OVERRULED IN PART by Walnut Valley Unified School District (2016) PERB Decision No. 2495

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

DON E. STOTT, Charging Party, v. SAN JOAQUIN DELTA COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SA-CE-2525-E PERB Decision No. 2091 January 29, 2010

Appearances: Don E. Stott, on his own behalf; Curiale, Dellaverson, Hirschfeld & Kraemer by Carmen Plaza de Jennings, Attorney, for San Joaquin Delta Community College District.

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

NEUWALD, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Don E. Stott (Stott) of a Board agent's dismissal (attached) of his unfair practice charge. The charge alleged that the San Joaquin Delta Community College District (District) violated the Educational Employment Relations Act (EERA) [1] by discriminating against him for engaging in protected activity, specifically, by reducing his class load from three classes to one class, canceling his one class, and offering him a class at a different location. Stott alleged that this conduct constituted a violation of EERA section 3543.5(a). The Board agent dismissed some of the allegations as untimely and dismissed the remaining allegations for failure to state a prima facie case of discrimination.

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

The Board has reviewed the dismissal and the record in light of Stott's appeal, the District's response, and the relevant law. Based upon this review, the Board adopts the warning and dismissal letters and affirms the dismissal of the charge subject to the discussion below.

BACKGROUND[2]

Stott is a part-time adjunct psychology instructor for the District. From 1994 to 1999, he was assigned to teach one class per semester. From 1999 to 2008, he was assigned to teach three classes per semester. In October 2008, the newly-appointed Interim Dean of the Social Sciences Division, Lynn Welch (Welch), assigned Stott to teach only one class. After complaining to Welch about the reduction in his class load, Stott sent a letter to the District's vice president of instruction in November 2008 complaining about Welch's action. On June 4, 2009, Welch informed Stott that his one Fall 2009 class was being cancelled due to budget restraints. On July 23, 2009, Stott sent an email to Welch questioning the reasons for her decision. On September 17, 2009, Welch asked Stott whether he was interested in teaching a class in the Spring 2010 semester at another campus.

Stott contends that the District discriminated against him for engaging in protected activity by reducing his class load in October 2008, canceling his class on June 4, 2009, and offering him a class at another location on September 17, 2009.

STOTT'S APPEAL

Stott contends that he established a prima facie case of discrimination for having engaged in protected activity.

[2] A complete statement of the facts of this case is contained in the dismissal and warning letters.

DISTRICT'S RESPONSE

The District contends that: (1) the appeal is procedurally defective because it fails to comply with the requirements set forth in PERB Regulation 32635[3]; (2) the appeal improperly seeks to introduce new evidence on appeal; and (3) the Board agent correctly found that the charge failed to state a prima facie case of discrimination or retaliation.

DISCUSSION

EERA section 3543 gives public employees the right to "represent themselves individually in their employment relations with the public school employer." PERB has held that individual complaints related to employment matters made by an employee to his superior are protected. (See, e.g., *Pleasant Valley School District* (1988) PERB Decision No. 708 [individual complaint about employee safety is protected activity].) This right of self representation, however, is not unlimited. Thus, the Board has held that employee complaints to employers are protected when those complaints "are a logical continuation of group activity." (*County of Riverside* (2009) PERB Decision No. 2090-M (*Riverside*); *Los Angeles Unified School District* (2003) PERB Decision No. 1552 (*Los Angeles*).) Where, however, an employee's complaint is undertaken alone and for his/her sole benefit, that individual's conduct is not protected. (*Riverside; Los Angeles; Oakdale Union Elementary School District* (1998) PERB Decision No. 1246.)

In this case, the only alleged protected activity consists of Stott's complaints to his supervisor and to the District vice president of instruction concerning the reduction of his own teaching assignment from three classes to one class. There are no allegations that would

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

establish that those complaints were a logical continuation of any group activity. Rather, the charge indicates that they were undertaken alone and for Stott's sole benefit. Accordingly, we conclude that Stott failed to establish that he engaged in any protected activity under EERA. Therefore, the charge was properly dismissed.[4]

ORDER

The unfair practice charge in Case No. SA-CE-2525-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Acting Chair Dowdin Calvillo and Member McKeag joined in this Decision.

