

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CHICO UNIFIED TEACHERS ASSOCIATION,

Charging Party,

v.

CHICO UNIFIED SCHOOL DISTRICT,

Respondent.

Case No. SA-CE-2658-E

PERB Decision No. 2463

December 22, 2015

Appearances: California Teachers Association by Ramon Romero, Attorney, for Chico Unified Teachers Association; Kingsley Bogard by Paul R. Gant, Attorney, for Chico Unified School District.

Before Martinez, Chair; Banks and Gregersen, Members.

DECISION

GREGERSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Chico Unified Teachers Association (Association) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The complaint alleged that the Chico Unified School District (District) violated the Educational Employment Relations Act (EERA)¹ when it took adverse action against bargaining unit member Kevin Payne (Payne) because of his exercise of protected rights by assigning him to teach non-welding courses. The complaint alleges that this conduct violates EERA section 3543.5(a).²

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

² Section 3543.5 provides, in pertinent part:

It is unlawful for a public school employer to do any of the following:

The ALJ issued a proposed decision dismissing the complaint and underlying charge, concluding that the Association had failed to prove its case. The Association timely filed a statement of exceptions and the District filed a timely response.

The Board has reviewed the record, the ALJ's proposed decision, the Association's exceptions, and the District's response thereto. We conclude that the ALJ's main factual findings are supported by the record, and we adopt the ALJ's findings as the findings of the Board itself. With the exception of finding that the Association failed to prove the requisite additional nexus factor for establishing a prima facie case of retaliation, we affirm the ALJ's conclusions of law, and to the extent they are consistent with our discussion below we adopt them as the decision of the Board itself.

PROCEDURAL HISTORY

On July 26, 2012, the Association filed an unfair practice charge alleging that the District retaliated against Payne, and unilaterally changed its policy concerning the distribution of extra duty assignments.

On August 27, 2012, the District filed its position statement in response to the charge.

On January 30, 2013, the Association withdrew the unilateral change allegation.

On February 4, 2013, PERB's Office of the General Counsel issued a complaint alleging that the District had retaliated against Payne in violation of EERA section 3543.5(a), when it assigned him to teach courses on June 20, 2012, other than the agricultural welding

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

courses Payne had exclusively taught for eight years, and when it directed Payne to work on the model farm project on July 19, 2012.

On February 13, 2013, the District filed its answer, denying the material allegations of the complaint and asserting several affirmative defenses.

On March 22, 2013, the parties met for an informal settlement conference, but the matter was not resolved.

On June 18 and 19, 2013, the ALJ conducted a formal hearing. During the hearing, the Association withdrew its allegation regarding the District's direction to have Payne work on the model farm project.

On August 21, 2013, the parties filed closing briefs.

On September 27, 2013, the ALJ issued her proposed decision.

On November 8, 2013, the Association timely filed its exceptions, to which the District timely responded on December 2, 2013.

On December 3, 2013, PERB's Appeals Assistant informed the parties that the filings were complete and the matter was placed on the Board's docket.

FACTUAL SUMMARY

Chico High School (CHS) is one of the few public schools in the State of California that maintains an Agricultural (Ag) Department. Payne is currently one of four teachers at CHS in the Ag Department. He holds a single subject teaching credential in Agriculture, an Agriculture Specialist credential, and a Building and Construction Trades credential. From 2002 until 2010, Payne was one of three teachers in the CHS Ag Department and the only teacher who taught Ag Welding. In 2002, the other two teachers in the Ag Department were

David Wemp (Wemp) and Quinn Mendez (Mendez). In 2007, Wemp retired and was replaced by Sheena Sloan (Sloan).

At the end of the 2006-2007 school year, the District began discussions about reducing the size of the Ag Department from three teachers to two. In response, a group of concerned citizens calling themselves “Friends of Agriculture” organized to support the CHS Ag Department. The Friends of Agriculture donated funds directly to the salary of the third Ag Department teacher and sponsored the creation of a working student farm known as “Henshaw Farm.”

At the end of the Spring 2010 semester, Payne was involuntarily transferred to a junior high school where he was assigned to teach Industrial Technology. The Industrial Technology class teacher from the junior high school, Ronnie Cockrell (Cockrell), was involuntarily transferred to CHS and assigned to teach the Ag Welding classes. Cockrell holds an Industrial Technology credential and a Physical Education credential. In August 2010, Payne grieved the involuntary transfer.³

During the two years that Payne was assigned to the junior high school, the Ag Department at CHS grew in size and new classes were offered. For the 2010-2011 school year, after approval from the CHS Instructional Council,⁴ the District introduced an “Ag Earth Science” course to the Ag Department designed to satisfy the graduation requirement for

³ Cockrell did not grieve his involuntary transfer.

