STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BRIAN CROWELL, Charging Party, v. BERKELEY UNIFIED SCHOOL DISTRICT, Respondent.	Case No. SF-CE-3027-E PERB Decision No. 2411 February 19, 2015

Appearances: Brian Crowell, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Marleen L. Sacks, Attorney, for Berkeley Unified School District.

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Charging Party Brian Crowell (Crowell) of the Office of the General Counsel's dismissal of his unfair practice charge. The charge, as amended, alleged that Respondent Berkeley Unified School District (District) violated the Educational Employment Relations Act (EERA)[1] by taking adverse actions against Crowell in retaliation for engaging in protected activity. The charge, as amended, alleged that this conduct constituted a violation of EERA section 3453.5, subdivision (a). The Office of the General Counsel dismissed the charge for failure to state a prima facie case.

The Board has reviewed the case file in its entirety in consideration of Crowell's appeal and the District's opposition thereto. The Board grants the appeal, and hereby reverses the dismissal of the charge and directs the Office of the General Counsel to issue a complaint in accordance with the Board's decision herein.

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

THE UNFAIR PRACTICE CHARGE

Since 2007, Crowell has been employed as a high school history teacher in the Academic Choice learning community at Berkeley High School. Crowell is a member of a bargaining unit represented by the Berkeley Federation of Teachers (BFT). The District and BFT operate under the BFT-BUSD Collective Bargaining Agreement (CBA). Crowell has been an active member of BFT, serving as a site representative from 2009 to 2013. Other site representatives during the events in question include Dan Plonsey (Plonsey) and Masha Albrecht (Albrecht).

Crowell's Complaint regarding the 9th Grade Curriculum

The initial charge alleges that on June 3, 2013, the District issued Crowell a "Notice of Unprofessional Conduct and Unsatisfactory Performance" (Notice) in retaliation for filing a complaint regarding the 9th grade curriculum.

Crowell alleges that he filed a "formal complaint" on February 20, 2013, with Principal Pascuale Scuderi (Scuderi) regarding the compliance and viability of the 9th grade curriculum.[2] Crowell alleges that he pursued the curriculum issue "on behalf of teachers and [himself] for the betterment of the achievement of the ninth grade students." He alleges that two other teachers had expressed concerns about the curriculum but did not want to pursue the issue, noting that both were probationary teachers. He also alleges that another, presumably permanent, teacher "has also broached the issue of compliance of the ninth grade curriculum for the past 4 years, and she was also ignored."

[2] Crowell alleges that also on February 20, 2013, as a union representative, he advocated for another teacher, Christina Mitchell (Mitchell), regarding a dispute with Vice Principal Vernon Walton (Walton). Mitchell was upset that Walton "publicly admonished" her during a meeting at which she was not present. As reported by Crowell to the union president, "[t]his turned out to be a simple miscommunication."

No "formal complaint" was provided with the charge. The February 20, 2013, date alleged in the charge appears to refer to the following e-mail message sent by Crowell to Scuderi on that date:

> I am planning to file a district complaint regarding the 9th grade Human Geography Curriculum. Before I do that I would like to give you the courtesy of meeting with you to resolve the issue. Below is a copy paste of my email sent on December 12th. Since I hadn't received a response from you, I gathered that you weren't interested in the issue. In the context of the "achievement gap" I think the issue is appropriate.

The message includes a copy of, and links to, state standards, and ends by incorporating a copy of a previous message allegedly sent by Crowell on December 12, 2012, regarding the 9th grade history curriculum's compliance with state standards and the viability of the 9th grade history text book.

Crowell alleges that in response to his complaint, he received a threat of discipline from Scuderi regarding Crowell's grading practices. Scuderi's e-mail response of February 20, 2013, copied to Walton, states, in pertinent part:

> To resolve your complaint about the curriculum and standards, I would propose a meeting between yourself, me, Mr. Walton, Mr. Sanoff, and perhaps a few other 9th grade [Academic Choice] social studies teachers. Our expectations, and your concerns regarding them, are shared expectations and multiple perspectives could be valuable.
>
> Additionally, I'm wondering whether this issue relates at all to the information shared with me that you were not planning to use the reader generated by AC staff in your classes. While it is our expectation that the common curriculum is used, if your opposition or objection to the reader is standards-based please elaborate.
>
> Related to the issue you raise I also want to share some administrative questions related to the course in question. During a school-wide review of Semester 1 grades, by teacher, by course, etc., the sections of the course for which you express concerns around standards, is a course wherein all students in both sections that you teach (approximately 50 students) received grades of "A" with most showing at or close to 100% in Powerschool. This is obviously an extraordinarily atypical distribution of grades, and

> brings up several questions for me about expectations and grading policies in this class.
>
> I'd like to meet with you and Mr. Walton over this issue. It might help to resend or share your syllabus. As it is an expressed concern we welcome your having union representation present.

On February 25, 2013, Crowell, Scuderi, Walton and Plonsey attended a meeting convened to discuss Crowell's grading practices.