[4] Because we affirm the dismissal of the charge, we do not address the District's remaining contentions.

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377

December 2, 2009

Re: *Don E. Stott v. San Joaquin Delta Community College District*
Unfair Practice Charge No. SA-CE-2525-E
DISMISSAL LETTER

Dear Mr. Stott:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 9, 2009. An amended charge was filed on September 29, 2009. Don E. Stott (Mr. Stott or Charging Party) alleges that the San Joaquin Delta Community College District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by discriminating against him for engaging in protected activity.

Charging Party was informed in the attached Warning Letter dated October 28, 2009, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to November 4, 2009, the charge would be dismissed.

On November 2, 2009, Charging Party filed a second amended charge.

Discussion

The attached Warning Letter explained in detail why the above-referenced charge did not initially state a prima facie case. The Warning Letter included an explanation of the pleading burden that a charging party must satisfy in order to have a complaint issue. PERB Regulation 32615(a)(5)[2] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S,

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

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

citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito and Vector Control District v. Public Employment Relations Board* (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

Charging Party was also informed that in order to demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) Specifically, Charging Party failed to establish the requisite showing that the District took adverse action and that it took such action *because* of his exercise of those rights.

In his second amended charge, Charging Party attempts to correct one inaccuracy referenced in the Warning Letter. Specifically, Charging Party stated that "an error in date exists." Mr. Stott states that he "sent an e-mail to Lynn Welch on July 23, 2009 asserting [his] referenced findings. . ." The Warning Letter originally stated that the e-mail to Ms. Welch was sent on June 23, 2009. No additional inaccuracies were addressed and Charging Party requested that the issue be reconsidered based on this error, with focus placed on "Lagrutta receiving a Psych 55 class that result[ed] in [Mr. Stott] being the only adjunct in Psychology to have their class for [F]all 09 cancelled."

In addition, Charging Party provided further argument supporting his contention that an additional Psychology course was not offered to him. Charging Party states that he was pre-qualified to teach Psychology 55 and was not considered for an alleged open position. According to the second amended charge, Charging Party learned of an opening after reviewing the Fall 2009 class schedules which showed that Psychology the 55 instructor changed from K. Wright to A. Lagrutta.[3] Charging Party states that since he was clearly

[3] It appears from the statement of the charge that Mr. Stott learned of the opening having been filled prior to his sending the July 23, 2009 e-mail.

qualified, he should have been considered for the alleged Psychology 55 class. Attached to the second amended charge, Charging Party included numerous pages of Psychology courses offered by the District and copies of his teaching assignments dating back to December 1998.

As written, Charging Party's amended statement and supporting documentation do not address all of the deficiencies outlined in the Warning Letter. First, Charging Party was informed that it was not clear from the facts in the original charge how the District took adverse action by offering Mr. Stott a class at a different location.[4] As previously stated, the Board has held that an involuntary transfer to a position with less favorable working conditions constitutes an adverse action. (*Trustees of the California State University* (2006) PERB Decision No. 1853-H.) However, as previously stated, the District's action does not appear involuntary. Ms. Welch only asked whether Mr. Stott would be interested in teaching a class at a different location. No requirement to transfer was placed on Mr. Stott. Therefore, the allegation that the District discriminated against Mr. Stott by offering him a class at a different location, even as amended, fails to allege a prima facie case of discrimination in violation of the EERA.

