

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



DAMJAN POSEDEL,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (LOS ANGELES),

Respondent.

Case No. LA-CE-1209-H

PERB Decision No. 2481-H

May 27, 2016

Appearances: Damjan Posedel, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo, Attorney, for Regents of the University of California (Los Angeles).

Before Winslow, Banks and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Damjan Posedel (Posedel) to a proposed decision (attached) by a PERB administrative law judge (ALJ), which dismissed the complaint and Posedel's unfair practice charge against the Regents of the University of California (University). The complaint alleged that the University violated the Higher Education Employment Relations Act (HEERA)¹ by terminating Posedel's employment on or about July 12, 2013, in retaliation for his protected activity, which included filing and pursuing a previous PERB charge in Case No. LA-CE-1153-H.²

¹ HEERA is codified at Government Code section 3560 et seq.

² The prior Board charge resulted in *Regents of the University of California* (2014) PERB Decision No. HO-U-1121-H, which is non-precedential, but binding on the parties. Reasoning that the prior decision had preclusive effect, the ALJ refused to allow Posedel to relitigate the propriety of prior disciplinary actions which lead to Posedel's dismissal. The ALJ also refused to consider some protected conduct included in the complaint because it was alleged to have occurred after the University gave notice of its intent to dismiss Posedel. The

While recognizing that Posedel received notice of the University's intent to dismiss him while scheduling a formal hearing in PERB Case No. LA-CE-1153-H, the ALJ reasoned that this fortuitous timing, by itself, was insufficient to establish that Posedel's protected conduct was a substantial factor in the University's decision to dismiss him. The ALJ found no evidence to support Posedel's allegations of disparate treatment in his work location, working conditions, or job assignments relative to other employees in his classification and found no other persuasive evidence of nexus. The ALJ also found no evidence to support Posedel's allegations that the University failed to follow established procedures either in processing Posedel's whistleblower retaliation complaints or in finalizing Posedel's dismissal after he took a medical leave of absence. Alternatively, the ALJ found that, even assuming Posedel had established a prima facie case for retaliation, the University would have met its burden to show that it would have dismissed Posedel anyway for his unsatisfactory job performance.

Posedel has filed 11 exceptions which challenge some of the ALJ's factual findings and credibility determinations. The University takes no exception to the ALJ's factual findings or legal conclusions and urges the Board to adopt the proposed decision.

The Board has reviewed Posedel's statement of exceptions, the University's response and supporting brief, the proposed decision and the entire record in light of applicable law. As explained below, we decline to consider most of Posedel's exceptions for non-compliance with PERB regulations. To the extent Posedel has identified and asserted any issue of fact, law or procedure warranting Board review as required by PERB's regulations, the ALJ's findings of

ALJ reasoned that, although protected, Posedel's participation in PERB proceedings after July 2013 could not have been a contributing factor in the University's decision to take adverse action. Posedel has not excepted to these findings or conclusions and thus the scope of issues is limited to the lawfulness of the University's termination of Posedel. (PERB Reg. 32300, subd. (c); PERB regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq.)

fact were adequately supported by the record and his conclusions of law were well-reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself.

DISCUSSION

PERB Regulation 32300 requires the party filing exceptions to a proposed decision to include: (1) a statement of the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) identify the page or part of the decision to which each exception is taken; (3) designate the portions of the record relied upon; and (4) state the grounds for each exception. (Reg. 32300, subd. (a)(1)-(4).)

PERB follows the policy of California courts favoring resolution of disputes on their merits and against depriving a party of the right to appeal because of technical noncompliance in matters of form. (*Trustees of the California State University* (1989) PERB Order No. Ad-192-H, pp. 4-5; *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 916.) However, compliance with the regulation is required to afford the respondent and the Board adequate notice of and opportunity to address the issues. (*Temecula Valley Unified School District* (1990) PERB Decision No. 836, pp. 2-3; *San Diego Community College District* (1983) PERB Decision No. 368, p. 13.) Consequently, failure to comply with even the most basic requirements of the regulation has resulted in dismissal of a matter without Board review of the merits of the excepting party's claims. (See *California State Employees Association (O'Connell)* (1989) PERB Decision No. 726-H, p. 3; *Los Angeles Unified School District (Mindel)* (1989) PERB Decision No. 785.)