On March 1, 2013, Walton conducted an observation of Crowell's class. This was the third observation of Crowell's classroom by Walton during the 2012/2013 school year. The first two observations were conducted on November 6 and December 13, 2012. According to the Notice, Crowell took issue with one aspect of Walton's second observation. Crowell did not formally challenge the observation and agreed instead to a third evaluation. Crowell alleges that on March 1, 2013, Crowell informed Walton at 10:31 a.m. that he was not feeling well and that he might arrange for a substitute teacher and go home. Walton visited Crowell's classroom at 2:30 p.m. for the third observation during the last period of the school day. Crowell alleges that it is highly unusual for the District to evaluate a teacher who is not feeling well.

On March 7, 2013, Walton gave Crowell a document entitled "First Letter: Incorrect Attendance" (Letter). The Letter alleges that Crowell had recorded at least six absent students as present. The Letter is dated February 20, 2013,[3] but was not given to Crowell until 15 days later. Crowell alleges that he was pulled out of the lunch line by Walton on March 7, 2013, and given the Letter in Walton's office. The Letter advised Crowell that continued submission of incorrect attendance taking would result in a formal letter copied to Crowell's personnel file.

[3] Crowell alleges that, on February 20, 2013, Scuderi ordered an audit of Crowell's attendance taking.

On March 8, 2013, Walton issued and discussed with Crowell his final Summative Evaluation. Crowell learned that he had received ratings of I (needs improvement) in two standards, and a rating of U (unsatisfactory) in one standard, i.e., developing as a professional educator. The U rating was given on account of grading and attendance deficiencies.[4] Walton informed Crowell that he would not refer Crowell to the Berkeley Peer Assistance and Review Program (BPAR),[5] but would place him on an evaluation cycle for the 2013/2014 school year. Walton also informed Crowell that he needed coaching.

On March 14, 2013, Crowell received a memorandum advising him that he could be referred to BPAR. On March 22, 2013, Walton met with Crowell, reissued the Summative Evaluation[6] and informed Crowell that he would be referred to BPAR because of the U rating on the one standard. Crowell refused to sign the evaluation. The Notice states that Crowell claimed that "this" was "retribution."

On April 29, 2013, Crowell was interviewed by Director of Personnel Services Mary Butler (Butler) and given an opportunity to respond to the deficiencies described in the Notice. On May 7, 2013, Crowell's referral to BPAR was finalized. In the charge, as amended, Crowell alleges that "[a]s a standard practice," a teacher referred to BPAR may not serve as a union representative.

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[4] Crowell alleges that he did not receive a copy of the Summative Evaluation shown to him on March 8, 2013.

[5] The District refers teachers with performance deficiencies to BPAR. BPAR is a remedial two-year program designed to give teachers peer support in correcting their deficiencies.

[6] In addition to the U rating on one standard, Crowell received three ratings of P (proficient) and two I ratings. The range of ratings includes (from worst to best) U, I, P and D (distinguished).

On June 3, 2013, Crowell received the Notice, and presumably the 91 supporting exhibits attached thereto.[7] Crowell alleges that the Notice was in retaliation for filing the curriculum complaint and that, prior to filing the complaint, Crowell was "in good employment standing" with the District. He also alleges that no other teachers with similar issues regarding grading practices and attendance taking had been subject to discipline. Crowell began an extended medical leave of absence from teaching on September 13, 2013.

Crowell's Investigation into BPAR

The first amended charge alleges Crowell's investigation into BPAR as an additional reason for the District's retaliation. Crowell alleges that since 2011, he, and other teachers, had been "actively investigating" BPAR "as it related to discrimination, and violations of rights by [sic] teachers."[8] Crowell began his BPAR investigation in his union capacity because of an "expressed concern of other unit members." Crowell alleges that the District had full knowledge of his involvement in the BPAR investigation.

[7] According to the Notice, Education Code section 44938 authorizes the issuance of such notices when a certificated employee's performance falls short. The Notice states that failure to correct deficiencies described therein within a certain time period will result in disciplinary action including dismissal. The deficiencies described in the Notice were characterized and categorized as follows: Fraudulent Tracking of Personal Attendance; Fraudulent Tracking of Student Attendance; Fraudulent Student Grading/Assessment; Failure to Follow Up on Evidence of Student Plagiarism; Unsatisfactory Evaluations and Referral to BPAR; BAMN Presentation to History Classes, Parent Complaint and Subsequent Insubordination/Dishonesty During Interview; and Directive Issued at April 29, 2013, Interview, Textbook Dispute, Insubordination, and Improper Interference with District Investigation/Disciplinary Process. The Notice contained 23 directives believed necessary for Crowell to comply with in order to overcome the deficiencies. Scuderi signed the Notice. A copy was placed in Crowell's personnel file.

[8] In its second position statement in response to the first amended charge, the District points out that BFT and the District collectively bargained BPAR and a panel "consisting of a majority of union members" select the individuals placed in BPAR. According to Article 19.4.1 of the CBA, the BPAR panel makes recommendations regarding retention and dismissal of teachers placed in BPAR.

On September 13, 2012, Crowell sent an e-mail message to the Berkeley School Board (School Board), requesting that the offer of employment extended by the School Board to a candidate for the superintendent position be rescinded. On October 15 or 16, 2012,[9] School Board Director Josh Daniels (Daniels) responded, stating that the School Board had received almost 1,000 e-mail messages on the subject, that the individual had withdrawn his candidacy and was no longer under consideration, and that the School Board will be more inclusive and transparent when it reinitiates the job search. There is another e-mail message from Daniels to Crowell, dated October 24, 2012, asking Crowell to meet for coffee.