Second, Charging Party was informed that the charge did not establish the requisite temporal proximity between Charging Party's protected activity and the District's adverse action. As previously stated, the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor in establishing the necessary connection or "nexus" between the adverse action and the protected conduct. (*North Sacramento School District* (1982) PERB Decision No. 264.) The Board has held that a time lapse of five or six months between alleged protected activity and adverse action does not establish temporal proximity sufficient to support indicia of unlawful motivation. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300.) Mr. Stott engaged in protected activity in November 2008 when he submitted his complaint to Ms. Hart concerning his initial reduced class load. The District did not take action until June 4, 2009, when Ms. Welch notified Mr. Stott that his Fall 2009 class had been cancelled, approximately seven months after Mr. Stott's protected conduct. The amended charge does not address this lapse in time.

Instead, Charging Party focuses on the District's additional alleged adverse action of failing to consider Mr. Stott for an opening in Psychology 55 and his subsequent e-mail to Ms. Welch addressing this issue on July 23, 2009. For the sake of argument, even assuming the District adversely acted against Mr. Stott by failing to consider him for an open position, Charging Party still lacks the requisite temporal proximity between his initial protected activity and adverse action. Moreover, the Board has also held that a charging party fails to establish nexus between protected activity and adverse action where alleged adverse action occurred prior in time to protected activity. (*Colton Joint Unified School District* (2003) PERB Decision No. 1534.) Therefore, even if Charging Party's July 23rd e-mail could be considered protected activity, the District's alleged adverse action occurred prior in time to his e-mail to Ms. Welch.

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[4] Mr. Stott was offered the class at a different location on or about September 17, 2009.

Therefore, the charge is hereby dismissed based on the facts and reasons set forth herein and in the October 28, 2009 Warning Letter.

Right to Appeal

Pursuant to PERB Regulations, Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

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

The Board's address is:

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

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

Service

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

Extension of Time

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

Final Date

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

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Katharine Nyman
Regional Attorney

Attachment

cc: Carmen Plaza de Jennings, Attorney

STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, Governor

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8386
Fax: (916) 327-6377

October 28, 2009

Re: *Don E. Stott v. San Joaquin Delta Community College District*
Unfair Practice Charge No. SA-CE-2525-E
WARNING LETTER

Dear Mr. Stott:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on September 9, 2009. An amended charge was filed on September 29, 2009. Don E. Stott (Mr. Stott or Charging Party) alleges that the San Joaquin Delta Community College District (District or Respondent) violated the Educational Employment Relations Act (EERA or Act)[1] by discriminating against him for engaging in protected activity. Investigation of the charge revealed the following information.

Factual Background As Alleged

The District initially hired Mr. Stott in 1992 to teach child development classes in the District's Family and Consumer Science Division. Beginning in 1994, Mr. Stott began teaching Psychology classes in the District's Psychology Department of the Social Science Division.

Between 1994 and 1999, Mr. Stott taught one class each semester. In 1999, Mr. Stott began teaching three classes per semester: one Psychology 1 class and two Psychology 30 classes.

In September 2008, Lynn Welch (Ms. Welch) was appointed the District's Interim Dean of the Social Science Division.

Also in September 2008, Mr. Stott was approached by full-time Psychology instructor Melissa Beeson-Holmes (Ms. Beeson-Holmes). Ms. Beeson-Holmes told Mr. Stott that the then-current Dean of the Social Science Division, Karen Millsop (Ms. Millsop), was a "liar and treated everyone in a negative manner." Mr. Stott responded by stating that he had "never witnessed that and she always treated [him] fairly."

In October 2008, Ms. Welch assigned Mr. Stott one Psychology 30 class.

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

Thereafter, Mr. Stott scheduled an appointment with Ms. Welch to "tactfully explain" that "though other adjunct Psychology instructors received more than one class, must [he] be the only adjunct with such a large cut in [his] classes." Ms. Welch responded by stating that since Mr. Stott was the only adjunct teaching Psychology 30, she believed a full-time faculty member should teach the class. According to the charge, numerous other adjunct Psychology instructors were teaching courses not being taught by full-time instructors. The charge alleges that Ms. Welch's reason was "without merit due to the referenced facts and to expect discriminatory animus from Ms. Welch which the enclosed facts clearly indicate."