The Board need not address exceptions in which the party seeking relief has simply reasserted its claims without citing to the record or otherwise identifying a specific error of

fact, law or procedure to justify reversal. (*Los Rios College Federation of Teachers (Sander, et al.)* (1995) PERB Decision No. 1111 (*Los Rios (Sander, et al.)*), pp. 6-7; *State of California (Department of Youth Authority)* (1995) PERB Decision No. 1080-S (*Youth Authority*), pp. 2-3; *San Bernardino City Unified School District* (2012) PERB Decision No. 2278, pp. 2-3; *County of San Diego* (2012) PERB Decision No. 2258-M, pp. 2-3.) Where the substance of a party's exceptions were properly considered and resolved by the ALJ, no further discussion is required by the Board. (*Trustees of the California State University (Culwell)* (2014) PERB Decision No. 2400-H (*CSU (Culwell)*), pp. 2-3; *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Compton Unified School District* (2003) PERB Decision No. 1518, p. 6, fn. 1.) Additionally, matters raised in exceptions may only come from the record. (PERB Reg. 32300, subd. (b); *State of California (Department of Developmental Services)* (1985) PERB Order No. Ad-145-S, p. 10; see Gov. Code, § 11425.10 and *English v. City of Long Beach* (1950) 35 Cal.2d 155, 158-159.)

Several of Posedel's exceptions fail to comply, even marginally, with the requirements of the regulation. Exception Nos. 1-6, 8, 9 and 10 attack the ALJ's reliance on testimony from Posedel's former supervisor, Associate Professor Jeanette Papp (Papp), either because she could not remember or clearly describe events regarding Posedel's alleged performance deficiencies in 2010 and 2011 or because, according to Posedel, she lied about being an experienced computer programmer and, most likely, lied about other matters as well. As explained in the proposed decision, where Papp's and Posedel's testimony conflicted, the ALJ credited Papp's version of events because Posedel's testimony was internally inconsistent and contradicted not only by Papp, but also by other evidence in the record, including e-mail correspondence documenting Papp's willingness to provide assistance and support to Posedel on various issues. (Proposed dec., p. 9.)

Additionally, the ALJ found, contrary to Posedel's assertion, that Papp was forthright about her lack of knowledge and familiarity with computer programming. He also found Papp's inability to recall specific details about Posedel's alleged misconduct reasonable, as these events had allegedly occurred four to five years before the hearing in this matter. (*Id.* at pp. 2, 9-10.) We reject these exceptions to the ALJ's factual findings and credibility determinations because they merely recycle contentions that were already adequately addressed by the ALJ. (*CSU (Culwell)*, *supra*, PERB Decision No. 2400-H, pp. 2-3; *Los Rios (Sander, et al.)*, *supra*, PERB Decision No. 1111, pp. 6-7; *Youth Authority*, *supra*, PERB Decision No. 1080-S, pp. 2-3.)

Other exceptions assert that certain factual findings of the proposed decision are reversible error but fail to designate the portions of the record relied upon or to cite to contrary evidence in the record to support the assertion of factual error. Posedel argues in Exception Nos. 8 and 9 that the ALJ committed reversible error by assuming, without any evidence, that Posedel was able to make changes to his workstation and that he suffered no differential treatment because the entire department was required to relocate to another office. Exception No. 11 similarly asserts that the University failed to accept and process Posedel's whistleblower retaliation claim. However, Posedel cites to no evidence in the record to support any of these assertions and, to the extent he relies on information not contained in the record, he has offered no explanation why such information was not available at the time of the hearing, or why he failed to put on such evidence in order to meet his burden, as the charging party, to support these contentions.

