff and discriminated against others (marketing professors v. non-marketing professors) in the areas of compensation; jeopardized accreditation by losing two professors and hiring poor professors; poorly instructed students based upon student’s on-line ratings; and was “showering” every tenured professors with release time or stipends. Liu sent a copy of the email to President Qayoumi, Provost Houpis, CFA representative(s) and Lt. James Hodges (Lt. Hodges).¹⁰

Denial of Tenure and Promotion: Department Faculty Committee Level

On November 5, 2010, the Department Faculty Committee, invited the faculty to provide input as to Liu’s application for tenure.¹¹ The meeting was scheduled for November 9,

¹⁰ Lt. Hodges was later promoted as the Interim Chief of CSUEB University Police.

¹¹ RTP Policy and Procedures section 10.2.2 provides in pertinent part:

The Department Committee shall carefully examine all the documentation supporting each candidacy, and may seek additional relevant evidence and consult with other department faculty. . . .

(Emphasis added.)

2010. Liu protested that he did not remember Professor Fung or Professor Tammie Simmons-Mosely having similar hearings and considered the November 9, 2010 meeting to be discriminatory. As it turned out, none of the faculty submitted a letter to the committee.

On November 15, 2010, the Department Faculty Committee of Professors Mangold, Lubwama and Satin issued its recommendation voting two to one against granting Liu tenure. Professor Mangold was the one vote who recommended granting Liu tenure.¹² Prior to issuing the reports, Professor Mangold knew nothing of Liu intending to file grievances and the committee did not discuss his intent to file grievances.

While the committee believed Liu's student evaluations for teaching to be satisfactory, the majority¹³ would have liked to see more breadth in the courses taught. The majority also believed that Liu's three published papers to be of good quality, however, the majority of the committee found:

Regarding Dr. Liu's [academic] achievement, the majority of the committee believes that while Dr. Liu meets the minimum requirements for being academically qualified in the College of Business and Economics, he fails to demonstrate unambiguous potential to contribute in the future to the development of the university through [academic] achievements. For example, during the last ten years for which Dr. Liu has been in academia, he has only been able to publish three refereed journal articles, two of which are in 2009, his ninth year.

After listing Liu's service, the committee noted that Liu was currently serving on the University Subcommittee on Writing Skills. The majority believed that Liu had limited university and community service. In closing, the majority stated:

According to RTP guidelines, tenure is not granted as recognition of past teaching performance and scholarly work, but a commitment (into the future) in anticipation of contributions to the University in the areas of instructional achievement, [academic] achievement, university service, and community

¹² Professor Mangold was the only member of the committee who testified.

¹³ Majority meaning the two votes against granting tenure.

service, and should only be granted within this framework. Given the extremely low publication rate, limitedness of courses taught, and the limited university and community service, the majority of the committee has serious concerns that this does not predict future contributions and excellence. Therefore, the majority of the committee would not recommend Dr. Liu be awarded tenure.

(Emphasis added.)

On November 15, 2010, the Department Faculty Committee voted unanimously, three votes to none, to recommend against promoting Liu to Associate Professor. The report was similar to the tenure report, except there was not a minority view.

Grievance Number One

On November 17, 2010, Liu filed a grievance stating that Dean Swartz had intentionally made it difficult for him to obtain teaching releases for Winter 2010. A formal level one meeting was conducted on May 31, 2011, to which Liu attended.

Rebuttal to Department Faculty Committee Recommendation

On November 24, 2010, Liu submitted his rebuttals to the Department Faculty Committee report denying him tenure and promotion which included extensive quotations from prior retention recommendation reports which placed him in a positive light.¹⁴ Liu admitted that he only taught five courses at CSUEB, but explained that teaching assignments were made by the department chairs. Liu also included an email in the beginning of the academic 2010-2011 year where he expressed interest in serving on other university, college and department committees. Liu added that in October 2010, he was elected to be on the board of directors of the Bridgeway Place Homeowners Association.

On November 24, 2010, Liu requested to meet with the Department Faculty Committee on his negative recommendation of his denial of tenure and promotion. On December 7, 2010, Mangold notified Liu that the faculty committee would meet with him on December 9, 2010.

¹⁴ The rebuttals on tenure and promotion were almost identical.

Liu brought a camera to the meeting. Mangold left and returned stating that the Provost would not allow the recording of the meeting. Liu replied that the RTP procedures did not set forth such a prohibition. Liu stated that he would write the faculty affairs committee and obtain a ruling and it would be better to reschedule the meeting after he obtained such a ruling.

After Liu's rebuttal, the Department Faculty Committee decided to look closer into Liu's WPAF, dossier and student evaluations. On December 17, 2010, the Department Faculty Committee of Professors Mangold, Lubwama and Satin issued its 16-page "Subsequent Tenure Recommendation" and "Subsequent Promotion Recommendation" after consideration of Liu's rebuttal. The committee revised its vote to a unanimous recommendation against tenure and upheld its original unanimous recommendation against promotion. The committee stated other deficiencies which Liu failed to address including: reviewing Liu's high grading scale and distribution and unfavorable student comments in their evaluations.¹⁵ Additionally, the committee provided:

The Committee is disturbed to find that Dr. Liu listed the same three publications in his 2010-2011 dossier as he did in his 2008-2009 dossier. Contrary to the committee's and Dean's recommendations, Dr. Liu has no new publications or a pipeline of submissions that will result in publications since the Committee's letter on February 26, 2009. . . . The Committee believes that Dr. Liu has not satisfied the Department RTP committee's and Dean's recommendations urging him to **continue** quality research and publication. Section 5.1 of the RTP document states that "*there shall be greater evidence of achievement the closer the candidate is to being considered for tenure.*" The committee believes that Dr. Liu has not shown greater evidence of achievement the closer he is to being considered for tenure since there was no evidence of continuing publications after his two papers were accepted in 2008 and published in 2009. The Committee believes Dr. Liu has not provided evidence that "*the candidate will continue to contribute*

¹⁵ Some of the comments were quite alarming and included comments about classes being substantially cut short; inappropriate jokes about females; and comments about making his class tough in order to get rid of students. Some of the comments included, "often makes inappropriate jokes in references to girls and guys" and "[d]rop the 'Sexy girl stuff' please."

into the future to the development of the university . . . in the area of professional achievement.”

(Bolding and italics in original.)

The supplemental recommendation reports went on for a number of pages and addressed numerous other issues as well.

Professor Mangold explained that after the committee received Liu's rebuttal, they decided to look more thoroughly into Liu's tenure files. They discovered some of the student's comments about Liu's classes which caused concern. Professor Mangold who initially was in favor of Liu being granted tenure changed her vote to recommend denial of tenure as she could not ignore the evidence against Liu. Professor Mangold was unaware of any grievances filed by Liu when the committee submitted its supplemental report and the committee did not discuss Liu's filing of a grievance.

Grievance Number Two

On January 4, 2011, Liu filed a grievance with the Provost's Office alleging that the recommendation reports submitted by the Department Faculty Committee (specifically Committee Chair Professor Mangold), the College Faculty Committee for retention (specifically Professor McBride) and Dean Swartz continuously misrepresented in the tenure reports that he attributed work he made while employed with CSUEB to Purdue University in the SSRN, when the error was made by SSRN staff. The formal level one meeting was held March 9, 2011, to which Liu attended.

Threat Assessment Team Meeting

On January 6, 2011, CSUEB Chief of Police Jan Davis (Davis) convened a Threat Assessment Team meeting regarding Liu. Present at the meeting along with others were Department Chair Frankel, Lt. Hodges, Dobb and Dean Swartz. They discussed whether to order Liu to a fitness-for-duty examination. Dobb explained how Liu was nervous about his

tenure status and it was making the rest of the staff “nervous and jumpy.” Dobb recounted some of Liu’s past bizarre behaviors including kicking an office door, slamming something on his desk, taking photographs, getting too close to people, suddenly appearing in hallways and bathrooms and asking, “isn’t [it] strange we are both here,” requesting to record meetings and loitering in the parking lot. Dean Swartz stated that other staff were seeking employment elsewhere and she was frightened over Liu’s statement that he would “fight to the death” over the right to teach a finance course. Chief Davis wanted to increase university police presence when Liu received the next negative letter related to Liu’s tenure.¹⁶

Denial of Tenure and Promotion: Department Chair Recommendation

On January 13, 2011, Department Chair Frankel issued his 22-page and 21-page memos agreeing with the Department Faculty Committee to recommend against granting tenure and promotion, respectively. The memos were almost identical in content. Frankel went into more detail when reviewing the comments of student evaluations, both positive and negative. The negative student comments covered cancelling class early; inappropriate sexual jokes; and difficulty in understanding Liu’s English. Some of these negative comments were repeated over multiple classes and years which Liu taught. Frankel’s memo also cited a number of concerns set forth in other faculty committees, as well as his prior reports/recommendations. Frankel also mentioned his observations of how Liu systematically attempted to intimidate faculty through bullying behavior. Frankel admitted that he issued Liu prior favorable retention recommendations, but distinguished between the differing standards under the RTP Policy and Procedures for retaining an Assistant Professor and granting tenure and/or promoting an Assistant Professor.

¹⁶ Liu attributed the comment about the “next negative letter” as a conspiracy that his tenure reviewers had already predetermined a course of action to deny him tenure. Frankel stated that he already knew which direction he was going at the time of the January 6, 2011 Threat Assessment Team meeting in regards to recommending that Liu be denied tenure.

Frankel could not state whether he knew Liu had filed any grievances at the time he issued his recommendation. He admitted that at some time he found out that Liu filed grievances, but it never factored into any of his decision-making.

On January 18, 2011, Liu emailed University Faculty Committee Chair Lettie Ramirez (Ramirez) and asked her to remove Professor McBride from his tenure review committee, alleging that McBride searched for negative material in his dossier. Liu contended that McBride wanted to add negative documents to his WPAF. On January 22, 2011, Liu sent a memo to Frankel and Ramirez requesting the University Faculty Committee conduct an investigation on the plot to deny him tenure and promotion.

Denial of Tenure and Promotion: College Faculty Committee

The College Faculty Committee consisted of Chair Professor McBride and Professors Jan, Anthony Lima, Kenneth Pefkaros, and Norman Smothers. On February 7, 2011, the College Faculty Committee issued its reports recommending by four votes to one that Liu be denied tenure and promotion. The reports were almost identical in content. The report noted Liu's overall positive ratings by student evaluations, but on the average he gave higher grades than the Department average and he sometimes cut class short and told inappropriate jokes. The majority believed that Liu's dossier did not contain enough evidence to substantiate performance and promise into the future in the area of instructional achievement. In regards to academic achievement, the committee noted that Liu had three published articles and one article in submission which did not contain enough evidence to substantiate performance and promise into the future. The majority believed Liu's university and community service to be minimal. The one member of the minority strongly objected to the majority's conclusions and reasoned that Liu should be granted tenure and promotion.

On February 18, 2011, Liu submitted a response to the College Faculty Committee's report recommending denial of tenure and promotion to the committee and to University

Faculty Committee Chair Ramirez. Specifically, Liu stated that his GPA target for the introductory Finance 3300 course was 2.95. Liu wanted the students to have an interest in finance as a major/career. Liu also argued that other instructors gave a lower overall GPA because they “hated” students and another Assistant Professor also gave a high GPA to students. Liu also believed that during the 2009-2010 academic year he served on two committees and made twice the contributions as his peers and cited the names of other professors who were granted tenure with less service. Liu blamed McBride as the one who had played a role in unfairly denying him early tenure and promotion in the past.¹⁷ Liu did not want the committee to reconsider its recommendation, but to transfer his tenure and promotion files to Dean Swartz.

