STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

SCOTT DOUGLAS, Charging Party, v. SAN DIEGO COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-5972-E PERB Decision No. 2625 February 20, 2019

Appearances: Scott Douglas, on his own behalf; Best Best & Krieger by Joseph Sanchez, Attorney, for San Diego Community College District.

Before Banks, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Scott Douglas (Douglas) to the attached proposed decision of an administrative law judge (ALJ), which dismissed the complaint and Douglas' unfair practice charge against the San Diego Community College District (District). The complaint alleged that the District violated the Educational Employment Relations Act (EERA or Act)[1] by subjecting Douglas to an extra and unnecessary performance evaluation in Spring 2014, and not offering him an adjunct teaching assignment in Fall 2014, because he pursued a class assignment preference under the collective bargaining agreement (CBA) with the assistance of his union. Following an evidentiary hearing, the ALJ dismissed the complaint, finding that although there was evidence suggesting the District acted because of Douglas' protected

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

activity, the District nonetheless proved that it would have taken the same actions in the absence of his protected activity.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we conclude that the ALJ's factual findings are supported by the record and, except as noted below, her conclusions of law are well-reasoned and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, except for its discussion of Douglas' Spring 2014 performance evaluation at pages 22 through 26, and as supplemented by the following discussion.

BACKGROUND[2]

Beginning in the 2007-2008 school year, a hiring freeze was in place under which the District would not replace full-time faculty who retired or left the District. During the freeze, the Mathematics Department at the District's Miramar College (Department) had to hire several adjunct instructors (adjuncts) because mathematics is a requirement for every student in every degree and certificate program.

In 2011, Douglas started working as an adjunct in the Department. He taught evening classes because he had a full-time job during the day. Beginning in Fall 2013 and at all relevant times thereafter, Francois Bereaud (Bereaud) was the chair of the Department, and Paulette Hopkins (Hopkins) was the Dean of the School of Mathematics, Biological, Exercise & Physical Sciences.

When Bereaud became chair, the Department had only three full-time faculty, down from ten about four years prior. Two days before the Fall 2013 semester started, the chancellor

[2] We summarize the material facts here to provide context for our discussion. A full recitation of the facts and procedural history can be found in the attached proposed decision.

announced the District's hiring freeze was being lifted. The School of Mathematics, Biological, Exercise & Physical Sciences received the first ten positions for hiring. With more full-time faculty on the way, the Department had less need for adjuncts.

On November 20, 2013, Douglas requested Priority of Assignment (POA) status under the CBA. Adjuncts with POA status receive priority over other adjuncts, but not full-time faculty, to teach classes listed in their POA documents. Pursuant to the CBA, the list of classes must include classes the adjunct is teaching at the time of the POA request, and may include other classes approved by the appropriate manager.

On December 18, Douglas met with Hopkins to discuss his POA request. Douglas was unhappy with how the meeting progressed and told Hopkins he needed to contact his union before proceeding. Douglas then contacted his union, American Federation of Teachers Guild, Local 1931 (AFT), and was assigned AFT grievance officer Darrell Harrison (Harrison).[3] Harrison interacted with Bereaud by e-mail to arrange another POA meeting.

On January 13, 2014, the Department hired four full-time faculty members. Meanwhile, Bereaud felt the Department had not done enough evaluations during the hiring freeze and decided to evaluate faculty in two or three consecutive semesters.

On February 4, Douglas received an e-mail stating he was to be evaluated. Douglas e-mailed Bereaud that since he had been evaluated in the prior semester, he did not believe he was due to be evaluated again. Bereaud responded:

> With more full-timers on board to help, I am implementing a policy where we evaluate all new part timers in each of their first two or three semesters. Although you are not new, your first ever evaluation was last semester, hence my request.

[3] Harrison was also the chair of the Business Department at Miramar College.

On February 19, Douglas, Harrison, Bereaud, and Hopkins met about the POA request. Hopkins offered to put two classes on Douglas' POA list, but no more. Douglas argued that refusing to consider more classes violated the spirit of the CBA, and he pushed for more classes to be added to his POA list. Harrison asked to speak to Douglas alone and recommended he accept the offer, but once they returned to the meeting, Douglas stated he needed to consult with his union further before he would agree with what was offered.

On March 6, Hopkins approached Douglas and told him that since he had applied for POA, she wanted Bereaud, as department chair, to evaluate him. Douglas said he would consider it and e-mailed Hopkins on March 12, asking why he was being evaluated at that time. Hopkins responded the next day:

> As Francois and I stated earlier, the department is behind in completing evaluations. We have been remiss in your evaluation process because you have only one evaluation in your file since your hire date in 2011. Miramar is striving to stay current with evaluations for accreditation purposes. Specifically, all adjuncts in the department who are applying for a POA assignment for the first time are evaluated as standard process. Thus, as a POA applicant, you and all other first time POA applicants in the department have been assigned as peer evaluator, the Department Chair, Francois Bereaud.

Douglas was evaluated on April 10 and the result was a positive review. On or about April 22, he received a Priority Assignment Application form with Hopkins' signature that showed POA status for the two classes previously offered by Hopkins.

On April 24, Douglas e-mailed Bereaud for information about his course assignment for the fall semester. Bereaud replied that he was still working on the schedule and was uncertain when he would have an answer for Douglas. On May 13, Douglas e-mailed Bereaud for an update. On May 14, Hopkins e-mailed Douglas to notify him that the Department did not have an assignment for him in Fall 2014.

Douglas was one of at least twelve adjuncts in the Department who did not receive an assignment for Fall 2014. Two additional full-time faculty began teaching in the Fall 2014 semester. Both of the classes on Douglas' POA list were assigned to full-time faculty that semester.

DISCUSSION

To establish a prima facie case that an employer has discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the employee's exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*).)

Once the charging party establishes a prima facie case, the burden shifts to the employer to prove it would have taken the same adverse action even if the employee had not engaged in protected activity. (*Novato*, *supra*, PERB Decision No. 210, p. 14; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083, p. 10.) To prevail, the employer must show that it had an alternative non-discriminatory reason for taking the adverse action and that it acted because of this alternative non-discriminatory reason, not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 12-13.)

The primary issue raised by the exceptions is whether the District met its burden to prove that, despite Douglas' protected activity, it would have evaluated him for a second

consecutive semester in Spring 2014 and would not have offered him a teaching assignment in Fall 2014.[4] We address each action below.

1. The Spring 2014 Evaluation

The ALJ found the District met its burden to show it evaluated Douglas in Spring 2014 for non-discriminatory reasons because the evidence showed the Department was catching up on delayed evaluations, which led to the evaluation of other adjuncts in the same consecutive semesters. In his exceptions, Douglas argues the District did not meet its burden because he was not similarly situated with other adjunct faculty who received an accelerated evaluation that semester.

Before turning to Douglas' argument, we address the ALJ's conclusion that the Spring 2014 evaluation was an adverse action.[5] PERB uses an objective test to decide whether an employer's action is adverse to an employee. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, pp. 28-29.) The question is "whether a reasonable person *under the same circumstances* would consider the action to have an adverse impact on the employee's employment." (*Jurupa Unified School District* (2013) PERB Decision No. 2309, p. 8 (emphasis added); *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

In finding Douglas' Spring 2014 evaluation was an adverse action, the ALJ relied on *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa I*) and *Jurupa Unified*

[4] Douglas also faults the ALJ for declining to resolve the parties' competing interpretations of the CBA language regarding POA status. The proposed decision properly and adequately addressed the parties' arguments on this point and the Board need not further analyze them. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.)

[5] Although not argued by either party in its submissions, we address this issue sua sponte to prevent the ALJ's erroneous ruling from becoming Board precedent. (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; *ABC Unified School District* (1991) PERB Decision No. 831b, p. 4.)

School District (2015) PERB Decision No. 2458 (*Jurupa II*). In *Jurupa I*, the Board held that evaluating a permanent certificated employee in two consecutive school years was an adverse action because, in the circumstances of that case, it signaled a performance deficiency. (*Jurupa I*, *supra*, PERB Decision No 2283, pp. 18-19.) The Board noted that under the applicable CBA and Education Code section 44663, subdivision (a)(2), the typical evaluation cycle was bi-annual. (*Ibid*.) In that environment, the Education Code establishes a "uniform system of evaluation" of certificated employees where permanent employees receive an evaluation at least every other year and an annual evaluation schedule is reserved for probationary employees and those permanent employees who have received an unsatisfactory evaluation. (*Id*. at p. 18.) The Board also emphasized the statutory standard was incorporated into the parties' CBA. (*Ibid*.) As a result, the Board concluded that requiring a consecutive year evaluation of a permanent employee treats the employee as though she were probationary and signals a performance deficiency. (*Id.* at p. 19.) Thus, it functions as the equivalent of an unsatisfactory evaluation. (*Ibid*.)

In *Jurupa II*, the Board affirmed its holding in *Jurupa I*. (*Jurupa II*, *supra*, PERB Decision No. 2458, p. 15.) The Board explained that in *Jurupa I*, a consecutive annual evaluation was an adverse action because it was "[o]nly in exceptional circumstances" that an employee was subject to consecutive annual evaluations. (*Id*. at pp. 15-16.) Since the "default evaluation cycle for permanent certificated employees who are performing satisfactorily is every two years," a more frequent evaluation schedule singled out the employee for treatment reserved for performance deficiencies. (*Ibid*.) Thus, in those circumstances, a reasonable person would consider a consecutive annual evaluation to have an adverse impact on their employment.