Exceptions Nos. 1-6, 8, 9 and 11 include identical assertions that Posedel timely requested subpoenas for documents in support of various points but that his request was denied. Near the end of the second day of hearing, after each side had rested its case-in-chief, Posedel

asked the ALJ to issue subpoenas for all e-mail correspondence between Papp and several other University employees, who had either complained to Papp about Posedel or who, as part of their human resources or employee relations duties, had consulted with Papp about progressive discipline of Posedel culminating in his dismissal. Posedel explained that the requested documents were necessary because Papp's testimony was so "ambiguous, vague, and exaggerating" in that it omitted names, dates and other details, that Posedel needed her e-mail correspondence "to confirm and clarify what exactly certain sections of her testimony mean." (Reporter's Transcript (R.T.), Vol. II, 210:1-10.) We disagree.

PERB Regulation 32150 provides, in relevant part, that *before* the hearing has commenced, the Board shall issue subpoenas at the request of any party for attendance of witnesses or production of documents at the hearing. The regulation also provides that compliance with the provisions of section 1985 of the Code of Civil Procedure shall be a condition precedent to the issuance of a subpoena for production of documents. After the hearing has begun, a decision to issue subpoenas is left to the sound discretion of the Board agent conducting the hearing. (PERB Reg. 32150, subd. (a); see also Code Civ. Proc., § 1985, subd. (b).)³

As the ALJ explained at the hearing, despite being a self-represented layperson, Posedel was familiar with PERB's unfair practice proceedings from his previous case. He understood that, as the charging party, it was his burden to put on relevant documentary evidence and/or competent witness testimony to support the elements of his prima facie case, including whether the University had conducted an inadequate investigation, departed from established procedures,

³ Code of Civil Procedure section 1985, subdivision (b), similarly requires that a subpoena duces tecum be served with accompanying affidavit *before trial*. The statute also provides that subpoena and affidavit "specify[] the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case."

or applied disparate standards when administering discipline. (*Rio School District* (2015) PERB Decision No. 2449, pp. 3-4; *California Statewide Law Enforcement Association (Armantrout)* (2014) PERB Decision No. 2386-S, p. 9; *Oakland Unified School District* (2009) PERB Decision No. 2061, p. 7.) Despite having had more than a month and a half to request subpoenas for witnesses or documents, Posedel waited until the hearing was underway and even nearly complete to request documents which would have fleshed out the details of matters referenced in the disciplinary documents at issue in this case. (R.T., Vol. II, 210:11-25, see also Vol. II, 6:26-7:12.) Under the circumstances, we agree with the ALJ that the unqualified breadth of Posedel's request and the resulting delay for documents which Posedel knew or reasonably should have known would form part of his case-in-chief justified the ALJ's refusal to grant Posedel's last-minute request for subpoenas. (PERB Reg. 32150, subd. (a); *State of California* (2002) PERB Decision No. 1484-S, pp. 2-3.)

Finally, Posedel's Exception No. 10 consists solely of a passage quoted from the proposed decision but includes no explanation or grounds for Posedel's exception.

In light of the above, we decline to consider most of Posedel's exceptions for non-compliance with PERB regulations and, to the extent, he has identified and asserted an error of fact, law or procedure, we deny the exception for failure to rely on evidence in the record for support.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1209-H are hereby DISMISSED.

Members Winslow and Gregersen joined in this Decision.



**STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD**

DAMJAN POSEDEL,
Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (LOS ANGELES),

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-1209-H

PROPOSED DECISION
(August 13, 2015)

Appearances: Damjan Posedel, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo, Attorney, for Regents of the University of California (Los Angeles)

Before Kent Morizawa, Administrative Law Judge.

In this case, a higher education employee claims that his employer violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by terminating his employment in retaliation for engaging in protected activity. The employer denies any violation.

PROCEDURAL HISTORY

On January 10, 2014, Damjan Posedel filed the instant unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Regents of the University of California (Los Angeles) (University). On October 15, 2014, the PERB Office of the General Counsel issued a complaint alleging that the University violated HEERA when it issued Posedel a notice of dismissal in retaliation for participating in a prior PERB proceeding.

On November 10, 2014, the University filed an answer to the PERB complaint denying any violation of HEERA and setting forth its affirmative defenses. The parties participated in an informal settlement conference on November 12, 2014, but the matter was not resolved.

