STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC MOBERG, Charging Party, v. HARTNELL COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2984-E PERB Decision No. 2567 June 12, 2018

Appearances: Eric Moberg, on his own behalf; Liebert, Cassidy Whitmore, by Eileen O-Hare-Anderson, Attorney, for Hartnell Community College District.

Before Banks, Winslow, and Krantz, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Eric Moberg (Moberg) to the proposed decision (attached) of a PERB administrative law judge (ALJ), which dismissed the complaint and Moberg's unfair practice charge against his former employer, Hartnell Community College District (Hartnell). The complaint alleged that Hartnell interfered with Moberg's right to union representation when Hartnell's Associate Vice President of Human Resources and Equal Employment Opportunity Terri Pyer (Pyer) insisted on selecting which union representative would accompany Moberg to an investigative meeting, and that Hartnell retaliated against Moberg for his protected activity by terminating his employment and refusing to pay him for services rendered, in violation of the Educational Employment Relations Act (EERA).[1]

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

The ALJ dismissed both the interference and discrimination allegations for failure to prove one or more of the elements of a prima facie case. He dismissed the interference allegation, after determining there was no evidence to show that Pyer had "insisted that she would choose [Moberg's] representative for him but from a union to which [he] did not belong," as alleged in the complaint. Similarly, the ALJ found that Moberg had proved some of the elements of retaliation under *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), including protected activity and adverse action, but dismissed the allegation for failure of proof that the relevant decisionmaker, Hartnell's President and Superintendent Willard Lewallen (Lewallen), had any knowledge of Moberg's protected activity when he decided to terminate Moberg's employment.[2]

Moberg has filed 12 exceptions, some with multiple sub-issues, and a supporting brief, which dispute various findings and conclusions underlying the ALJ's dismissal of the complaint's interference and retaliation allegations.[3] Moberg argues that, contrary to the proposed decision, he alleged sufficient facts to state a prima facie case that Hartnell interfered with his right to union representation, and that such facts show unlawful motive in support of the complaint's separate retaliation allegation. Moberg also argues that the ALJ improperly

[2] The ALJ also dismissed the complaint's allegation that Hartnell retaliated against Moberg by refusing, post-termination, to pay Moberg for all services rendered, as the record established that Moberg had been paid in full for all work performed and that Hartnell's payroll officials had no knowledge of his protected activity. Moberg does not except to these findings and conclusions and the issue is therefore not before the Board as part of this decision.

[3] Moberg's exception 9 also asserts that the ALJ improperly failed to rule on several requests for administrative notice (one of which Moberg mischaracterizes as a request for judicial notice) of documents which he contends would disprove Hartnell's contention that his educational credentials were fraudulent. Contrary to Moberg's assertion, the ALJ considered and denied each of these requests for reasons that are adequately set forth in the proposed decision. Because we adopt the proposed decision's reasoning and conclusions as to each of these requests, the issue warrants no further consideration by the Board and we deny Moberg's exception as without merit.

failed to consider other evidence supporting the retaliation allegation, including evidence that Hartnell's decisionmaker, Lewallen, knew of Moberg's protected activity before terminating Moberg's employment, as well as other evidence demonstrating that Lewallen's decision was unlawfully motivated. Moberg also excepts to the ALJ's rulings denying Moberg's requests to take administrative notice of various documents not otherwise included in the record.

The District argues that Moberg's exceptions are procedurally defective and substantively meritless, and urges the Board to adopt the proposed decision.

The Board has reviewed the hearing record and exhibits, the proposed decision, Moberg's exceptions and supporting brief, and Hartnell's response thereto in light of applicable law. Based on this review, we find that the ALJ's findings of fact are adequately supported by the record and his conclusions of law are well reasoned and in accordance with applicable law. We adopt the proposed decision as the decision of the Board itself, subject to the discussion below of Moberg's exceptions.

DISCUSSION

Although the Board's review of exceptions to a proposed decision is de novo, it need not address arguments that have already been adequately addressed in the same case or that would not affect the result. (*Trustees of the California State University* (2014) PERB Decision No. 2400-H (*CSU* (*Culwell*)), pp. 2-3); *Los Angeles Superior Court* (2010) PERB Decision No. 2112-I, pp. 4-5; *Morgan Hill Unified School District* (1995) PERB Decision No. 1120, p. 3.) While Moberg excepts to several of the ALJ's findings and conclusions,[4] we limit our

[4] Although the grounds for each exception are not always clearly identified, as required by PERB Regulations, it appears that most of Moberg's exceptions concern whether the ALJ improperly ignored evidence of unlawful motive and/or whether Hartnell established as an affirmative defense that it would have terminated Moberg regardless of his protected activity. Because we conclude that Moberg's exceptions regarding the interference and employer

discussion to the two issues on which the complaint's allegations were dismissed: whether the ALJ properly dismissed the interference allegation for lack of proof that Pyer's September 10, 2012 e-mail message would tend to cause even slight harm to protected rights and, with respect to the retaliation allegation, whether Moberg failed to prove the element of employer knowledge. We first address the interference issue and then turn to the issue of employer knowledge.

Failure to Prove Interference with Protected Rights

To prevail in a case alleging interference, the charging party must show that the employer engaged in conduct that tends to or does result in at least slight harm to rights guaranteed by EERA and that, on balance, the resulting harm to protected rights outweighs any legitimate business justification asserted by the employer. (*Carlsbad Unified School District* (1979) PERB Decision No. 89 (*Carlsbad*), pp. 10-11.) Alternatively, where the employer's conduct is deemed inherently destructive of protected rights, it will be excused only on proof that it was caused by circumstances beyond the employer's control and that no alternative course of action was available. (*County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 36.) Regardless of whether the harm is deemed inherently destructive or comparatively slight, the charging party must prove the elements of the prima facie case by a preponderance of the evidence, and the respondent must come forward with evidence of operational necessity or any other affirmative defense it may assert. (*Carlsbad*, *supra*, PERB Decision No. 89, pp. 10-11; PERB Reg. 32178[5]; *Community Learning*

---

knowledge issues are without merit, we find it unnecessary to determine whether the remainder of Moberg's exceptions and brief comply with the requirements of PERB Regulations.

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

Center Schools, Inc. (2017) PERB Order No. Ad-448, p. 9.) Additionally, an interference violation may only be found where the pertinent statute provides the rights claimed by the charging party. (*Regents of the University of California* (2006) PERB Decision No. 1804-H, adopting warning letter at p. 5.)

In this case, the ALJ found that by copying the Faculty Association president on an e-mail message directed at scheduling an investigative meeting, Pyer did not interfere with Moberg's right to choose his own union representative, because nothing in the message itself or the surrounding circumstances indicated that Pyer was attempting to choose any particular representative for Moberg. Rather, her message sought to ensure both that the interview was not delayed any further, and that the Faculty Association was aware of the interview, so that it could determine which of its agents would represent Moberg in the interview. While not expressly stated as such, the ALJ reasoned that any effect Pyer's e-mail message may have had on Moberg's choice of a representative posed only slight harm to protected rights and that, under the circumstances, it was justified by Hartnell's need to schedule an investigative interview without further delay. Alternatively, the ALJ reasoned that under the circumstances, Moberg had no protected right to choose a particular representative who was unavailable, given that it is ultimately the exclusive representative's prerogative, and not the employee's, to decide which of the union's agents will accompany an employee to an investigative meeting with management.

Exception 6 asserts that the ALJ's findings and conclusions regarding Pyer's interference with Moberg's right to union representation are contrary to the reasoning of our prior decision in this case, *Hartnell Community College District* (2015) PERB Decision

No. 2452.[6] His supporting brief contends that Pyer's "meddling" into Moberg's choice of a representative constituted interference with his protected rights and the "'internal affairs' of Moberg's relationship with his union," as determined by the Board in *Hartnell*, *supra*, PERB Decision No. 2452. We disagree.

In *Hartnell*, *supra*, PERB Decision No. 2452, we reviewed the dismissal of Moberg's amended unfair practice charge alleging interference and retaliation. On review of a dismissal without hearing, the Board treats the charging party's factual allegations as true (*San Juan Unified School District* (1977) EERB[7] Decision No. 12, p. 4; *Golden Plains Unified School District* (2002) PERB Decision No. 1489, p. 6), and considers them in the light most favorable to the charging party's case (*California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4). We may also consider information provided by the respondent under certain circumstances (see PERB Reg. 32620, subd. (c)), but, in the absence of a formal hearing and a developed evidentiary records, it is not the function of the Board or its agents to judge the merits of the charging party's dispute by resolving factual disputes or making credibility determinations. (*Golden Plains*, *supra*, PERB Decision No. 1489, p. 6; *Eastside Union School District* (1984) PERB Decision No. 466, pp. 6-7.)