Jurupa I and *Jurupa II* are distinguishable. The Education Code does not create the same system of evaluation for community college faculty as it does for certificated employees in elementary and secondary education. (Compare Ed. Code §§ 87660-87664 with §§ 44660-44664.) As noted above, under Education Code section 44664, subdivision (a)(2), the regular evaluation cycle for certificated employees is bi-annual, i.e., every other year. Subdivision (b) of that section, however, mandates annual evaluations of an employee who "has received an unsatisfactory evaluation . . . until the employee achieves a positive evaluation or is separated from the district." Subdivision (b) was the basis for the Board's holding in *Jurupa I* that, under this system, "a consecutive annual evaluation is the functional equivalent of an unsatisfactory evaluation, and thus adverse." (*Jurupa I, supra*, PERB Decision No. 2283, p. 19.)

Education Code section 87663, subdivision (a), sets out a different system governing the frequency of evaluations for community college faculty:

> Contract employees shall be evaluated at least once in each academic year. Regular employees shall be evaluated at least once in every three academic years. Temporary employees shall be evaluated within the first year of employment. Thereafter, evaluation shall be *at least once* every six regular semesters, or once every nine regular quarters, as applicable.

(Emphasis added.) The parties' CBA tracks this provision in that it requires the District to evaluate each adjunct at least once every six semesters. Unlike Education Code section 44663, section 87663 and the parties' CBA contain no language requiring more frequent evaluations of a faculty member who has received an unsatisfactory evaluation. Consequently, we examine all surrounding circumstances to determine whether the District took adverse action by evaluating Douglas more frequently than once every six semesters.

The undisputed evidence shows the Department's practice is to schedule a new evaluation whenever an adjunct requests POA for the first time.[6] Nirmala Kashyap (Kashyap), who applied for POA at the same time as Douglas, was also evaluated in Spring 2014, less than six semesters after her prior evaluation in Fall 2012. Far from suggesting a performance deficiency, an early evaluation in these circumstances signaled the adjunct was merely undergoing an evaluative process related to an important contractual protection for adjuncts. Thus, a reasonable person in these circumstances would not consider Douglas' consecutive semester evaluation adverse.

But even if we were to treat Douglas' Spring 2014 evaluation as an adverse action, we still would find that the District proved it would have evaluated him then regardless of his protected activity. Douglas was one of at least seven adjunct faculty members in the Department who were evaluated ahead of schedule in Spring 2014 as part of a new policy to capitalize on having "more full-timers on board to help" evaluate adjuncts and to catch up on evaluations that backlogged during the hiring freeze. Indeed, at least six other adjuncts were evaluated in both Fall 2013 and Spring 2014, just as Douglas was. Douglas argues he was not similarly situated to these other evaluated adjuncts because they were all newly hired for the Fall 2013 semester. The evidence is inconclusive as to when most of these adjuncts were hired. Nonetheless, among them was Kashyap, who had taught every semester since Fall 2010, and received her prior evaluation in Fall 2012. Thus, contrary to Douglas' argument, he was similarly situated to other adjunct faculty who received early evaluations in Spring 2014. This fact, coupled with the Department's undisputed practice of evaluating adjuncts again at the

[6] The Department was not alone in this practice: Harrison testified, "as a chair, I would do an evaluation of anyone who just requested POA."

time they apply for POA status, demonstrates the Department would have evaluated Douglas in Spring 2014 regardless of his protected activity. We thus affirm the ALJ's conclusion that the District satisfied its burden to prove it evaluated Douglas in Spring 2014 for a non-discriminatory reason.

2. No Class Assignment for Fall 2014[7]

The ALJ found the District met its burden to show it would not have offered Douglas a teaching assignment for Fall 2014 even if he had not engaged in protected activity. In his exceptions, Douglas asserts he was at least as qualified as other adjuncts who received assignments in Fall 2014, implying that the District's reasons for hiring them over him were pretextual.

As the ALJ noted, the undisputed evidence at the hearing showed that Bereaud selected the best adjuncts for the needs of the students and demands of each course for each adjunct assignment. While we need not address an argument where, as here, the proposed decision adequately addresses it (*City of Calexico*, *supra*, PERB Decision No. 2541, p. 12), we supplement the ALJ's analysis by noting that in his exceptions, Douglas raises no specific critique of Bereaud's method and agrees the selected adjuncts were qualified. Nor does Douglas explain how the evidence before us shows that he was more qualified for any

[7] In his exceptions, Douglas also argues the District did not give him an assignment in Spring 2015 for unlawful reasons. However, no allegation concerning Spring 2015 appears in the complaint or the unfair practice charge, and Douglas did not move to amend the complaint to include such an allegation. Nor does the record show that Douglas put the District on notice that he intended to litigate the Spring 2015 class denial or that the parties fully litigated that issue at the hearing. Indeed, the e-mail on which Douglas relies for this argument was admitted into evidence over the District's relevance objection based on the complaint not including an allegation of adverse action in Spring 2015. Accordingly, we cannot consider Douglas' claim of an unlawful denial of a class assignment in Spring 2015 under our unalleged violation doctrine. (*County of Santa Clara* (2017) PERB Decision No. 2539-M, pp. 14-18.)

particular class than any of the adjuncts who were selected instead of him.[8] We thus find no basis to discredit the District's evidence that it selected the most qualified adjuncts for the courses available in Fall 2014.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-5972-E are DISMISSED.

Members Banks and Krantz joined in this Decision.

[8] The proposed decision cites *Bellevue Union Elementary School District* (2003) PERB Decision No. 1561, p. 4 (*Bellevue*), for the proposition that "it is within the discretion of an employer to select those employees it considers to be the most superior for its program." (Proposed decision, p. 39.) But *Bellevue* merely held that where an employer had an across-the-board policy of granting tenure only to probationary teachers rated as "superior," and followed that policy with regard to two teachers who engaged in protected activity, the employer proved it denied the teachers tenure for a non-discriminatory reason. (*Jurupa II*, *supra*, PERB Decision No. 2458, p. 24; *Oakland Unified School District* (2007) PERB Decision No. 1880, adopting proposed decision, at p. 70, fn. 27.) We therefore do not read *Bellevue* as broadly as the proposed decision suggests.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

SCOTT DOUGLAS, Charging Party, v. SAN DIEGO COMMUNITY COLLEGE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-5972-E PROPOSED DECISION (February 24, 2017)

Appearances: Scott Douglas, on his own behalf; Best, Best & Krieger by Joseph Sanchez, Attorney, for San Diego Community College District.

Before Valerie Pike Racho, Administrative Law Judge.

INTRODUCTION

An adjunct Mathematics instructor alleges in this case that his community college district employer subjected him to an off-cycle performance evaluation and failed to offer him a course assignment because he requested help from his union regarding enforcement of a contractual procedure that creates seniority among adjunct instructors. The employer denies any statutory violation, arguing that the employee's performance evaluation was in accord with the contract and the lack of course assignment was for legitimate business reasons that were unrelated to the employee's protected conduct.

PROCEDURAL HISTORY

On October 1, 2014, Scott Douglas filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the San Diego Community College

District (District) alleging retaliation for protected activities in violation of the Educational Employment Relations Act (EERA) section 3543.5, subdivision (a).[1]

On November 3, 2014, the District responded to the allegations in the charge through a position statement.

On November 16, 2015, Douglas withdrew from the charge an allegation that the District had attempted to coerce him to abandon his request to obtain priority in teaching assignments. That same day, the PERB Office of the General Counsel issued a complaint alleging that the District violated the above section of EERA by requiring Douglas to undergo an "extra and unnecessary" performance evaluation and by failing to rehire him to teach any courses for the Fall 2014 semester.

On December 3, 2015, the District filed its answer to the complaint, denying any substantive violation of EERA and raising various affirmative defenses, including that the charge is untimely under the applicable statute of limitations.

On February 2, 2016, an informal settlement conference was held but the disputed matters were not resolved and the case was thereafter scheduled for formal hearing to commence in June 2016.

On June 17, 2016, a pre-hearing conference was held to resolve certain issues that had arisen over Douglas's request for the issuance of subpoenas and the availability of witnesses. The hearing was rescheduled for September 2016.

On September 26 through 28, 2016, the formal hearing was held.

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

By December 5, 2016, the parties had filed closing briefs with PERB. At that time, the record was closed and the case was submitted for decision.

FINDINGS OF FACT

Jurisdiction

The District admits that it is a public school employer within the meaning of EERA section 3540.1, subdivision (k), and therefore under PERB's jurisdiction. At all relevant times in this matter, Douglas was a public school employee within the meaning of EERA section 3540.1, subdivision (j).