¹ HEERA is codified at Government Code section 3560 et seq.

PERB held a formal hearing on May 18 and 19, 2015, and the matter was submitted for decision when post-hearing briefs were filed on July 27, 2015.

Related Prior Proceeding

Posedel and the University were involved in a prior PERB proceeding (PERB Case No. LA-CE-1153-H) where Posedel alleged that the University retaliated against him for engaging in protected activity under HEERA by placing him on administrative leave and issuing him an October 22, 2012 Warning Notice – Unsatisfactory Job Performance and Conduct. Posedel filed that unfair practice charge on May 2, 2012, and the PERB Office of the General Counsel issued a complaint on January 22, 2013. The parties participated in an informal settlement conference on April 4, 2013, but were unable to resolve the matter. A formal hearing was held in September and October of 2013, after which Administrative Law Judge (ALJ) Eric J. Cu issued a proposed decision finding that Posedel’s placement on administrative leave constituted unlawful retaliation, but that the issuance of the Warning Notice did not. Neither party filed exceptions to the proposed decision, and it is now final.

Findings of fact and law made by an ALJ in a prior proceeding that were not appealed to the Board are binding on the parties in a subsequent proceeding and may not be relitigated. (*Antioch Unified School District* (1986) PERB Decision No. 581; *Trustees of the California State University of the California* (2008) PERB Decision No. 1949-H.) Accordingly, official notice is taken of ALJ Cu’s decision in PERB Case No. LA-CE-1153-H,² and any relevant findings of fact and law from that decision will be relied upon here as necessary.

² The Board has held that it is appropriate for an administrative agency, such as PERB, to take notice of its own records. (*Regents of the University of California* (1999) PERB Decision No. 1359-H.)

FINDINGS OF FACT

The Parties

Posedel is an employee within the meaning of HEERA section 3562, subdivision (e). Prior to his dismissal, he was employed as a Staff Research Associate (SRA) II in the Sequencing and Genotyping Core Facility (Core Facility) in the Department of Human Genetics at the University of California Los Angeles (UCLA). Posedel's position is in a bargaining unit represented by the University Professional and Technical Employees.

The University is an employer within the meaning of HEERA section 3562, subdivision (g). At all relevant times, Dr. Jeanette Papp served as the director of the Core Facility.

Background

The Core Facility performs sequencing and genotyping assays for researchers at UCLA. Papp testified that it is critical for the facility to produce accurate, high-quality work because it does not receive any institutional support from UCLA and must generate its entire operating budget through fees for its services. If there are errors, the Core Facility must redo the work for free and absorb the cost of any additional testing, which could be thousands of dollars. Furthermore, if researchers cannot trust the results generated by the Core Facility, there are several other competitors to which they can turn. Papp testified that the Core Facility cannot afford to lose business or absorb losses because it is required to break even each year. She worries that if it fails to do so, the University will shut down the facility and lay off its entire staff, as it has done in the past to similar fee-based facilities that continually operated at a deficit.

Posedel began working at the Core Facility in 2005 as an SRA I, a position that requires familiarity with both laboratory work and computers. Papp testified that she hired Posedel

because he was proficient in both aspects of the job, but in particular the computer element. Posedel's resume indicated he had knowledge of programming, web design, and network administration. In Papp's opinion, at the time Posedel's skill set made him unique and highly desirable. Sometime during his employment with the University, Posedel was promoted into the position of SRA II. The job description for an SRA II sets forth the incumbent's duties and tasks as follows:

Amount of Time	Duties and Tasks
45%	A. Perform DNA Sequencing Reactions
5%	B. Run and maintain 3730 DNA Sequencer
5%	C. Perform general laboratory tasks
10%	D. Perform computer-based management and analysis of data
5%	E. Review the scientific literature, identify key technologies, develop new assays and services
10%	F. Develop and add content to website
10%	G. Provide IT support to the lab and users
10%	H. Meet with customers to consult, plan experiments, and trouble-shoot

Over the course of Posedel's employment at the Core Facility, Papp became concerned with the quality of his laboratory work, which she determined to contain excessive errors. Papp was worried that the errors would affect the financial viability of the Core Facility as well negatively impact the results of a prenatal diagnostic laboratory that shared equipment with the Core Facility. In addition to concerns about his work product, Papp was also concerned about Posedel's lack of professionalism, including poor attendance, interactions with colleagues that were perceived as hostile, and an overall negative attitude. She began meeting with Posedel in 2008 to discuss her concerns with him. However, his job performance did not improve, and she noted his deficiencies in his March 2010 performance evaluation.