On February 28, 2011, the College Faculty Committee issued its report stating that Liu’s rebuttal letter did not persuade the majority to change its original vote.

Grievance Number Three

On February 18, 2011, Liu submitted a grievance to the Provost’s Office alleging that Department Chair Frankel violated the College office hours policy by not holding office hours on February 7, 2011 and that Professors Mangold and McBride similarly violated the office hours policy in Winter 2011.

Grievance Number Four

On February 18, 2011, Liu submitted a grievance to the Provost’s Office alleging that Department Chair Frankel manipulated the summary sheet of the Fall 2010 teaching evaluation

¹⁷ RTP Policy and Procedures section 6.5 Early Tenure, and 6.5.1: provides:

The normal period of probation is six years. Any deviation from this standard is unusual and shall require such an unusually strong profile of performance in all aspects of tenure criteria or other factors as to make the case unambiguously compelling.

summary statistics, especially in dividing instructors into categories of “Finance” and “No Finance.” Liu believed this artificial division had a negative impact on his RTP process.

Dean’s Recommendation

On March 8 and 15, 2011, Dean Swartz issued one-paragraph affirmations of the College Faculty Committee, Department Chair, and Department Faculty Committee recommendations denying Liu’s tenure and promotion. In support of her recommendation, she cited to RTP Policy and Procedures sections 6.1. and 7.1.

Grievance Number Five

On April 1, 2011, Liu filed a grievance with the Provost’s Office that Department Chair Frankel continued to violate the office hours policy by not holding office hours for the requisite number of hours in February and March 2011 and McBride did not hold the requisite number of office hours in Spring Quarter 2011.

Grievance Number Six

On April 25, 2011, Liu submitted a grievance with the Provost’s Office alleging that on March 28, 2011, Dean Swartz “spoke in a firm tone” to him to leave the Valley Business and Technology (VBT) Building Room 408 when he was checking his emails at a computer. Liu requested an apology from Dean Swartz. The informal level one meeting was held on May 9, 2011. According to Liu’s subsequent grievance (Grievance Number Eleven, filed on May 17, 2011), Dobb placed a police officer two yards from him during that meeting.

Grievance Number Seven

On April 26, 2011, Liu submitted a grievance with the Provost’s Office alleging that Dean Swartz awarded favorite professors \$13,995 for publications based upon an “ill-made research policy.”

Tenure and Promotion: University Faculty Committee

The University Faculty Committee consisted of Committee Chair Professor Ramirez, and Professors Jessica Weiss, Julie Glass, Iliana Holbrook and Cesar M. Maloles, III (Maloles). Liu stated that Maloles and Frankel met him at the Chef's Experience China Bistro Restaurant to discuss his tenure review on October 27, 2010. Because of that meeting, Liu suspected that Maloles would vote against him as Maloles and Frankel were friends. Maloles explained in an email that he only met Liu as he was concerned for Liu's mental health and to express that he would not prejudge his case. When it came time to cast his vote at the University Faculty Committee, Maloles was very supportive of Liu.

On April 27, 2011, the University Faculty Committee issued its report recommending Liu be awarded tenure voting four to one and recommending against promotion three votes to two. The tenure and promotion recommendations emphasized that its conclusion was based upon Liu's dossier, WPAF, student evaluations and "strictly" on the RTP documents. The tenure recommendation listed portions of Liu's retention reports from 2006 through 2010 and concluded that he met the standards for tenure in instructional achievement. The committee noted some of the disturbing comments in student evaluations which led the minority to vote against Liu as satisfying the requirement of instructional achievement. In the area of academic achievement, the report acknowledged that Liu had published three articles in top peer-reviewed journals, presented papers at several conferences in finance and had a paper which was a semi-finalist in the Financial Management Association Annual Meeting Competitive Papers Award program, but noted that he had submitted the same articles for publications for years. In the area of university and community service, the majority believed Liu could have done more, but felt he received conflicting advice to concentrate on his publications. The report made note of Liu's behavioral and ethical issues and explained:

Other levels of review have made much of the alleged behavioral and ethical issues that attend Dr. Liu's candidacy. While the Majority empathizes with their concerns, the Majority strongly feels that such issues are not germane to the determination of his fitness for tenure. Instead, if deemed valid, these issues should be addressed through different channels.

The minority based its recommendation against tenure upon its opinion that Liu did not meet the standard that Liu would contribute in the future to the development of the University. In the report recommending against promotion, it cited the same negative aspects in the tenure report to deny him a promotion to Associate Professor.

The University Faculty Committee inspected the prior recommendations to determine if there was any bias in their reports and did not find any. The committee reviewed the emails and communications from Liu on this matter and all of the tenure and promotion reports at the various levels. Pursuant to the RTP procedure, the committee is not allowed to review issues of bias until it is time for them to conduct their review. The committee was unaware of any grievances filed by Liu and Dobb did not discuss Liu's behavioral issues with them.

Grievance Numbers Eight through Fourteen

On May 5, 2011, Liu submitted a grievance (Grievance Number Eight) with the Provost's Office alleging that Department Chair Frankel did not assign Finance 4315 course according to the students' needs, but according to the instructor's desire when to teach the course. Additionally, Liu alleges that Department Chair Frankel and Dean Swartz assigned non-finance instructors to teach finance courses.

On May 11, 2011, Liu filed a grievance (Grievance Number Nine) with the Provost's Office alleging that Dean Swartz and Department Chair Frankel abused their power by condoning McBride engaging in a full-time business without producing a quality research publication in exchange for McBride's false statements against Liu in the RTP process.

On May 16, 2011, Liu submitted a grievance (Grievance Number Ten) with the Provost's Office alleging that Dean Swartz appointed her friend, Luanne Meyer, to the directorship of the Human Investment Research and Education Center. A formal level one meeting was conducted on May 31, 2011.

On May 17, 2011, Liu submitted a grievance (Grievance Number Eleven) with the Provost's Office alleging that during his informal level one meeting on May 9, 2011, Dobb was biased by placing a police officer about two yards away from him. A formal level one meeting was held on June 1, 2011.

On May 27, 2011, Liu submitted a grievance (Grievance Number Twelve) with the Provost's Office alleging that Professor Frankel had not conducted meaningful research in years, yet required Liu to do so.

On May 27, 2011, Liu submitted a grievance (Grievance Number Thirteen) with the Provost's Office alleging that McBride erroneously claimed Department Chair Frankel to be an AQ professor and that on September 20, 2010, Liu stated during a departmental meeting that a department professor was not AQ.

On May 27, 2011, Liu submitted a grievance (Grievance Number Fourteen) with the Provost's Office alleging that on February 4, 2011, Liu discovered that a 30-inch monitor was purchased for the Dean's Office and sent an email reporting it to the College on March 28, 2011. Liu believes he is currently being investigated in retaliation for "exposing corruption."

Denial of Tenure and Promotion: University President's Decision

On May 31, 2011, Liu sent an email to President Qayoumi stating that Liu was going to be investigated by the CSUEB for his documenting "corruptions" related to office hour policy violations and the purchase of a 30-inch monitor by the Dean's Office during a budget crisis. Liu explained that hundreds of students signed a petition in his support. He complained how

Dean Swartz gave several raises, chair positions and jobs in exchange for their vote against Liu. He explained that Department Chair Frankel told him that every recommendation of Liu would be negative.¹⁸ CFA Chapter President Brian McKenzie also sent an email to President Qayoumi in support of Liu and that Liu had been the subject of a “misunderstanding.”¹⁹

On June 1, 2011, President Qayoumi issued his letter stating that he was denying Liu tenure as Liu’s WPAF demonstrated that he did not meet the university standards in the areas of instructional achievement, academic achievement and university service. Liu was also notified that his next academic year would be his final year of service (terminal year notice). Liu was informed that if he wanted to have his denial of tenure reconsidered, he should provide new evidence in the three areas. On June 8, 2011, President Qayoumi issued his letter stating he was not approving Liu for promotion to Associate Professor as Liu did not meet the university standards in the areas of instructional achievement, academic achievement and university service. Qayoumi testified that although the letters were dated June 1 and 8, 2011, respectively, his decisions on tenure and promotion had been made approximately a week before the dates on the letter as the letters were drafted by the Academic Affairs Office.

President Qayoumi reviewed between 100 to 150 retention, tenure and promotion issues as CSUEB President.²⁰ His general process of review was to have his Chief of Staff²¹ review the tenure and promotion files and determine whether all the required materials were present. In a majority of cases, there was a concurrence of recommendation at all levels. Most of the

¹⁸ Department Chair Frankel denied stating this. Frankel’s fear of Liu makes it highly unlikely that he would make such a statement to Liu for fear of what Liu would do.

¹⁹ This was not a support letter for Liu to be granted tenure and/or promotion, but in support of Liu’s right to express a dissenting opinion.

²⁰ President Qayoumi averaged about 30 to 40 retention, tenure and promotion reviews a year.

²¹ President Qayoumi’s Chief of Staff was also a former chair of the academic senate.

President's time was spent when there was a disagreement of recommendation existed at the different levels of review. President Qayoumi also consulted with the Provost when there was a disagreement among the levels of review.

President Qayoumi considered tenure decisions to be extremely serious as these decisions affected the next 20 to 30 years at CSUEB. In the past, he has agreed with, as well as overruled, a Dean's recommendation, including Dean Swartz, who he overruled in granting someone tenure on one occasion and denying someone else tenure on another occasion. He has also overruled the University Faculty Committee in the past.

President Qayoumi explained that he does not receive any tenure/promotion file materials until all of the other levels have completed their reviews and issued their recommendations. When President Qayoumi conducted his review whether to grant or deny tenure and/or promotion, he reviewed all of the file materials. President Qayoumi considered Liu's teaching effectiveness to be troublesome, especially when he reviewed the students' comments about the cancellation of classes or ending classes early and joking sexually. There were enough students comments in different courses and time periods that President Qayoumi could not dismiss these comments as aberrant.

Regarding Liu's research, Qayoumi was concerned that Liu only had three published papers which were early in his career and had no prospects in the pipeline. Qayoumi was also concerned about Liu's Google, Inc., article and his generalizations about the involvement of the SEC's consideration of his article and that Liu did not attribute some of his articles in the SSRN to CSUEB, but to Purdue University.

Qayoumi believed that Liu's university and community service was minimal in breadth and depth. Liu had worked on a couple of occasions with a Chinese community group and had quit one committee in 2007 because it was too much work for an untenured professor.

Qayoumi stated that when he looked at Liu's record of instructional achievement, academic achievement, and service separately, Liu "may appear" to be an acceptable candidate, but when Qayoumi looked at all three areas together, he had great difficulty recommending Liu for tenure. Qayoumi admitted that it was unusual to have a candidate that was very good in all three areas and a tenure candidate could be marginal in one area and still be granted tenure, but Qayoumi considered Liu to be marginal in all three areas.

Qayoumi was not aware that Liu had filed any grievances and Liu's grievance activity played no role in Qayoumi's decision. Although a grievance document may come to the President's Office, Qayoumi did not see any from Liu. Qayoumi explained that a document will go to his Chief of Staff, and if Qayoumi needed to see it, he would.²²

Other than what was mentioned in the various recommendation reports, Qayoumi was unaware of any of Liu's alleged inappropriate behaviors. Qayoumi made his decision without any discussion with Dean Swartz, Dobb or Frankel. No one suggested to Qayoumi what decision he should make regarding Liu.