Background

The District is composed of three colleges—Mesa College, Miramar College, and San Diego City College—and a division of Continuing Education, which function independently from each other and have separate administrations. Douglas began employment with the District in 2003 as an adjunct instructor teaching Mathematics at Mesa College. He possesses a Master's degree in Mathematics. In 2011, Douglas left Mesa and began teaching at Miramar College. Adjunct faculty are represented in their employment relations with the District by American Federation of Teachers Guild, Local 1931 (AFT). AFT also represents the District's full-time, "contract" faculty. AFT and the District are parties to a collective bargaining agreement (CBA) that was in effect during all relevant times. Adjunct faculty are generally considered under the CBA and Education Code to be temporary, at-will employees who have no re-employment rights absent certain contractual conditions being met as discussed further below.[2]

[2] See CBA, Article V, section 5.1; Education Code, section 87482.5, subdivision (a), in relevant part:

During his time at Miramar, Douglas taught five different Mathematics courses: Math 121 (Spring 2011), Math 46 (Fall 2011 and Spring 2012), Math 38 (Fall 2012), Math 151 (Spring 2013 and Spring 2014), and Math 252 (Fall 2013). Higher-level Mathematics courses, such as those suitable for students majoring in the subject, are numbered 100 and above, and lower-level Mathematics courses are numbered under 100. Adjunct instructors complete a form for each upcoming semester indicating the times that they are available to teach. The adjunct instructor also states courses that he or she has previously taught and those that he or she is "willing to teach." Douglas has a full-time, non-teaching job during the day so he always noted on these availability forms that he was only available to teach evening classes. Douglas also stated on the forms, including the one he submitted for Fall 2014, that he was willing to teach any course, but his preference was always for higher-level courses.[3]

The department chair, who is included in AFT's bargaining unit, is responsible, among other things, for creating the course schedule and recommending the faculty to be assigned to teach each course. The dean then has final approval over the schedule and faculty course assignments. As a threshold matter, courses are assigned under the following hierarchy based on the employment status of the instructor: (1) contract faculty; (2) "overload" contract

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> Notwithstanding any other law, a person who is employed to teach adult or community college classes for not more than 67 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under Section 87604.

[3] Douglas stated on the Fall 2014 teaching availability form under the heading "Courses Willing to Teach": "Any but I prefer college level; would be nice to do 150, 104, 118, 119, or 141; but only one."

faculty;[4] (3) "pro-rata" faculty;[5] (4) adjunct faculty with priority of assignment (POA); and (5) adjunct faculty without POA. The POA process is central to the dispute in this case and will be discussed in detail below.

It is undisputed that the Mathematics department at Miramar prefers that contract faculty teach all courses, but especially higher-level courses. There was a shortage of contract faculty in the department starting in 2008 due to the imposition of a District-wide hiring freeze responding to the budget crisis in California that commenced around that time. The hiring freeze prevented the District from hiring new contract faculty, even to replace those who had retired or otherwise left employment. As a result, adjunct faculty were heavily relied upon. The hiring freeze was lifted in 2013, allowing the Miramar Mathematics department to begin filling vacant full-time faculty positions. In the Fall 2013 semester, the department had only three contract faculty. During the following semester (Spring 2014), the department hired four new tenure-track contract faculty, and then two more contract faculty were hired for the Fall 2014 semester. During Fall 2013, there were 33 adjunct faculty teaching 62 course sections in the department. By Fall 2014, there were only 21 adjunct faculty teaching 34 course sections in the department.

Priority of Assignment

The CBA at Article V covers certain terms and conditions of employment specific to adjunct faculty. Section 5.2.1.1 provides that, ordinarily, adjunct faculty should not have an annual FTEF (i.e., "full-time equivalent" course load) of more than 67 percent during any

[4] Overload refers to a contract faculty member who received more course assignments than what is regularly required for full time status.

[5] Pro-rata are retired contract faculty who are permitted to teach with a reduced course load while collecting retirement benefits.

academic year. The at-will employment status of adjunct faculty generally allows the District to dismiss them from service at any time and for any reason. If adjunct faculty meet certain criteria discussed below they may attain POA status, which, among other things, provides them the right to be assigned a certain course or courses before other adjuncts who do not have POA for a particular course or courses. Section 5.2.3, "Eligibility for Priority of Assignment," states in relevant part:

> 5.2.3.1 Adjunct faculty who have *completed six (6) semesters* of service…within a specific discipline *at a particular college* will *become eligible* to participate in the priority of assignment process in that discipline.
>
> 5.2.3.2 *Two semesters prior to becoming eligible to participate* in the priority of assignment process for a particular discipline, the adjunct faculty member shall request, in writing, to meet with the appropriate manager and department chair and *mutually determine* which assignments within the discipline in which he/she holds priority of assignment rights. *At minimum*, this list of assignments *will include* those assignments the adjunct faculty member holds *at the time of the request*. In the case where mutual agreement cannot be reached on additional assignments, *the appropriate manager shall make the final determination*. The final determination of the list of assignments must be made prior to the end of the semester during which the adjunct faculty member requests the above meeting. The list of assignments *may subsequently be modified* upon mutual agreement of the adjunct faculty member, appropriate manager, and department chair.
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> 5.2.3.3 Priority of assignment rights *will not be granted* to adjunct faculty *who have not requested* the above meeting with their appropriate manager. In cases where an adjunct faculty member requests the above meeting *subsequent to the completion of five (5) semesters* of service in the discipline, he/she shall become eligible to participate in the priority of assignment process *effective two (2) semesters following* the request. However, any accumulated FTEF will apply only to the prior four (4) semesters.

(Emphasis added.)

POA status affords adjunct faculty with other employment protections aside from simply gaining priority over other adjuncts in course assignments. Relevant here, section 5.2.6.1 provides:

> Adjunct faculty who are not given any assignment for circumstances beyond their control (course cancellations, contraction of discipline, etc.) will retain their accumulated FTEF for a period of eighteen (18) months. Adjunct faculty shall remain in contact with the appropriate manager during this time period so that they may be called back if conditions warrant.

Section 5.2.10, "Termination," states at 5.2.10.1: "Adjunct faculty members who have not qualified for priority of assignment rights within a specific discipline within a college, shall have no re-employment rights within that discipline and may have their assignment terminated at any time." In contrast, section 5.2.10.2 provides regarding adjunct faculty with POA:

> Adjunct faculty members who have qualified for priority of assignment rights within a specific discipline within a college, may have their assignment terminated at any time as a result of reasons which are delineated in the California Government Code, Education Code, Penal Code, District Policies and Procedures, and District Human Resources Manual. The reason(s) shall be provided in writing. Termination per this Section of the Article shall not be grievable.

It is noteworthy that only AFT is entitled to file a grievance over an alleged violation of contractual procedures regarding POA. (Section 5.2.8.) Thus, individual employees are precluded from seeking contractual redress for alleged violations of these sections. It is undisputed that, even with POA, an adjunct instructor has no right to a course assignment over contract, overload contract, or pro-rata faculty.

AFT publicizes POA through informational brochures and in-person presentations to adjunct employees and encourages them to apply for it. In its publication, "Adjunct Faculty Survival Guide," AFT describes the process of requesting and ultimately attaining POA status,

noting that it does not become effective until *after* six semesters are completed. Regarding the POA meeting and resulting course list discussed above, AFT notes:

> At the meeting you, your department chair, and your dean will discuss which courses qualify for your priority of assignment. These *should* be all of the courses within your discipline that the dean and the chair concur you are qualified to teach….(*Your dean has the final say if there is disagreement regarding which courses should be on your "list,*" although at a minimum all courses you are currently teaching must be listed[.])

(Emphasis added.)

Douglas's Request for POA

On November 20, 2013, Douglas sent a letter to then-dean Paulette Hopkins and Mathematics department chair Francois Bereaud, stating his desire to begin the POA process.[6] As Douglas had been working continuously at Miramar since Spring 2011, he requested to begin the POA process during his sixth semester.[7] Having heard nothing from Hopkins or Bereaud within a couple of weeks after sending the letter, Douglas followed up with an e-mail to them both on December 6, 2013. Hopkins responded, saying that she would schedule a meeting between the three of them soon.

Bereaud also sent an e-mail reply to Douglas on December 6, 2013, leaving Hopkins off that message. Bereaud stated: "Sorry to drop the ball here as well. I'm in no way trying to dissuade you from this course, but there are some disadvantages to having POA [(]as well as the obvious advantages of course) which I could share with you if you'd like." Douglas was intrigued and replied that he was interested in what Bereaud had to say. Bereaud then replied

[6] During the time relevant to this matter, Hopkins was the dean of the Mathematics and Science departments at Miramar. On July 1, 2015, Hopkins became the interim vice president of Instruction at Miramar.

[7] It is undisputed that POA is college-specific; thus, Douglas's history at Mesa had no bearing on his POA request at Miramar.

that he and Douglas should talk on the phone, which they did. Bereaud admits he told Douglas in that conversation that Hopkins followed the contract very closely regarding POA applications and she would likely only offer a POA list containing the class that Douglas was currently teaching. Bereaud also said that Douglas's POA list might not ever expand to include other courses. Douglas feared that his future assignments might also be restricted to the classes on his POA list. At hearing, Bereaud explained that at the time of his conversation with Douglas, it was his first semester as department chair. Since then, he has discovered that he was incorrect about POA lists not expanding for adjunct faculty with POA status. Bereaud was able to provide two recent examples of adjunct faculty—Nirmala Kashyap and Lance Gordon—whose POA lists were later modified to include other courses beyond those that were initially offered to them.

On December 18, 2013, Douglas met with Hopkins to discuss his request for POA. Bereaud was unable to attend the meeting for a reason related to child care. Hopkins initially offered for the POA list Math 252, the class Douglas was currently teaching. During their conversation, Hopkins added Math 151 to the list, since Douglas was slated to teach that class the following semester. Douglas protested that the list was not acceptable, stating that he understood the purpose of the meeting to be a discussion of all of the courses that he was qualified to teach, and which should therefore populate his POA list. Douglas also expressed that he was unhappy the meeting was occurring without Bereaud. Douglas said he needed to speak with AFT about the situation. Hopkins then asked Douglas if he was withdrawing his POA request. Douglas replied that he was not withdrawing anything, but he needed to consult AFT before he proceeded further.