In November 18, 2008, Mr. Stott sent a letter to the District's Vice President of Instruction, Kathleen Hart (Ms. Hart). The letter attempted to document Mr. Stott's concern regarding his teaching schedule. According to the charge, Ms. Hart did not respond to Mr. Stott's letter.

On June 4, 2009, Mr. Stott received a telephone call from Ms. Welch stating that Mr. Stott's only Fall 2009 class was being cancelled due to "budget restraints." According to the charge, Mr. Stott was the only adjunct Psychology instructor to not receive a teaching assignment for Fall 2009 because of "budget restraints."

On June 23, 2009, Mr. Stott sent an e-mail to Ms. Welch requesting reasons why one adjunct Psychology instructor received three courses for Fall 2009 and why a full-time Psychology instructor received an "overload" class previously taught by Mr. Stott. Ms. Welch allegedly did not respond to Mr. Stott.

On or about September 17, 2009, Mr. Stott received an e-mail from Ms. Welch inquiring whether he was interested in teaching a Psychology 30 class in the Spring 2010 semester at the District's new campus south of Tracy.

Discussion

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

1. Statute of Limitations

The charging party's burden also includes alleging facts showing that the unfair practice charge was timely filed; i.e., that the alleged unfair practice occurred no more than six months prior to the filing of the charge. (*Los Angeles Unified School District* (2007) PERB Decision No. 1929; *City of Santa Barbara* (2004) PERB Decision No. 1628-M.) PERB is prohibited from issuing a complaint with respect to any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge. (*Coachella Valley Mosquito*

and Vector Control District v. Public Employment Relations Board (2005) 35 Cal.4th 1072.) The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.)

The charge was filed on September 9, 2009. As such, the six-month statute of limitations prohibits PERB from issuing a complaint in this case based on alleged conduct that occurred before March 9, 2009.

Charging Party asserts that the District acted unlawfully when it (1) reduced Mr. Stott's class load to one class in October 2008; (2) cancelled Mr. Stott's one Fall 2009 class on June 4, 2009; and (3) offered Mr. Stott a class at a different District location on September 17, 2009.

In cases alleging discrimination, a charging party must establish that the conduct complained of either occurred or was discovered within the six-month period immediately preceding the filing of the charge. (*San Dieguito Union High School District* (1982) PERB Decision No. 194.) In or about October 2008, Mr. Stott's class-load was reduced from three classes to one class. Because the reduction in class-load occurred in October 2008, such conduct occurred prior to March 9, 2009, and is therefore untimely and must be dismissed.

Therefore, only the allegations that the District discriminated against Mr. Stott by canceling his Fall 2009 class on June 4, 2009 and offering him a class at a different location shall be discussed below.

2. Discrimination/Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5(a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action <u>because of</u> the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

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

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

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; *Campbell, supra*, 131 Cal.App.3d 416); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; *San Leandro, supra*, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; *San Leandro, supra*, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210.)

a. Protected Activity

EERA's defined rights of public school employees are found in Government Code section 3543(a), which states in pertinent part as follows:

> Public school employees shall have the right to represent themselves individually in their employment relations with the public school employer...

The Board has also held that under EERA, an employee has the right to represent him or herself in employment relations with the school district. (*Pleasant Valley School District* (1988) PERB Decision No. 708.)

Here, Mr. Stott submitted a complaint to Ms. Hart of what he considered to be unfair working conditions when his class-load was reduced to one class. This conduct falls squarely under the right for employees to represent themselves individually in their employment relations protected by EERA section 3543(a). (See *Los Angeles Unified School District* (1999) PERB Decision No. 1338.) Therefore, Mr. Stott has engaged in protected activity.

b. Employer Knowledge

The charge alleges that the complaint Mr. Stott made concerning his reduced class-load was made directly to Ms. Hart. The District does not contest that it was aware that Mr. Stott submitted his complaint. Therefore, the second element of the prima facie case is met.

c. Adverse Action

As previously stated, the test used to determine whether an employee suffers adverse action is whether a reasonable person under the same circumstances would consider the action to have an adverse impact on his or her employment. (*Newark Unified School District*, *supra*, PERB Decision No. 864.)