Because the matter came before the Board on review of a dismissal/refusal to issue a complaint, the focus of our review in *Hartnell*, *supra*, PERB Decision No. 2452 was whether

[6] Exception 1 similarly argues that Moberg may rely on Pyer's interference with protected rights to support a finding of nexus in his separate retaliation allegation, and that the ALJ thus erred by ignoring this evidence of nexus. Although exception 1 thus pertains to the retaliation rather than interference allegation, it suffers from the same problem as exception 6, in that it ignores the procedural posture of our prior decision and mischaracterizes its holdings, by confusing *factual allegations* made at the pre-hearing stage of PERB proceedings with *factual findings* resulting from a formal hearing and developed record.

[7] Before January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.

Moberg had *alleged* sufficient facts to state a prima facie case of interference and retaliation, not whether Moberg had *proved* anything because, at that point in the proceedings, there had been no formal hearing or opportunity for examination and cross-examination of witnesses with personal knowledge of the matters in dispute. (PERB Regs. 32176; 32180.) Having determined that Moberg had alleged sufficient facts to state a prima case of interference and retaliation, we vacated the dismissal and directed the Office of the General Counsel to issue a complaint in this matter. The Board's prior decision in this matter made no factual findings and left it to the Board's hearing process for Moberg to prove the complaint allegations with competent and admissible evidence. (PERB Regs. 32178.)

Whereas the complaint and Moberg's unfair practice charge alleged that Pyer "insisted that she would choose [Moberg's] representative for him but from a union to which [he] did not belong," the record did not support this allegation. As noted in the proposed decision, after several unsuccessful attempts to schedule an investigative meeting with Moberg, on September 10, 2012, Pyer sent an e-mail message inquiring about Moberg's availability. The message was copied to Ann Wright (Wright), the president of the Faculty Association, which was Moberg's exclusive representative. On its face, Pyer's message states that it was copied to Wright to ensure that *some* union representative would be able to accompany Moberg at the investigative meeting. As the president of the Faculty Association, Wright had the authority to speak on the organization's behalf and to decide which of its available representatives would accompany Moberg to the investigative meeting. (*County of San Bernardino (Office of the Public Defender)*, (*supra*), PERB Decision No. 2423-M, p. 36; *Jurupa Unified School District* (2012) PERB Decision No. 2283, p. 30.) Neither the message, nor any other evidence in the

record supports the complaint's allegation that Pyer "insisted that she would choose [Moberg's] representative for him but from a union to which [he] did not belong."

Moberg points to nothing in the proposed decision that contradicts the Board's reasoning in *Hartnell*, *supra*, PERB Decision No. 2452. As we noted there, under the system of exclusive representation authorized by EERA, "once an employee organization is recognized or certified as the exclusive representative of an appropriate unit . . . only that employee organization may represent that unit [of employees] in their employment relations with the public school employer." (*Id*. at p. 34, citing EERA, §§ 3543, subd. (a), 3543.1, subd. (a).) Once recognized or certified, the exclusive representative is solely responsible for designating its agents, including without limitation those who will represent employees in investigative interviews. (*Capistrano Unified School District* (2015) PERB Decision No. 2440, pp. 13-14; *Jurupa*, *supra*, PERB Decision No. 2283, p. 30.) EERA does not oblige an employer to accommodate an employee's choice of a representative, either in scheduling or conducting an investigative interview; provided that, where an employee's preferred union representative is available, an employer may not insist upon a different representative. (*Jurupa*, *supra*, PERB Decision No. 2283, pp. 30-31.) Having attempted for more than two weeks to schedule the investigative meeting with Moberg and his preferred representative, we agree with the ALJ that Hartnell was not obligated to further delay the meeting, and that Pyer's message, appropriately, deferred to the Faculty Association's president to determine which of its agents would be available to represent Moberg. In short, Pyer's message did not interfere with Moberg's right to choose a representative because, under the circumstances, any choice of a representative was for the Faculty Association, and not Moberg, to make.

In light of the foregoing, we reject Moberg's exceptions on this issue and affirm the dismissal of the complaint's interference allegation.

Failure to Prove Employer Knowledge

To prevail in a case alleging retaliation under *Novato, supra*, PERB Decision No. 89 and similar authorities, the charging party must prove that at least one of the respondent's agents responsible for taking adverse action knew of the charging party's participation in protected activity. (*City & County of San Francisco* (2011) PERB Decision No. 2207-M, adopting dismissal letter p. 5.) The ALJ found that Lewallen was the ultimate decisionmaker responsible for terminating Moberg's employment, but that the record did not show that he knew of Moberg's protected activity.

Moberg's exception 10 and his supporting brief assert that his September 12, 2012 e-mail message to Pyer was copied to Lewallen and "several Hartnell Board members," that this fact in turn proves Lewallen knew of Moberg's protected activity before deciding to terminate Moberg's employment, and that the ALJ improperly ignored this evidence to dismiss the complaint's retaliation allegation. As support, Moberg cites to Respondent's Exhibit G and the Board's prior decision in this matter. Respondent's Exhibit G is a hardcopy of Moberg's September 12, 2012 e-mail message to Pyer in which Moberg invoked his right to union representation and threatened to file a charge with PERB if Hartnell failed to respect his rights. The message was addressed to Pyer and several other recipients, none of whom were identified as Hartnell Board members.

Moreover, Lewallen is not listed among the recipients of the message, at least not on the hardcopy entered into the record as Respondent's Exhibit G. The name of last recipient listed, which appears to be Hartnell's Interim Vice President Stephanie Low, is followed by

ellipses, suggesting that other individuals may have also been copied on the message, but that the list of names may have been truncated by the e-mail program for space considerations. Despite this possibility, Lewallen's name does not appear on the face of the document and Moberg has cited to no other evidence in the record to establish employer knowledge. As noted in the proposed decision, Lewallen testified at the hearing, but was not specifically asked about Respondent's Exhibit G or even, more generally, about his knowledge of any of Moberg's protected activity.

For the reasons discussed above regarding Moberg's interference allegation, the Board's prior decision in this matter likewise fails to support Moberg's argument that the ALJ ignored competent and admissible evidence establishing that Lewallen knew of Moberg's protected activity. In summarizing the material allegations of Moberg's third amended charge, our decision in *Hartnell*, *supra*, PERB Decision No. 2452 referenced the September 12, 2012 message as follows:

> Moberg also alleges that on September 12, 2012, he sent an email message to Pyer and Hartnell President Willard Lewallen (Lewallen) in which Moberg invoked his right to representation under EERA section 3543, subdivision (a), and advised Pyer and Lewallen that he would file an unfair practice charge with PERB if Hartnell failed to respect Moberg's right to "union" representation.

(*Id*. at p. 7.)

Among the issues on appeal in *Hartnell*, *supra*, PERB Decision No. 2452 as described at page 17 of the decision, was whether Moberg's message of September 12, 2012, which he allegedly sent to Pyer and Lewallen, constituted evidence of protected activity for establishing a prima facie case of retaliation, because the message invoked Moberg's right to union representation at the investigative meeting requested by Pyer, and because it advised Pyer and

Lewallen that Moberg would file an unfair practice charge with PERB for interference and retaliation if Hartnell did not respect his rights under EERA. After reviewing PERB and private-sector authorities, we concluded, at page 41 of the Decision, that "nothing in his charge or the appeal suggests that [Moberg's] threat to file a PERB charge was not made in good faith," and that, "[b]ecause use of the Board's unfair practice process is itself protected, Moberg [had] alleged sufficient facts to establish that his threat to file a PERB charge was protected, regardless of the merits of his allegations." (*Ibid*.)

Moberg's reliance on *Hartnell*, *supra*, PERB Decision No. 2452 is also misplaced. As discussed above, the Board's *Hartnell* decision was not concerned with resolving factual disputes or making credibility determinations, but with whether Moberg had *alleged* sufficient facts to state a prima facie case of interference and/or retaliation. Indeed, we noted that "the facts included in the charge and supporting materials provide little information about [Moberg's] email exchanges with Pyer and Lewallen," though, for the purpose of reviewing the dismissal of Moberg's charge, we *assumed the truth* of Moberg's allegations and considered them in the light most favorable to his case. (*Id*. at pp. 19, 41.) However, in the absence of a formal hearing and evidentiary record, we made no factual findings on this or any other disputed factual issue in this case. While it is fair to say that, if supported by competent and admissible evidence, Moberg's allegations, as described in our prior *Hartnell* decision, would likely satisfy Moberg's burden of proving protected activity and employer knowledge (PERB Reg. 32178), the ALJ found insufficient evidence in the record to prove Lewallen's knowledge of any of Moberg's protected activity, and Moberg's exceptions and supporting brief likewise fail to identify any competent and admissible evidence requiring reversal on this issue.

The ALJ also considered whether knowledge of Moberg's protected activity could be imputed to Lewallen under the subordinate bias liability doctrine, whereby a decisionmaker relies on inaccurate or biased information provided by a subordinate employee who, in turn, was improperly motivated by protected activity. (*Anaheim Union High School District* (2015) PERB Decision No. 2434, adopting proposed decision, pp. 91-92; *Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 33.) However, the ALJ rejected this theory, after determining that the only reason offered by Lewallen for Moberg's termination was his false educational credentials from Corllins University, and that the record did not establish that the information Pyer provided to Lewallen on this subject was biased or inaccurate.