Douglas contacted the AFT president, Jim Mahler, immediately following his meeting with Hopkins. After that, AFT grievance officer, Darrel Harrison, was assigned by AFT to assist Douglas with his request for POA. Douglas sent an e-mail to Hopkins on December 20, 2013, which, among other things, expressed Douglas's desire to hold a "proper POA meeting" with Bereaud participating, and also with an AFT representative there to represent him. A little more than an hour later, Douglas received an e-mail from Hopkins, which purported to be "a follow up" to the POA meeting held on December 18, 2013. Hopkins recapped that Douglas had refused to accept the classes he had been offered for POA because he felt he was also qualified to teach others. Hopkins quoted the contractual language discussed previously, which noted, at minimum, the POA list must include those classes taught by the adjunct at the time of the request and that if agreement on other classes cannot be reached, then the dean makes the final determination. Hopkins stated that the offer she made to Douglas was compliant with the contract and would stand. She also stated that unless Douglas informed her otherwise by December 23, 2013, she would assume that his refusal to sign the POA agreement meant that he was "declining the assignment." Hopkin's e-mail to Douglas did not acknowledge the e-mail that Douglas had sent to her earlier in the day asking for another POA meeting with union representation.

Douglas forwarded Hopkins's December 20, 2013 e-mail to Harrison and Bereaud. Harrison then asked Bereaud to provide him with a statement in writing that Bereaud was unavailable to attend Douglas's POA meeting in December, had not yet consulted with Douglas regarding Bereaud's absence or regarding suitable POA course offerings, and was available for a future meeting with all parties. Bereaud complied with Harrison's request that same day.

On December 23, 2013, Harrison sent Hopkins an e-mail, requesting a POA meeting for Douglas with the participation of the department chair and AFT. In a private e-mail between Harrison, Mahler, and Douglas shortly thereafter, Harrison noted that Hopkins had a "vindictive side" and warned Douglas to be respectful during the next POA meeting. Harrison also stated that Hopkins was "perfectly within her rights" to offer only a minimal POA list to Douglas and that he should accept it. At hearing, Harrison testified that his statement about Hopkins being vindictive was based upon his experience with her but did not otherwise elaborate.

Before the second POA meeting was held, Douglas asked the former Mathematics department chair, Harvey Wilensky, to accompany him to an informal meeting with Bereaud to discuss the upcoming POA meeting and Douglas's hope that Bereaud would advocate for his POA list to be expanded. Wilensky testified, but could not recall the substance of this meeting. Wilensky testified generally that he believed Douglas to be qualified to teach any of the course offerings in the Mathematics department. It is not clear, though, that Wilensky shared that opinion during the informal meeting.

Douglas testified that he felt he was not getting his point across to Bereaud during the informal meeting. According to Douglas, Bereaud stated that Douglas wanted every class on his POA list. Douglas said that was not true; he just wanted a conversation about his qualifications to be considered before the list was finalized. Bereaud then said that, in the past, the department had been "burned" by some adjuncts. Bereaud, however, was not questioned during the hearing about that last statement that was attributed to him by Douglas.

On February 19, 2014, the reconvened POA meeting was held with Douglas, Harrison, Bereaud, and Hopkins attending. Again, Hopkins offered only Math 151 and Math 252 for the

POA list, said her offer was firm, and this was how she always handled POA requests. Douglas protested that refusing to consider anything but the bare contractual minimum violated the spirit of the CBA, as the purpose of the POA meeting was to have a discussion over qualifications and attempt to reach an agreement over the list. Douglas also stated what Bereaud had told him in their private conversation about it being likely that his POA list would not expand from the initial offered courses. Harrison then asked to speak to Douglas alone. Harrison told Douglas that Douglas should not "throw his department chair under the bus," and urged Douglas to accept the courses being offered to him because that was all that was required under the CBA. Once everyone was back in the meeting, Hopkins assured Douglas that the classes he was being offered were likely to be available for teaching assignments in the future and, in any event, he would not be restricted to teaching only those classes. Despite having heard Harrison's opinion over what he should do, Douglas told Hopkins that wanted to further consult with AFT over actions that could be taken as he did not agree with what the department had offered. Hopkins asked if he was withdrawing his request for POA, to which Douglas responded that he was not, but simply need further consultation with AFT before acting. Douglas testified at hearing that he wanted AFT's opinion on whether a grievance should be pursued.

The Performance Evaluation and the Conclusion of Douglas's POA Process

A few weeks before the second POA was meeting was held, Douglas was informed that he was due to be evaluated. Douglas's first notice of this came via e-mail on February 4, 2014, from Joan Thompson, an administrator in charge of coordinating faculty evaluations. Douglas had just been evaluated for the first time at Miramar in Fall 2013, during the immediately previous semester. This recent evaluation was in all respects positive. The CBA at Article

XV, section 15.1.14.1, provides regarding the frequency of performance evaluations: "Adjunct faculty *must* be evaluated during the *first year* of employment *and at least once every six (6) regular semesters* thereafter." (Emphasis added.)

Douglas believed that since he had just received a positive performance evaluation, the department must have been in error to require another evaluation so soon. He sent an e-mail to Thompson and Bereaud asking for his personnel file to be checked for accuracy in that regard. To that, Bereaud responded to Douglas:

> With more full-timers on board to help, I am implementing a policy where we evaluate all new part timers in each of their first two or three semesters. Although you are not new, your first ever evaluation was last semester, hence my request.

On February 13, 2014, Douglas sent an e-mail to Bereaud with the names of three peer evaluators whom Douglas had secured as being willing and available to perform his evaluation.[8] Section 15.1.14.3 of the CBA evaluation article allows for the adjunct faculty member to submit a list of three peer evaluators to his or her department chair from which the dean shall either select one of those persons to perform the employee's evaluation, or further consult with the department chair and the employee to select another peer evaluator.

After Douglas's class concluded on the evening of March 6, 2014, Hopkins approached Douglas and asked him to step into her office for a moment. Hopkins told Douglas that since he had applied for POA, she wanted Bereaud, being department chair, to conduct Douglas's performance evaluation. Douglas said he would consider it. After consulting with Harrison, Douglas e-mailed Hopkins on March 12, 2014, asking her to explain why he was being evaluated at this time. Hopkins replied to Douglas the next day:

[8] Before Douglas submitted the names of peer evaluators, Douglas had communicated with Harrison and expressed the belief that the department was requiring him to be evaluated because he was fighting the department over his POA request.

> As Francois and I stated earlier, the department is behind in completing evaluations. We have been remiss in your evaluation process because you have only one evaluation in your file since your hire date in 2011. Miramar is striving to stay current with evaluations for accreditation purposes. Specifically, all adjuncts in the department who are applying for a POA assignment for the first time are evaluated as standard process. Thus, as a POA applicant, you and all other first time POA applicants in the department have been assigned as peer evaluator, the Department Chair, Francois Bereaud.

On March 19, 2014, Douglas e-mailed Hopkins, copying Bereaud and Harrison. Douglas stated that on the advice of AFT, he refused to have Bereaud be his evaluator and requested that the department select for that role one of the persons he had previously submitted as being acceptable to him per the CBA evaluation article. In early April 2014, Douglas was contacted by one of the peer evaluators, Mike Charles, to arrange the date for the evaluation. It was conducted by Charles on April 10, 2014, and resulted in a positive review.

On April 16, 2014, Douglas sent an e-mail asking Bereaud what impact his recently completed evaluation would have on his POA request. Harrison was copied as well. Bereaud responded to Douglas by including Hopkins and deferring responsibility for an answer to her, noting that the issue was one for management. Hopkins responded to Douglas the next day, stating that her offer of Math 151 and Math 252 remained unchanged and that was her final decision. The next day, Douglas informed Hopkins that he would tentatively accept the department's offer pending further advice from AFT. Harrison testified that AFT determined not to file a grievance over the District's handling of Douglas's POA process because in his and Mahler's estimation, the District had not violated any contractual terms governing POA.

On or about April 23, 2014, Douglas received in his faculty mailbox the department's "Priority Assignment Application" form bearing Hopkins's signature and showing POA in

Math 151 and Math 252. As Douglas understood the situation, his receipt of this form meant that his POA status in those two courses was already in effect.

Douglas Does Not Receive a Course Assignment for Fall 2014

On April 24, 2014, Douglas sent Bereaud an e-mail asking for information over his course assignment for the next semester. Bereaud replied the same day, stating that he was still working on the schedule and had not yet received final "allocation numbers," so he was uncertain of when he would have an answer for Douglas. Having still heard nothing about his assignment, on May 13, 2014, Douglas sent another e-mail to Bereaud asking if there was any news. Douglas knew at that point that some other adjuncts had already been informed of their assignments. The next day, Hopkins sent Douglas an e-mail message stating that she did not have a course assignment for him for Fall 2014. She invited Douglas to remain in contact with the department for his teaching availability in Spring 2015. It is undisputed that the evening sections of both Math 151 and Math 252, the classes taught most recently by Douglas and those for which he had been offered POA, were assigned by the department to contract faculty for Fall 2014.