Qayoumi admitted to getting emails from Liu, but explained that he received a "barrage" of emails daily²³ and Liu's emails did not influence his decision. Qayoumi remembers the gist of Liu's emails being that he was dissatisfied with Dean Swartz and had concerns about the Department and the College. When Qayoumi received an email from Liu, he assigned it to the Chief of Staff or Provost to review. The Provost later returned to Qayoumi stating that Liu's allegations were baseless.

²² As an example, President Qayoumi was showed a June 11, 2011 (after the date of the President's decision) first level response of one of Liu's grievance which copied Qayoumi. Qayoumi stated that he had not seen the response.

²³ CSUEB has several hundred full-time faculty, several hundred part-time faculty, over a thousand staff, and 40,000 students.

Grievance Numbers Fifteen through Twenty

Between June 9 and 30, 2011, Liu filed five grievances alleging that Liu was unfairly denied tenure and promotion; Dobb responded to three grievances which were filed against her; Dean Swartz, Department Chair Frankel, McBride and Mangold took discriminatory actions against him in his 2009-2010 early tenure and promotion process, 2009-2010 retention process, and 2010-2011 tenure and promotion process; Dobb retaliated against him for issuing him a September 20, 2010 reprimand after he sent Dobb an email on September 27, 2010 complaining of Dean Swartz; CSUEB and CFA representatives tried to get him to sign a settlement agreement that waived his rights; and President Qayoumi retaliated against him for filing a whistleblower complaint in May 2011.

Grievance Twenty-One was not filed until November 17, 2011.

Penal Code Section 626.4 Withdrawal of Consent Order

Penal Code section 626.4 provides in pertinent part:

(a) The chief administrative officer of a campus or other facility of a community college, a state university, the university, or a school, or an officer or employee designated by the chief administrative officer to maintain order on such campus or facility, may notify a person that consent to remain on the campus or other facility under the control of the chief administrative officer has been withdrawn whenever there is reasonable cause to believe that such person has willfully disrupted the orderly operation of such campus or facility.

[¶...¶]

(c) Consent shall be reinstated by the chief administrative officer whenever he or she has reason to believe that the presence of the person from whom consent was withdrawn will not constitute a substantial and material threat to the orderly operation of the campus or facility. In no case shall consent be withdrawn for longer than 14 days from the date upon which consent was initially withdrawn. The person from whom consent has been withdrawn may submit a written request for a hearing on the withdrawal within the two-week period. The written request shall state the

address to which notice of hearing is to be sent. The chief administrative officer shall grant such a hearing not later than seven days from the date of receipt of the request and shall immediately mail a written notice of the time, place, and date of such hearing to such person.

(Emphasis added.)

CSUEB has a “Workplace Safety and Security Policy,” which provides in pertinent part:

California State University recognizes that workplace violence is a critical problem requiring strict attention and has therefore adopted a policy of no tolerance towards this problem and adopted the Work Place Safety and Security Plan, as the campus general plan to increase workplace safety and security.

Consistent with this policy, acts or threats of physical violence, including intimidation, harassment, and/or coercion, which involve or affect the university or which occur on property owned or operated by the Board of Trustees, will not be tolerated. Acts or threats of violence include conduct which is sufficiently severe, offensive, or intimidating to alter the employment conditions at the University or to create a hostile, abusive, or intimidating work environment, for one of several employees. Examples of workplace violence include, but are not limited to the following:

1. All threats or acts of violence occurring on university premises, regardless of the relationship between the University and the parties involved in the incident.

[¶...¶]

Specific examples of conduct that may be considered threats or acts of violence include, but are not limited to the following:

[¶...¶]

2. Threatening an individual or his/her family, friends, associates, or property with harm.

Lt. Hodges kept a running log of his contacts with Liu. The log included events which ranged in their degree of peculiarity and seriousness. Lt. Hodges began the log on May 26, 2006 and it ran through April 7, 2011.²⁴

On March 1, 2010, Department Administrative Assistant Jeannie Gee (Gee) reported to the University Police Department (UPD) a verbal altercation she had with Liu where she believed Liu confronted her regarding the whereabouts of Liu's retention letter. Specifically, Gee complained that Liu stood too close to her and invaded her personal space.

On March 9, 2010, Dobb sent an email to Liu stating in pertinent part:

In the meantime, I think it best to let you know that your behavior recently has had the effect [of] frightening or causing concern with your fellow employees. This has resulted in one of them seeking assistance from the University Police and others approaching the Dean in the College of Business.

On or about June 28, 2010, Dean Swartz contacted Lt. Hodges and complained about Liu's intimidating behavior with her during a meeting where he stated that he would "fight to the death" over the right to teach a Finance course. Lt. Hodges asked Liu to come to the police station and asked him what he meant by the statement. Liu did not want to answer his question.

On June 29, 2010, Liu shared with Lt. Hodges an email from CFA CSUEB President Eagan that her impression of Dean Swartz based upon Liu's description was that she was a "rogue dean." On that same day, Lt. Hodges met with Dean Swartz and stated that Liu's

²⁴ The log is 12 pages long, single-spaced. Of those twelve pages, the log makes reference that on July 15, 2010, Liu showed Lt. Hodges an email from Professor Eagan that her impression was Dean Swartz was a rogue dean who made unilateral decisions without the input of faculty and the Provost Office should be made aware of her, and a January 13, 2011 email where Liu on January 4, 2011, went to the Provost Office and submitted a grievance against Dean Swartz, and Professors Mangold and McBride for their bias against him. The rest of the 12 pages dealt with Liu's threatening or aberrant behavior.

comment on June 28 would not meet the elements of a criminal threat.²⁵ Lt. Hodges later confirmed his opinion with the Alameda County District Attorney's Office. Dean Swartz advised Lt. Hodges that Liu would not be returning to teach at CSUEB until the Fall 2010 quarter.

On September 17, 2010, Lt. Hodges received and reviewed Liu "Criminal Actions . . ." email where he accused Dean Swartz of various criminal conduct. Lt. Hodges did not believe anything stated by Liu in the email could be interpreted as a criminal action.

On September 20, 2010, Dobb issued a written reprimand to Liu stating in pertinent part:

Over the past few months, two individuals within the College of Business and Economics have had occasion to call the police in regards to your behavior. Before we start a new academic year, I felt it important to write you directly about your behavior and what our expectations are regarding how you interact with colleagues and staff within the University.

Remarks like I will "fight to the death for my right to teach Finance 4315" and behaviors which seem overly aggressive are inappropriate. I ask that you keep your remarks and actions brief and to the point when working with colleagues and staff. I would certainly anticipate that nothing in your behavior would occasion a call to the police department. If you are having trouble controlling your behavior or remarks, I would ask that you seek help either through your Chair or through our Employee Assistance Program.

Liu sought the assistance of the CFA and Dobb agreed to withdraw the reprimand if Liu got some help through the Employee Assistance Program (EAP). On October 7, 2010, Liu notified Dobb that he had enrolled in the EAP.

²⁵ Lt. Hodges had an extensive law enforcement history. He worked as a law enforcement officer with the Alameda County Sheriff's Department for 36 years and retired at the rank of lieutenant. He was later hired with CSUEB as a lieutenant.

On November 17, 2010, Dean Swartz sent Lt. Hodges an email alerting him that Liu may have received a negative tenure and promotion review from his department. Lt. Hodges called Dean Swartz and everything seemed calm.

On January 5, 2011, Department Chair Frankel reported to UPD Officer Mark Engel that when he told Liu that he would be incorporating some of the students' comments of the faculty committee into his tenure review, as some of them were valid, Liu replied that if Frankel put any of those things in his review letter, it would be a traumatic experience. Liu then reached into the pocket of his trenchcoat and started to pull an object out of his pocket, fumbled it and dropped it. Frankel thought Liu was reaching for a recording device in his pocket. Frankel told the officer he was concerned for Liu's mental state.

On January 6, 2011, Chief Davis convened a Threat Assessment Team²⁶ with Lt. Hodges, Dobb, and Dean Swartz among others. Dobb explained that Liu's behavior was "unusual" and he was nervous about tenure. She summarized past reports of Liu's behavior.

On February 7, 2011, McBride emailed UPD that the College RTP letters for candidates had been completed and forwarded. The police department continued their visibility at the College as the letters were placed in the candidate's mailboxes.

On March 3, 2011, Liu went to see Interim Chief Hodges²⁷ (Chief Hodges) that Gee came from behind Liu and simulated an action with her foot as if she was kicking Liu in the rear end. On March 4, 2011, Chief Hodges telephoned Associate Dean Jagdish Agrawal (Agrawal) that Gee simulating a kick toward Liu was not a criminal offense, but that all faculty and staff should avoid any activity which could be construed as inappropriate and provoking to Liu.

²⁶ A Threat Assessment Team is a team of core campus representatives to discuss threatening information and suggest a course of action to the University President.

²⁷ Lt. Hodges had been promoted to Interim UPD Chief of Police.

On March 7, 2011, Frankel went to the UPD to complain that Liu had taken photos of his students before they were coming to class that day. When Frankel spotted Liu doing this, Frankel became scared that Liu would attack him and had two students escort him to UPD. Frankel did not want to press charges, but wanted Liu to stop harassing him.

On March 18, 2011, CBE Budget Analyst Autumn McGrath (McGrath) called UPD to complain about Liu taking photos in the hallway and outside her door. Chief Hodges saw Liu in the VBT building and asked to speak with him in his office. Liu explained that he was taking pictures of vacant and unused space. When Chief Hodges suggested that Liu cease from the activity, Liu asserted his rights to do so. Chief Hodges encouraged Liu to pursue his tenure review through proper legal and ethical channels. Chief Hodges then contacted McGrath and informed her that Liu's photography was not a criminal offense, but needed to be handled administratively through CSUEB and the College.

On April 4, 2011, Associate Dean Agrawal notified Liu that CSUEB retained the services of an outside investigator, Deborah Allison (Allison), to investigate whether his conduct violated Education Code section 89535 and other university policies. The investigator was to interview Liu on April 15, 2011, but the process was delayed due to Liu's unavailability and lack of response.

In July 2011, Provost office staff²⁸ contacted the President's Office and stated that they were frightened of Liu and that they didn't want Liu to come to the Provost Office again.²⁹ The President's Chief of Staff directed Dobb to "handle it." Dobb discussed the matter with the Director of Human Resources and they agreed that Liu could bring his grievances to the Department of Human Resources and Human Resources staff would take the grievance(s) upstairs to the Provost's Office. On July 15, 2011, Dobb sent Liu a written notification stating

²⁸ One of the staffpersons was Gina Traversa (Traversa).

²⁹ Dobb was unaware that her staff contacted the President's Office about Liu.

that CSUEB had received a complaint of Liu's behavior from the Provost's Office staff and that if he was to deliver anything to the Provost's Office that he was to use the campus mail or personally deliver it to the receptionist at the Human Resources Office.

On August 24, 2011, Provost Houpis issued the final discipline suspending Liu from September 19 through December 13, 2011. The charges included intimidating Gee; attaching a Global Positioning System (GPS) tracking device to the automobile of Professor Fung so that he could monitor Fung's whereabouts to determine Fung's outside activities; telling Dean Swartz that he would "fight to the death" and "sacrifice his life" to teach Finance 4315; stalking Department Chair Frankel by loitering outside his office armed with a camera to take photos; and, taking photos of Frankel's students.