With regard to the District's cancellation of Mr. Stott's class, the Board has held that the cancellation of an employee's teaching assignment was adverse action because it resulted in loss of pay. (*San Mateo County Community College District* (2008) PERB Decision No. 1980.) On June 4, 2009, Mr. Stott was notified that his single class scheduled for the Fall 2009 semester was being cancelled. Based on *San Mateo County Community College District*, *supra*, PERB Decision 1980, the District's action adversely affected Mr. Stott's employment.

With regard to the District offering Mr. Stott a class at a different location, it is not clear from the facts in the charge how the District's action constitutes adverse action for purposes of reprisal. The Board has held that an involuntary transfer to a position with less favorable working conditions constitutes an adverse action. (*Trustees of the California State University* (2006) PERB Decision No. 1853-H.) However, the District's action does not appear involuntary. Ms. Welch only asked whether Mr. Stott would be interested in teaching a class at a different location. No requirement to transfer was placed on Mr. Stott. As such, this allegation fails to allege a prima facie case of discrimination in violation of EERA.

d. Nexus

<u>Timing</u>

The timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor in establishing the necessary connection or "nexus" between the adverse action and the protected conduct. (*North Sacramento School District*, *supra*, PERB Decision No. 264.) The Charge states that Mr. Stott engaged in protected activity in November 2008. The District did not take action until June 2009, approximately seven months after Mr. Stott's protected conduct. The Board has held that a time lapse of five or six months between alleged protected activity and adverse action does not establish temporal proximity sufficient to support indicia of unlawful motivation. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300.) As such, the charge does not establish the requisite temporal proximity between Charging Party's protected activity and the District's alleged adverse action.

Additional *Novato* Factors

As stated above, one factor that demonstrates the necessary connection or "nexus" between the adverse action and the protected conduct is the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons. (*County of San Joaquin (Health Care Service)*, *supra*, PERB Order No. IR-55-M.) A second factor demonstrating the necessary nexus is the employer's departure from established procedures and standards when dealing with the employee. (*Santa Clara Unified School District*, *supra*, PERB Decision No. 104; *San Leandro*, *supra*, 55 Cal.App.3d 553.)

First, the charge specifically states that the District chose to cancel Mr. Stott's Fall 2009 class for "budget restraints." Though unclear, Charging Party appears to argue that the District offered Mr. Stott exaggerated, vague or ambiguous reasons for canceling his Fall 2009 class. From the District's reason, as stated in the charge, it is not clear how the District's rationale for its decision was either vague or ambiguous. Nothing in the District's decision to cancel Mr. Stott's class establishes a contradictory justification for purposes of establishing a prima facie of discrimination.

If instead, Charging Party is attempting to argue that the District deviated from standard practices or procedures, Charging Party has not met its burden as stated in *Ragsdale*, *supra*, PERB Decision No. 944. Charging Party has provided no information documenting an existing practice or standard establishing what the class assignment and/or cancellation procedure was at the time it cancelled Mr. Stott's class.

Lastly, Charging Party states that after the District cancelled his class, he learned that one adjunct Psychology instructor received three courses for Fall 2009 and another full-time Psychology instructor received an "overload" class previously taught by Mr. Stott. Charging Party appears to argue that he was therefore disparately treated by the District. However, nothing in the charge, as presently written, identifies how Mr. Stott and the other Psychology instructors are similarly situated. The Board has rejected arguments for disparate treatment when the charging party failed to present evidence about similarly situated employees. (*San Mateo County Office of Education* (2008) PERB Decision No. 1946.) As such, Charging Party has failed to establish a prima facie case of discrimination.

For these reasons the charge, as presently written, does not state a prima facie case.[2] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies

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

explained above, Charging Party may amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of Charging Party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before November 4, 2009,[3] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Katharine Nyman
Regional Attorney

KN

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