[9] The e-mail messages attached to the initial charge and first amended charge are not organized or in chronological order. Nor are they adequately identified or referenced in the charge. Sometimes the text is hidden or cut and pasted into another message, and sometimes text is missing from the to/from/subject/date lines. One copy of the message sent by Daniels shows it was sent on October 15, and another on October 16.

Another e-mail message from Crowell regarding the curriculum issue and his negative performance evaluation states: "I appreciate your previous email, and I hope we can resolve our differences to make Berkeley High School a world class school. I would like my union activity to not cloud the perception of me as an intellectual and educator. Despite the many differences we have had, your leadership at Berkeley High is necessary and extremely important." Only the last section of this message showing Crowell as the signatory is provided. The first section, including the to/from/subject/date lines, is missing. From the context of the section provided, it appears to have been written to an administrator, perhaps Scuderi, because it contains a request that the recipient change the U on Crowell's Summative Evaluation to P and a request that the recipient of the e-mail message be the one to evaluate Crowell (instead of Walton).

Given the disorganization of the e-mail messages attached to the charge, only those with obvious relevance to the charge allegations have been considered as supporting evidence. Where attachments to an unfair practice charge are neither properly identified and placed in a logical order, whether it be chronological or otherwise, nor cross-referenced in the charge document or narrative statement of the charge, they are of limited use to the Office of the General Counsel in the investigation and processing of the charge. While the powers of the Board agent include "Assist[ing] the charging party to state in proper form the information required by [PERB Regulation] 32615" (PERB Reg. 32620, subd. (a)(1)), it is not the Board agent's responsibility to sift through the charging party's supporting documents and determine their possible relevance to the charge allegations where it is clear that the charging party has copied a stack of documents and attached them to the charge without an earnest effort to eliminate duplicates, place them in a logical order, ensure their authenticity and identify through labeling and cross-referencing which ones support the various allegations of the charge. (PERB Regs. are codified at Cal. Code Regs., tit. 8, sec. 31001, et seq.)

There are a number of e-mail messages between Crowell and Daniels in late October and November 2012 attempting to set up a meeting. It appears they had scheduled a meeting for November 10, 2012, but Crowell cancelled because his father-in-law had been in an accident. On November 12, 2012, Crowell wrote:

> I can essentially work around your schedule. I would like to discuss the following:
>
> 1. African American representation in the certificated staff.
> 2. Concern about how BPAR is used. Teachers concern about possible age discrimination and political retaliation.
> 3. Course Approval as it relates to the African American Studies Department.
> 4. Relationship between Administration and Classified Staff Concerns.
> 5. Teacher turnover as it relates to the weakening of the overall staff.

Crowell does not provide the date his meeting with Daniels ultimately occurred, but does allege that they met for two hours in relation to his BPAR investigation.

By e-mail dated January 6, 2013, Crowell wrote to co-superintendents Neil Smith (Smith) and Javetta Cleveland with a formal request for statistical information relating to BPAR. Crowell's message states:

> Greetings Mr. Smith and Ms. Cleveland:
>
> I am writing this note on behalf of some concerned teachers in the Berkeley Unified School District. We are increasingly concerned with how BPAR has been used since its inception in BUSD. We do not feel that the program is working as it was designed, with the intent of improving teacher pedagogy and practice. Therefore, we would like the following information regarding the BPAR Program as highlighted in Article 19 of the BFT/BUSD Contract. We would like the following information:
>
> 1. The ages of teachers placed into BPAR,
> 2. The ethnicity of teachers placed into BPAR,
> 3. The gender of teachers placed into BPAR,
> 4. The placement on the salary schedule when placed into BPAR.

> We understand that names of persons placed into BPAR would be inappropriate, so we feel the 4 items requested above would be adequate for our needs. We are strongly committed to constantly improving our teaching practice and working to improve the success of all students at Berkeley Unified School District.
>
> Regards,
>
> Brian Crowell
> AC Co Site Rep

Smith responded by informing Crowell that he had forwarded his request to Delia Ruiz (Ruiz), assistant superintendent for human resources.[10]

On the same day Crowell filed the curriculum complaint, February 20, 2013, District officials released documents responsive to Crowell's information request,[11] which allegedly shows "a bias towards age and race regarding to [sic] teachers referred to remediation program." The BPAR documents were sent to Crowell as an attachment to an e-mail message from Ruiz. Copied on the message were Butler, the union president and one of the co-superintendents. According to the first amended charge, the data shows "a bias with teachers with higher salaries, advanced education, and higher wages."

[10] By e-mail of January 29, 2013, Crowell forwarded his BPAR information request to Daniels stating that a "substantial group of teachers at BHS are concerned with the validity and methodology of [BPAR]" and further states, "[o]n behalf of concerned teachers I will continue my attempts to retrieve this data." Daniels responded by e-mail message of February 5, 2013, thanking Crowell for forwarding his request.