On September 28, 2011, at 3:30 p.m., Liu dropped off a grievance package³⁰ at the President's Office and then walked over to the Provost's Office to drop off the same documents. The door was locked and when Traversa came to the door she told Liu to go to Human Resources Office and not to come to the Provost's Office.

On Friday, September 30, 2011, at 11:32 a.m., Liu sent the following email to the Human Resources Director Denise Needleman (Needleman), Human Resources and Provost Office staff, Traversa, and Chief Hodges:

Dear Ms. Needleman and other Colleagues at HR department,

By this email, I want to discuss Ms. Gina Traversa's discrimination against HR staff – as second class of citizen who are inferior to her.

Two days ago, I tried to deliver a package to the Provost Office and Ms. Traversa initially refused to accept the document and asked me to go to the Human Resources department. The assumption that Ms. Traversa made about Liu, an assistant professor of finance, is that Liu is a risky person who will kill many people in the. [sic] This is obviously a criminal action of

³⁰ The package may have also been the instant unfair practice charge.

open discrimination against Liu. However, in this email, let us temporarily assume Ms. Gina Traversa's assumption is true.

Then I wish all members of the HR department to think about the following question.

If Professor Liu is risky and he may kill other people, then why did Ms. Traversa knowingly sent [sic] Liu to HR?

It is well known that the designated campus location for faculty members to deliver grievance forms is the Provost Office.

Why is [sic] Ms. Gina Traversa asks staff members of HR to take care of things that are solely the responsibility of the Provost Office?

It is very clear that Ms. Gina Traversa thinks that, at CSUEB, she is a first-class citizen. Just like the old slave-owners, to Ms. Traversa, all other CSUEB faculty and staff members are the black slaves. Those black slaves only deserve to work in the dirty cotton field, and they can not come to where the slave owners live (the CSUEB Provost Office).

Staff members of HR department are of a[n] inferior class to Ms. Traversa.

And if Professor Liu kills someone, then staff members of HR department should die first.

Here, I want to make the clear statement.

I am a very friendly person and I only take peaceful means to fight corruption, discrimination, and organized fraud at CSUEB. I will never hurt any of my colleagues at CSUEB, there is no need to think of Liu as a risky person.

In this email, I demand an immediate investigation by the Office of Equity and Diversity on Ms. Gina Traversa's open discrimination against staff members of HR department and Jerry Liu[.]

I also demand the HR department conduct an investigation on Ms. Gina Traversa's frequent failure to come to work – while being fully paid by the State of California.

Finally, I demand a written apology from Ms. Traversa to staff members of HR department and me for her act of open discrimination.

Thank you very much for your attention.

I wish you a nice weekend!

Jerry Liu

(Emphasis added.)

After receiving the email, Chief Hodges believed that Liu was intentionally attempting to intimidate the Human Resources staff as it was addressed to them and Liu referenced “killing” them. Chief Hodges convened a Threat Assessment Team meeting between 2:00 p.m. and 3:00 p.m. Present were eight team members, Nyassa Love of Risk Management, Human Resources Manager Andre Johnson, Director of Accessibility Services Katherine Brown, UPD Commander Kirk Gaston, Associate Vice President of Student Affairs Stan Hebert, Director of Student Health and Counseling Andrea Wilson, Chief Hodges and Dobb. Dobb was present telephonically and contributed as a team member. Chief Hodges provided the team with his chronological history of concerns regarding Liu’s behavior since March 2010 and the team discussed the September 30, 2011 email. Chief Hodges believed that Liu was insubordinate to a direct order that Dobb gave him on July 15, 2011 and was disruptive by handing out pamphlets outside of Frankel’s classroom.³¹ The team decided that immediate action needed to be taken pursuant to Penal Code section 626.4 to order the withdraw of the university’s consent for Liu to be on campus for 14 days.

Chief Hodges contacted CSUEB Chief of Staff Don Sawyer (Sawyer) to discuss getting authorization for the Penal Code section 626.4 order to withdraw consent. Chief Hodges discussed all of the details of the basis for the order with Sawyer. As President Leroy Morishita³² (Morishita) was out-of-town, Sawyer telephoned President Morishita who gave

³¹ Chief Hodges admitted that the impetus for calling the Threat Assessment Team meeting was the September 30, 2011 email.

³² President Qayoumi left CSUEB on July 1, 2011.

authorization to issue the order. Sawyer then communicated the authorization to Chief Hodges.³³ President Morishita confirmed the issuance of the order on Monday morning.

At approximately 4:33 p.m., UPD officers served Liu with the Penal Code section 626.4 order near his office. Liu was upset and animated when he received the document, but eventually complied as he was allowed to finish faxing a PERB unfair charge proof of service to the CSUEB President's Office. Liu was escorted off campus grounds to his vehicle after being allowed to pack up some personal items. Liu was informed that he was forbidden to return to campus and if he returned during the 14-day period, he would be arrested.

On October 5, 2011, Chief Hodges sent an email to Liu reflecting his interactions with the Provost's Office staff on the week of September and he was reportedly going inside a classroom to pass out flyers which made fellow faculty members uneasy. Chief Hodges explained that the impetus of the Penal Code section 626.4 order was the September 30, 2011 email to Needleman and Human Resources staff. Liu was eventually provided an appeals hearing and the order was upheld.³⁴

Post Deferral Repugnancy Review

CBA Article 19 sets forth the "Disciplinary Action Procedure" between CFA and CSU. Disciplinary action, includes dismissal and suspension without pay (CBA section 19.1). There

³³ Chief Hodges explained that he had authority to issue the Penal Code section 626.4 order without the University President's authorization in exigent circumstances, but whenever he can, he receives authorization from the University President.

³⁴ The issue of whether Liu's appeal rights were denied him was not part of the complaint, only the Penal Code section 626.4 order.

are three appeal options provided in the CBA for a disciplinary action, including an appeal through the Disciplinary Arbitration Procedure (CBA section 19.10).³⁵

19.9 Within five (5) days of the receipt of the report,^[36] the President shall notify the affected faculty unit employee of his/her decision to rescind, modify, or affirm the pending disciplinary action. The effective date of such disciplinary action shall be included in this notification. . . .

Disciplinary Action Appeal Process

19.10 A faculty unit employee may appeal a pending disciplinary action by selecting one (1) of the three (3) following appeal options at the time s/he files his/her notice of appeal:

- a. Within ten (10) days of receipt of the notification pursuant to provision 19.9 above, a faculty unit employee or his/her representative may file a written notice of appeal with the President in accordance with the Disciplinary Action Arbitration Procedure of this Article. . . .

[¶...¶]

Disciplinary Action Arbitration Procedure

19.13 No later than ten (10) days after the decision to submit the pending disciplinary action to disciplinary action arbitration, CFA and the Office of the Chancellor shall agree on a mutually acceptable arbitrator or shall jointly request the American Arbitration Association to supply a list of arbitrators pursuant to its rule, and consistent with the further requirements of 19.15.

19.14 Upon receipt of the names of proposed arbitrators pursuant to 19.15, the parties shall alternately strike names from the list until one (1) person is ultimately designated as the arbitrator. The decision as to which party strikes first shall be determined by lot. Any appeal of a disciplinary action shall be considered withdrawn if the parties have not, within twelve (12) months after the CFA has submitted the pending disciplinary action to arbitration, agreed upon a date and scheduled the case for hearing with the arbitrator

³⁵ The other two options offered in the CBA is an appeal before the State Personnel Board (SPB) or a hearing before the Faculty Hearing Committee selected from the Faculty Review Panel.

³⁶ This report is prepared for the President by the Reviewing Officer after the Reviewing Officer conducts a *Skelly* hearing. (*Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.)

assigned to the case. This provision shall be extended for an additional thirty (30) days at a time, in cases where the Union has agreed to dates proposed by an arbitrator which are unacceptable to the CSU.

Scheduling Arbitration Hearings

19.15 a. All disciplinary cases involving suspension, dismissal or demotion appealed to arbitration pursuant to 19.10 (a) above shall be scheduled for hearing in arbitration no later than ninety (90) days from the effective date of the disciplinary action contained in the notification issued by the President pursuant to 19.9. The process for selecting the arbitrator shall be that contained in 19.13 and 19.14. If the parties have mutually agreed on an acceptable arbitrator then they shall submit jointly a list of suitable hearing dates to the arbitrator within the ninety (90) day period. If the hearing is estimated by the parties to require more than one (1) day, then the hearing dates should be consecutive whenever possible. If the arbitrator cannot offer consecutive dates to the parties, then he/she may offer his/her soonest available dates. If the parties have not been able to mutually agree on an acceptable arbitrator, then they shall submit jointly a list of suitable hearing dates to the American Arbitration Association and request them to supply pursuant to its rule a list of arbitrators each of whom has at least one of those dates available to hear the appeal within the ninety (90) day period. If the hearing is estimated by the parties to require more than one (1) day, then the hearing dates should be consecutive whenever possible. If the arbitrator cannot offer consecutive dates, then he/she may offer his/her soonest available dates. The parties shall then use the strike procedure detailed in 19.14 to designate an arbitrator to hear the appeal.

[¶...¶]

Arbitration Rules and Procedures

19.16 It shall be the function of the arbitrator to determine whether cause for disciplinary action existed and to affirm, modify, or deny the sanction or pending sanction.

19.17 Absent a mutual agreement to the contrary, if an arbitrability question exists, there shall be a bifurcated hearing in which the arbitrator shall determine the arbitrability question after the submission of post-hearing briefs and prior to hearing the formal presentations of the parties on the merits of the grievance.

19.18 Within ten (10) days from the date the hearing has concluded, the arbitrator shall issue to the parties a written award

stating the decision on the issue(s) submitted. Copies of the award shall be provided to the parties. The award shall be final and binding on the parties.

19.19 Both the arbitrator's decision and the recommendation of the faculty hearing committee shall set forth the findings, reasons, and the conclusions on the issue(s) submitted no later than thirty (30) days after the award is issued. Copies of the complete decision shall be provided to the parties.

19.20 The Voluntary Labor Arbitration Rules of the American Arbitration Association shall apply except when the specific language of this Article shall apply.

[¶...¶]

19.24 Each party shall bear the expenses of preparing and presenting its own case both in arbitration and in hearings before faculty committees. . . . The cost for the services of the arbitrator shall be borne by the CSU.

(Emphasis added.)

The AAA Voluntary Labor Arbitration Rules effective at the time of the request for arbitration and the arbitration hearing provided in pertinent part:

Rule 13. Direct Appointment by Parties

If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the panel from which the party may, if it so desires, make the appointment.

If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make an appointment within that period, the AAA may make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within ten days thereafter such arbitrator has not been so appointed, the AAA shall make the appointment.

[¶...¶]

Rule 19. Date, Time, and Place of Hearing

The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to established deadlines and hearing schedules. . . .

[¶...¶]

Rule 26. Order of Proceedings

[¶...¶]

The arbitrator may vary the normal procedure under which the initiating party presents its claim, but in any case shall afford full and equal opportunity to all parties for the presentation of relevant proofs.

Rule 27. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

[¶...¶]

Rule 31. Closing of Hearings

The arbitrator shall inquire of all parties whether they have any further proof to offer or witness to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs or other documents are to be filed, the hearings shall be declared closed as of the final date set by the arbitrator for filing with the AAA. . . .

[¶...¶]

Rule 46. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. . . . All other rules shall be interpreted and applied by the AAA.^[37]

(Emphasis added.)