⁴ The CHS Instructional Council is made up of all CHS Department Chairpersons and is tasked with reviewing new course offerings and determining proper placement within instructional departments.

physical science.⁵ Prior to this new course offering, Earth Science courses had been offered only through the Science Department. Adding the new courses resulted in an increase in the overall student enrollment in the Ag Department. Although, enrollment in Ag Earth Science decreased slightly during the 2011-2012 school year, the overall student enrollment numbers in the CHS Ag Department continued to increase. As a result, during the 2011-2012 school year, the District also added an additional sixth section of Ag Welding. As with Ag Earth Science, the addition of the sixth Ag Welding class increased the overall student enrollment in the Ag Department.

Early in the Spring 2012 semester, the District began preparing the CHS master calendar for the 2012-2013 school year. CHS District Principal Jim Hanlon (Hanlon) testified that the process for creating the master calendar begins in February with a pre-registration of the incoming senior class to determine their course preferences. Surveys are typically completed by the incoming seniors in mid-April, and final responses are received in mid-May from the remaining student body. After the completion of this process, the District determines which courses will be offered and by whom.

As a result of the continued increased student enrollment in the Ag Department, the District began contemplating whether to hire a fourth Ag teacher to keep the class size small, or to add additional classes and sections to each Ag teacher's schedule for the 2012-2013 school year. The District's goal of having a fourth teacher centered around finding someone to strengthen the business part of the Ag Department since none of the current teachers were comfortable teaching those subjects. To that end, the District made the decision to add two new courses for the 2012-2013 school year: Veterinary Science and Ag Marketing

⁵ During the 2010-2011 school year, the District also introduced an "Ag Econ/Gov" course.

(management of Henshaw Farm). In addition, the District also added an additional section of Ag Econ/Gov and two additional sections of Ag Earth Science.

In the meantime, Payne's grievance over his involuntary transfer proceeded to arbitration. The arbitration hearing was held over seven days between June 1 and October 19, 2011. On March 16, 2012, an award was issued. The arbitrator sustained Payne's grievance and ordered the District to "return [Payne] to his prior position in the [Ag] Department at [CHS], effective with the start of the 2012-2013 school year." When the arbitration award was issued, the District had the option of either absorbing Payne back into the Ag Department while retaining the three existing teachers including Cockrell, or restoring Payne and eliminating one of the other three teaching positions. Because of increased student enrollment in the Ag Department and the additional classes being offered, the District chose to have four teachers in the Ag Department.

In early June 2012, Payne learned that he would not be the only Ag Welding teacher at CHS. The District did not assign Payne to teach all Ag Welding classes as he had taught prior to his involuntary transfer. Instead, Payne was assigned to teach two beginning Ag Welding classes and two additional courses he had never taught before: Ag Econ/Gov and Intro to Ag.

Hanlon testified as to the District's rationale for the 2012-2013 class assignments citing both an increase in the number of students and the scope of credentials of the Ag Department teachers. He stated that when determining teacher assignments, the District discovered that it was hampered by the fact that Cockrell did not have an Agricultural credential like Payne and the other Ag Department teachers. While the Ag Department is, as a whole, a "department of electives," some of the courses offered within the Ag Department satisfy state mandated graduation requirements such as Environmental Horticulture, Ag Biology, and Ag Econ/Gov.

Courses such as Ag Welding do not correlate to any state mandated graduation requirements. While Cockrell's Industrial Technology credential provided the necessary qualifications to teach Ag Welding, it did not permit him to teach the other courses, which correlated to state mandated graduation requirements. As a result, there was no way for the District to make the 2012-2013 school schedule work if Cockrell was not assigned to teach Ag Welding. The District would have had to involuntarily transfer Cockrell out of the Ag Department, had it given Payne all Ag Welding courses. There was also a restriction on the total number of Ag Welding courses that could be scheduled in a given day, since the Ag Department had only one welding shop. Therefore, the District could not retain Cockrell and simply increase the number of Ag Welding courses offered.

In the end, the District chose to retain Cockrell, and he and the remaining two Ag teachers were assigned to teach courses during the 2012-2013 school year that fell outside the gamut of courses they had been assigned to teach in previous years. Cockrell, in addition to being scheduled to teach three Ag Welding classes, was also assigned to teach the new "Ag Marketing," an elective course intended to encompass work associated with Henshaw Farm. Sloan was assigned to teach the new Veterinary Science course in addition to two sections of Ag Earth Science, a course she had not previously taught. Hanlon testified that Mendez was also assigned to teach a section of Ag Earth Science, a new course for her.