Bereaud and Hopkins testified about the manner in which courses are scheduled and assigned. Hopkins testified that the department chair "takes the lead" after she provides him or her with the allocation, or budget, and the department chair then determines which courses should be offered based on student need. The overarching principle in matching instructors with available courses was to assign the instructor that the department believed to be the best fit for the particular course. Bereaud testified that he considered several factors when making recommendations to the dean about whom should be assigned to particular courses. Bereaud considered the length of time the faculty member had been teaching for the District, whether

the faculty member had taught a particular course in the past, whether the faculty member had expressed a preference for teaching a particular course, the faculty member's relevant teaching experience outside of the District, and the advanced degrees held by the faculty member. As noted previously, contract faculty in all respects had priority over adjunct faculty whether or not POA was a factor. Bereaud testified about the reasons that he selected eight of the adjuncts that were assigned evening courses for Fall 2014, noting the factors discussed above, such as length of service, course assignment history, the possession of advanced degrees, etc.[9] All but two of them were assigned in Fall 2014 to the course he or she had taught during the immediately preceding semester. Of the two who were assigned a course for Fall 2014 that they did not teach during the previous semester, one of them, Spoon, also taught at Mesa College, had previously been full-time at Miramar, and possessed a Ph.D.[10] The other, Daud, was assigned for Fall 2014 a statistics class, a subject in which he was earning a second Master's degree.

Hopkins testified that her area of academic expertise was in Exercise Science. As she does not have a background in Mathematics, she especially relied upon the Mathematics department chair's course assignment recommendations. There is no evidence in the record showing that Hopkins went against any of Bereaud's course assignment recommendations for Fall 2014.

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[9] Bereaud was questioned about the following adjunct faculty who were assigned courses by the department for Fall 2014: Mitra Ashan (Math 38), Nemie Capacia (Math 46), Natalia Navarova (Math 96), Lamia Raffo (Math 141), Earl Toler (Math 104), Alireza Farahani (Math 121), Solomon Daud (Math 119), and Kelly Spoon (Math 150).

[10] It did not appear that Spoon taught at Miramar in Spring 2014. At the time of the hearing, Spoon had become a contract faculty member at Mesa.

Douglas Learns That His POA Rights Never Went Into Effect

On September 19, 2014, Douglas sent an e-mail to Hopkins and Bereaud, stating that per CBA section 5.2.6.1, he was remaining in contact with them since his lack of assignment the previous semester was for reasons beyond his control. Hopkins responded to Douglas on September 22, 2014. She thanked Douglas for his interest, but stated, "Article 5.2.6.1 does not pertain to you since you do not have priority of assignment rights having not completed the (6) semesters condition for eligibility defined in Article 5.2.3." Hopkins also informed Douglas that she did not have a course to offer him for Spring 2015.

The Way the POA Process and Evaluations Were Handled for Other Adjunct Faculty

Hopkins testified that she handled around a dozen other adjunct faculty employees' requests for POA during her tenure as dean. After she received a request from an adjunct employee to begin the POA process, Hopkins would print a history of the instructor's course assignments in advance of the POA meeting. Labeling the semester of the request as number four, Hopkins would then count back three previous semesters and add up the sum of these four semesters to attain the adjunct employee's accumulated FTEF. The accumulated FTEF number provides a method of determining seniority among adjunct faculty with POA in the same courses. Hopkins consistently offered to adjunct employees seeking POA the course(s) they were currently teaching and, if different, the course(s) they were already scheduled to teach for the following semester. The documentary evidence submitted by the District for several other adjunct instructors' POA requests showed that Hopkins never deviated from this approach in handling employees' requests for POA.

At the same time that Douglas requested POA in Fall 2013, adjunct Mathematics instructor Kashyap, who was discussed briefly above, also requested POA. At the time of her

request, Kashyap was teaching Math 38 and Math 104. She was scheduled to teach Math 96 the following semester. Kashyap was offered those three courses for her POA list. Kashyap had a performance evaluation during Spring 2014 by Bereaud. Her most recent performance evaluation before that had been in Fall 2012. Kashyap's POA went into effect during Spring 2015. At the time of the hearing, she was still employed by the District at Miramar. An adjunct employee in the Science department, Dustin Wood, also applied for POA with Hopkins in Fall 2013, was only offered the courses he was currently teaching, and his POA went into effect beginning Spring 2015. Hopkins explained that, in her view, the CBA requires the completion of six semesters before POA takes effect. The semester of the employee's request is considered the fourth semester. The next two semesters are the fifth and sixth. Then, the following semester (the seventh) is when the POA status is actually conferred.

Two adjunct instructors who worked at San Diego City College in the Spanish and Drama departments testified regarding their POA processes. Both were only offered for their POA lists the courses they were currently teaching during the semesters of their requests. The Spanish instructor did not receive any course assignment during the semester after his POA process occurred because the courses he had been teaching were assigned to contract faculty. The Drama instructor continued to receive course assignments and was still employed by the District at the time of the hearing.

The District introduced evidence regarding the frequency of adjunct faculty evaluations in the Mathematics department at Miramar. In addition to Douglas, six other adjunct instructors were evaluated in both the Fall 2013 and Spring 2014 semesters. For five of the six other adjunct instructors who were evaluated in consecutive semesters, Bereaud was the evaluator for at least one of those evaluations.

ISSUES

Did the District retaliate against Douglas for his protected activities by requiring an "extra and unnecessary" performance evaluation and by failing to offer him a course assignment in Fall 2014?[11]

CONCLUSIONS OF LAW

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show by a preponderance of evidence that (1) the employee exercised rights under EERA, (2) the employer had knowledge of the exercise of those rights, (3) the employer took adverse action against the employee, and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8 (*Novato*).)

[11] The District raised untimeliness as a defense in its answer to the complaint. In its position statement, the District asserted that the evaluation allegation was untimely. Untimeliness was not argued in the District's closing brief, however. Once a complaint has been issued by PERB, the burden of proof is on the respondent to demonstrate that a charge is untimely and no tolling exception to the statute of limitations applies. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 3.) In a case where termination of employment was at issue, the Board stated that the actual date of the adverse action, rather than notice to the employee of the employer's intent to pursue it, triggered the running of the limitations period because negotiated or statutory procedures may be at play and significantly extend the time between the notice and the action. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, p. 34; see also *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, proposed dec., p. 29 [date of investigatory meeting, not notice of investigation, triggered running of limitations period].) The evidence here shows that while Douglas was initially informed by the department that he would be required to have a performance evaluation in February 2014, which was outside of the six-month limitations period, the evaluation was not actually performed until April 10, 2014, which was within the limitations period. In the interim, there had been communication between Douglas and Hopkins over why Douglas needed to be evaluated and who should be the evaluator under relevant CBA provisions. The rationale from the above cases is persuasive here, where negotiated evaluation procedures were discussed between the parties for some time before the evaluation was actually scheduled by the department. Accordingly, the date of the evaluation itself, not the earlier notice of it to Douglas, triggered the limitations period and the allegation is therefore timely.

The test for determining whether an action taken by a respondent against an employee is adverse to the employment interests of that employee is an objective one, and therefore does not rely on the employee's subjective reactions to it. (*Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 12.) As explained by the Board:

> The test which must be satisfied is…whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment.

(*Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

A causal connection between the employee's protected activity and the respondent's adverse action is the critical final element of the charging party's prima facie case. Evidence of a respondent's unlawful motive can be shown by either direct or circumstantial evidence. When considering circumstantial evidence of unlawful motive, PERB looks to the timing of the protected conduct relative to the adverse action to provide an inference that the action occurred because of the employee's exercise of statutory rights. (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096, p. 11.) But close timing by itself is not determinative for finding a violation. (*Moreland Elementary School District* (1982) PERB Decision No. 227, p. 13)

Additionally, PERB examines other factors, at least one of which must be present, to demonstrate the requisite nexus between protected conduct and adverse action. These factors include: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 6); [12] (2) the employer's

[12] That case was decided under the Ralph C. Dills Act (Gov. Code, § 3512 et seq.) When interpreting EERA, it is appropriate for PERB to derive guidance from court and administrative decisions interpreting the National Labor Relations Act (NLRA) (29 U.S.C. § 151 et seq.) and parallel provisions of California labor relations statutes. (*San Diego Teachers Assn. v. Superior Court* (1979) 24 Cal.3d 1, 12-13.)

departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104, p. 20); (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, p. 15); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 19; (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529, p. 10) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786, pp. 13-14); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, pp. 15-16;); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento School District* (1982) PERB Decision No. 264, p. 22).

If the charging party produces sufficient evidence demonstrating a prima facie case, and therefore establishes an inference of unlawful motivation, the burden shifts to the respondent to prove that it had an alternative, non-discriminatory reason for the challenged action. The respondent's burden includes proving that it, in fact, acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 31 (*Palo Verde*).)

Turning to the facts in this case, there is no question that Douglas engaged in activities protected by EERA, as alleged in the complaint, when he asserted rights under the negotiated evaluation and POA procedures in the CBA (*Jurupa Unified School District* (2012) PERB Decision No. 2283, p. 16 (*Jurupa I*)) and sought representation from AFT regarding his view that CBA procedures were not being followed. (*Jurupa Unified School District* (2015) PERB

Decision No. 2420, p. 37.) Hopkins, the ultimate decision-maker for both alleged adverse acts, was aware of Douglas's protected activities. Thus, the first two elements of the *Novato* discrimination standard are met for both allegations. There is also no question that the failure to receive a course assignment effectively ended Douglas's employment with the District, which is a clear adverse action. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 18.) The remaining disputed elements of the prima facie case for both allegations are discussed below.