³⁷ Official notice is taken of these rules. Both parties have cited them in support of their arguments.

Selection/Appointment of Arbitrator and Scheduling of Hearing

On August 24, 2011, Provost Houpis issued the final discipline suspending Liu from September 19 through December 13, 2011. On September 22, 2011, Liu appealed the suspension to arbitration. On October 4, 2011, University Counsel Andrea Gunn (Gunn) emailed Liu and volunteered to write AAA to jointly request a list of arbitrators. On October 18, 2011, Gunn emailed Liu again, in order that she may request a list of arbitrators and asked for Liu to reply by the next day. Gunn stated her availability for an arbitration hearing between January 23 through 27 and February 6 through 29, 2012. She stated that if she did not hear back from Liu by the next day, she would write AAA.

On October 19, 2011, Liu responded that he was busy dealing with another issue, needed to finish a financial document and consult with a CFA representative about arbitrators and would write back to Gunn before October 30, 2011. On October 19, 2011, Gunn responded that Liu's delays placed them beyond the CBA deadline and she was only asking Liu's availability for hearing. On October 30, 2011, Liu emailed Gunn that he had a "VIP" visitor and would have to travel with the visitor until November 2011, but he would send her a draft letter before December 1, 2011.

On November 3, 2011, Provost Houpis issued the final disciplinary letter terminating Liu effective November 21, 2011.³⁸ On November 7, 2011, Gunn emailed Liu confirming that he intended to appeal the termination and she would draft a letter to AAA regarding Liu's

³⁸ The charges included: walking into Associate Dean Agrawal's office uninvited, asking him about his record of intellectual contributions and threatening to expose him to the New York Times; leaving several pages of material about department professors' grading in Professor Satin's and Professor Jan's classes for their students without their permission; passed out the same materials right before Professor Jin-Wen Yang's class without her permission; distributing materials in classrooms and identifying some professors, such a Professor Lowenthal, as being one of the faculty issuing students a low GPA; frightening Traversa on September 29, 2011 and sending a threatening email on September 30, 2011; and lurking outside three professor's offices during their office hours.

appeals requesting the “strike list(s).” Gunn requested Liu’s availability for hearing over the next three to six months so that the process would not be delayed any further. On November 8, 2011, Gunn sent an email to AAA and copied Liu requesting a list of arbitrators and that the parties would alternately strike the names on the list until one name was left. Gunn cited to CBA section 19.15(a).

On November 18, 2011, AAA sent a letter by email to Liu and Gunn stating that the arbitration would be conducted pursuant to the AAA Labor Arbitration Rules and the parties should jointly submit a list of suitable dates to the AAA pursuant to CBA section 19.15 by November 21, 2011. AAA specified that if it did not get the dates by November 21, 2011, it would provide a list of arbitrators with dates available to hear the dates within a 90-day period. Gunn provided dates in January and February 2012 and Liu provided dates in April, May and June 2012. AAA then asked Liu to provide dates within a 90-day period.

On November 29, 2011, AAA sent a letter by email to Liu and Gunn stating that it was not able to find mutually agreeable hearing dates within 90 days and it would move forward with arbitrator selection. The parties were provided a list of ten arbitrators and they were to alternately strike names of arbitrators until they had one arbitrator left by December 9, 2011. On December 2, 2011, Gunn sent Liu an email expressing she wanted to set up a teleconference call on December 6 or 7, 2011, to strike the names of arbitrators. Gunn estimated that it would not take more than an hour. On December 5, 2011, Liu responded that he did not want to strike arbitrators over the phone due to his limitations in speaking the English language and that this was too important to speak over the phone. Liu stated he would write AAA the next day about arbitration issues and either he or AAA would get back to her. That same day, Gunn wrote AAA stating that she did not want to meet with Liu in-person due to the cost of flying from Long Beach. She stated she could offer video-conference or Skype.

On December 13, 2011, Liu emailed CSUEB President Morishita, Gunn and AAA requesting CSUEB agree to extension to strike arbitrators until January 20, 2011, because he needed to concentrate on his PERB litigation. Gunn responded the same day and did not agree to an extension. Gunn also wrote to AAA challenging two of the arbitrators because they had been employed at CSUEB in the past.

On December 22, 2011, AAA sent a letter by email, notifying Liu and Gunn that if the parties had not engaged in the strike procedure for selecting an arbitrator within the next ten days, AAA would appoint an arbitrator pursuant to Labor Arbitration Rule 13. That same day Liu blamed CSUEB for not contacting him after December 13, 2011, and tasked AAA with having CSUEB arrange meetings with him within ten days. Then Liu emailed Gunn to meet with him within ten days. Gunn said she was unavailable until January 3, 2012, but was happy to schedule a brief conference call on or after that date. Gunn explained that it was a process that they could take care of in a few minutes. Gunn asked Liu's availability on that day or after January 3, 2012.³⁹ Liu stated that since Gunn was not available in ten days then he would contact her after January 3, 2012.

On December 27, 2011, AAA emailed Liu and Gunn to provide their availability to each other no later than January 3, 2012. On December 29, 2011, Gunn provided Liu with a five-hour window to conduct a telephonic conference on January 3, 2012. On December 30, 2011, AAA emailed Liu if he was available at any time during the five-hour window that Gunn was available. On January 2, 2012, at 9:40 a.m., Gunn notified AAA that she had not yet heard from Liu as to his availability for a call on January 3, 2012. On January 2, 2012 at 11:31 p.m., Liu sent an email stating that he was "booked" this week but was available to meet her at the campus on January 9 and 16, 2012. On January 3, 2012, AAA notified the parties that absent receipt of a name of a mutually selected arbitrator, AAA would

³⁹ January 1, 2012, fell on a Sunday. January 2, 2012, was a CSU holiday.

appoint an arbitrator the next day pursuant to the December 22, 2011 letter. That same day, Liu sent an email to Gunn that because of the importance of the case, an arbitrator must be selected by a meeting at CSUEB.

On January 4, 2012, Liu emailed AAA accusing them of violating Labor Arbitration Rule 13 and CBA section 19.14 as he was not allowed to strike names of arbitrators. On January 13, 2012, AAA notified Liu that the parties did not select the arbitrator within the appointed time and AAA would select the arbitrator soon. Again, Liu opposed AAA as depriving him from his CBA right to participate in the selection of the arbitrator.

On January 17, 2012, Liu emailed Gunn and offered to meet with her face-to-face on January 18 and 19, 2012, to strike arbitrators. Gunn replied that AAA had already made its decision to appoint an arbitrator, and if not, would do so soon.

On January 26, 2012, AAA sent a letter to Liu and Gunn stating that Arbitrator Catherine Harris (Harris) had been appointed to hear the disciplinary arbitrations. The parties were given until February 10, 2012, to file any objection to Arbitrator Harris serving as the arbitrator. Within the letter Arbitrator Harris disclosed that she had been selected to arbitrate a matter between CFA and CSU on May 14 and 15, 2012, in Northridge, California. On February 10, 2012, Liu filed his objections to the appointment of Arbitrator Harris,⁴⁰ which included being deprived of the ability to select an arbitrator. CSU opposed Liu's objections. On February 28, 2012, AAA decided to reaffirm Arbitrator Harris as the arbitrator appointed to the case.

Subsequent to the objection letter, Liu attempted on multiple occasions in the months of February 2012 to meet with CSU representatives to select an arbitrator face-to-face, but CSUEB representatives refused and desired to proceed to arbitration.

⁴⁰ Most of the objections have been previously addressed in the ALJ's ruling in the notice of deferral. For purposes of post-deferral review, the remaining objection is whether Liu was denied his CBA right to participate in the selection of an arbitrator.

On March 5, 2012, Liu emailed AAA and Gunn agreeing to a phone conference to select arbitrators. He asked to be contacted on March 13, 2012. On March 9, 2012, Gunn emailed AAA and Liu that CSUEB would be willing to engage in a teleconference call to engage in the strike process if it occurred on March 13 and 14, 2012. CSUEB specified that this was its final attempt to engage in the arbitrator selection process. On March 13, 2012, at 11:20 a.m., Gunn emailed AAA and Liu stating she was waiting to hear back from Liu to schedule the dates for the telephone call on March 14 and 15. Gunn emailed Liu again at 5:28 p.m. On March 15, 2012, at 12:34 a.m., Liu sent AAA (not Gunn) an email stating that he was out of town and would set up a meeting with CSUEB in early April. After the email was eventually forwarded to Gunn, Gunn stated the CSUEB would not wait until early April and withdrew its offer of March 9 to engage in a teleconference call to strike arbitrators. On March 16, 2012, Liu sent an email blaming the whole matter on Gunn. He admitted, however, that he told Gunn that she could contact him by email on March 13.

Disciplinary Arbitration Proceedings

On April 18, 2012, AAA set hearing dates for August 21 through 24, 2012. Arbitrator Harris conducted arbitration hearings on August 21, 22, 23 and 24, 2012, and Liu represented himself with Mark Hostetter, Esq. (Hostetter) present on some of these days as his advisory attorney. In his opening statement, Liu contended that he was being suspended and terminated because of his filing of grievances and his whistleblowing.⁴¹ During the first four days of hearing, Liu caused delay in the proceedings by constantly interrupting CSUEB's direct examination to make an argument in support of his case; provide unsworn testimony to contradict the witness; asking questions about the City of Bell; prolonging witness testimony by editorializing; summoning the California Highway Patrol to take a report against University

⁴¹ During Liu's opening statement at the arbitration, the arbitrator acknowledged the potential relevance of the filing of grievances prior to the adverse action to his defense.

Counsel; refusing to proceed with the hearing for a three-hour period because he needed to speak to his advisory attorney, Hostetter; voicing objection to testimony he believed to be inaccurate; and arriving an hour late for the hearing. Due to these delays, at the end of the fourth day, CSUEB was only able to finish eight of the fifteen to sixteen witnesses it had scheduled.

On August 30, 2012, AAA set September 17 and 18, November 27 and 28, and December 10 and 11, 2012, for further days of hearing.

On September 16, 2012, the day before the September 17, 2012 hearing date, Liu sent an email to CSU Vice Chancellor of Human Resources Gail Brooks (Brooks) which stated:

I would like to keep you updated on the progress on both the PERB hearing and Arbitration of CSU's retaliations on Liu.

In these hearings, CSU lawyer Dawn Theodora^[42] and CSUEB Interim Associate Provost Linda Dobb pressed each and every CSU witness to lie under oath on basic facts.

As a matter of fact, it was so easy for Jerry Liu to expose these perjuries at the hearings that even the CSUEB police officers in the room were laughing at these obvious liars.

At the PERB hearing, Liu has presented solid proofs that CSUEB engaged [in] audacious retaliations against Liu's protected activities. It was also very clear at the hearing that CSU was pushing these employees to commit perjuries.

Please be sure that PERJURY charges will be filed by Liu against all the people who ha[ve] committed the felony,

Here is an incomplete name list

Deborah Allison
Nancy Mangold
Micah Frankel
Lettie Ramirez
Jagdish Agrawal
Jeannie Gee

⁴² Theodora had replaced Gunn as University Counsel assigned to Liu's disciplinary arbitration.

Scott Fung
Jame[s] Hodges
Linda Dobb
Mo Qayoumi

Please understand that I am sending this email to you solely out of my good will.

I urge [the] highest leaders of CSU system [to] think twice about what charges that these people/employees will do – after they get out of prison for perjuries committed under CSUEB intimidation/pressure.