Hanlon further testified that since the pre-registration for incoming seniors started in February, it was well underway by the time the Arbitrator's decision issued. The Advanced Ag Welding course and the Ag Econ/Gov course were populated entirely by seniors. In addition, Advanced Ag Welding was a two-hour block class. These courses needed to not only be balanced against other senior classes in the master schedule, but the two-hour Advanced Ag

Welding block needed to be placed on the master schedule before other classes, since moving a block course after the fact would be highly disruptive to the scheduling process.

Payne believed that his 2012-2013 class assignments were in contravention of the Arbitrator's award. As a result, the Association sought and received a clarification from the arbitrator. The arbitrator responded that the award issued in March 2012 only ordered that Payne be reassigned to the CHS Ag Department, and did not mandate that Payne be assigned to teach the same classes that he had taught prior to the involuntary transfer.

On July 19, 2012, Association Representative Kevin Moretti (Moretti) sent an e-mail message to Hanlon raising concerns about the extra duty assignments⁶ for Payne and Cockrell. On July 20, 2012, in response to Moretti's e-mail message, Hanlon sent a lengthy response containing the following:

Kevin Payne fought to come back to CHS and since he won the arbitration regarding the transfer he has gone to you about his class assignment and now the expectations of his extra duties. His reluctance to actually do the job he fought so hard to get back is becoming unacceptable.

[¶]

Kevin doesn't "get along well" with the Friends of "Ag, the Ag Boosters, his co-workers at CHS or the administration at CHS. Even the arbitrator acknowledged "he is difficult to work with." My expectations are that he is professional at all times in dealing with all these groups and I will hold him to that standard.

On August 3, 2012, the District published the Ag Department class assignment for the 2012-2013 school year. Payne's class assignment remained unchanged. He was scheduled to teach two beginning Ag Welding classes, two classes of Ag Econ/Gov and one class of Intro to

⁶ The Ag Department has a negotiated stipend paid to each Ag teacher for additional work done outside the classroom, typically extra work done maintaining the Henshaw Farm.

Ag. Cockrell was scheduled to teach two beginning Ag Welding classes, a two-hour block of Advanced Ag Welding, and Ag Marketing.

PROPOSED DECISION

The ALJ identified the issue before her as whether the District issued Payne's class assignment for the 2012-2013 school year in retaliation for his filing of the August 2, 2010 grievance.

After reviewing the elements of a prima facie case, the ALJ concluded that: (1) Payne engaged in protected activity by filing the August 2010 grievance and pursuing it through arbitration (Proposed Dec., p. 15); (2) the District clearly had knowledge of Payne's protected activity (Proposed Dec., p. 15); and (3) the District's class assignment for Payne for the 2012-2013 school year constituted adverse action. (Proposed Dec., p. 17.)

Regarding nexus, the ALJ determined that the adverse action occurred in temporal proximity to Payne's protected activity, but she found no other nexus factors. The ALJ concluded, therefore, that the Association had failed to establish a prima facie case of retaliation. Additionally, the ALJ determined that the District established its affirmative defense that retaliation was not the motive for Payne's class assignments. The ALJ found that the District was restricted in the number of Ag Welding classes that could be offered in any given day, and also by the courses Cockrell's credential allowed him to teach. The ALJ therefore dismissed the Association's complaint and underlying charge.

DISCUSSION

Prima Facie Case

As stated by the ALJ, 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 or adverse to the interest of the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).

Protected Activity, Employer Knowledge and Adverse Action

The ALJ found that Payne engaged in protected activity under EERA by filing a grievance and pursuing it through arbitration and that the District's knowledge of the protected activity was not in dispute. The ALJ further found that the District's decision to assign Payne to teach different classes was adverse because the assignment created less favorable working conditions for Payne. We concur with the ALJ's discussion of protected activity, employer knowledge, and adverse action on pages 15 through 17 of the proposed decision.

Nexus

The focus of the Association's exceptions is the ALJ's determination that Payne failed to sufficiently establish the fourth element of the prima facie case, i.e., that the District took action against Payne *because of* his protected activity. The Association asserts that the record evidence does not support the ALJ's conclusions on this point. The Association further asserts that, having established a prima facie case, the burden shifted to the District to prove that its decisions were not motivated by Payne's protected activity, and that the District failed to meet this burden.