1. Adverse Action - Performance Evaluation

The District argues that the CBA only sets a minimum frequency for adjunct instructors' performance evaluations because of the phrase noting that adjunct employees must be evaluated "*at least once* every six regular semesters" at section 15.1.14.1. (Emphasis added.) The District believes it has the right to perform evaluations more often than the contractual minimum, so its action was routine and therefore not adverse to Douglas's interests. PERB has addressed a similar issue in two cases involving the same parties. In the first case, *Jurupa I*, *supra*, PERB Decision No. 2283, the Board concluded that because the Education Code requires evaluation of a permanent certificated employee "at least once every other year,"[13] and only when an employee receives an unsatisfactory evaluation must the employee be annually assessed, then requiring a consecutive year evaluation where there was not a previous negative one "signals a performance deficiency requiring remediation," which is the functional equivalent of a negative evaluation. (*Id.* at pp. 18-19.) The Board then partially reversed the dismissal of the charge and remanded the case to the PERB Office of the General Counsel to issue a complaint. (*Id.* at p. 32.) After a hearing on the merits, the employer took

[13] Education Code section 44664, subdivision (a)(2).

exception before the Board to the finding of the Administrative Law Judge (ALJ) that the consecutive year evaluation in that matter was an adverse action under the holding of *Jurupa I.*

The Board in *Jurupa Unified School District* (2015) PERB Decision No. 2458 (*Jurupa II*), rejected the employer's argument and upheld its previous conclusion regarding the adverse nature of an off-cycle evaluation, noting that "the default evaluation cycle for permanent certificated employees who are performing satisfactorily is every two years[,]" under both the Education Code and the parties' contract. (*Id.* at pp. 17-18.) The Board found it significant that the Education Code enforces a more frequent evaluation cycle only where an employee has received a negative evaluation (Educ. Code, § 44664, subd. (b)) and concluded that when Education Code sections 44664 (a)(2) and (b) were read together, these provisions establish a default cycle of every other year for the evaluation of satisfactorily performing permanent teachers. (*Jurupa II*, *supra*, PERB Decision No. 2458, pp. 15-16.) The Board further concluded that a more frequent evaluation cycle than that allowed under the Education Code was a matter reserved for collective bargaining. (*Id.* at p. 16.) Thus, the Board found that to require an employee who was performing satisfactorily to undergo more frequent evaluations than the default cycle was an adverse action. (*Ibid*.)

In this case, although adjunct instructors working for community college employers do not enjoy the full panoply of statutory procedural due process protections afforded to permanent certificated employees in the K-12 system, the Education Code does set an expectation regarding the normal frequency of performance evaluations for adjunct, i.e., "temporary" employees. Education Code section 87663, subdivision (a) states:

> Contract employees shall be evaluated at least once in each academic year. Regular employees shall be evaluated at least once in every three academic years. *Temporary employees* shall be evaluated within the first year of employment. Thereafter,

> evaluation shall be *at least once* every six regular semesters, or once every nine regular quarters, as applicable.

(Emphasis added.)

As in the *Jurupa* cases, the CBA language here also mirrors applicable Education Code provisions regarding evaluation frequency, signaling that AFT and the District have agreed to follow the Education Code procedures. Likewise, the same "at least once" language at issue here was also present in the applicable Education Code and contractual provisions at issue in both *Jurupa* cases. Thus, the Board has confronted the argument that the Legislature's use of the term "at least once" implies that a more frequent evaluation cycle might be permitted under some circumstances. (*Jurupa II*, *supra*, PERB Decision No. 2458, pp. 15-17.) The Board nonetheless has concluded that there is a "default" evaluation cycle for satisfactorily performing permanent certificated employees of every other year. (*Id.* at p. 17.) Unlike for permanent certificated employees in the primary and secondary school system, the Education Code does not mandate that a temporary employee in the community college system must be evaluated annually after receipt of an unsatisfactory performance evaluation. The likely reason for this difference is that temporary employees in the community college system, in contrast to permanent certificated employees, are at-will and may be released from employment without cause. Thus, a temporary employee receiving a negative review may simply be released from service without further ado. There is no reason to believe the Board would find the absence of procedures for negative evaluation in the Education Code in this circumstance, given these procedural due process differences, significant enough to warrant a different approach here.

Douglas was not evaluated in his first year of employment at Miramar as he should have been under the Education Code and the CBA. However, his first evaluation occurred during Fall 2013. Under the Board's rationale in *Jurupa II*, after Douglas's first evaluation,

the Education Code and the identical negotiated procedures between AFT and the District set an expectation that his next evaluation would be due in six regular semesters. Because the District required Douglas to be evaluated again the very next term, especially while he was applying for POA, it could imply that his performance was deficient. Thus, the off-cycle evaluation may objectively be considered an adverse action.

2. Nexus – Performance Evaluation and Failure to Assign a Course

As discussed above, in the absence of direct evidence of unlawful motivation, close timing alone between an employee's protected activity and the employer's adverse action is not determinative for demonstrating that the action was taken because of the protected acts. Other circumstantial evidence must also be present to prove up this critical element of the prima facie case. In the present matter, Douglas first challenged Hopkins's interpretation of the POA eligibility article and told her that he would seek AFT's help on December 18, 2013. After that, Harrison contacted Hopkins on Douglas's behalf and appeared to represent Douglas at the second POA meeting in February 2014. Douglas also frequently communicated with Hopkins through April 2014, discussing his consultation with AFT over POA and evaluation issues, and disputing that the department was following the CBA regarding either topic. Thus, the District's requirement that Douglas submit to a performance evaluation during Spring 2014, and its notification to Douglas in May 2014 that he would not be assigned a course for the next semester, occurred close in time to his ongoing exercise of protected rights. In addition to this close timing, there is some other evidence that Hopkins may have been unlawfully motivated.

In both POA meetings, each time that Douglas expressed displeasure with the classes being offered to him for his POA list and said that he needed to consult with AFT before

making a decision, Hopkins responded by asking if Douglas meant to withdraw his request for POA. Similarly, when Douglas e-mailed Hopkins on December 20, 2013, stating that he wanted a second POA meeting with an AFT representative present, Hopkins ignored his request and wrote immediately afterward that he had three days to confirm whether he was accepting the POA offer or withdrawing his request for same. Hopkins offered no explanation during the hearing over why she ignored Douglas's e-mail on December 20 and continuously asked Douglas if he was withdrawing his request for POA each time he discussed involving AFT. Her seeming rush to dispense with Douglas's POA process by having him withdraw it may show hostility toward a unit member exercising contractual rights or animus against AFT becoming involved. Hopkins's behavior in this regard, coupled with Harrison's testimony that Hopkins had a vindictive nature based on his past experiences with her, which one can reasonably assume were as a representative, and Bereaud's attempt to caution Douglas regarding enforcing his contractual right to POA with Hopkins, provides enough evidence to suggest that the ultimate decision-maker in this case may have harbored some animus toward union activities. This evidence, in conjunction with the close timing between Douglas's protected conduct and the adverse actions, is sufficient to demonstrate unlawful motivation for the purpose of establishing a prima facie case.[14]

Because Douglas has shown all of the elements of a prima facie case under the standard in *Novato*, *supra*, PERB Decision No. 210, the burden shifts to the District to show that its actions against Douglas were taken for non-discriminatory reasons.

[14] This is the only convincing evidence I found of nexus between Douglas's protected activity and the adverse actions at issue. Arguments regarding other evidence of nexus raised by Douglas are discussed in the next section of the proposed decision in connection with the District's defenses.

The District's Defense

Where, as here, the charging party has produced sufficient evidence demonstrating a prima facie case, the burden shifts to the respondent to prove that it had an alternative non-discriminatory reason for the challenged action; and that it in fact acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. (*Palo Verde, supra*, PERB Decision No. 2337, p. 31.) Where there is evidence that the respondent's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distributors v. Agricultural Labor Relations Bd*. (1981) 29 Cal.3d 721, 729-730 (*Martori Bros*.).) The "but for" test is "an affirmative defense which the respondent must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

In assessing the evidence, PERB's task is to determine whether the respondent's "true motivation for taking the adverse action was the employee's protected activity." (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3, citations omitted; see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 23.) Further, PERB "weighs the respondent's justifications for the adverse action against the evidence of the respondent's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 14.) If PERB determines that a respondent's action was not taken for an unlawful reason, it has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 17.)

In this case, it is not difficult to see things from Douglas's perspective. He was worried, despite assurances from Hopkins, that the classes he was being offered for POA

would limit his assignments in the future. Douglas's concern was induced, at least in part, by the warning over such possibility by his own department chair. In the middle of the somewhat adversarial POA process, Douglas learned he was to be evaluated when he did not expect to be. Then, immediately after the POA process, he failed to receive an assignment for the next semester. Douglas's concerns appear, on the surface, to have been well taken. However, when the entire record is taken into account, the evidence of retaliatory motive here is weak when compared with the District's reasons for both evaluating Douglas in Spring 2014 and not having a class to offer him for the next semester.

1. Performance Evaluation

Regarding the evaluation, the evidence shows that Douglas was not treated differently than other adjuncts in the department, either in his being subjected to an evaluation in consecutive semesters or because he had requested POA. Douglas did not dispute that the department was behind in conducting adjunct employee evaluations because of the low number of contract faculty employed during the years of the hiring freeze. It is also undisputed that he had had only one previous evaluation before he was asked to submit to another. The District provided a reasonable explanation that it was taking advantage of the newly hired contract faculty, as the hiring freeze had just been lifted, in an attempt to become current with the adjunct evaluation process.