[11] In an e-mail exchange between Berkeley citizen Margy Wilkinson (Wilkinson) and District Public Information Officer Mark Coplan (Coplan), Coplan forwarded to her a document containing BPAR data. Coplan states that the document was created in 2013, "but because it went to the [School] Board in closed session, it never came to my attention until it was shared with me now." He further states that "there has been some distribution of the document in the community by someone undergoing the BPAR process." Crowell alleges that he "brows[ed]" through the closed session agendas from 2013 and 2014, and none disclosed any discussion of BPAR or a BPAR information request in closed session.

By e-mail message of February 21, 2013, Albrecht disseminated the BPAR data to 25 lines of staff e-mail addresses.[12] The message states:

> Dear Teachers,
>
> Brian just got the data from the district that shows the age, ethnicity, and salary schedule placement of teachers that have been put in the [BPAR]. This is a punitive process for tenured teachers, which we have discussed in earlier emails. We wanted to share the data right away because we were amazed at the results. A few simple statistics we worked out are: 29% of the teachers are African American or Latino/Latina. (We don't know the overall average for the district, but it is much lower than this.) 76% of the teachers are over 50 years old (Again, we don't know the % of tenured teachers in the district over 50, but it must be less than 76%.) Does anyone have any suggestions on where we should go from here, now that we have this information?
>
> Masha, Brian, Matt Laurel

On February 23, 2013, Crowell wrote to Albrecht by e-mail that Ira Holsten (Holsten)[13] wanted "the data sample" for the entire District, but thought it was more appropriate for someone else to make the request. By e-mail the same date, Albrecht sent the following message to other site representatives:

> Hi Phil, Rosa, and Monica,
>
> We have several requests from members to follow up on our data regarding teachers in BPAR. Specifically, they want to know the overall data for teachers in the district regarding race and age, the two factors that stand out in the BPAR data. If we can compare the sample of teachers overall, we are able to do a true test for bias.

[12] Crowell alleges that one of the e-mail message recipients, Department Chair of Academic Choice Matthew Carton (Carton), approached Crowell on February 22, 2013, yelling and cursing. Crowell alleges that Carton was extremely irate that the BPAR data had been shared with the Academic Choice teachers. Crowell reported this incident by e-mail message of February 24, 2013, to Daniels, stating that Crowell had been "shaken" by the experience. According to Crowell, Daniels did not respond.

[13] Holsten is not identified in the charge documents but from the context of various e-mail messages attached to the charge documents appears to be a teacher and union member, actively involved in the BPAR issue.

> I'm writing to you because I thought of you three as site reps who might be interested in helping us with this. It would be useful if the next Request for Information came from other site reps besides Brian and myself. As you can imagine, this data has stirred up some heat and Brian and I are feeling a bit weary. Brian can share the steps for making a Request for Information. It's a standard procedure for any rep or group of reps to do. I hope you are having a good weekend.
>
> Masha

On March 2, 2013, site representative Monica Salvador wrote an e-mail message, asking why do "some react negatively to sharing the BPAR data." By e-mail message of the same date, Crowell responded:

> The negative responses are attributed to the misunderstanding of teachers as it relates to BPAR. Some teachers are treated well by administration, many others are not. Many of our colleagues think that the administrators should have this kind of power, I do not. Unfortunately the union has participated in this process, and has therefore weakened the union itself. BHS is the perfect place of not dealing with "gorilla in the room" which often times has to deal with our working conditions, support or non support of administrators, political power of some parents vs others, teacher delivery of content, all these items have to do with how well we perform in the classroom, and many times lead a teacher into BPAR.
>
> On 3 occasions iv'e [sic] seen blatant contract violations which should have led to evaluations being thrown out, ended up with teachers being railroaded into bpar, and the honest question of teaching pedagogy, content knowledge and competence never being honestly addressed. Iv'e [sic] never seen so much collusion between the union leadership and district in my 12 years of teaching. For many years the bpar panel itself was illegal and in violation of state law.
>
> If there is a program that supports teachers and improves our practice I'm all for it, but as long as the district is in total control of it we have no power. Do teachers want to have power and jurisdiction over their own economic livelihoods or not? Since the answer for many of our colleagues is "no", that's why we are getting the negative responses. The teachers have the power, but they have decided to cede that power to administration. That as a front seat observer in this fight is the problem.

Crowell alleges that his "working conditions changed in an adverse way IMMEDIATELY after these [BPAR] disclosures." (Unfair practice charge [capitalization in the original].

DISMISSAL OF THE UNFAIR PRACTICE CHARGE

The Office of the General Counsel appropriately dismissed allegations falling outside the purview of PERB's jurisdiction, i.e., allegations that the District violated the California Education Code and allegations that the District discriminated against teachers on the basis of race, age or gender. The Office of the General Counsel appropriately analyzed the remaining allegations under the retaliation test set forth in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*). As the Office of General Counsel explained, charging party in a discrimination/retaliation case must show as a prima facie matter protected activity, employer knowledge, adverse action and nexus.

Regarding protected activity, the Office of the General Counsel determined that Crowell's filing of the curriculum complaint was not to enforce rights stated in a collective bargaining agreement or to jointly prosecute violations of workplace rights under *Coachella Valley Unified School District* (2013) PERB Decision No. 2342 (*Coachella Valley*). Nor was it a logical continuation of group activity under *Los Angeles Unified School District* (2003) PERB Decision No. 1552 (*Los Angeles*). The Office of the General Counsel acknowledged that advocacy on behalf of a group of employees concerning working conditions is protected activity, but determined that the charge lacks any details about Crowell's specific conduct relating to his BPAR investigation such as specific allegations of when or how Crowell brought his concerns to the attention of District officials.