Finally, I ask you seriously consider the scenario of Jerry Liu, who has solid evidence on the perjuries, sending over 10 CSU employees to prison before the end of 2012.^[43]

The email was mailed to the “incomplete name list” as well as others. Those who were addressees of the email who testified during the first four days of hearing in August 2012 were Houpis, Alan Monat, Darrell Haydon, Allison, Gee, Professor Fung, Professor Mangold and Andre Johnson. Those who were addressees of the email and who testified on September 17 and 18, 2012 were Aubrey Wade, McGrath, Agrawal, Dobb and Frankel. After this, Liu emailed some of these addressees asking for their physical addresses so that he could serve a legal document related to a perjury charge. The addressees were supposed to provide it to Liu by the afternoon of September 18, 2012.

Arbitrator Harris conducted hearings on September 17, 2012, and expressed great concern over Liu’s email sent the day before, however, the arbitration hearing went forward.⁴⁴

⁴³ Official notice is taken of the transcripts of the arbitration proceedings and this email. Liu included a compact disc of the transcript of the proceedings with his argument opposing deferral.

⁴⁴ In the PERB proceedings on September 13, 2012, the ALJ severely rebuked Liu for inquiring how to prosecute witnesses for perjury in the presence of Dobb who he knew was to testify for CSUEB soon. After the rebuke and at the request of the ALJ, Liu apologized to Dobb. The hearing went forward. It is befuddling that Liu repeated these actions which were more blatant than in his arbitration proceedings only three days later.

On September 18, 2012, the hearing began with CSUEB calling Frankel as a witness. After CSUEB began to ask questions to Frankel about the retention, tenure and promotion process, Liu vehemently objected that CSUEB was attempting drag out the hearing as the arbitration concerned his suspension and termination and not his denial of tenure and promotion. The arbitrator stated that Liu's objection had already been overruled. On multiple occasions, Liu demanded that the arbitrator allow him to present his case that day, even if CSUEB had not concluded its case, but his request was ruled to be out of order.

DR. LIU: I'm very respectful to the arbitrator. I came here. I paid extra money to hire lawyer. I came here for six days. I'm hoping a chance for me to present. This looks to me will never happen. I know this will never happen. The arbitrator's intention was to try to delay this forever and cause me extra pain and suffering. I have to quit.

THE ARBITRATOR: Dr. Liu, are you withdrawing your appeal?

DR. LIU: I will email you later.

(Arbitration Transcript, page 1066:15-24.)

THE ARBITRATOR: Dr. Liu, if you walk out of the hearing, you are, in essence, abandoning your appeal.

DR. LIU: I ask the arbitrator to give me a chance to present today.

THE ARBITRATOR: I will give you a full opportunity to present your case as soon as she finishes her case.

DR. LIU: Not until I become homeless, jobless, and not until 2013.

THE ARBITRATOR: Dr. Liu, she has the burden of proof.

DR. LIU: She has the burden of killing the time forever. This is a game two years old can see.

(Arbitration Transcript, page 1068:9-22.)

THE ARBITRATOR: You are trying to put your witnesses on in the middle of her case, which is totally inappropriate.

DR. LIU: You allow her case to go on forever.

[¶...¶]

DR. LIU: Are you going to allow me to present today?

THE ARBITRATOR: I am allowing you to present your case after she concludes her case. So if you're going to – you're abandoning your appeal, Dr. Liu. Is that what you want to do?

DR. LIU: I'm not abandoning my appeal.

THE ARBITRATOR: You are. Yes, you are.

(Dr. Liu left the hearing room.)

(Arbitration Transcript, page 1070:1-5, 17-25.)

Before Liu left the hearing room, he deposited three binders on the arbitrators desk containing his 43 grievances and rebuttal documents to the termination and suspension actions. After Liu left, the arbitrator invited the CSUEB to file a motion to dismiss the appeal for failure to prosecute or to consider whether the CSUEB had met its burden based upon the evidence presented. The CSUEB was to file its motion by October 2, 2012, with Liu responding by October 16, 2012.

On September 19, 2012, Liu wrote the arbitrator that he had no intention of returning to the arbitration at any time, but the arbitrator should find in his favor based upon the evidence presented in his cross-examination of the CSUEB witnesses that he had been retaliated against because of his grievance filing and whistleblowing activities. The arbitrator replied that absent an agreement to conclude the matter in a manner which would allow both parties the right to have a full opportunity to present their cases, the arbitrator would entertain a motion to dismiss the appeal or allow CSUEB to complete its case.

Issuance of Award

On September 27, 2012, Liu emailed AAA that the arbitration ended on September 18, 2012, and the award should be issued according to the timelines set forth in CBA sections 19.18 and 19.19.

On October 2, 2012, CSUEB filed its motion to dismiss the appeals as Liu abandoned his appeals. On October 16, 2012, Liu submitted his opposition of the motion and requested the arbitrator to rule in his favor based upon the evidence he brought forth from witnesses on his cross-examination and the binders of evidence he left with the arbitrator on September 18, 2012.⁴⁵

On October 17, 2012, AAA notified Liu that the remaining days of hearing had not been vacated and will not be vacated unless the parties mutually agree or by order of the arbitrator.

On November 2, 2012, Liu emailed the PERB ALJ stating that the arbitration was “finished” and that the ALJ should set aside two days of hearing to conduct the suspension and termination retaliation actions. The ALJ refused to schedule any further PERB hearings until CSUEB had a chance to respond. CSUEB informed the ALJ of the pending motions. The ALJ informed the parties that he would wait for Arbitrator Harris’s ruling on the motions.

On November 15, 2012, Arbitrator Harris issued her “Arbitrator’s Rulings on Cross Motions of Parties and Final Award.” The arbitrator dismissed the appeals and found that Liu failed to adhere to AAA Labor Arbitration Rules 19 and 26; interfered with the CSUEB’s presentation of its case; defied the arbitrator’s directives and rulings; and undermined the integrity of the hearing.

⁴⁵ These three binders of evidence (grievances and rebuttal of disciplinary action) were never marked and admitted as exhibits as copies were not provided to CSUEB. The binders were never authenticated other than a representation that they were produced at the PERB hearing.

Arbitrator Harris chronicled in her award Liu's misbehavior on each day of hearing and how Liu would not follow the arbitrator's directives. These descriptions included interrupting the CSUEB's direct examination to make arguments; providing unsworn testimony in an effort to contradict the witness; making statements instead of cross-examining the witness; editorializing when the witness gave a response he did not like; justifying his bad conduct by his lack of English proficiency and familiarity with the legal process; accusing CSUEB Counsel of misconduct; summoning the California Highway Patrol to take a report; refusing to resume the hearing until he was able to contact his advisory attorney who was not present that day causing a three-hour delay; arguing with the witness and ignoring the admonitions of the arbitrator; commanding the arbitrator not to question his integrity; accusing CSUEB Counsel and the CSUEB representative of using hand and facial signals to coach witnesses; counting out loud the number of objections made by CSUEB Counsel even after being warned by the arbitrator to cease; appearing late for the hearing; sending emails to CSUEB witnesses who it intended to call that he would be filing perjury charges against them which would cause them to go to prison; sat in the corner of the room instead of the table where the hearing was occurring; raising his voice to an unacceptable level; demanding that he be allowed to put on his case even though CSUEB had not completed his case or he would quit; and finally, walking out of the hearing when the arbitrator declined his request to wait until CSUEB completed its case.

In her ruling, Arbitrator Harris explained Liu's undermining of the integrity of the hearing.

By contacting University witnesses in a manner that discourages them from coming forward to give testimony, Dr. Liu has undermined the integrity of the arbitration process. In the arbitrator's view, the e-mail sent to Vice Chancellor Brooks, as well as witnesses that the University was intending to call, contains language that could reasonably be interpreted to rise to the level of threats and intimidation. E-mails sent to the opposing

party's witnesses that insinuate that their testimony may result in "perjury charges" and "prison" are obviously designed to discourage testimony favorable to the opposing party. By sending e-mails of this nature, Dr. Liu has shown profound disrespect for the arbitration process. Indeed, Dr. Liu, when confronted by the arbitrator on the record at the hearing, would only represent to the arbitrator that he would refrain from sending additional e-mails to University witnesses *for the duration of the hearing*. By engaging in conduct tantamount to witness tampering, Dr. Liu has forfeited the right to pursue an appeal of the University's disciplinary actions.

Being entitled to a day in court does not imply a right to use any means, however inappropriate or unethical, in order to influence the outcome of the proceeding. Even if Dr. Liu were to now agree to conduct himself in a manner consistent with AAA Labor Arbitration Rules and the arbitrator's directives, the damage already done to the hearing process by Dr. Liu is incalculable, i.e., there is no way of guaranteeing that witnesses who would be called to any future hearing would be able to testify without fear of repercussions. Where a party has persisted in a course of conduct that threatens the integrity of the proceeding, the arbitrator has no other alternative than to exercise her inherent authority to decline to resolve the merits of the appeal and to dismiss the appeal in its entirety. Any other result would reward Dr. Liu for flagrant misconduct and undermine the effectiveness of the dispute resolution procedure negotiated by the University and the Union. In sum, if a party deliberately taints the integrity of the hearing process, that party is no longer entitled to a hearing or a decision.

(Italics in original.)

As stated by the arbitrator in the conclusion of her award:

In reaching her conclusion, the arbitrator has specifically declined to resolve the "just cause" issue as it pertains to Dr. Liu's suspension and termination. Such a determination cannot be fairly made in the absence of a complete record and a fair hearing process that allows each party a full and fair opportunity to present its evidence and arguments. If a party will not allow the arbitrator to manage the hearing in a manner that affords each party minimal standards of due process, that party is no longer entitled to a resolution of the dispute on the merits. As demonstrated by the voluminous record, Dr. Liu's inappropriate conduct permeated the hearing but reached a crescendo when he presented the arbitrator with an ultimatum, i.e., either allow me to present my case prior to completion of the University's case or I quit. To date, Dr. Liu continues to insist that he has no intention

of resuming the hearing. Viewing his conduct in its totality, Dr. Liu has engaged in a wide array of inappropriate tactics, some of which have inspired fear and alarm on the part of University employees and managers. An athlete who repeatedly violates the rules of the game will be ejected by the neutral umpire or referee. Likewise, a party who persistently refuses to comply with AAA Labor Arbitration Rules, or to defer to the arbitrator's judgment as to the appropriate procedures for insuring a fair hearing process, is no longer entitled to an appeal of disciplinary action. For all of the above-stated reasons, the arbitrator has no other reasonable alternative other than to dismiss Dr. Liu's appeal in its entirety.

ISSUES

1. Did CSUEB retaliate against Liu by denying him tenure and promotion because of the grievances he filed and grievance meetings he attended?
2. Did CSUEB retaliate against Liu by issuing a Penal Code section 626.4 order restricting him from campus grounds for 14 days because of the grievances he filed and grievance meetings he attended?
3. Should Arbitrator Harris's award be deemed repugnant to HEERA?

CONCLUSIONS OF LAW

Retaliation for Filing Grievances and Attending Grievance Meetings

Higher education employees have the right to "form, join and participate in the activities of employee organizations of their own choosing." (HEERA, § 3565.) A higher education employer violates this right when it imposes reprisals on employees because of their participation in protected activities. (HEERA, § 3571, subd. (a).) To demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (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*).