The District's explanation in this regard is also bolstered by the fact that in addition to Douglas, at least six other adjuncts in the department were also evaluated in both Fall 2013 and Spring 2014. And Kashyap, who had also applied for POA at the same time as Douglas, was similarly evaluated in Spring 2014 and was assigned Bereaud for that task. Kashyap's most recent previous evaluation had occurred only two semesters earlier. Kashyap's evaluation

during her POA process could also then be considered off-cycle. The District's view that the CBA permitted more frequent evaluations than just once every six semesters is apparent in the consistency in which the department actually performed evaluations on adjunct faculty more often than what it viewed as the minimum requirement. Given that the contractual language says "at least once" rather than "at *most* once," the District's interpretation is not without reason. The fact that Douglas was being treated in exactly the same way as other similarly situated employees provides the most compelling evidence that Douglas's protected activity was not the actual motivation behind the District's action in this regard. If other employees were also being routinely subjected to evaluations more often than what might be expected under the CBA and the Education Code, then it is not likely that Douglas's contemporaneous protected conduct was the true motivator behind the District's action.

It is also important to note that the decision to evaluate Douglas in Spring 2014 appears to have originated from Bereaud, not Hopkins. While it is clear that Hopkins also believed that Douglas should be evaluated, Bereaud testified that he was the person who had decided all adjuncts should be evaluated at least twice in their first two or three semesters and was trying to catch-up where that had not happened. That Bereaud had made the decision to evaluate in this instance is also apparent in Bereaud's response to Douglas's e-mail in which Douglas asserted he was not due for evaluation. Bereaud is not a management representative and is also included in the AFT bargaining unit. There is no evidence that Bereaud harbored any animus toward either AFT or Douglas's exercise of contractual rights. For instance, Bereaud cooperated easily with AFT's request to provide a written statement about his availability for a second POA meeting and lack of participation in the first. And although Bereaud tried to caution Douglas about what he perceived at the time to be the pitfalls of POA status, that

appears to have been motivated by a desire to help Douglas rather than any hostility toward an employee exercising contractual rights. Later, Bereaud realized that he had been mistaken about employees' POA lists not expanding from the original offerings as he began to see examples of that occurring after he gained more experience in the role of department chair. His explanation of his changed opinion was believable.

For all of these reasons, it is likely that Douglas would have been evaluated in consecutive semesters even if he had not applied for POA and enlisted the help of AFT, as he only had one previous evaluation on file. Thus, I cannot conclude that "but for" Douglas's protected conduct, the evaluation would not have occurred. (*Martori Bros.*, *supra*, 29 Cal.3d 721, 729-730.) Additionally, given that the department also evaluated the other POA applicant at the same time and assigned Bereaud to do it, this further shows that Douglas was not being treated any differently because of his protected activities. The District has therefore met its burden that it had and acted because of non-discriminatory reasons in deciding to evaluate Douglas in Spring 2014.

2. Failure to Offer a Course Assignment for Fall 2014

According to the District, the reason that Douglas was not offered a course for Fall 2014 is because the courses he taught the previous two semesters, Math 151 and Math 252, were assigned to newly hired contract faculty. Full-time faculty members always have priority for course assignments over adjunct employees, whether or not the adjunct employee has POA. Thus, there was simply no course available for Douglas. As noted previously, PERB has held that an employer proves its affirmative defense when it demonstrates that it has "both an alternative non-discriminatory reason for its challenged action, *and* that the challenged action would have occurred regardless of the employee's protected activity" (*Palo*

Verde, *supra*, PERB Decision No. 2337, p. 13, emphasis added); and when the adverse action is "justified by criteria wholly unrelated to the employees' protected activity" (*Rio Hondo Community College District* (1982) PERB Decision No. 272 at p. 5). The District has met that burden here as the hiring of full-time faculty for the classes that Douglas was previously teaching was wholly unrelated to Douglas's protected conduct.

Douglas argues that the District's reason in this regard is pretextual and reveals only the District's unlawful motivation. PERB has found that an employer's stated reasons for its actions were pretext where the evidence contradicted those reasons. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221, pp. 21-23.) The crux of Douglas's theory of retaliation in this case is that because he challenged Hopkins during the POA process, she determined to end his employment at Miramar. Douglas argues that he achieved POA status at the end of the Spring 2014 semester and, therefore, Hopkins's later refusal to acknowledge that fact reveals her animosity toward the exercise of his contractual right to POA.[15] Douglas also argues that Hopkins's arbitrary refusal to offer for his POA list more courses than what he was teaching or slated to teach, without providing any valid reasons for such decision, shows that she must have intended to limit his course opportunities in the future, which then allowed him to be effectively fired at the next available opportunity. Douglas also believes that the reason things worked out regarding Kashyap's POA request is because, unlike him, Kashyap did not cause any trouble and simply accepted what was offered to her, including having Bereaud as her evaluator. Douglas thus offers Kashyap's situation as illustrative of disparate treatment

[15] It is noted that these events occurred outside of the timeframe of the complaint and Douglas did not state an intention at hearing or in his brief to pursue a separate allegation of unfair practice in this regard. Nonetheless, it is appropriate to consider events that fall outside of the statutory limitations period as relevant background information when they may shed light on timely alleged violations. (*San Diego Unified School District* (1991) PERB Decision No. 885, p. 38.)

and the department's antipathy toward his protected activity. Douglas argues finally that the District hired two new adjunct instructors for Fall 2014 rather than give him an assignment, which shows its discriminatory motive. These arguments are addressed in turn below.

A. POA Status

Regarding Douglas's belief that he had already achieved POA status at the time that the District refused to offer him a course for the following semester, there are two important points to be made. First, even if he did achieve POA for Math 151 and Math 252, that would not have helped him attain an assignment for either of those particular courses in Fall 2014, since they were assigned to contract faculty. In addition, if he was to have been assigned a course for Fall 2014, the most likely candidate would have been Math 151, as that is what he taught the immediately previous semester. The evidence showed that Bereaud usually recommended assigning an adjunct instructor to continue teaching the same course he or she had been previously teaching. The lifting of the years long hiring freeze occurred contemporaneously with Douglas's request for POA. The newly-bolstered ranks of contract faculty thus took a much larger share of the available course assignments by Fall 2014. The department went from having 33 adjunct faculty teaching 62 course sections in Fall 2013, to just 21 adjunct faculty teaching 34 course sections by Fall 2014. So, Douglas was by no means the only adjunct faculty member who found himself without an assignment in Fall 2014 because of newly hired full-timers.[16] It is quite likely then that even if Douglas had not pursued POA, he still would not have received an assignment for Fall 2014.

Second, the CBA provisions explaining when POA eligibility commences are open to more than one reasonable interpretation. PERB may interpret contractual terms to the extent

[16] Besides Douglas, nine other adjunct employees failed to receive a course assignment for Fall 2014.

such interpretation is necessary for determining a violation of the statutes under its jurisdiction. (*City of Riverside* (2009) PERB Decision No. 2027-M, p. 10.) PERB applies the traditional rules of contract interpretation embodied in Civil Code sections 1638 and 1641. (*King City Joint Union High School District* (2005) PERB Decision No. 1777, pp. 4-5.) Accordingly, each contract clause must be read in conjunction with the phrases surrounding it, and the interpretation should harmonize any potential conflict between provisions of the agreement so that there is a "reasonable, lawful and effective meaning" given to all terms. (*Ibid*.) The interpretation given must avoid leaving any provision without meaning. (*Bellflower Unified School District* (2015) PERB Decision No. 2455, proposed dec., p. 13, and the cases cited therein.) Where a contract is susceptible of two interpretations, one of which is reasonable and fair, and the other is unreasonable or unfair, the latter interpretation must be rejected and the first accepted. (Civ. Code, § 1643; *Division of Labor Law Enforcement Dept. of Indus. Relations v. Safeway Stores, Inc.* (1950) 96 Cal.App.2d 481, 490.)

Douglas argues that because he made his request for POA during his sixth semester of service with Miramar (Fall 2013), and he taught the following semester (Spring 2014), then his POA went into effect by Fall 2014 as he had completed more than six semesters of service by that time. Douglas further argues that section 5.2.3.3 implies that is expected that a faculty member will make the request for POA during the fifth semester of service, and then POA status is granted after the completion of semester six. (§ 5.2.3.1.) Hence, there is only one "waiting" semester before it becomes effective, not two, as asserted by the District. Douglas also argues:

> If it was the intent of Section 5.2.3.1 that the faculty member should make the request during the fourth (4th) semester of service, this would render nonsensical the provision that the accumulated FTEF is from the four (4) semesters prior to the

> semester of the application; for, if that were the case, the applicant would have only provided service for three (3) semesters prior to the semester of the application.

The District interprets Article 5.2.3 slightly differently than Douglas. Hopkins testified that adjunct employees are first eligible to apply for POA during their fourth semester of service and then there is a two semester waiting period before it becomes effective, as six semesters must first be completed before the status is conferred. Hopkins also pointed to the language in section 5.2.3.3 that notes POA status becomes effective two semesters following the employee's request for it.