The Office of the General Counsel determined that Crowell had successfully alleged only one instance of protected activity, i.e., his advocacy on behalf of Mitchell concerning her

dispute with Walton on February 20, 2013 (see, *ante*, fn. 2), correctly observing, however, that this instance of protected activity was not alleged to be the cause of the unsatisfactory performance evaluation or the Notice.

The Office of the General Counsel proceeded to analyze whether the charge establishes a sufficient nexus, as a prima facie matter, between Crowell's advocacy on behalf of Mitchell and the later adverse actions. The Office of the General Counsel determined that no nexus factors were satisfactorily alleged apart from temporal proximity. The Office of the General Counsel rejected Crowell's assertion that nexus is established by allegations that two teachers with attendance taking problems were not formally disciplined. As the Office of the General Counsel observed, Crowell failed to provide specific information about the conduct of these teachers, and therefore it was impossible to tell whether the District treated Crowell more harshly than similarly situated individuals, citing *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S (*Transportation*). The Office of the General Counsel also rejected Crowell's assertion that nexus is established by allegations that Albrecht had assigned a 90 percent grade to every student on a final examination, but did not receive any discipline for this conduct. Relying on *San Mateo County Office of Education* (2008) PERB Decision No. 1946, the Office of the General Counsel determined that the District's failure to discipline Albrecht is not evidence of unlawful motivation because Crowell failed to establish that his conduct and Albrecht's conduct were comparable.

In sum, according to the Office of the General Counsel, the charge establishes one instance of protected activity and two adverse actions, the unsatisfactory performance evaluation and the Notice; the charge, however, fails to establish a nexus between these events as Crowell's examples of disparate treatment lack comparability.

CROWELL'S APPEAL

On appeal, Crowell asserts that the Office of the General Counsel erred in determining that the filing of the curriculum complaint was not protected activity. Regarding nexus, Crowell cites Walton's failure to give him the Letter until 15 days after it was dated and one day before presentation of the Summative Evaluation. According to Crowell, the timing of the Letter left Crowell no opportunity to clear up the attendance-taking issue prior to it appearing as a basis for the U on his Summative Evaluation. Crowell also points to the District's reversal on the BPAR referral as another example of nexus. Last, in support of his claim of disparate treatment, Crowell asserts that the grading system used by Albrecht is comparable to the grading system he used. Crowell continues to assert that he was singled out on the attendance-taking issue. Crowell argues that he is being retaliated against because of his union activism.[14]

THE DISTRICT'S OPPOSITION

The District requests that the appeal be summarily dismissed based on Crowell's failure to comply with PERB Regulation 32635 governing the filing of appeals. The District asserts that Crowell simply restates arguments previously made, and attaches multiple documents without explaining their relevance or indicating whether they are new or old evidence. According to the District, the appeal fails to identify the page or part of the dismissal to which the appeal is taken or state the grounds and is therefore subject to dismissal.

[14] The Board does not consider new allegations or supporting evidence raised for the first time on appeal without a showing of good cause. Lacking such a showing, the Board disregarded any such allegations or evidence in Crowell's appeal. (PERB Reg. 32635, subd. (b).)

DISCUSSION

PERB Regulation 32635, subdivision (a), provides that an appeal (1) state the specific issues of procedure, fact, law, or rational to which the appeal is taken, (2) identify the page or part of the dismissal to which the appeal is taken, and (3) state the grounds for each issue stated. As the District points out in its opposition to the appeal, to satisfy the requirements of this regulation, the appeal must sufficiently place the Board and the respondent on notice of the issues on appeal. (*State Employees Trades Council (Ventura, et al.)* (2009) PERB Decision No. 2069-H (*SETC United*); *City and County of San Francisco* (2009) PERB Decision No. 2075-M.) Although the appeal is not perfect, it specifically takes issue with the Office of the General Counsel's determinations on the protected activity and nexus elements of the *Novato* retaliation test. Accordingly, we find that the appeal substantially complies with the regulatory requirements and sufficiently places the Board and the District on notice of the issues on appeal.

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato, supra,* PERB Decision No. 210.)

Protected Activity

The first issue is whether Crowell's filing of the curriculum complaint is protected activity under EERA. This issue has not previously been directly presented to or decided by the Board. One approach would be to differentiate between an employee complaint arising out of, and based on, professional or academic concerns and an employee complaint arising out of, and based on, employment-related concerns. Under such an approach, an employee seeking to

enforce professional or academic standards would not be engaged in protected activity whereas an employee seeking to enforce rights stated in a collective bargaining agreement or jointly pursuing violations of workplace rights would be engaged in protected activity. This approach comports with the principle that PERB does not enforce external laws such as that contained in Education Code or whistleblower statutes. (*Coachella Valley, supra,* PERB Decision No. 2342.)