Moberg's exception 3 asserts that the ALJ failed to consider evidence that Pyer provided Lewallen with inaccurate and incomplete information before rejecting a subordinate bias theory of liability. The exception includes no citation to the record and does not identify any specific evidence that was neglected. PERB Regulation 32300 requires the party filing exceptions to: (1) state 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. (PERB Reg. 32300, subd. (a)(l)-(4).) The language of the Regulation expressly contemplates a statement of exceptions, a brief, or both a statement of exceptions and a supporting brief, and in *Regents of the University of California (San Francisco)* (2014) PERB Decision No. 2370-H, we clarified that while the required content of exceptions to a proposed decision is clearly delineated by the Regulation, the form in which exceptions are presented may vary. (*Id.* at p. 10.) So long as all of the information required by the Regulation is provided, whether in a statement of exceptions, a brief, or a document that combines elements of the two,

the Board should address the substance of the exception, and not summarily reject an issue, simply because some of the required information appears under the heading "statement of exceptions," while other information appears under another heading, or in a separately-titled but accompanying brief. (*Ibid*.) We therefore look to Moberg's supporting brief to determine whether, when read in conjunction with exception 3, he has sufficiently complied with the Regulation's requirements, so as to provide Hartnell and the Board adequate opportunity to address the issues raised. (*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; see also *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 16.)[8]

Although not specifically identified as an exception, Moberg's supporting brief appears to dispute the ALJ's finding that Lewallen was ultimately responsible for deciding to terminate Moberg's employment. Moberg's brief argues that, while Pyer "was not the sole or ultimate

[8] In addition to his supporting brief, some of Moberg's other exceptions potentially overlap in content with exception 3. Exception 5 reiterates Moberg's contention before the ALJ that Pyer's investigation was cursory; exceptions 4 and 8 recite various facts from the proposed decision purportedly demonstrating that Lewallen's decision to terminate Moberg was based on a cursory investigation and incomplete information; and, exception 8 disputes the proposed decision's characterization of Moberg's transcript from Corllins University as "fraudulent credentials," by reiterating his argument before the ALJ that Hartnell "never provided any evidence that the Corllins transcripts were 'fraudulent.'" In this exception, Moberg also asserts that it is undisputed that he was never provided an opportunity to explain, augment, correct or deny any allegations against him before his termination. However, it appears from context that each of these exceptions was intended to address issues of nexus and/or Hartnell's affirmative defense, by showing that its proffered reason for terminating Moberg was pretextual. In any event, the Regulation states that an exception not specifically urged shall be waived (PERB Reg. 32300, subd. (d)), and none of these exceptions refer to the issue of employer knowledge or a subordinate bias liability theory. Without any clear statement of the issues or the grounds for the exception or, at least some explanation of each exception's significance within the overall context of the case, we decline to consider each of these other exceptions as supporting or supplementing Moberg's exception 3 regarding the subordinate bias liability doctrine.

decision-maker, she and Lewallen testified that Pyer had much input into and/or authority to effectively recommend Moberg's termination," and that Pyer "tricked Lewallen into firing Moberg." However, these assertions are not supported by any citation to the record, and thus fail to comply with the Regulation. Paragraph 15 of Moberg's statement of facts similarly asserts that "Interim Vice President Low dismissed Moberg . . . on September 24, 2012," and cites to Low's letter of that date as support for this assertion. The exhibit cited indicates that Low signed the letter informing Moberg of the decision to terminate Moberg's employment. It does not indicate that Low was herself responsible for that decision. It thus fails to support Moberg's factual assertion that Low was responsible, in whole or in part, for Moberg's termination or to identify any error of fact, law, procedure or rationale that would undermine the ALJ's rejection of subordinate bias liability in this case.

In light of the foregoing, we reject Moberg's exceptions concerning employer knowledge and/or the subordinate bias liability doctrine and affirm the dismissal of the complaint's retaliation allegation for failure of proof.

Conclusion

Because Moberg has raised no other issues of fact, law, procedure or rationale that would alter the outcome, we adopt the proposed decision as the decision of the Board itself.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-2984-E are hereby DISMISSED.

Members Winslow and Krantz joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC MOBERG, Charging Party, v. HARTNELL COMMUNITY COLLEGE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-2984-E PROPOSED DECISION (May 12, 2017)

Appearances: Eric Moberg, on his own behalf; Liebert Cassidy Whitmore by Eileen O'Hare-Anderson, Attorney, for Hartnell Community College District.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

This case proceeds from a remand from the Public Employment Relations Board (PERB or Board) and alleges that a public school employer interfered with an employee's right to a union representative by insisting that it would choose a union representative for him and by discriminating/retaliating against that employee by terminating his employment and not paying him for work that he actually performed because of his exercise of protected activities in violation of the Educational Employment Relations Act (EERA).[1] The employer denies committing any unfair practices.

PROCEDURAL HISTORY

On November 5, 2012, Eric Moberg (Moberg) filed an unfair practice charge (charge) against the Hartnell Community College District (District) with PERB. On June 28, 2013,

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

July 30, 2013, and October 17, 2014, Moberg filed a first, second, and third amended charge, respectively. On December 17, 2014, the PERB Office of General Counsel filed its Dismissal Letter of the charges stating, in summary, that Moberg failed to establish a prima facie case for interference of his protected activity and discrimination/retaliation because of his protected activity.

On January 5, 2015, Moberg appealed the Dismissal Letter to the Board itself. After briefing, and continued requests by Moberg to present new evidence, on September 4, 2015, the Board issued its 59-page decision in *Hartnell Community College District* (2015) PERB Decision No. 2452 (*Hartnell CCD*). In this decision, PERB reversed the Dismissal Letter and remanded the matter to the PERB Office of General Counsel to issue a complaint that the District discriminated against Moberg and interfered with his protected rights, in violation of EERA section 3543, subdivision (a), in accordance with the Board's decision.

On October 16, 2015, the PERB Office of General Counsel issued a complaint alleging that the District violated EERA section 3543.5, subdivision (a), by stating that it would choose a representative for Moberg, and by terminating his employment on September 24, 2012, and by failing to pay him in October 2012 for time actually worked in the Fall 2012 semester because of his statement that he would file a unfair practice charge with PERB if the District failed to respect his right to union representation.

On November 5, 2015, the District filed its answer to the complaint, denying any violation of EERA. An informal settlement conference was conducted on November 24, 2015, but the matter was not resolved. Formal hearing on this matter was conducted on February 24, 25, and 26, 2016. The case was submitted for proposed decision on April 22, 2016, when post-hearing briefs were submitted.

FINDINGS OF FACT

Jurisdiction

The District admits in its answer that Moberg is a public school employee within the meaning of EERA section 3540.1, subdivision (j), and that the District is a public school employer with the meaning of EERA section 3540.1, subdivision (k). Dr. Willard Lewallen (Dr. Lewallen) became the President/Superintendent of Hartnell College/District in July 2012 and is responsible for the overall operation of the college. Dr. Lewallen reports to the Board of Trustees as to the college's educational programs, services, and its general operations. In 2012, the District employed approximately 220 part-time faculty members.

The Hartnell College Faculty Association (HCFA or Faculty Association) is the exclusive representative of all full-time regular, contract certificated, and part-time employees, which included Moberg while he was employed with the District as a part-time faculty member. The District and the Association have entered into a Collective Bargaining Agreement with a term which expired on June 30, 2012. For all times pertinent, Ann Wright, Ph.D. (Wright) was the president of the Faculty Association.

Statutory, Regulatory, and Local District Authority

In pertinent part, Education Code section 87356, subdivision (a), provides:

> The board of governors shall adopt regulations to establish and maintain the minimum qualifications for service as a faculty member teaching credit instruction, . . .

In pertinent part, sections of the California Code of Regulations, title 5, provide:

> 53406. Requirement for Accredited Degrees and Units; Definition of Accredited Institution.
>
> All degrees and units used to satisfy minimum qualifications shall be from accredited institutions, unless otherwise specified in this Article.

> For purposes of this Subchapter, "accredited institution" shall mean a postsecondary institution accredited by an accreditation agency recognized by either the U.S. Department of Education or the Council on Postsecondary Accreditation. It shall not mean an institution "approved" by the California Department of Education or by the California Council for Private Postsecondary and Vocational Education.
>
> Determination of equivalency of foreign degree shall be according to district rule.
>
> 53410. Minimum Qualifications for Instructors of Credit Courses, Counselors, and Librarians.
>
> The minimum qualifications for service as a community college faculty member teaching any credit course, . . . shall be satisfied by meeting any one of the following requirements:
>
> (a) Possession of a master's degree, or equivalent foreign decree, in the discipline of the faculty member's assignment.
>
> (b) Possession of a master's degree, or equivalent foreign degree, in a discipline reasonably related to the faculty member's assignment and possession of a bachelor's degree, or equivalent foreign degree, in the discipline of the faculty member's discipline.