On May 16, 2011, Papp issued Posedel a Warning Notice – Unsatisfactory Job Performance and Conduct (First Warning Notice) notifying Posedel of her ongoing concerns about his job performance, including the errors in his laboratory work and his lack of professionalism. At this time, Papp decided to modify Posedel’s job duties so that he no longer performed any laboratory work and only performed computer-related tasks, such as computer-based management and analysis of data, development and addition of content to the website, and review of scientific literature to identify key technologies and develop new assays and services. She also assigned Posedel a new work location and began supervising him directly.

Posedel took a leave of absence from May 23, 2011 through September 6, 2011. By late September 2011, Papp began having additional concerns about Posedel’s job performance, including a failure to complete assigned tasks and the disruption of other staff members’ work. She intended to issue Posedel further discipline based on those concerns. However, before she could do so, Posedel took another leave of absence beginning on November 3, 2011. Upon his return to work on October 22, 2012, Papp issued him a Warning Notice – Unsatisfactory Job Performance and Conduct (Second Warning Notice), which detailed the concerns about his job performance that she had identified prior to his leave of absence. After receiving the Second Warning Notice, Posedel took another leave of absence, this time from November 15, 2012 to May 10, 2013.

Posedel’s Dismissal From Employment

When Posedel returned to work, Papp gave him a detailed assignment sheet that specified a number of computer-related projects and tasks for Posedel to complete, with

deadlines for each task that ranged from one to two weeks.³ Papp testified that the tasks she assigned Posedel fit within D, E, and F of the duties and tasks in the SRA II job description. The assignment sheet also set forth specific procedures for Posedel to follow. For example, he was required to place his work in a shared folder on the network so Papp could review and comment on his work. He was also required to meet with Papp on a weekly basis to discuss his progress in completing his assignments.

Posedel did not complete or make progress on most of the tasks Papp assigned to him. The only task he completed was reading a manual for a specific computer program called GeneMapper. However, Posedel never actually opened the GeneMapper program to complete the task related to that program.⁴ Posedel did not place any work in the shared folder on the network or submit weekly progress reports as Papp had directed him to do. Posedel also failed to report to work on time, sometimes arriving up to sixty minutes late. In addition to his deficient job performance, Papp also found Posedel's interactions with her to be hostile and intimidating. Posedel would raise his voice when speaking to her, interrupt her without letting her finish, and question her authority as his supervisor. Papp communicated her dissatisfaction with Posedel's job performance and professionalism to him during their weekly meetings, but neither improved.

Posedel testified that a number of factors prevented him from completing his work. He stated that the computer the University issued to him was non-operational because it lacked a

³ Some of the projects on the assignment sheets were marked as "cancelled." Papp initially assigned all of the tasks and projects on the assignment sheet to Posedel in 2011 and again in 2012, but had to direct other employees to complete them in the interim due to their time sensitive nature.

⁴ Papp testified that she set up Posedel's computer to log any instances when GeneMapper was activated, and there were no instances of the program being activated.

functioning printer and its screen resolution was set to 640 x 480, which he believes is too low to perform any work. He also testified that when he returned to work, he was placed in an underground office that made it difficult for him to perform his duties, and that his work station collapsed in June 2013. He further testified that he could not complete some of the assigned tasks within the allotted time because they required him to learn the programming language Visual Basic, which he believed would take two to three years. Posedel also testified that he had trouble accessing the building when he returned to work. However, when he voiced his access concern to the University, it responded by asking him to visit the security office for assistance.⁵