This approach, however, fails to take into consideration language unique to EERA that suggests a broader definition of protected activity when evaluating unfair practice charges arising in the public school arena. In describing the various purposes of EERA, the Legislature specifically recognized the right of public school employees to be represented by employee organizations of their own choice in both their *professional* and employment relationships with public school employers. (EERA, § 3540.) Similar declarations of purpose found in other public sector labor relations statutory schemes administered by PERB refer only to the employment relationship between public employees and their public sector employers. This is true of the Meyers-Milias-Brown Act (§ 3500), the Ralph C. Dills Act (§ 3512) and the Trial Court Employment Protection and Governance Act (§ 71630).[15] EERA is the only statutory scheme whose purpose includes an explicit recognition and protection of the public employee's professional relationship with the public sector employer as distinct from, or at least as encompassed within, the public employee's employment relationship with the public sector employer.

[15] While the Legislature's declaration of purpose found in the Higher Education Employer-Employee Relations Act (HEERA) (§ 3560) also refers only to the employment relationship, other sections of HEERA recognize the unique relationship between, and common interests of, public employers and employees in an educational setting (see, e.g., § 3561, subd. (b) [joint decisionmaking and consultation between administration and faculty or academic employees], § 3562, subd. (q) and (r) [consultation rights over content and conduct of courses, curricula and research programs].)

Consistent with this broader protection, EERA specifically protects the right of certificated employees to be afforded "a voice in the formulation of educational policy." (EERA, § 3540.) In furtherance of this right, the statutory provision defining the "scope of representation" under EERA states that "the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent those matters are within the discretion of the public school employer under the law." (EERA, § 3543.2, subd. (a)(3).)

In *Rancho Santiago Community College District* (1986) PERB Decision No. 602, the Board considered whether an instructor's speech was protected. The Board stated that the first inquiry was whether the speech related to matters of legitimate concern to the employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on matters of employer-employee relations under EERA section 3543. The Board concluded that "educational policy and academic freedom," amongst other subjects of the instructor's speech, were of legitimate concern to employees *as employees*. (*Id.* at pp. 12-13.)

EERA section 3543, subdivision (a) protects the right of public school employees "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." The question is whether Crowell's filing of the 9th grade curriculum complaint is of legitimate concern to employees as employees so as to come within the right to participate in the activities of an employee organization for the purpose of representation on all matters of employer-employee relations.

Accepting the allegations of the charge as true,[16] as is required at this stage of the proceedings, they support a conclusion that Crowell's filing of the 9th grade curriculum complaint is protected activity. Crowell pursued the 9th grade curriculum complaint "on behalf of teachers and [himself] for the betterment of the achievement of the ninth grade students." Two probationary teachers had expressed concerns about the curriculum but did not want to pursue the issue. Another teacher had raised the issue of 9th grade curriculum compliance and was ignored. Through Crowell's complaint, Crowell questioned whether the 9th grade curriculum complied with state standards and raised the issue of the viability of the 9th grade history text book.

Scuderi's response to Crowell's complaint has twofold significance to the issue whether Crowell's filing of the curriculum complaint is protected activity. First, in response to Crowell's complaint, Scuderi proposed to meet, not just with Crowell, but also with other 9th grade social studies teachers. This provides some limited support for the notion that the curriculum complaint was pursued by Crowell not solely on his own behalf but on behalf of other 9th grade teachers. Second, Scuderi's response directly links Crowell's curriculum complaint to Crowell's displeasure with the 9th grade history text book and his grading policies. In the course of making that linkage between the curriculum and Crowell's grading policies, Scuderi asks to meet with Crowell and his union representative to discuss Crowell's grading policies. As we know from the alleged chronology of events, Crowell's grading policies contributed in large part to the unsatisfactory performance evaluation and referral to BPAR, and the Notice he subsequently received from the District.

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[16] At this stage of the proceedings, we assume that the essential facts alleged in the unfair practice charge are true. (*San Juan Unified School District* (1977) EERB Decision No. 12 [prior to January, 1978, PERB was known as the Educational Employment Relations Board or EERB]; *Trustees of the California State University (Sonoma)* (2005) PERB Decision No. 1755.)

In sum, EERA protects certificated teachers' right to be represented in their professional and employment relationship with their public school employer including their right to have a voice in the formulation of educational policy. Crowell pursued the 9th grade curriculum complaint on behalf of himself and other teachers. (*Los Angeles, supra,* PERB Decision No. 1552 [an employee's complaint concerning an issue that impacts employees generally is protected activity].) Accordingly, the Board concludes that Crowell's filing of the 9th grade curriculum complaint is protected activity under EERA, for prima facie purposes.[17]

We now turn to the issue of whether Crowell's investigation into BPAR is protected activity under EERA. As the Office of the General Counsel correctly points out, advocacy on behalf of a group of employees concerning working conditions is protected activity. The Office of the General Counsel dismissed the BPAR investigation allegations because of a lack of specificity about Crowell's conduct such as specific allegations of when or how Crowell brought his concerns to the attention of District officials. On this point, we take a different view of the factual allegations concerning Crowell's BPAR investigation.