The California Community Colleges Board of Governors issues a publication entitled, "Minimum Qualifications for Faculty and Administrators in California Community Colleges," which sets forth the minimum qualifications for community college faculty employed within the California Community College system. A Master's degree is required to teach English at the community colleges. Specifically, the minimum qualifications for the instruction of English courses provides:

> Master's degree in English, literature, comparative literature, or composition OR bachelor's degree in any of the above AND master's degree in linguistics, [Teaching English as a Second Language], speech, education with a specialization reading, creative writing, or journalism OR the equivalent.

The publication also requires that an instructor possess a Master's degree in Education or the equivalent in order to teach Education courses at community college.

District Board Policy 5005 states in part:

> It is the policy of the Governing Board of the Hartnell Community College District to employ academic personnel of the highest quality to help achieve the mission, goals, and objectives of the District, with due consideration of its commitment to equal employment opportunity.
>
> In those disciplines in which academic degrees are customary, candidates recommended to the Board will possess a Master's Degree or equivalent from an accredited institution in their subject field. The minimum qualifications in disciplines not normally requiring a Master's Degree shall be a Bachelor's Degree or equivalent plus related occupational or professional experience required by Title 5, Sections 53410-53413. The process for determining minimum qualifications for faculty hire will be jointly developed by the Superintendent/President and the Academic Senate and submitted to the Governing Board for approval. The process shall include the minimum requirements set forth in Title 5, Sections 53430 (b) and (c).
>
> In the event that a candidate for employment does not meet the minimum qualifications set forth within the standards established by the Board Approved Minimum Qualifications List, it shall be incumbent upon that candidate to apply for an evaluation of equivalency.
>
> The Academic Senate shall establish minimum standards for consideration of equivalency. These standards will be submitted to the Governing Board for approval.

Moberg's Application for Employment with the District

On or about December 22, 2009, Moberg submitted to the District, a cover letter and Application for an Adjunct or Part-time Faculty Position as an English Instructor. In his application, he claimed that he met the minimum qualifications for the position to teach English and therefore did not have to submit an equivalency determination form. For his educational experience, Moberg listed a Doctorate in Education in Higher Education and Adult

Learning from Walden University in Baltimore, Maryland in 2011;[2] a Master's of Arts Degree in English from Corllins University in Santa Clara, California in 2001; a Master's of Arts Degree in Special Education from San Francisco State University (SFSU) in 1998; and a Teaching Credential in Education from the University of California, Irvine (UC Irvine) in 1987.

In the employment history portion of the application, he did not list that he was employed with the San Mateo County of Education (San Mateo COE), but his resume indicated that he was employed with San Mateo COE between 1994 and 2008 as a head teacher.

Moberg did not request an equivalency determination[3] because he was already teaching at Monterey Peninsula College (MPC) in November 2009 and had been assigned to teach a developmental English class, which he thought was similar to the class he would teach with the District. He also felt confident and competent to teach English because he taught high school English classes for years and had written extensively.

Moberg interviewed with Faculty Consultant Heidi Ramirez (Ramirez) for the position of English instructor in January 2010. Ramirez and then Vice-President of Academic Affairs Susan Flannigan (Flannigan) subsequently hired him. He started teaching as a part-time temporary adjunct faculty in February or March of 2010. Sometime during the summer of

[2] Moberg was scheduled to complete this degree in 2011, but at the time of his submission only completed half of the class requirements in 2009 and had not completed his dissertation. Walden is an online school.

[3] If Moberg had requested an equivalency determination, his qualifications would have been reviewed by a committee comprised of two District academic administrators and two faculty members.

2010, Moberg began teaching English in the District's Academy of College Excellence Program (ACE), which was designed to help at-risk students succeed in college.

Fall 2012 Semester

For the Fall 2012 semester, Moberg was assigned to teach two semester long courses: Education 112–Community Survey Results, and English 101—Intermediate Composition and Reading. Both of these courses are part of the ACE program.

The "Agreement for Temporary, Part-Time Hourly, Adjunct Faculty Assignment" between Moberg and the District, stated in part:

> 5. Termination of Agreement Services: This agreement and the services rendered under it may be subject to discontinuance if the Instructor's class or assignment is canceled before a term begins, class enrollment is judged to be too low, it becomes necessary to reassign the class or assignment to a probationary or tenured faculty member; conditions arise which make maintaining the class undesirable for the District, or the Instructor is terminated by the Board of Trustees at its discretion pursuant to Education Code Section 87665.[4] Decisions related to the above rest with the Superintendent/President or designee. Instructor further specifically acknowledges that the District may terminate temporary employment without any obligation to provide a statement of reasons, evidence of cause, or right to hearing.

(Emphasis added.)

Dr. Lewallen testified that the Board of Trustees had delegated to him the decision-making authority to terminate District's temporary employees. No testimony was provided to the contrary.

---

[4] Education Code section 87665 provides:

> The governing board may terminate the employment of a temporary employee at its discretion at the end of a day or week, whichever is appropriate. The decision to terminate the employment is not subject to judicial review except as to the time of termination.

Pyer's Attempt to Interview Moberg over an Employee Complaint

On August 22, 2012, Denyss Estrada (Estrada), an Administrative Assistant in the ACE Program, sent an e-mail to Terri Pyer (Pyer), Associate Vice-President and Chief Human Resources Officer, complaining that Moberg was harassing her by accusing her of taking his California Academy of Arts and Humanities corporate stamp.[5] One of Pyer's many duties was investigating employee complaints. She attempted to complete these interviews of involved employees within three days of the filing of the complaint. She believed this timeline assisted her to obtain employees' recollection while it was fresh in their recollection and to, on occasion, mediate a solution to the complaint.

On August 23, 2012, at around 6:31 p.m., Pyer e-mailed Moberg advising him of her duties with respect to investigating complaints and that she wanted to meet with him in person to discuss Estrada's complaint. At this time, Moberg was already aware of the general allegations of Estrada's complaint. Pyer advised Moberg that her investigation was confidential and asked him to contact her administrative assistant, Monica Massimo (Massimo), to schedule an appointment the following week so they may have a conversation that she expected to last about a half-hour. At 6:59 p.m. that same evening, Moberg sent Pyer an e-mail informing her that since the complaint had become a formal investigation, he was going to arrange for union representation and would get back to her.

Moberg e-mailed Pyer on August 27, 2012 at 11:08 a.m., advising her that he was still arranging a time to meet that would be convenient for both he and his union representative. He then requested information about his alleged misconduct. At 11:28 a.m. that same day, Pyer

[5] This was the first time Pyer had any contact with Moberg.

e-mailed Moberg to inform him that she wanted to meet with him, but was not going to have a discussion about it by e-mail.

Pyer again e-mailed Moberg on August 27, 2012, reminding him of her initial request to meet on August 23, 2012. The next morning, August 28, 2012, Moberg e-mailed Pyer, accusing her of rushing the meeting before he filed a report with the District's Director of Security reporting his missing corporate stamp and then accused the administration of committing a crime and cover-up. In his e-mail, he also included citations to the "Reporting by School Employees of Improper Governmental Activities Act."[6] Moberg added that he was busy that week and was going to talk to Liz Estrella (Estrella) and Hermelinda Rocha (Rocha) to determine their availability to be his union representatives. He suggested that if both were too busy, he would need to look for someone else and suggested meeting over the weekend. The weekend, however, was Labor Day weekend and Pyer was not available to meet at that time.

On September 7, 2012, Massimo e-mailed Moberg attempting to schedule a meeting for Pyer. Moberg responded that he was available on Mondays and Wednesdays and he would check with his union representatives. He also wanted to know the agenda for the meeting.

Pyer's Attempt to Interview Moberg on Wednesday September 12

On Monday, September 10, 2012, Massimo sent an e-mail to Moberg advising him that Pyer wanted to discuss Estrada's complaint and that Pyer was available that afternoon on Wednesday until 3:00 p.m. Moberg responded to Massimo, while copying Pyer, Estrella, and Rocha, that his union representative was on jury duty and that they would need to meet the following week. Moberg inquired as to which regulation or policy he was accused of violating

[6] Education Code section 44110, et seq.

by talking to Estrada and whether Pyer was aware of the whistleblower law. Moberg then express his suspicion over Pyer's failure to provide an agenda and her scheduling an interview over an event which did not merit an investigation.

Pyer then checked with employees from the Human Resources department to determine whether any employees had recently stated that they would be off work on jury duty. Pyer was informed that no District employees had so indicated. Because of this, Pyer believed that Moberg was attempting to delay the interview.

Pyer responded to Moberg by e-mail at 2:04 p.m. and copied Estrella, Rocha and Faculty Association President Wright.[7] In her e-mail, Pyer stated:

> As you are on campus on Wednesday, I want us to meet on Wednesday. Please arrange a time with [Massimo].
>
> While every represented employee may request to have a union [representative] at an investigatory interview under certain conditions, there is no right to have a particular representative at a meeting. I have copied Dr. Wright on this e[-]mail so that we can make sure that someone will be able to attend a meeting with you on Wednesday.
>
> I made the request for a 30-minute meeting with you on August 23, when I asked that it be scheduled within a week. You replied that you did not have even 30 minutes to spare except during the Labor Day weekend.
>
> As I said before, any conversation you and I have will be in conversation when we meet, not in e-mail.