Papp's testimony regarding Posedel's ability to complete his assignments directly contradicts that of Posedel. Papp testified that in the weeks prior to Posedel's return to work, she tested Posedel's computer and was able to perform her work without any trouble. She testified that Posedel's computer was similar to what others in the Core Facility were using, and when Posedel raised concerns about his computer, the University's specialists were quick to respond and assist him. The University was also diligent about providing Posedel with replacement equipment through the reasonable accommodation process, and Posedel expressed satisfaction with what the University provided. Papp testified that Posedel was placed in a new office upon his return to work because while Posedel was on leave the entire department had been moved to accommodate a new faculty member. While the office did not have windows, it was on the second floor of the building; not underground. Papp further testified that while Posedel could use Visual Basic to complete the assigned tasks, it was not necessary and that he

⁵ It is unclear if and when Posedel visited the security office for assistance or if his access issues persisted.

should have been able to use his existing knowledge of computer programming to complete those tasks.

On June 13, 2013, Papp issued Posedel a Notice of Intent to Dismiss for Unsatisfactory Performance (Intent to Dismiss). The Intent to Dismiss is based on Papp's determination that Posedel's job performance was severely inadequate and had failed to improve, despite his receipt of the First Warning Notice and Second Warning Notice. Posedel received the Intent to Dismiss during a time when he and the University were trying to schedule a formal hearing in PERB Case Number LA-CE-1153-H.

After receiving the Intent to Dismiss, Posedel was provided the opportunity to participate in a hearing pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, but he ultimately declined to do so. On June 20, 2013, Posedel made it known to the University that he desired to file a whistleblower retaliation complaint with the University. The University responded by saying should Posedel wish to do so, he should file the complaint in accordance with the University's policies, which were previously forwarded to Posedel. Posedel testified that he did not file a complaint because he believed the University had denied his request.

On June 27, 2013, Posedel submitted a response to the Intent to Dismiss, asserting that he had been provided inadequate direction and equipment to complete the tasks that Papp assigned to him. On July 12, 2013, Anne Carson, the Chief Administrative Officer of the Department of Human genetics, upheld Papp's Intent to Dismiss and issued Posedel a Notice of Dismissal for Unsatisfactory Performance (Dismissal Notice).

Credibility Determinations

The standards for evaluating witness credibility in Evidence Code 780 are: demeanor; character of testimony; capacity to perceive, recollect, or communicate; bias, interest, or motive; prior consistent or inconsistent statements; attitude; admissions of untruthfulness; and existence or non-existence of facts testified to.

To the extent Posedel and Papp's testimony contradict each other, Papp's testimony is credited because Posedel's testimony is inconsistent with itself and with other evidence in the record. For example, Posedel asserts that Papp refused to fix any deficiencies with his equipment, but email correspondence between the two shows that she actively assisted him. When Posedel had trouble filling out an electronic order form to purchase an ink cartridge for his printer, Papp walked him through the process via email then ultimately sat with him and helped him fill out the form. As another example, Posedel testified that he had immense trouble with his computer, but he also testified that he is a computer expert, and his resume shows that he has substantial knowledge of computers. It is difficult to believe that someone so skilled in computers would have such a hard time troubleshooting simple issues like screen resolution or a printer lacking a functioning ink cartridge.

Posedel's attempts to discredit Papp's testimony are also unpersuasive. He asserts that her testimony is unreliable because she lied about being an experienced computer programmer and therefore must have lied about other aspects of her testimony. However, Papp did not claim that she is an experienced computer programmer. To the contrary, although she stated she has some knowledge of computer programming, she was forthcoming in stating that it is not her area of expertise. Posedel also calls into question Papp's failure to recall specific details surrounding Posedel's misconduct. However, Papp's inability to recall these details

occurred during questioning of events that occurred in 2010 and 2011, and it is reasonable for an individual to have difficulty recalling with complete clarity details of events that occurred so long ago. Posedel also asserts that Papp's testimony is unreliable because she failed to take adequate steps to investigate his alleged misconduct in 2010 and 2011, noting that she failed to speak to each and every witness prior to drawing conclusions about Posedel's conduct.