The fourth element in the prima facie case is the line or link connecting the adverse action to the protected activity. (*Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista*) citing *The TM Group, Inc. and Kimberly Grover* (2011) 357 NLRB No. 98 (*The TM Group*)). It seeks to establish whether the employer acted with an

unlawful motive. Motive may be proven either by direct or circumstantial evidence, or by a combination of both.

Unlawful motive is the specific nexus required in the establishment of a prima facie case. Direct proof of motivation is rarely possible since motivation is a state of mind which may be known only to the actor. Unlawful motive can be established by circumstantial evidence and inferred from the record as a whole.

(Trustees of Cal. State University v. Public Employment Relations Bd. (1992) 6 Cal.App.4th 1107, 1124 (Trustees of CSU).)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is one important nexus factor (*North Sacramento School District (1982) PERB Decision No. 264 (No. Sacramento Sch. District)*), 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*); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District (1979) PERB Decision No. 104*); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S*); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance (2008) PERB Decision No. 1971-M; Coast Community College District (2003) PERB Decision No. 1560*); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District (2003) PERB Decision No. 1529*), or the offering of exaggerated, vague, or ambiguous reasons

(*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive (*No. Sacramento Sch. District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Regarding timing of the adverse action, Payne engaged in protected activity beginning with his grievance filing in August 2010. That activity continued well past the issuance of an arbitration award in March 2012, since representatives for both parties engaged in a series of subsequent communications regarding implementation of the award, which continued through July 2012. Less than one month later, on August 3, 2012, the District published the Ag Department class assignment for the 2012-2013 school year, which significantly differed from Payne's former teaching assignment. The proximity in time between the protected activity and the adverse action goes to the strength of the inference of unlawful motive, but is not determinative by itself. (*California Teachers Association, Solano Community College Chapter, CTA/NEA (Tsai)* (2010) PERB Decision No. 2096.) We have long held that adverse action occurring within one to two months of protected activity is more than sufficient to determine the requisite timing element. (*Calaveras County Water District* (2009) PERB Decision No. 2039-M.) Consequently, the Association established that the District took adverse action against Payne close in time to his protected activity.

While the ALJ correctly concluded that numerous allegations of unlawful motive were not proven, the ALJ did not address Hanlon's July 20, 2012, e-mail message response to Moretti in the context of whether it established a requisite additional nexus factor. As written, the e-mail message shows that Hanlon harbored at least some animus toward Moretti's efforts

on behalf of Payne and toward Payne's participation in the grievance process and effort to seek assistance from his union. Hanlon told Moretti that Payne "fought to come back to CHS and since he won the arbitration regarding the transfer he has gone to you about his class assignment and now the expectations of his extra duties." Hanlon further stated that Payne's "reluctance to actually do the job he fought so hard to get back is becoming unacceptable." PERB has held that statements by management discouraging the pursuit of a grievance constitute an expression of union animus. (*Jurupa Community Services District, supra*, PERB Decision No. 1920-M.) Therefore, we find the above statements by Hanlon support an inference of retaliation.

Based on all of the above, we conclude that Payne presented a prima facie case of retaliation.

The Affirmative Defense

Once a prima facie case is established, the burden of proof shifts to the employer. Under the burden-shifting framework, the employer bears the burden of proving it would have taken the same action even in the absence of the protected activity. (*Chula Vista, supra*, PERB Decision No. 2221; *Novato, supra*, PERB Decision No. 210; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Brothers Distr.*)). Thus, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers Distr., supra*, 29 Cal.3d 721, 729.) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*Trustees of CSU, supra*, 6 Cal.App.4th 1107, 1130 citing *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 302-304.) When conducting the "but for" analysis, "PERB weighs the employer's justifications for the adverse action against the

evidence of the employer's retaliatory motive." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993.) When evaluating the employer's justification, the question is whether the justification was "honestly invoked and was in fact the cause of the action." (*The TM Group, supra*, 357 NLRB No. 98, citing *Framan Mechanical Inc.* (2004) 343 NLRB 408.)

At the formal hearing, Hanlon testified that student interest in the school's Ag courses had significantly increased by the 2012-2013 school year. Due to the increased interest, additional class offerings in the Ag Department could sustain an additional teacher. Cockrell had a credential which limited the classes he was permitted to teach. The remaining three teachers in the Ag Department held teaching credentials that enabled them to teach a broader range of courses, including courses which met the state mandated graduation requirements, but were not necessarily the courses each teacher had been historically assigned. As a result, the remaining three teachers were assigned to teach courses during the 2012-2013 school year that fell outside the gamut of courses they had been assigned to teach in previous years.