On Wednesday, September 12, 2012, at approximately 10:53 a.m., Moberg sent an e-mail responding to Pyer and copying Wright, Estrella, Rocha, Massimo and Interim Vice-

[7] Pyer copied Estrella and Rocha as Moberg identified them as possible union representatives. She copied Wright in order to ensure that the Faculty Association could arrange representation for Moberg if his chosen representative was not available.

President of Academic Affairs and Accreditation Stephanie Low (Low) entitled, "What is your preference?" Among other things, the e-mail stated in pertinent part:

> Would you prefer to respect my statutory rights under the Educational Employment Relations Act to 'join, and participate in the activities of employee organizations of [my] own choosing. . . [emphasis added.]
>
> or
>
> Would you prefer that I file an Unfair Practice Charge with the Public Employment Relations Board for interference (Government Code section 3543(a)) and retaliation (Government Code section 3543.5)?

(Insertions included in quotation.)

Pyer's Review of Moberg's Personnel File

On September 10, 2012, as Pyer was having difficulty scheduling a meeting with Moberg, she thought she might make more progress in scheduling an interview if she would call him directly by telephone. After 5:00 p.m., Pyer reviewed Moberg's personnel file looking for his telephone number. While she was looking for a telephone number, a glossy or shiny document caught her attention. The document turned out to be Moberg's transcript from Corllins University. The transcript appeared to be very different from the thousands of transcripts which she had reviewed in the past. She also reviewed Moberg's resume and application, which gave her concern.

The "Part-Time Faculty Minimum Qualifications Disciplines Requiring a Master's Degree" form that Pyer found in Moberg's personnel file indicated that the basis for Moberg's qualification to teach English was a Master's of Art degree in English awarded June 22, 2007 from Corllins University. Pyer saw that former Vice-President Flannigan and Faculty

Consultant Ramirez signed this form in March 2010, but the form did not indicate that they believed Moberg met the minimum qualification to teach the English courses.

With respect to the Corllins University transcript, Pyer noted that there was no address, telephone number, name of the registrar with a raised seal, or any indication that the transcript was from an accredited university. A normal transcript was usually on security paper with some indicia of authenticity. Pyer believed the course numbering for the semesters was strange because it showed five consecutive courses in completely different disciplines arranged sequentially for the first semester (e.g., 6526 Human Diversities, 6527 Communications, 6528 Political Science, 6529 Human Psychology, and 6240 Philosophy.) Additionally, the transcript purported to be an official transcript awarding a Master's degree in English, but there were few English classes listed on the transcript.

Pyer then conducted an internet search of Corllins University and determined that it was, in her opinion, a "diploma mill"—an institution that exists only to provide transcripts/degrees without requiring study, attending classes, or completing anything in particular that would ordinarily indicate someone had achieved something that an accredited college or university would require before awarding a degree. In short, she did not believe Corllins University was an accredited university.

Moberg admitted that Corllins University was an online school which sent its correspondence from Dubai, United Arab Emirates.[8] Moberg described Corllins University as "alternative education" where he obtained an "experiential" degree. Moberg admitted he paid

[8] It is unknown from the evidentiary record whether there is an actual physical location of Corllins University.

a fee.[9] The courses listed under the first, second, and third semesters included some of the 44 units he had taken from UC Irvine and other institutions and the publications he had written. He also admitted that he did not take or attend any courses from Corllins. The transcript purportedly awarded Moberg with a Master's of Arts degree in June 2007.

While looking through Moberg's personnel file, Pyer also noted that Moberg listed that he attended or obtained degrees from Glendale University and Prescott University. Pyer believed that these two universities were also unaccredited. Pyer also noted that while Moberg included his prior employment as the head teacher with the San Mateo COE on his resume, he failed to include this information in the employment history section of his application. She was concerned that he did this to avoid having to explain why he had been separated from San Mateo COE.

Pyer's Discussion with Dr. Lewallen

On September 10, 2012, after reviewing Moberg's personnel file, Pyer stopped by Dr. Lewallen's office as she was familiar with his pattern of working after 5:00 p.m. She voiced her concerns that she believed the District had a serious problem in that it was employing an adjunct instructor who did not appear to have the minimum qualifications necessary to teach the subjects he was teaching which then put the College's students' credits and apportionment funding, as well as the integrity of the Human Resources office, in jeopardy. Pyer mentioned that the faculty member did not fill out his application for employment completely as he left off one of his public school employer's and concealed his reason(s) for leaving employment.

[9] It is unknown how Corllins University evaluated Moberg before conferring a Master's degree in English to him. It seems some of the grades attributed to Moberg on the Corllins University transcript were lower than the grades Moberg received from those courses that he took at SFSU.

After discussing her concerns with Dr. Lewallen, Pyer conducted some internet searches as to whether some of the learning institutions which Moberg listed as having obtained degrees (Corllins University, as well as possibly Glendale University and Prescott University), were included on a database published by the State of Oregon as to which institutions' degrees were not to be considered valid. She did not contact anyone at San Mateo COE to determine Moberg's employment status at the time that he left his employment.

Pyer's September 11, 2012 E-mail to Dr. Lewallen

After conducting further research into Moberg's personnel file, Pyer e-mailed Dr. Lewallen at 5:55 p.m. on September 11, 2012. The September 11, 2012 e-mail was lengthy and included an electronic copy of the Corllins University transcript. Pyer stated that she first starting having trouble with Moberg responding to her request to meet with him to discuss an employee's complaint that Moberg had accused her of stealing his corporate stamp. Pyer stated that as she was unable to set up this meeting since August 23, 2012, she looked in his personnel file to determine if there was a better way to attempt to schedule this meeting. When Pyer reviewed his personnel file, she discovered "false documentation." Pyer continued the e-mail and stated:

> . . . Mr. Moberg currently teaches two classes for us that he is apparently unqualified to teach.[10] That is, the documentation that he provided to us at the time of his application in

[10] Pyer's reasoning for this assertion was Moberg did not have a Master's degree in English from a post-secondary institution recognized by the United States Department of Education or the Council on Post-Secondary Accreditation. Although Moberg had a Master's degree in Special Education from SFSU, that degree did not specifically qualify him to teach the Education course which he taught, although it would have qualified him to teach in the Disabled Student Program and Services. Pyer admitted that Moberg may be able to qualify to teach the Education course if he sought an equivalency determination from the District/Academic Senate. Pyer did not investigate whether other ACE faculty who taught Education courses also had a Master's degree in Education as she was unfamiliar whether this was an issue.

December 2009 does not reveal that he has the minimum qualifications to teach the courses he is assigned (despite the fact that our former [Vice-President] of Academic Affairs signed a document stating that he did not meet minimum qualifications).

He is assigned to teach two semester-long courses:
--EDU-112-Community Survey Results (meets MW, 7-9:05).
--ENG-101-Intermediate Composition & Reading (meets MW, 5:30-6:45).

These are both in the ACE program.

His application to begin work as an English adjunct was dated December 22, 2009. On that application, he indicated that he had never been dismissed from employment, and had never resigned to avoid being dismissed. His minimum qualifications form to teach English was signed by one faculty member and Suzanne Flannigan, the former [Vice-President]. They hired him to teach English apparently on the strength of his application and the transcripts he submitted. We have transcripts from these institutions:

BA, [H]istory – CSU Hayward
MA, [S]pecial [E]ducation – San Francisco [State University]
MA, English – Corllins University (PDF attached)

([H]is file also contains transcripts showing that he has taken various education classes from Chapman, UC Irvine, and Notre Dame de Namur, and that he has teaching credentials in special education and "cross cultural language and academic development," neither of which are relevant here.)

On his application, Eric listed Corllins University as being in Santa Clara. I see several web sites of individuals who also list it in Santa Clara. But, this appears to be not true. In fact, it doesn't appear that Corllins exists anywhere except online. The transcript from Corllins looks entirely UNlike real transcripts in that it contains no address, no telephone numbers, no names of any responsible parties of the institution (like registrar, president, [Vice-President] of instruction, nothing), no indication of his previous education, no notation of his social security number, no FERPA[11] disclaimers, and no special security paper to guard against fraud. Moreover, the course number system is ridiculous (Political [S]cience is 6528 while [H]uman [P]sychology is 6529

[11] Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99.

and [P]hilosophy is 6530. My favorite is "Syllabuses & Materials"), and there [is] no attempt to even list very many English classes.

A quick internet search of the name of the institution reveals that this is a diploma mill. It is not, and has never been, regionally accredited. At least one website contains allegations that degrees are returned to applicants within two weeks of the applicants' payment of a fee. One of the sites goes directly to something called "Instant Degrees." It's shocking.

I do notice that his e-mail signature line usually contains his name thus:

"Eric Moberg, M.F.A, Ph.D."