However, it is unclear how this casts doubt on Papp's credibility. She testified that at the time those events occurred, she spoke to Posedel's supervisor to gather information, and she drew conclusions based those discussions. While speaking to each and every witness may have constituted a more exhaustive investigation, it is reasonable for an administrator to rely on facts relayed to her by a subordinate given the time required to conduct the type of investigation that Posedel implies should have occurred.

Based on the above, Papp's testimony is credited over Posedel's where they contradict each other. Specifically, I find that upon his return to work in May 2013, Posedel's computer was sufficiently functional to allow him to complete, or at the very least begin, his assigned tasks, and that Posedel possessed the requisite skill level to perform the tasks Papp assigned to him.

ISSUE

Did the University retaliate against Posedel for engaging in protected activity when it issued him the Dismissal Notice?

CONCLUSIONS OF LAW

To demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571, subdivision (a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of

those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*)). The University does not dispute that Posedel engaged in protected activity by filing and prosecuting the unfair practice charge in PERB Case Number LA-CE-1153-H,⁶ that it had knowledge of Posedel's protected activity, and that it took adverse action against Posedel by terminating his employment. Accordingly, the only element of the prima facie case in dispute is nexus.

The timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor in establishing nexus. (*North Sacramento School District* (1982) PERB Decision No. 264). Posedel was terminated while actively litigating PERB Case Number LA-CE-1153-H. His termination occurred two months after he attended an informal conference in that matter and the same week he was attempting to schedule the formal hearing. Accordingly, timing is established as a nexus factor.

However, timing alone does not demonstrate the necessary nexus between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent

⁶ It should be noted that the complaint references protected activity that occurred after Posedel received the Dismissal Notice. This activity cannot serve as a basis for Posedel's claim of retaliation. (See *Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H [to establish prima facie case of retaliation, the protected activity must precede the adverse action.])

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

As an additional nexus factor, Posedel argues that the University treated him differently by moving him to an underground office upon his return to work in May 2013. However, the entire department was forced to change offices while Posedel was on medical leave due to a reallocation of space outside of Papp's control. In this sense, Posedel was treated similarly to his coworkers. Furthermore, although Posedel implies that his office was in a remote location, the record reflects that his office was on the second floor of the hospital in an area with other offices and University departments. Although it had no windows, it was not underground.

Posedel also argues that his non-operational computer is evidence of disparate treatment. As discussed above, Papp's testimony is credited that she was able to use Posedel's workstation without incident, and that his workstation was substantially similar to those used by his coworkers. Posedel asserts that the screen resolution on his computer was set to 640 x 480, which he argues rendered the machine non-operational. However, nothing in the record

supports a connection between screen resolution and a computer's functionality. While less information may fit onto a screen with a lower resolution, it is unclear how that makes the computer non-operational. It is also unclear why Posedel, who held himself out as possessing vast computer experience, was unable to simply increase the screen resolution from the settings on his monitor if that is what he desired. The record does not suggest that he was precluded from doing so, either because he lacked the know-how or because a component in the computer was faulty such that it rendered the screen resolution static. It is also unlikely, as Posedel suggests, that the University refused to provide him with a functioning computer. The record reflects that the University actively engaged with Posedel in the reasonable accommodation process and replaced or fixed any faulty equipment shortly after being brought to the University's attention.

Posedel also asserts that he was made to perform more assignments that required him to use his knowledge of computer programming than other SRA IIs. While this is true, computer-related tasks are squarely within the duties listed in the SRA II job description. Furthermore, Papp required Posedel to perform more of these duties than other SRA IIs because she no longer trusted him to perform laboratory work. It is reasonable to expect that he would be required to perform more computer-related tasks than his coworkers given this modification to his job duties. Posedel appears to imply that he was not equipped to perform the computer-related tasks Papp assigned to him. However, most of the tasks she assigned to him do not require an extensive knowledge of computer programming, and to the extent that they do require computer programming, Posedel held himself out as possessing these skills when he interviewed for the position and when he testified at the hearing.