The language in the three sections of Article 5.3.2 regarding when POA takes effect is somewhat ambiguous, so either party's interpretation has some merit and thus neither one can be rejected outright. Douglas's position about sections 5.3.2.1 and 5.3.2.2 requiring only one waiting semester before POA becomes effective is reasonable. Section 5.2.3.1 states that adjunct faculty must have *completed six semesters* within a specific discipline *before becoming eligible* to participate in POA. That logically means that POA eligibility would take effect at the beginning of the seventh semester. And section 5.2.3.2 states that an adjunct employee may first request to begin the POA process *two semesters prior to becoming eligible.* If one becomes eligible at the beginning of the seventh semester, then two semesters before that is the fifth semester. Hence, if an employee requested the POA meeting at his or her earliest opportunity, during the fifth semester, then after completing one additional semester (the sixth), POA would take effect. But the language in section 5.2.3.3 is open to a different interpretation about when the status is conferred. This section applies to the situation where an adjunct employee has not requested POA at his or her earliest opportunity. The section begins by noting that POA is not granted to adjunct instructors who have not requested a POA

meeting with their manager. Thus, POA is not automatic. So even if one has been employed by the District for many years as a member of the adjunct faculty, longevity alone does not confer POA status. Next, this section notes where an adjunct faculty member requests the POA meeting *after* he or she has *completed five semesters* of service, which is exactly what Douglas did here, "he/she *shall become eligible* to participate in the priority of assignment process *effective two semesters following the request*." (Emphasis added.)

Hopkins always interpreted the POA eligibility article to require two waiting semesters before an adjunct employee's POA status became operative, no matter when the employee applied to begin the process. Because section 5.2.3.3 states that POA should not become effective until after two semesters have passed from the time of the employee's request, this interpretation of the CBA language is equally as plausible as Douglas's contrary one. Ultimately, it does not matter whose interpretation is the most "correct" because PERB's role is not to enforce the contract, but to determine whether an employer's actions that were adverse to employment interests were pursued for an unlawful reason. Hopkins applied the same interpretation of the POA eligibility article to Douglas's request as she did for every other employee who requested POA in the Math and Science departments while she was the dean. Douglas and Kashyap both applied for POA in the Mathematics department during Fall 2013. Kashyap's POA did not take effect until two full semesters later, in Spring 2015. Since Hopkins interpreted these CBA provisions in Douglas's situation in the same manner as she did for all other similarly situated employees, then Douglas's protected activity cannot be found to have had any significant effect on her analysis.

Because I find no fault with Hopkins's interpretation of the POA eligibility article, which was the same interpretation she applied to all other POA applicants within her purview, I cannot conclude with Douglas that her refusal to recognize that he had achieved POA by Fall 2014 showed any animus toward his protected activities, disparate treatment, or a departure from established procedures. Thus, Hopkins's statements to Douglas in September 2014 do not reveal any unlawful motivation behind her earlier decision that there were no classes available for Douglas to teach in Fall 2014.

B. POA Process

Hopkins showed some impatience with Douglas's responses to her POA offers to be sure. If she had not initially ignored Douglas's request for a second POA meeting with union representation and repeatedly inquired if Douglas was going to withdraw his POA request every time he balked over her offers and stated his intent to seek help from AFT, the analysis would not have reached this point as there would have been no prima facie case. However, this slight evidence of animus toward union activities by Hopkins, as noted above, is tenuous when viewed in the context of the entire record. Although Douglas clearly believes he was treated unfairly during the POA meetings and that the "spirit" of the CBA was violated by Hopkins's seeming refusal to attempt to reach an agreement with him over all of the courses he was qualified to teach, Hopkins still acted within her authority under section 5.2.3.2 to make a final determination over the POA course list in the absence of agreement. The idea that an adjunct instructor's POA list "*should* be all of the courses…that the dean and the chair concur the [adjunct] is qualified to teach" (emphasis added) derives from an internal AFT publication. That "should" language is not found in the POA eligibility article in the CBA, however. The

CBA is what actually defines the rights and obligations of the parties' to the agreement and what is owed to the employees who are subject to its terms.

Hopkins did not handle Douglas's request for POA any differently than she handled that of all other employees who requested POA while she was the dean.[17] She always only offered to POA applicants the course(s) they were currently teaching and, if different, the course(s) already assigned for the following semester. There was nothing unique about her approach to Douglas's situation, despite Douglas's subjective feelings of mistreatment. Even if Douglas had not protested the POA offer and involved AFT, it is likely that the exact same result would have occurred. Since she never deviated from her approach to POA, it is unlikely that animus toward Douglas's union activities had any influence over the courses he was offered for POA. And since the evidence showed that Hopkins relied upon the recommended course assignments that Bereaud suggested for the department and there is no evidence that she rejected any of those recommendations for Fall 2014, it can be fairly surmised that Bereaud did not find a course to assign Douglas that term and Hopkins simply accepted that fact. As previously concluded, Bereaud did not show any hostility toward Douglas's protected activities. Accordingly, there is really no convincing evidence that Hopkins's handling of Douglas's POA request played any substantial part in the decision not to assign him a course in Fall 2014.

[17] It is noted that the testimony of the two San Diego City College adjunct employees who were called by Douglas to explain the circumstances of their own POA processes did not provide any compelling evidence showing that there were any applicable District-wide procedures regarding the handling of POA requests that were then deviated from by Hopkins.

C. The Handling of Kashyap's POA Request

Douglas argues that the District treated Kashyap more favorably than him due to his exercise of protected rights under EERA. As a threshold point, although Douglas concludes that Kashyap simply accepted what was offered to her for POA and did not involve AFT in the matter, there is actually no information in the record over whether Kashyap did or did not ask AFT for help with POA, or whether she individually raised any concerns to Hopkins over the courses she was being offered, as none of the pertinent witnesses were asked questions that would confirm or deny such possibilities. Bereaud did confirm, however, that Kashyap did not object to him performing her evaluation in Spring 2014. Just like Douglas, Hopkins offered Kashyap the courses she was teaching during the semester of her POA request and the course she was slated to teach the following semester. Again, the evidence shows that Hopkins treated Douglas and Kashyap the same way. Bereaud was not questioned about the reasons for his recommendations over Kashyap's course assignments for Fall 2014. Accordingly, the only conclusion that can be reached based on the evidence in the record is that Hopkins handled Kashyap's and Douglas's requests for POA in precisely the same manner. I therefore reject Douglas's argument that Kashyap remaining employed by the District after she requested POA shows any disparate treatment of Douglas by the District.

D. The Selection of Other Adjunct Instructors for Course Assignments in Fall 2014 Instead of Douglas

Douglas's main argument about the District's selection of other adjunct instructors over him for course assignments in Fall 2014 is that the department preferred to hire two new adjunct faculty—Sarah Mohanty and Mohamed El-Ansary—rather than select him to teach an evening course during the semester after his contentious POA process. Douglas argues that those two instructors must be newly hired because they do not appear in the published course

schedules (Charging Party's Exh. 5) or the department's program reports (Respondent's Exh. 26) for the three previous semesters. Douglas concludes that the department's preference for newly hired adjuncts over him, when he was qualified to teach any course offering in the department, must show that the department failed to select him for a discriminatory reason. There are at least two reasons that the argument is not persuasive.

First, as noted above, Bereaud was questioned by both Douglas and the District's counsel about the reasons that he recommended courses to be assigned to several adjunct instructors who appeared, along with Mohanty and El-Ansary, in the Fall 2014 program report. Bereaud was not questioned, however, about his reasons for recommending Mohanty and El-Ansary for course assignments or even to verify whether these employees were newly hired in the District. Hopkins was also not questioned about these two employees. Hopkins did testify generally that she could not tell simply from looking at the department's program reports whether an employee was a new hire, because people often took breaks in service. Second, the department's program report for Fall 2014 shows an asterisk next to the names of both Mohanty and El-Ansary. An asterisk next to the name of an employee on the report denotes that the employee works at more than one college in the District. Spoon, whom Bereaud confirmed worked at more than one college in the District, also had an asterisk next to her name on the Fall 2014 program report. For these reasons, I reject Douglas's conclusion, without factual support, that Mohanty and El-Ansary were newly hired in the District, and do not find that their course assignments in Fall 2014 reveal anything about the District's actions against Douglas.

PERB has recognized that it is within the discretion of an employer to select those employees it considers to be the most superior for its program. (*Bellevue Union Elementary*

School District (2003) PERB Decision No. 1561, p. 4.) Bereaud testified about the rationale used in his recommendations for course assignments and about specific reasons why he paired certain adjunct instructors with particular course selections in Fall 2014. Bereaud's specific reasons for his recommendations corresponded with the criteria he testified about. There is no basis to find that his reasons were pretextual. There was also no indication that Bereaud or Hopkins found fault of any kind with Douglas's performance as an instructor. By all accounts, Douglas had very good performance reviews. Rather, because there were more contract faculty hired after the hiring freeze abated, there were less course sections available for adjunct faculty, in particular for the higher level courses that Douglas had been teaching and which he expressed that it was his preference to continue teaching. The District's justifications here were supported by the evidence. It has therefore met its burden to show that it failed to assign Douglas a course in Fall 2014 because of non-discriminatory reasons, and not because of Douglas's protected conduct. (*Palo Verde, supra*, PERB Decision No. 2337, p. 31.)

Conclusion

Although Douglas met his burden of stating a prima facie case of retaliation, the evidence of unlawful motivation was slight in comparison with the District's evidence of its non-discriminatory reasons for evaluating Douglas when it did and not having a course to offer him in Fall 2014. For all of the above reasons, the allegations in the complaint in this matter must be dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact, conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. LA-CE-5972-E, *Scott Douglas v. San Diego Community College District*, are hereby DISMISSED.

Right to Appeal

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
E-FILE: PERBe-file.Appeals@perb.ca.gov

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 or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 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, 32091 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).)