We do not have transcripts supporting either of these degrees. Now, we wouldn't necessarily have them if they weren't necessary to qualify him for his teaching assignment (Unlike full-timers, adjuncts do not move on a salary scale with additional degrees and units earned). At the time of his application, he indicated that he was scheduled to graduate from Walden University with an Ed.D. in 2011. There is no mention of a Ph.D. program, and he has not submitted additional information related to this Walden University degree.

So, we do have an indication that he knowingly provided a false degree, though it is on us that we accepted it (when it is so obviously bogus—a scan is attached. This piece of glossy paper isn't even folded, and we have no idea how it was delivered to [Hartnell]. If transcripts are mailed to [Human Resources], we file the envelope as well as the transcript. We have no envelope, which means that it was delivered to a different person or office and brought over to us. I also see that he was placed in a classroom on [January] 23, 2010, he didn't sign a contract for this work until [February] 26, and his [minimum qualifications] paperwork wasn't signed until early March. [Human Resources] didn't get this paperwork until March 9, well into the semester.)

[¶ . . . ¶]

Since I will be away starting Thursday and through next week, on a confidential basis, I have alerted Nora Torres in my office, of this situation. She is the person who would be able to help get a sub in his classes ASAP if necessary.

Between September 13 and 24, 2012, during a period of time that Pyer was on vacation, Dr. Lewallen directed that the District move forward with terminating Moberg based upon his fraudulent credentials (Corllins University transcript and degree) and his accompanying failure to meet the minimum qualifications required to instruct the District's students. Dr. Lewallen was aware of the regulations governing the earning of credits by students and funding for the District that required that courses must be taught by faculty who met the minimum qualifications to teach their assigned courses. Fortunately, as a result of Moberg's employment with the District, the District did not subsequently lose any funding and students did not lose credit for the courses taught by Moberg.

Notification of Termination and the District Board's Ratification of the Decision

On or about September 24, 2012, Moberg was served with written notification from Interim Vice-President of Academic Affairs and Accreditation Stephanie Low that his employment was to be terminated on the close of business that day. The notice did not provide the reasons for the separation. Dr. Lewallen wrote the majority of the termination letter and directed Low to sign the letter and deliver it to Moberg the next time he was on campus. Low did not play a decision-making role regarding the termination of Moberg.

On October 2, 2012, Pyer prepared a memo setting forth the reasons why Moberg was terminated.[12] On January 15, 2013, the District Board ratified the release of temporary faculty member Moberg effective September 24, 2012.

Dr. Lewallen did not testify, one way or another, whether he was aware of Moberg's request for union representation or threat to file an unfair practice charge, as he was not questioned about that subject at the hearing.

[12] This memo carries less relevance, having been prepared after Dr. Lewallen's decision.

Moberg's Final Compensation

In early October 2012, Pyer found out that Moberg complained about not being paid. Pyer asked Human Resources Technician Nora Torres (Torres) to review all of Moberg's contracts and pay records to make sure he was paid for all of his work through and including September 24, 2012. She asked Torres to work with Payroll Supervisor Dora Sanchez (Sanchez) in accomplishing this task. Sanchez does not report to Pyer.

During the course of the Torres/Sanchez review, it was discovered that Moberg's time sheets for his two-week intercession class from August 11 to 16, 2012 were found on someone's desk and had not been entered into the automated payroll system. This represented nine lecture hours and fourteen laboratory hours. The Payroll History listing depicted Moberg's compensation being directly deposited into his account was as follows:

August 31, 2012	Net Pay of	$650.45
September 28, 2012	Net Pay of	$1,231.34

On September 27, 2012, Torres notified Sanchez to place a stop on Moberg's direct deposit for October and to hold his check until she heard from Low, Rosa Cabrera (Cabrera), or herself to release the payment. Pyer was copied on this e-mail. On September 28, 2012, Low sent an e-mail to Moberg, confirming her understanding that he would be on campus next week and asked that he return his attendance records, course materials, and keys. She advised him that his last check would be held until the items were delivered. Moberg, however, did not receive the e-mail. Low resent the e-mail on October 3, 2012. In the meantime, Moberg picked up his personal belongings on October 2, 2012 and returned the items requested. On October 4, 2012, Sanchez called and asked Moberg for his address to send his final check. Moberg provided Sanchez with his address. On October 5, 2012, Sanchez mailed a physical check representing his net pay in the amount of $1,617.94 to him, which he received.

During the third day of hearing, the ALJ queried Moberg as to the specific amount that he had not been paid for time actually worked during the Fall 2012 semester. Moberg admitted that he received the physical October 5, 2012 check mailed from Sanchez for $1,617.24 on October 19, 2012, and does not dispute this check. Moberg contended that he did not receive the September 28, 2012 check for $1,231.34 net pay ($1,576.27 gross pay) which should have been directly deposited into his account and was allegedly not. After reviewing his own direct deposit records, he determined that he received the September 28, 2012 check by direct deposit after all. Therefore, in light of these facts and admissions, all money due and owed to Moberg had been paid in full.

Sanchez was unaware that Moberg ever requested union representation or threatened to file an unfair practice against the District. As Torres did not testify, it was not demonstrated that she was ever aware that Moberg ever requested union representation or threatened to file an unfair practice against the District.

ISSUES

1. Should the complaint be amended as requested by Moberg to add further incidents of protected activity?

2. Should any of Moberg's requests to augment the hearing record after it had been closed be granted?

3. Did the District interfere with Moberg's EERA rights by allegedly insisting that it would choose his representative for him at an interview?

4. Did the District discriminate/retaliate against Moberg for his protected activity by terminating his employment or failing to pay him for work that he performed during the Fall 2012 semester?

CONCLUSIONS OF LAW

Motion to Amend the Complaint

Toward the end of first day of hearing, February 24, 2016, after a number of e-mails had been admitted into the evidentiary record demonstrating that Moberg had requested union representation for an interview with Pyer, Moberg requested that his complaint be amended to add more incidents of protected activity. The ALJ asked Moberg to bring the amendment in writing to the next day of hearing. On the second day of formal hearing, February 25, 2016, Moberg moved to amend the complaint to add more incidents of protected activity, but did not provide the proposed language which he wanted to amend into paragraph 3 of the complaint. The ALJ deferred ruling on the motion to amend until Moberg provided specific language to amend into the complaint.

On the final day of hearing, February 26, 2016, Moberg provided proposed language which he wanted to amend into paragraph 3 of the complaint. That language added the following incidents reflecting Moberg's exercise of protected activity:

> (a) On or about August 23, 2012, Charging Party asserted his rights, guaranteed by the Educational Employment Relations Act, to union representation during a meeting called by Terri Pyer relating to the investigation that Pyer had initiated earlier on that same day.
>
> (b) On or about August 27, 2012, Charging Party re-asserted his rights, guaranteed by the Educational Employment Relations Act, to union representation during a meeting called by Terri Pyer relating to the investigation that Pyer had initiated on or about August 23, 2012.
>
> (c) On or about August 28, 2012 Charging Party re-asserted his rights, guaranteed by the Educational Employment Relations Act, to act in concert with Liz Estrella and Hermelinda Rocha for the purpose of providing mutual aid and protection of his right to union representation during a meeting called by Terri

Pyer relating to the investigation that Pyer had initiated on or about August 23, 2012.

(d) On or about September 7, 2012, Charging Party re-asserted his rights, guaranteed by the Educational Employment Relations Act, to union representation during a meeting called by Terri Pyer relating to the investigation that Pyer had initiated on or about August 23, 2012.

In summary, Moberg sought to amend his complaint to allege other protected activities where he requested union representation prior to the decision to terminate his employment. These requests were not unknown to the District as they were all part of the e-mail chain of Pyer attempting to schedule an interview with Moberg over the complaint filed against him. These requests to add specific incidents of protected activity should not be precluded as it merely conformed evidence presented into the complaint and therefore does not substantially affect the rights of the parties. (*City of Montebello* (2016) PERB Decision No. 2491-M, p. 6.) In light of the fact that these protected activities were known to the District, and the District did not demonstrate any prejudice by an amendment of adding protected activity which had been already introduced into the record on the first day of the hearing, Moberg's proposed amendments in paragraphs 3 (a) through (d) are deemed appropriate pursuant to PERB Regulation 32648 and are therefore amended into the complaint.

Requests to Augment the Hearing Record After it was Closed

At the end of the last day of hearing, February 26, 2016, the ALJ agreed to leave the evidentiary record open only so Moberg could check his direct deposit records with his credit union to confirm whether the September 12, 2012 check from the District had been directly deposited into his account as testified by Dora Sanchez. The evidentiary record was not left open for any other documentation to be submitted. On March 10, 2016, Moberg notified the

ALJ and the District, that his direct deposit records from Provident Credit Union reflected that on September 28, 2012, he received $1,232.34 into his account.[13]

1. First Requests to Augment the Hearing Record

On February 29 and March 1, 2016, Moberg sent e-mails to the ALJ and the District attaching two documents (both e-mails) requesting to augment the evidentiary record.[14] On March 2, 2016, the ALJ rejected Moberg's attempt to augment the record, as the evidentiary record was closed, and informed Moberg that he needed to file a formal motion to reopen the record with the appropriate justification(s) and declaration(s) for his request to considered. Moberg never filed the requisite motions and declarations to reopen the record.