Regarding Crowell's meeting with Daniels, we do not know the exact date of the meeting, but the allegations establish that the meeting occurred sometime after November 12, 2012, and lasted for two hours. Crowell's failure to supply the exact date of the meeting is not fatal to establishing a prima facie case. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M, p. 15.) Crowell's information request to the co-superintendents of January 6, 2013, contains sufficient specificity about Crowell's conduct.[18] The request states

[17] Also, in this case, Crowell's professional relationship with the District had a direct impact on his employment relationship with the District. The curriculum and course text book, depending on their suitability for a particular classroom, bear a relationship to grading policies and, as we have seen here, performance evaluations and discipline, matters of legitimate concern to employees *as employees*.

[18] Also, prior to Crowell's meeting with Daniels, Crowell sent Daniels an e-mail message on November 12, 2012, expressing "[c]oncern about how BPAR is used."

that Crowell is writing on behalf of "some concerned teachers" in the District. He signs the request as "AC [Academic Choice] Co Site Rep." Crowell specifically refers to Article 19 of the CBA in support of the request. (See *Jurupa Unified School District* (2012) PERB Decision No. 2283 (*Jurupa*) [individually seeking to enforce provisions of a collectively bargained agreement is a logical continuation of group activity and therefore protected].) The subject matter concerns the placement of teachers by administrators into BPAR, a collectively-bargained remedial program for teachers who have received an unsatisfactory performance evaluation, a matter of legitimate interest to employees as employees. The Board concludes, therefore, that Crowell's investigation into BPAR is protected activity under EERA, for prima facie purposes.

Employer Knowledge

The second element of the *Novato* test entails a determination of whether the employer had knowledge of Crowell's exercise of rights under EERA. To prove the knowledge element of the prima facie case, the charging party must establish that the relevant individual or entity actually knew or was clearly informed of the protected activity.[19] (*SETC United, supra,* PERB Decision No. 2069-H.) An employer's knowledge of protected activity may be inferred from circumstantial evidence. (See *Los Angeles Community College District* (2004) PERB Decision No. 1668.)

Regarding the curriculum complaint, Scuderi was the recipient of Crowell's complaint and Walton was copied on Scuderi's response. The unsatisfactory performance evaluation was

[19] In addition, under the subordinate bias liability theory, the unlawful motive of a subordinate supervisorial employee may be imputed to the decision-maker responsible for authorizing the adverse action against the charging party where: the lower-level official's recommendation, evaluation or report was motivated by the employee's protected conduct; the lower-level official intended for his or her conduct to result in an adverse action; and the lower-level manager's conduct was a motivating factor or proximate causes of the decision to take adverse action against the employee. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M.)

given by Walton, and the Notice was signed by Scuderi. Accordingly, the Board concludes that the District had knowledge of Crowell's filing of the 9th grade curriculum complaint when its agents issued the unsatisfactory performance evaluation and the Notice.

Regarding the BPAR investigation, Crowell's information request was forwarded to Assistant Superintendent for Human Resources Ruiz. The BPAR documents responsive to Crowell's information request were sent to Crowell as an attachment to an e-mail message from Ruiz. Copied on Ruiz's e-mail message was Director of Personnel Services Butler who interviewed Crowell on April 29, 2013, concerning Crowell's alleged performance deficiencies. Following Butler's interview of Crowell, the District's referral of Crowell to BPAR, which resulted from the unsatisfactory performance evaluation, was finalized on May 7, 2013, and the Notice was provided to Crowell on June 3, 2013. Crowell alleges the District had full knowledge of his involvement in the BPAR investigation, which is supported by these facts. Accordingly, the Board concludes that the District had knowledge of Crowell's BPAR investigation when its agents issued the unsatisfactory performance evaluation and the Notice.

Adverse Action

The third element of the *Novato* test entails a determination whether the employer took adverse action against the employee. 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.)

> 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, fn. omitted.)

Under long-established Board precedent, receipt of an unsatisfactory performance evaluation is an adverse action for retaliation purposes. (*Woodland Joint Unified School District* (1990) PERB Decision No. 808; *Jurupa, supra,* PERB Decision No. 2283, p. 19.) The Summative Evaluation, first discussed with Crowell on March 8, 2013, and reissued on March 22, 2013, contained two I ratings and one U rating. There is no question that the Summative Evaluation qualifies as an unsatisfactory performance evaluation and therefore satisfies the adverse action element of the *Novato* test. In addition, Crowell was placed in BPAR ostensibly as a result of receiving a U rating on one of the standards. Given the relationship between unsatisfactory performance evaluations and the BPAR referral process, we conclude that the District's referral of Crowell to BPAR, whether considered a part of the performance evaluation process or on its own, also satisfies the adverse action element of the *Novato* test.

Turning to the Notice, it informs Crowell that his alleged unprofessional conduct and unsatisfactory performance are grounds for dismissal and, if not corrected within a specified time period, will result in disciplinary action, up to and including dismissal. A copy of the Notice was placed in Crowell's personnel file. Under PERB's objective standard for evaluating whether the employer's action is adverse, a reasonable person under the same circumstances would consider the Notice to have an adverse impact on Crowell's employment. (*City of Long Beach* (2008) PERB Decision No. 1977-M; *Los Angeles Unified School District* (2007) PERB Decision No. 1930 [a counseling memoranda that threatens future disciplinary action is an adverse action]; *Alisal Union Elementary School District* (2000) PERB Decision No. 1412 [placing a document that could support future discipline in an employee's personnel file is an adverse action].) The Notice satisfies the adverse action element of the *Novato* test.