Protected Activities

It is undisputed that Liu filed approximately 20 grievances between November 17, 2010 and June 30, 2011, on a number of different topics related to his employment. He also attended grievance meetings on May 31, 2011 (Grievance One); March 9, 2011 (Grievance Two); May 9, 2011 (Grievance Six, informal meeting); and May 31, 2011 (Grievance Ten). Filing grievances and participating in grievance meetings pursuant to the CBA constitute protected activities pursuant to HEERA section 3565. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H, p. 10.)

It is also undisputed that Liu sent a number of emails very critical of his Department Chair and College Dean including a February 1, 2010 email to President Qayoumi and Provost Houpis criticizing the Dean for hiring “low-quality candidates,” paying them above market salaries, and treating her friends favorably; June 1 and 29, 2010 emails to Provost Houpis that he was treated unfavorably by not being assigned to teach an Options and Futures course; a September 17, 2010 email to Dobb expressing Liu’s personal views that Dean Swartz pushed staff to file false police reports against him, played favorites, was unfair to him in the RTP process, and jeopardized accreditation based on the candidates she hired; and a May 31, 2011, email contending that he was being investigated for his disclosure of office-hour policy violations and the purchase of a 30-inch monitor.

HEERA section 3567 provides in pertinent part:

Any employee or group of employees may at any time, either individually or through a representative of their own choosing, present grievances to the employer and have such grievances adjusted, without the intervention of the exclusive representative;

provided, the adjustment is reached prior to arbitration pursuant to Section 3589, and the adjustment is not inconsistent with the terms of a written memorandum then in effect. . . .

(Emphasis added.)

In *Regents of the University of California* (1991) PERB Decision No. 872-H, the Board held that while HEERA section 3567 grants employees a right to file grievances without the interference of their exclusive representative, it does not grant a statutory right to employees to represent themselves individually in their employment relations with their employer. In concluding that a higher education employee had not engaged in activity covered by HEERA, the Board relied heavily on the fact that the employee's activities were entirely personal in nature and not an extension of concerted action. (*Regents of the University of California* (2010) PERB Decision No. 2153-H.) The Board has held that employee complaints to employers are protected when those complaints "are a logical continuation of group activity." (*County of Riverside* (2009) PERB Decision No. 2090-M (*Riverside*); *Los Angeles Unified School District* (2003) PERB Decision No. 1552 (*Los Angeles*).) Where, however, an employee's complaint is undertaken alone and for his sole benefit, that individual's conduct is not protected. (*Riverside*; *Los Angeles*; *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246.)

Liu's emails to various administrators are better characterized as a complaint undertaken for his own benefit versus a continuation of group activity. His email's were sent on his behalf and expressed his own personal views. While some of his complaints were broadly categorized under the auspices of favoritism and discrimination, they eventually pertained to how he was paid, assigned classes, and treated under the RTP process by various administrators. These emails therefore will not be considered protected activity under HEERA.

Adverse Action

A denial of tenure and promotion constitute an adverse action. (*Bellevue Union Elementary School District* (2003) PERB Decision No. 1561; *McFarland Unified School District* (1990) PERB Decision No. 786 (*McFarland*), *County of Tehama* (2010) PERB Decision No. 2122-M, *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S.) As a Penal Code section 626.4 order essentially places an employee on involuntary administrative leave, it is also found to constitute an adverse action. (*Oakland Unified School District* (2003) PERB Decision No. 1529 (*Oakland*.) Liu has satisfied this element in establishing that an adverse action has been taken against him by the employer.

Knowledge of Protected Activities and Unlawful Motive

1. Decisionmaker Liability - Knowledge of Protected Activities

The decisionmaker who denied Liu's tenure and promotion was President Qayoumi. The decisionmaker who issued the Penal Code section 626.4 order restricting Liu from campus grounds was President Morishita.

President Qayoumi was unaware of any of Liu's grievance activity. President Qayoumi testified without contradiction that he was not made aware of CSUEB grievances, unless it was required of him. As President Morishita was not called as a witness by Liu, it was never established whether he was aware of Liu's grievance activities. The last grievance filed by Liu before President Morishita's September 30, 2011 decision restricting him from campus was on June 30, 2011 (Grievance Twenty); when President Qayoumi was still the University President. The first grievance filed by Liu under the tenure of President's Morishita was not until November 21, 2011, almost two months after the Penal Code section 626.4 order. As it was not established that either President Qayoumi or President Morishita were aware of Liu's grievance activity before they denied tenure/promotion or issued the Penal Code section 626.4 order, their actions as the decisionmaker cannot be deemed to be a violation of HEERA.

2. Subordinate Bias Liability

Pursuant to *County of Riverside* (2011) PERB Decision 2184, under the theory of subordinate bias liability theory, a supervisor's unlawful motive may be imputed to a decisionmaker when (1) the supervisor's recommendation, evaluation, or report was motivated by the employee's protected activity; (2) the supervisor intended for his or her conduct to result in an adverse action; and (3) the supervisor's conduct caused the decisionmaker to take adverse action against the employee.⁴⁶ (*Id.* at p. 15.) In this case, it is not disputed that some of the retention/tenure/promotion committees as well as the Department Chair/College Dean intended that their recommendations be taken seriously and result in an adverse action (denial of tenure/promotion) to be taken against Liu. Likewise, the Threat Assessment Team also intended that their recommendations be taken serious and the President issue a Penal Code section 626.4 order to Liu. It is also undisputed that these Presidents based their actions on some of the contents of the committee/team recommendations. The real issue at dispute is the first element as to whether these committees/team recommendations were motivated by Liu's protected activity.

a. Decision to Deny Tenure/Promotion – Knowledge of Protected Activities

President Qayoumi's decision to deny tenure/promotion was based upon Liu's marginal performance in the three areas of instructional achievement, academic achievement and university and community service. Specifically, President Qayoumi cited to concerns of student comments regarding the cancellation of classes, ending classes early and sexual joking; a lack of published papers with no prospects in the pipeline; attributing his work on the SSRN to Purdue University rather than CSUEB; Liu's generalizations about the involvement of the

⁴⁶ This case is somewhat distinctive in that the recommendation to take an adverse action was not just made from a "supervisor," but also from coworkers such as faculty and the Department Chair.

SEC in the consideration of his Google, Inc., article; and his minimal involvement in university and community service, including quitting one committee because it was too much work.

However, these concerns had been already raised by the Department Faculty Committees (March 1, 2010 retention report and the November 5, 2010 tenure report) before Liu filed his first grievance on November 17, 2010, and in the Department Faculty Committee's Subsequent Recommendation Report dated December 17, 2010.⁴⁷ Professor Mangold's testimony that she was unaware of Liu's filing of grievances or intent to file grievances during the preparation and drafting of the November 5, 2010 tenure report and the December 17, 2010 subsequent tenure report was uncontradicted. Additionally, the department faculty committee members never discussed Liu filing any grievances. In short, Liu never demonstrated that these two committees consisting of Professors McBride, Jan and Satin (department retention committee) and Professors Mangold, Lubwama and Satin (department tenure committee) were motivated by Liu's grievance filing in issuing their recommendations. Because President Qayoumi based his decision upon these committees' representations in their reports, Liu has failed to demonstrate the decisionmaker's knowledge of his protected activity or subordinate bias liability. As such, Liu has failed to demonstrate a prima facie case of retaliation for the denial of tenure/promotion and that allegation is dismissed.

⁴⁷ The March 1, 2010, Department Faculty Committee report on retention for the 2010-2011 academic year referred to the SSRN issue, the sensationalizing of the Google, Inc., article, and Liu's quitting the CBE Curriculum Committee because it was too much work. The November 15, 2010, Department Faculty Committee report referred to the lack of published work and the limited university and community service. The December 17, 2010 Department Faculty Committee subsequent tenure report referred to the student comments regarding cutting short classes and sexual joking, and the lack of publications with no submissions in the pipeline.

b. Decision to Issue Penal Code Section 626.4 Order

1) Knowledge of Protected Activities

The decision to recommend the issuance of the Penal Code section 626.4 order was made by the Threat Assessment Team on September 30, 2011 chaired by Chief Hodges. Of the eight members of the team, two were aware of Liu's grievance filing: Chief Hodges and Dobb. Chief Hodges was aware in that he assigned police to provide security at an informal grievance meeting on May 9, 2011, and through the oblique references in Chief Hodges police contact log about Liu submitting a grievance on January 4, 2011. Dobb, as the Associate Vice Provost, was aware of Liu's grievance filing as the Provost's Office was the location where Liu filed his grievances and Dobb assisted in processing such grievances. It is found that both Chief Hodges and Dobb had knowledge of Liu's grievance filing prior to the issuance of the Penal Code section 626.4 order.

2) Unlawful Motive

Unlawful motivation is an essential element of a charging party's case. In the absence of direct evidence an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (*Carlsbad Unified School District* (1979) PERB Decision No. 89.) 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 (*North Sacramento*)), 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, supra*, PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland, supra*, 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.)

The most recent event related to Liu's grievance filing which Chief Hodges was aware was on May 9, 2011, when he provided police coverage for an informal grievance meeting. Dobb's would have been aware of the multiple grievances filed by Liu between June 9 and 30, 2011 (Grievances Fifteen through Twenty) and the processing of Liu's grievances. The proximity of these grievances and grievance meeting is sufficiently close in time to establish a temporal proximity between the protected activity and the Penal Code section 626.4 order. Temporal proximity between an employee's protected activities and an employer's adverse actions is probative, but not determinative, circumstantial evidence of a causal connection between the two events. (*County of Riverside, supra*, PERB Decision No. 2090-M.)

Other than timing, Liu claims that the reasons that the Threat Assessment Team recommended the Penal Code section 626.4 order were exaggerated as he guaranteed his friendliness and commitment toward a peaceful means in fighting corruption in the September 30, 2011 email. However, the Threat Assessment Team had every reason not to be

assuaged by the guarantee, especially since Liu had used such physically-charged language before and been warned of its impact. He also copied each of the Human Resources staff of his comment that they would be killed first. In light of CSUEB's zero tolerance policy regarding threatening behavior, the team's concern cannot be deemed to be exaggerated.

Liu failed to demonstrate that the team's recommendation was unlawfully motivated by his protected activities. As Liu has failed to demonstrate the actual decisionmakers' knowledge of his protected activity or subordinate bias liability, Liu has failed to demonstrate a prima facie case of retaliation by issuing the Penal Code section 626.4 order and that allegation is dismissed.

CSUEB's Burden

Once the charging party establishes a prima facie case of retaliation, the burden shifts to the employer to show it would have imposed the adverse action even if the employee had not engaged in protected activity. (*Novato, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083.) Thus, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers.*) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

In retaliation cases, PERB does not determine whether the employer had cause to discipline the employee. (*San Bernardino City Unified School District* (2004) PERB Decision No. 1602.) Rather, PERB must determine whether the employer took adverse action for an unlawful reason set forth in one of its labor relations statutes. (*McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166, 169.)

Although, it has been found that Liu failed to demonstrate a prima facie case of retaliation, even if he did satisfy his burden, CSUEB has amply demonstrated evidence that it

would have denied Liu tenure/promotion and issue the Penal Code section 626.4 order, but for Liu's protected activity.

There was disagreement⁴⁸ as to whether tenure should be granted among the various faculty committees, the Department Chair, the College Dean and the University President. The only committee that recommended Liu be granted tenure was the University Faculty Committee. Even that committee expressed reservations in regards to some of the student comments, Liu's submitting the same articles for publications over a number of years and the limited university and community service. Additionally, the University Faculty Committee did not find any bias in the prior recommendations. It is clear that there was room for a difference of opinion, and the President's decision was also based upon some of the same findings made by prior level recommendations which were untainted by Liu's protected activity. The President did not have a history of following recommendations of subordinate managers. It is found that President Qayoumi would have made the same decision, but for any protected activity exercised by Liu.