On March 10, 2016, Moberg sent an e-mail to the PERB electronic filing account (e-file)[15] in which he notified the ALJ and the District that a SFSU accounting major told him that Respondent's Exhibit M may demonstrate that Hartnell still owed him compensation for eight hours of work and that he would be submitting a full report the next day from his expert witness—a former professor of governmental accounting from University of California Berkeley. The District responded by reminding Moberg that the record was closed and that no further evidence was appropriate absent a motion to reopen the hearing. Moberg did not file such a motion with an accompanying declaration.

[13] Moberg's admission as to the direct deposit is considered part of the hearing record.

[14] The first e-mail covered the dates of August 22 and 23, 2012, and was between Estrada, Pyer, and Moberg. The second e-mail was dated September 7, 2012, and was between Lucy Serrano, Tina Esparza-Luna, and Wright.

[15] PERB Regulation 32091. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

2. Second Request to Augment the Hearing Record

On March 12, 2016, the ALJ notified the parties that the representatives agreed that post-hearing briefs were to be submitted by April 22, 2016. At the end of Moberg's post-hearing brief, he requested that the ALJ take judicial/official notice of: (1) a sentence from page 40 of an unpublished 2015 tentative decision in *The People of the State of California v. Accrediting Commission for Community and Junior Colleges* from San Francisco Superior Court Judge Karnow in San Francisco Superior Court Case No CGC013-533693;[16] (2) Moberg's SFSU academia listing demonstrating Moberg's standing as a prominent international public intellectual; (3) an April 11, 2016 declaration of Vincent P. Hurley in another PERB case (*Eric M. Moberg v. Cabrillo Community College District*, PERB Case No. SF-CE-2994-E) stating that Prescott University exists; (4) GAO-04-1096T, an official publication of the United States Government which establishes that Corllins University is not a "diploma mill;" (5) the Michigan Department of Education Non-Accredited Schools list; (6) the fact that Oregon no longer lists non-accredited universities; (7) an article in lexisnexis.com and Opulent Acquisition's FORM 8-K dated January 14, 2016, with the United States Securities and Exchange Commission; (8) a newspaper article in the *Santa Cruz Sentinel*, dated September 12, 2010, regarding Joe Clarke, who was promoted to sergeant with the Santa Cruz County Sheriff's Department and who had a degree from Corllins University. The post-hearing brief also cites to documents which were not part of the evidentiary record, but were supposedly part of the hearing file which were not introduced at the hearing. These

[16] Moberg did not give any indication as to the context of this tentative decision, whether the tentative decision became final, and the current status of the case. The tentative decision itself was not provided with the request for judicial notice.

documents were not part of the evidentiary record, and cannot be used for purposes of determining a finding of fact.[17]

3. Third Request to Augment the Hearing Record

On April 28, 2016, Moberg sent to the PERB e-file account an e-mail inquiring whether the opposing party objected to taking official notice of a newspaper article from *The Guardian*, in April 2016, titled "Trump and Clinton share Delaware tax 'loophole' address with 285,000 firms." The District did not agree to reopen the hearing. Moberg never filed a motion to reopen the record with the accompanying declaration(s).

4. Fourth Request to Augment the Hearing Record

On or about June 27, 2016, Moberg submitted a fourth request to augment the hearing record which included a declaration stating that he did not receive the e-mail until June 21, 2016, as a result of his formal hearing in *Eric M. Moberg v. Cabrillo Community College District*, PERB Case No. SF-CE-2994-E. The attached e-mail with the request was dated November 12, 2012, from Cabrillo College Dean Kathleen Welch, who learned at a conference that Moberg's transcripts/degrees needed to be verified and that Cabrillo College should contact Hartnell College, who suffered from threats of lawsuits from Moberg. On or about June 28, 2016, the District filed its opposition to Moberg's request to reopen the record.

5. Fifth Request to Augment the Hearing Record

On or about March 20, 2017, Moberg sent an e-mail to the PERB e-file account requesting that District Counsel allow him to present newly collected evidence regarding his academic research and writing abilities, his stature in "American arts and letters," and the

[17] At the beginning of the hearing, the ALJ notified the parties that he intended to take official notice of the hearing file, but it was only for the purpose of how the parties arrived at the point where a formal hearing was authorized to be conducted.

likelihood that the Academic Senate of Hartnell College would have approved his equivalency application(s). On the same day, District Counsel responded that it objected to Moberg's latest attempt to present new evidence.

PERB Regulation 32140, subdivision (a), sets forth its requirements for requesting reconsideration from a Board decision,[18] including when the request for reconsideration is based upon the discovery of new evidence. PERB Regulation 32140, subdivision (a), provides in pertinent part:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. . . . The grounds for requesting reconsideration are limited to claims that: . . . (2) the party has newly discovered evidence which was not previously available and could not have been discovered with the exercise of reasonable diligence. A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under the penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issues sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

(Emphasis added.)

PERB Regulations governing the conduct of unfair practice proceeding (PERB Regulations 32165 through 32230) do not have a similar regulation for reopening an evidentiary hearing record once the formal hearing has been closed, however, PERB Regulations 32190 and 32170, subdivisions (a), (d), and (f), taken together arguably authorize the ALJ to reopen the hearing to take new evidence. Regardless, it seems unlikely that the ALJ

[18] This regulation applies only to Board decisions from the filing of exceptions from an Administrative Law Judge's proposed decision. (*Berkeley Federation of Teachers, Local 1078 (Crowell)* (2015) PERB Decision No. 2405a, pp. 14-15.)

could reopen the hearing under a procedure which is less restrictive than that outlined by the Board for itself in PERB Regulation 32140, subdivision (a). The Board's own procedure, moreover, provides a useful framework from which ALJs may evaluate requests to consider new evidence, in the absence of more specific guidance from PERB's Regulations or from the Legislature.

All of Moberg's requests to augment the record, other than his fourth request, did not meet the requisite requirements set forth in PERB Regulation 32140, subdivision (a), and the ALJ's own instructions to him (a formal request or motion with an accompanying declaration, not an e-mail) and therefore must be rejected outright. Moberg's fourth request to augment the hearing record included a declaration stating that the e-mail was recently discovered. However, the e-mail has no relevance or impact upon the final outcome of the proceeding as it reflects communications which occurred on November 1, 2012, and would not add anything new to Dr. Lewallen's decision or his reasons for taking the termination action against Moberg at the time of his decision. The e-mail also does not establish whether Dr. Lewallen had any knowledge of Moberg's protected activities at the time that he made his decision to terminate Moberg. The introduction of the e-mail into the record of this proceeding therefore does not satisfy the "extraordinary circumstances" requirement of PERB Regulation 32140. Moberg's fourth request to augment the hearing record after it had been closed is also rejected.

Interference Allegation

Paragraphs 7 and 8 of the amended complaint set forth the interference allegation as:

> 7. On or about September 10. 2012, Respondent, through its agent Terri Pyer, sent Charging Party an e-mail message wherein Pyer insisted that she would choose Charging Party's representative for him but from a union to which Charging Party did not belong.

> 8. By the acts and conduct described in paragraph 7, Respondent interfered with employee rights guaranteed by the Educational Employment Relations Act in violation of Government Code section 3543.5(a).

EERA section 3543 protects public school employees' right to form, join, and participate in the activities of their employee organization. PERB's interference test does not require evidence of unlawful motive, only that there be at least "slight harm" to employee rights results. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 17 (*Simi Valley USD*).) The Board described the prima facie standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

(*Ibid*., quoting *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S; *Carlsbad Unified School District* (1979) PERB Decision No. 89, p. 10, emphasis added (*Carlsbad USD*).)

PERB examines whether the respondent's actions "reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." (*Clovis Unified School District* (1984) PERB Decision No. 389, pp. 14-15, quoting *NLRB v. Triangle Publications* (3d Cir. 1974) 500 F.2d 597, p. 598.) That "no one was in fact coerced or intimidated is of no relevance." (*Ibid*.) PERB considers the totality of the circumstances when making these determinations. (*Los Angeles Community College District* (1989) PERB Decision No. 748, proposed decision, p. 16.)

If a prima facie case is established, then PERB balances the degree of harm to protected rights against the employer's asserted interests. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, p. 16, citing *Carlsbad USD*, *supra*, PERB Decision No. 89 at pp. 10-11.)

"Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests." (*Ibid*.) On the other hand, "[w]here the harm is inherently destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid*.) The employer bears the burden of proving the necessity of its actions. (*Simi Valley USD, supra,* PERB Decision No. 1714, pp. 17-18, citing *Carlsbad USD*.)

Regarding an employee's right to his choice of union representation, the Board in *Jurupa Unified School District* (2012) PERB Decision No. 2283, succinctly stated:

> Under EERA a union designates the union's agents, including without limitation union agents who will represent employees in investigatory interviews. EERA does not oblige an employer or the union to accommodate an employee's choice of union representative, either in scheduling or conducting an investigatory interview; provided that, where an employee's preferred union representative is available, an employer may not insist upon a different representative. Nor does EERA afford an employee the right to be represented by the employee's own attorney in an investigatory interview conducted by employer officials.