Posedel also notes that the University failed to follow established procedures when processing his dismissal, arguing that his dismissal while on medical leave is suspicious. However, Posedel failed to show that there is any University policy that would prohibit the University from initiating and finalizing the dismissal process while an employee is on a leave of absence, medical or otherwise. He also argues that the University failed to follow its procedures for processing whistleblower retaliation claims when it rejected his June 2013 claim. However, the evidence reflects that the University responded to Posedel's emails about a whistleblower retaliation claim by directing him to file the complaint in accordance with the applicable procedures, of which it had apprised Posedel in the past. The University did not deny him the opportunity to file a complaint. It simply requested that he do so in accordance with the University's procedures, which is neither unreasonable nor unusual under the circumstances.

Based on the above, Posedel did not establish a prima facie case for retaliation because he did not establish any nexus between his protected activity and his dismissal.

The University's Burden of Proof

Even assuming Posedel had established a prima facie case for retaliation, the University would have met its burden to show that it dismissed Posedel for a non-discriminatory reason. Once the charging party establishes a prima facie case for retaliation, the burden of proof shifts to the respondent to show that the adverse action occurred for reasons unrelated to the protected activity. (*Novato, supra*, PERB Decision No. 210; *Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line, a Division of Wright Line, Inc.* (1980) 251 NLRB 1083, 1089, *enfd on other grounds* (1st Cir. 1981) 662 F.2d 899, *cert. denied* (1982) 455 U.S. 989.) In cases where an adverse action appears to have

been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred “but for” the protected acts. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C.) This requires the employer to establish that it had an alternative non-discriminatory reason for the challenged action and that it acted because of this alternative non-discriminatory reason and not because of the employer’s protected activity. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337.) Stated another way, the respondent must prove by a preponderance of the evidence that the challenged action would have occurred in the absence of the employee’s protected activity. (*Ibid.*)

The University put forth ample evidence to support a finding that it dismissed Posedel for his unsatisfactory job performance; not for engaging in protected activities. Papp started having concerns about Posedel’s work performance as early as 2008 and began discussing her concerns with him at that time, ultimately memorializing them in a March 2010 performance evaluation. In May 2011, she issued the First Warning Notice, which identified areas of concern relating to Posedel’s job performance and overall attitude, such as frequent errors and hostile interactions with coworkers.

When Posedel’s job performance and attitude did not improve after the First Warning Notice, Papp issued the Second Warning Notice, which contained additional concerns about Posedel’s job performance, such as a failure to complete assignments and ongoing conduct that his coworkers deemed to be disruptive. Even after receipt of the Second Warning Notice, Posedel’s job performance and attitude still did not improve. After he returned to work in May 2013, Posedel failed to complete any of the tasks assigned to him. Posedel did not challenge the fact that he did not complete any assignments, instead arguing that he was unable to do so because he was saddled with non-operational equipment and that deadlines were unreasonable.

As indicated above, his testimony that his equipment was completely non-operational is not credited and cannot serve as a defense to why he performed no work. Furthermore, even assuming Papp's deadlines for completion of assignments were unreasonable, that does not justify Posedel's failure to make any progress at all on those assignments. In addition to failing to complete assignments, Posedel was also consistently late to arrive to work and continued to engage in conduct that his coworkers perceived as disruptive and hostile. For these reasons, Papp issued the June 13, 2013 Intent to Dismiss, and Carson ultimately upheld Posedel's dismissal after reviewing his response and all other pertinent information.

Based on the above, even assuming Posedel had established a prima facie case for retaliation, the University would have met its burden to show that his dismissal would have occurred in the absence of his involvement in PERB Case No. LA-CE-1153-H. Posedel's dismissal was the last link in a chain of progressive discipline that began long before Posedel filed the unfair practice charge in LA-CE-1153-H. Papp's concerns over Posedel's job performance continued over an extended period of time, and Posedel was given ample opportunity to correct deficiencies, which he did not do. The University dismissed Posedel on that basis, not for his protected activities.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-1209-H, *Damjan Posedel v. Regents of the University of California (Los Angeles)*, are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the

Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

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

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

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

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