The impetus for the Threat Assessment Team being convened was Liu's own September 30, 2011 email. Although Chief Hodges also considered Liu to be insubordinate to Dobb's July 15, 2011 directive and disruptive by handing out flyers outside Frankel's classroom, the team would have never been convened without the September 30, 2011 email. The team recommended that immediate action be taken. No evidence was presented that the eight-member team mentioned that its decision was motivated by his protected activities, but rather based upon the email and the belief that Liu was intentionally attempting to intimidate

⁴⁸ It should be noted that all faculty committees, the Department Chair, the College Dean and the University President agreed that Liu should be denied a promotion to Associate Professor. CSUEB easily satisfies its burden that the decision to deny promotion was not based upon an unlawful motive.

Human Resources staff by referencing “killing” them. This is also what Chief Hodges discussed with Don Sawyer who discussed it with President Morishita.

The content of Liu’s September 30, 2011 email alone justifies the issuance of the Penal Code section 626.4 order. The email is copied to the very Human Resources staff which Liu states should die first. If Liu wanted to make a point about discourtesy, he need not have copied them. While Liu attempts to ameliorate his comments by guaranteeing his friendliness and peaceful intentions, such comments still cause great disruption to the workplace. Additionally, Liu made inflammatory comments in the past and had been warned of their effect, yet still continued to speak or write them. These facts coupled with the express provisions of CSUEB’s zero tolerance policy regarding Workplace Safety and Security Policy and threatening an employee with harm easily demonstrates that Liu “willfully disrupted the orderly operation of such campus” (Penal Code section 626.4) to justify such an order.

Post Deferral to Arbitration Repugnancy Review

PERB Regulation 32620(b)(6) requires the Board agent to:

Place the charge in abeyance if the dispute arises under MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act and is subject to final and binding arbitration pursuant to a collective bargaining agreement, and dismiss the charge at the conclusion of the arbitration process unless the charging party demonstrates that the settlement or arbitration award is repugnant to the purposes of MMBA, HEERA, TEERA, Trial Court Act or Court Interpreter Act, as provided in section 32661.

(Emphasis added.)

In determining repugnancy claims, PERB utilizes the standards set forth in *Dry Creek Joint Elementary School District* (1980) PERB Order No. Ad-81a, in which the Board adopted the post arbitration deferral standard enunciated by the National Labor Relations Board (NLRB) in *Spielberg Manufacturing Company* (1955) 112 NLRB 1080. (*Santa Ana Unified School District* (2008) PERB Decision No. 1951.) Under this standard, the Board will exercise

its discretionary jurisdiction to dismiss and defer a complaint to the arbitrator's award if:

(1) the unfair practice issues were presented to and considered by the arbitrator; (2) the arbitral proceeding was fair and regular; (3) the parties agreed to be bound; and (4) the decision of the arbitrator must not have been "clearly repugnant to the purposes and policies of the Act."

(*Santa Ana*, at p. 6.)

In *Olin Corp.* (1984) 268 NLRB 573, 574, the NLRB further described its standard for deferral to an arbitrator's award:

. . . we adopt the following standard for deferral to arbitration awards. We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the [NLRB] as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. . . . Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

(Emphasis added; fns. omitted.)

The NLRB further stated that it:

would require that the party seeking to have the [NLRB] reject deferral and consider the merits of a given case show that the above standards for deferral have not been met. Thus, the party seeking to have the [NLRB] ignore the determination of an arbitrator has the burden of affirmatively demonstrating the defects in the arbitral process or award.

(Emphasis added; fn. omitted.)

Unfair Practice Issues Were Presented and Considered By the Arbitrator

The disciplinary arbitration of the suspension and termination was going to include, among other affirmative defenses, that the disciplinary actions were taken because of Liu's grievance filing. In this matter, the contractual issue was parallel with that before PERB.

During Liu's opening statement at the arbitration, Arbitrator Harris acknowledged the potential relevance of filing grievances prior to the disciplinary actions and stated that she thought she understood his case of alleged retaliation. Arbitrator Harris then held hearings on August 21, 22, 23 and 24, and September 17 and 18, 2012. Additional days of hearing had been set for November 27 and 28 and December 10 and 11, 2012. Before CSUEB finished its case-in-chief, Liu left three binders of documents including his 43 grievances and his rebuttal to the disciplinary actions and left the hearing room as the arbitrator would not let him put on his case that day.

When Arbitrator Harris issued her award on November 15, 2012, she dismissed Liu's disciplinary appeals and specifically declined to resolve the "just cause" issue as she did not have a complete record and a fair hearing process which allowed both sides the "full and fair opportunity to present its evidence and arguments." As such, the suspension and termination retaliation issues were never fully adjudicated.

A policy question therefore arises as to whether Liu should be able to avoid the deferral order by walking out of a hearing for which he was unhappy in how it was proceeding and, as a result, the deferral issue was not "fully presented." To allow Liu to escape the deferral order by his obstructionist and contumacious conduct would be to put the control of the enforcement of the deferral order in his hands rather than the ALJ issuing the order. While Liu was not happy with the speed of the arbitration proceedings, he greatly contributed to its delay. Additionally, the two disciplinary actions involved multiple charges and witnesses. The arbitration record supports the assertion that the arbitrator was willing to hear his protected activity defense and rule on it. In light of the unusual circumstances surrounding the conclusion of these proceedings, and the arbitrator's willingness to hear his defense, the element that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice has been met.

Arbitral Proceedings were Fair and Regular

Liu objected that the arbitral proceedings were not fair and regular in that it was unduly time consuming. Again, each of the disciplinary actions included multiple charges and witnesses involved. The arbitrator was attempting to provide a full and equal opportunity for the parties to present evidence, but Liu interfered with her ability to do so. Any irregularity of the proceeding was caused by Liu.

Liu raises two additional defects in the arbitral process which, he contends, mandates that he be allowed to proceed before PERB on his retaliation allegations of the two disciplinary actions.

1. Selection/Appointment of Arbitrator Harris

Liu alleges that he was never allowed to participate in the CBA procedure in selecting an arbitrator. He is incorrect, he was allowed to do so, but did not do so in a timely manner.

CBA section 19.14 provides that the parties shall alternately strike names from a AAA list until they arrived at an arbitrator. The section does include a timeline in which this duty is to be accomplished. CBA section 19.20 provides that the AAA Voluntary Labor Arbitration Rules will apply unless the CBA specifically states otherwise. AAA Voluntary Labor Arbitration Rule 13 provides the time frame in which the parties are to select an arbitrator as ten days after AAA notified them to make an arbitrator appointment.

On November 29, 2011, AAA sent a list of arbitrators to Liu and CSUEB and they were to alternatively strike arbitrators by December 9, 2011. Liu insisted that Gunn and he strike names face-to-face and Gunn wanted to strike arbitrators by teleconference call. Liu told Gunn he would write AAA about it. A selection was not made by December 9, 2011.

On December 22, 2011, AAA sent another letter warning Liu and Gunn that if they had not engaged in the strike procedure in ten days, that AAA would appoint an arbitrator. AAA later extended the deadline to January 3, 2012. Gunn provided a five-hour window in which

she was available on January 3, 2012, for a telephonic conference. Liu stated he was booked, but that he wanted to meet on campus on January 9 and 16, 2012, and that the selection must occur on campus. On January 13, 2012, AAA notified the parties that it would be appointing an arbitrator as they had not met the deadline and on January 26, 2012, appointed Arbitrator Harris.

On March 5, 2012, Liu agreed he would engage in a teleconference call to strike arbitrators. Gunn replied she would agree if it was done by March 13, 14 or 15, 2012. Gunn tried to contact Liu by email for the teleconference, but was unsuccessful. Liu never contacted Gunn. Finally, on March 15, 2012, Liu emailed AAA stating he was out of town and could not strike arbitrators until early April. CSUEB refused.

The CBA or AAA Voluntary Labor Arbitration Rules does not give a party the right to strike arbitrators in a face-to-face meeting.⁴⁹ Liu was given an opportunity on multiple occasions to participate in the selection of an arbitrator, but refused to do so unless his terms were met. Finally, in March 2012, Liu was given another opportunity and failed to meet the deadline again. When he failed to engage in the teleconference call to strike arbitrators and meet the deadline, he waived his right to participate in the selection.

2. Timing of the Issuance of the Award

Liu contends that the arbitrator's November 15, 2012 award has no jurisdiction over him as it was issued more than ten days after his October 16, 2012 opposition to CSUEB's motion to dismiss and his request for ruling on his behalf. Again, Liu is incorrect.

CBA section 19.18 provides that the arbitrator shall issue a written award stating the decision on the issues submitted ten days after the hearing has "concluded." AAA Voluntary Labor Arbitration Rule 31 provides that a hearing is not declared "closed" until the arbitrator

⁴⁹ Based upon Liu's affinity for email as a mode of communication, it is hard to believe that he would not just agree to strike arbitrators by email which would avoid any communication difficulties.

has been informed that the parties do not have any further proof to offer or witnesses to be heard, or the arbitrator is satisfied that the record is complete. On September 18, 2011, when Liu walked out of the hearing, the record was not complete and CSUEB had further witnesses/evidence to offer. Additionally, the hearing dates of November 27 and 28 and December 10 and 11, 2011, had not been vacated.

A motion to dismiss was filed by CSUEB on October 2, 2011, and Liu filed his responsive opposition/motion on October 16, 2011. At that point, nothing had been determined to be concluded. The arbitrator could dismiss the appeal or could allow CSUEB to continue. As the hearing had not been concluded, the arbitrator was not bound by the ten-day deadline in CBA section 19.18. The arbitrator's ruling on the motion or award was issued within 30 days of Liu's responsive pleading. As the CBA does not dictate a time deadline for the issuance of awards based upon motions, the issuance of the arbitrator's award was timely.

The Parties Agreed to Be Bound by Arbitration

Liu specifically requested that his disciplinary actions be arbitrated. He could have selected a hearing before SPB or a Faculty Hearing Committee. His opening statements specifically included the affirmative defenses that he was disciplined because of his grievance filing and whistleblower activities. He never stated he withdrew from the arbitration. This element is therefore satisfied.

Repugnancy of Award

Liu contends that the arbitrator could not dismiss his appeals, but could only order the hearing to continue in his absence. Again, Liu narrowly interprets a rule which does not fit his conduct during the arbitration hearing.

AAA Voluntary Labor Arbitration Rule 27 sets forth a provision which allows an arbitration to proceed in the absence of a party if a party fails to appear at an arbitration after it has been noticed and require the other party to proceed as required for the issuing of an award.

Liu's conduct went beyond a simple failure to appear at the arbitration. Arbitrator Harris chronicled a continuum of arbitral interference and misconduct which culminated in his issuance of an ultimatum to the arbitrator: let me put on my case or I leave. While the arbitrator could have elected to proceed in Liu's absence, she was also not palpably wrong by dismissing the appeals pursuant to AAA Voluntary Labor Arbitration Rules 19 and 26.

As Liu did not satisfy his burden that the arbitration proceedings and award were deemed repugnant according to the purposes of HEERA, the retaliation allegations in the complaint related to the suspension and termination are deferred to the award and dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SF-CE-995-H, *Wenjiu "Jerry" Liu v. Trustees of the California State University (East Bay)*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135, subdivision (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.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)