Nexus (Unlawful Intent)

Where direct evidence of unlawful intent is presented, it alone establishes the requisite nexus. (*Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H.) PERB recognizes, however, that direct proof of motivation is not often possible and, thus, unlawful motivation or intent may be established by circumstantial evidence and inferred from the record as a whole. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde*).)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*Transportation, supra,* PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104 (*Santa Clara*)); (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 (*Parks and Recreation*)); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino*

Union Elementary School District (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*North Sacramento*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210).

Here, Crowell's information request was made on January 6, 2013, and his 9th grade curriculum complaint was made on February 20, 2013. The Summative Evaluation was first discussed with Crowell on March 8, 2013, and reissued on March 22, 2013. The BPAR referral was finalized on May 7, 2013, and the Notice provided to Crowell on June 3, 2013. All of the events in question occurred within a five-month period of time. Based on this timeline, we conclude that the protected activity occurred in close temporal proximity to the adverse actions. (*North Sacramento*, *supra*, PERB Decision No. 264.)

In addition, we agree with Crowell that the circumstances surrounding his receipt of the Letter and his referral to BPAR support an inference of unlawful motive. The Letter, which addressed attendance taking deficiencies, was not provided to Crowell until 15 days after it was dated and one day before discussion of his Summative Evaluation in which the attendance taking deficiencies, first presented to Crowell in the Letter, were used as a basis for the U rating. While ordinarily it is for the charging party to establish what the employer's procedures and standards are before accusing the employer with departing from them, in this case, it can be presumed that the District's procedures and standards do not contemplate a 15-day delay in delivery. Accordingly, we conclude that Crowell has established a nexus factor in addition to close temporal proximity in the allegations concerning his receipt of the Letter. (See *Santa Clara, supra,* PERB Decision No. 104 [the employer's departure from established procedures and standards].)

Adding to the inference of unlawful motivation, initially Walton informed Crowell that he would not be referred to BPAR. Six days later, Crowell was then informed that he

could be referred to BPAR. Then, eight days later, Crowell was informed that he was referred to BPAR. Wavering and taking inconsistent positions on a decision as critical to a teacher's professional standing as this supports an inference of unlawful motivation, for prima facie purposes. (See *Parks and Recreation, supra,* PERB Decision No. 328-S [the employer's inconsistent or contradictory justifications for its actions].)

Also, other factual allegations, which likely would not be enough to satisfy the nexus element standing alone, at least play a contributory role in the analysis. Crowell alleges that it is unusual to be evaluated by an administrator on a day when the administrator knows that the teacher to be evaluated is not feeling well and thinking about going home. And, yet, Crowell was given his third evaluation on such a day. In addition, the District asserts that the document containing the BPAR data "went to the [School] Board in closed session." And, yet, the closed session agendas for 2013 and 2014 did not disclose any closed session discussion of BPAR or Crowell's BPAR information request.

Finally, in Scuderi's response to Crowell's filing of the 9th grade curriculum complaint, he raised an issue, i.e., Crowell's grading policies, that could, and did, lead to an unsatisfactory performance evaluation and pre-disciplinary, counseling memoranda. An employer's managerial prerogative to raise performance and professional misconduct issues with employees is beyond doubt. When such issues are raised in immediate response to the exercise of protected rights, however, the threat of adverse action becomes closely enmeshed with the protected activity to a point not well tolerated by the statutory scheme. (See *City of Monterey* (2005) PERB Decision No. 1766-M.) While such evidence is not direct evidence of unlawful motivation, it is nonetheless probative on the question of unlawful motivation.

In sum, the Board concludes that Crowell has satisfied the nexus element of the *Novato* test, for prima facie purposes.

CONCLUSION

At the dismissal review stage of these unfair practice proceedings, the Board does not examine the District's reasons for issuing Crowell the Summative Evaluation or the Notice. The Board examines only the sufficiency of Crowell's pleadings to determine whether Crowell has stated a prima facie case of retaliation. The Board's conclusion that Crowell has done so means that an unfair practice complaint will issue. If this case proceeds to a formal hearing after issuance of the complaint, Crowell will have the affirmative burden *to prove by a preponderance of the evidence* the factual allegations of his unfair practice charge (PERB Reg. 32178), and make persuasive legal arguments as to why his proffered evidentiary showing satisfies his burdens of proof and persuasion.

If Crowell succeeds at proving his prima facie retaliation case at a formal hearing, the burden will then shift to the District to prove that it would have issued the Summative Evaluation and the Notice even if Crowell had not engaged in the protected activity. *(Novato, supra,* PERB Decision No. 210; *Martori Bros. Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730; *Wright Line* (1980) 251 NLRB 1083.) Thus, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." *(Martori Bros.)* The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." *(McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.) The employer must prove that it had both an alternative non-discriminatory reason for its challenged action, or in this case, actions, and that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity. *(Palo Verde, supra,* PERB Decision No. 2337.)

ORDER

The Board REVERSES the Office of the General Counsel's dismissal in Case No. SF-CE-3027-E and REMANDS the case to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members Winslow and Banks joined in this Decision.