(*Id*., at p. 30-31, citations and footnotes omitted.)

In other words, once an employee organization has been recognized or certified as the exclusive representative of a bargaining unit, "only that employee organization may represent that unit [of employees] in their employment relations with the public school employer." (EERA, § 3543.1, subd. (b); *Mount Diablo Unified School District, et al*. (1977) EERB Decision No. 44 (*Mount Diablo*), pp. 8-9; *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 13.) The right to union representative at an investigatory interview does not require an employer to postpone an interview because a specific union representative the employee requested is absent, so long as another union representative is available at the time set

for the interview. (*State of California (Department of Transportation)* (1994) PERB Decision No. 1049-S.)

In *Hartnell CCD, supra*, PERB Decision No. 2452, the Board provided the following regarding an employer's role in deciding or influencing matters of employee choice regarding employee representation:

> [T]he employer has *no* role in deciding or influencing matters of employee choice or the administration of an employee organization's internal affairs. (*San Ramon Valley Unified School District* (1982) PERB Decision No. 230 (*San Ramon*), p. 16; *Fresno Unified School District* (1982) PERB Decision No. 208, pp. 21-22; *Trustees of CSU, supra*, PERB Decision No. 2384-H, p. 33; see also *NLRB v. Wooster Division of BorgWarner Corporation* (1958) 356 U.S. 342.) Consequently, employer statements that assert a right to influence or direct the employee's choice of a representative interfere with protected rights, because they convey the impression that engaging in union or other concerted activity is futile. (*County of Riverside, supra*, PERB Decision No. 2119-M, pp. 18-20; *Dayton Hudson Corp.* (1995) 316 NLRB 477; *Holiday Inn-Glendale* (1985) 277 NLRB 1254, 1271.) (Emphasis in original.)

In this case, Pyer had attempted to interview Moberg for a couple of weeks without success. For one reason or another, Pyer, Moberg, and his union representative could not come to an agreement as to an interview date. Pyer finally set a deadline for an interview. In setting a deadline, she copied Wright with the e-mail so that union representation could be provided for him. It was undisputed that Wright was the president of the Faculty Association which represented Moberg.

In Pyer's September 10, 2012 e-mail, she did not reference the name of a specific Faculty Association representative who would be representing Moberg on the Wednesday at issue. Rather, she contacted Wright to ensure that Moberg would be present with a Faculty Association representative that day. It is not found by the content of her e-mail and the events

leading up to the September 10, 2012 e-mail, that Pyer was selecting a union representative for Moberg, but rather only ensuring that her interview went forward on Wednesday and that Moberg had a union representative at that interview. As such, Moberg has not established that the District interfered with Moberg's right to avail himself of a union representative from the exclusive representative and the allegation that Pyer interfered with Moberg's rights under EERA is dismissed.

Discrimination/Retaliation Allegations

To demonstrate that a public school employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (a) the employee exercised rights under EERA; (b) the employer had knowledge of the exercise of those rights; (c) the employer took adverse action against the employee; and (d) 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 USD*).) If the charging party satisfies all of the elements of the prima facie case, the burden shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in protected activity. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 12, citing *Martori Bros. Dist. v. Agricultural Labor Relations Board* (1981) 29 Cal.3d 721; *Trustees of the California State University* (2000) PERB Decision No. 1409-H; *Novato USD*.)

1. Protected Activity

EERA section 3543, subdivision (a), provides in pertinent part:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations.

Moberg's multiple requests for a union representative to assist him at an investigatory interview where an employee complaint had been filed against him is exactly the type of right protected by EERA section 3541, subdivision (a). Additionally, the communication of a threat to file an unfair practice charge is similarly protected. (*Hartnell CCD, supra*, PERB Decision No. 2452.*)* Moberg has satisfied the first element of establishing a prima facie case of discrimination/retaliation.

2. Adverse Action

In determining whether evidence of an adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 12.) In a later decision, the Board further explained that:

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

(*Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12; emphasis added; footnote omitted.)

a. Termination

Termination from one's teaching position clearly constitutes an adverse action under EERA. (*Los Angeles Unified School District* (2016) PERB Decision No. 2479.) Moberg has established this element of the prima facie case of discrimination/retaliation.

b. Failure to Pay for Work Performed

Moberg was unable to show that he was not paid for time actually worked during the Fall Semester of 2012. He initially stated that he believed that Pyer had stopped the direct

deposit of the September 28, 2012 check; however, after reviewing both the records of the District, the accompanying testimony of Sanchez, and Moberg's belated admission, it was demonstrated that this direct deposit was not halted. Additionally, the District established that Moberg was paid for the missing timesheets reflecting his work during the two-week intercession class and Moberg did not challenge that he was paid for these hours. Therefore, as Moberg did not demonstrate that the District failed to pay him for time actually worked during the Fall Semester of 2012, this allegation must be dismissed as Moberg did not establish a prima facie case of discrimination/retaliation.

3. Knowledge of Protected Activity

To demonstrate the knowledge element of a prima facie case, at least one of the individuals responsible for taking the adverse action (the termination action) must be aware of the protected conduct. (*Oakland Unified School District* (2009) PERB Decision No. 2061.) The issue is whether "the individual(s) who made the ultimate decision to take adverse action against the employee had such knowledge." (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 7, citing *City of Modesto* (2008) PERB Decision No. 1994-M.) Without factual support, knowledge of protected activity cannot simply be presumed and imputed to the employer's decision-maker in the action at issue. (See *City & County of San Francisco* (2011) PERB Decision No. 2207-M, adopting dismissal ltr., p. 5.)

Dr. Lewallen was the ultimate decision-maker who decided that Moberg should be terminated on September 24, 2012. He stated that he terminated Moberg based upon his fraudulent credentials (Corllins University transcript and degree) and his accompanying failure to meet the minimum qualifications required to instruct the District's students. Dr. Lewallen did not mention any other reason for the termination such as Moberg's prior employment with

San Mateo COE. Dr. Lewallen did not testify as to the issue of whether he was aware of Moberg's request for union representation and threat to file an unfair practice charge against the District. Additionally, Pyer's September 11, 2012 e-mail does not mention that Moberg requested union representation or that he threatened to file an unfair practice charge against the District, but only that she was having difficulty trying to schedule a meeting with Moberg to discuss an employee complaint filed against him. Moberg has the burden to establish Dr. Lewallen's knowledge of his protected activity and has failed to do so.

The analysis does not end there. Moberg can attempt to establish Dr. Lewallen's knowledge of his protected activities under the subordinate bias liability doctrine. According to PERB's subordinate bias liability doctrine, a subordinate employee's anti-union animus is not imputed to a decision-maker unless:

> (1) the subordinate makes a recommendation, report, or evaluation to the decision-maker because of an employee's protected conduct; (2) the subordinate intended his or her conduct to result in an adverse action for the employee; and (3) the subordinate's conduct was a motivating factor or proximate cause for an adverse action against the employee. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 33, citing *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S, other citation omitted.) Subordinate liability will not be found where the lower-level employee provides the decision-maker with accurate information. (*Id*. at p. 34.) Rather, there must be a showing that the subordinate tainted the decision-making process with biased, inaccurate, or incomplete information. (*Ibid*.)

(*Anaheim Union High School District* (2015) PERB Decision No. 2434, adopted proposed decision, pp. 91-92.)

As stated earlier, the reason why Dr. Lewallen terminated Moberg was because of his fraudulent credentials, in this case referring to Moberg's Corllins transcript.. The information provided by Pyer regarding Corllins's University transcript was straight from the face of the

transcript itself and her accompanying internet searches. During the hearing, the content of the Corllins's University transcript and the accompanying internet searches of Pyer were not established to be inaccurate. Indeed, Moberg's own testimony describing how he obtained the degree from Corllins University, including whether he had to complete any work to obtain this degree, only buttressed Pyer's testimony and her September 11, 2012 e-mail to Dr. Lewallen. Additionally, in Pyer's September 11, 2012 e-mail she was candid about how Vice-President Flannigan had approved Moberg's hire even after she did not indicate that Moberg had met the minimum qualifications for the position. Such a candid disclosure revealed to Dr. Lewallen the one weakness which the District had in proceeding with a termination action, but, on the other hand, further established that Pyer provided complete and accurate information to the ultimate decision-maker.

As it cannot be found that Pyer provided the ultimate decision-maker with inaccurate or incomplete information regarding the reasons for which the District took adverse action against Moberg, it cannot be found that Pyer tainted the decision-making process or that she issued her September 11, 2012 e-mail because of Moberg's protected conduct. Therefore, Moberg has failed to demonstrate that the District's decision-maker had knowledge of his protected activities through the subordinate bias liability doctrine. As such, Moberg has also failed to establish a prima facie case of discrimination/retaliation in regards to his termination from the District and this allegation is also dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. SF-CE-2984-E, *Eric Moberg v. Hartnell 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).)