In its exceptions, the Association asserts that the District had more than sufficient time to figure out what to do with Cockrell given his limited credential so that Payne could exclusively teach Ag Welding. However, as Hanlon testified, had the District attempted to give Payne all the Ag Welding courses, it would have had to involuntarily transfer Cockrell out of the Ag Department and hire someone else with Agricultural credentials. Likewise, adding additional Ag Welding courses to justify retention of Cockrell and to allow Payne to teach exclusively Ag Welding was not possible since there is only one welding shop making it impossible to schedule more than six Ag Welding classes.

The Association next asserts that given the arbitrator's decision and award in favor of Payne and Hanlon's subsequent July 20, 2012, e-mail message to Payne and the Association,

Hanlon's testimony at the formal hearing as a whole "should not be relied upon as the exclusive evidence in support of the District's case." The Association appears to be arguing that it should be permitted to use the District's ultimate loss in the arbitration as cause for disregarding Hanlon's testimony. The issue before PERB is distinct from the matter decided by the arbitrator. As such, we find this exception meritless.

The Association further takes issue with the ALJ's reliance on Hanlon's testimony, arguing that he was tainted by union animus. However, the inference of union animus and issues of the trustworthiness of Hanlon's testimony are two separate issues. If the Association believed Hanlon's testimony to not be credible, it had an obligation to discredit it either through impeachment on cross-examination or by offering more credible testimony through its own witnesses. Without having done that, the ALJ, and now the Board, have no basis to disregard, discount, or discredit Hanlon's testimonial evidence.

The Association also, for the first time in its statement of exceptions, objects to the testimony Hanlon gave about District Human Resources Specialist Heather Deaver (Deaver). According to Hanlon, it was Deaver who determined that Cockrell was not credentialed to teach any other classes, and that if he was assigned to teach a class for which he was not credentialed, the District's Human Resources Department would be notified by the Butte County Office of Education. The Association argues that this evidence constitutes inadmissible hearsay in violation of PERB Regulation 32176⁷ and was therefore improperly

⁷ PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32176 provides, in pertinent part:

Compliance with the technical rules of evidence applied in the courts shall not be required. Oral evidence shall be taken only on oath or affirmation. Hearsay evidence is admissible but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. Immaterial, irrelevant,

relied upon by the ALJ. The Association's argument must be rejected. Evidence that Cockrell was not credentialed to teach any classes other than Ag Welding and Ag Marketing was not admitted for the truth of the matter, but to demonstrate the state of mind of the District's decision-makers when creating the master schedule. Moreover, there is no support in the record that the District was not operating under a good faith belief as to the limited scope of Cockrell's credential. Submitted for this purpose, such evidence is not hearsay. (Cal. Evid. Code, § 1250; *Regents of the University of California (San Francisco)* (2014) PERB Decision No. 2370-H [hearsay is admissible not for its truth, but to demonstrate state of mind].)

Although the Association established a prima facie case of retaliation, the District demonstrated that it had a non-discriminatory reason for its action. Creating a master calendar is a complex and time consuming process, one that requires the balancing of many factors including student enrollment, scope of credentials, number of teachers, variety of course offerings, the importance of including a balance of electives, and graduation requirements. The complexity of the process and the prerogative needed by the District to devise a master calendar is confirmed by the arbitrator's clarification of the arbitration award. In consideration of all the factors as a whole, but predominately the increased student enrollment during the 2012-2013 school year and the scope of credentials amongst the existing Ag Department teachers, we conclude that even in the absence of Payne's protected activity, the District would have made the same course assignments as it did.

or unduly repetitious evidence may be excluded. The rules of privilege shall apply. Evidence of any discussion of the case that occurs in an informal settlement conference shall be inadmissible in accordance with Evidence Code Section 1152.

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. SA-CE-2658-E, Chico Unified Teachers Association v. Chico Unified School District, is hereby DISMISSED.

Chair Martinez and Member Banks joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CHICO UNIFIED TEACHERS ASSOCIATION,

Charging Party,

v.

CHICO UNIFIED SCHOOL DISTRICT,

Respondent.

UNFAIR PRACTICE
CASE NO. SA-CE-2658-E

PROPOSED DECISION
(09/27/2013)

Appearances: Chico Unified Teachers Association, CTA/NEA by Ramon E. Romero, CTA Staff Attorney; Kingsley Bogard LLP by Paul R. Gant, Attorney, for Chico Unified School District.

Before Alicia Clement, Administrative Law Judge.

PROCEDURAL HISTORY

On July 26, 2012, the Chico Unified Teachers Association (Union) filed an unfair practice charge with the Public Employment Relations Board (PERB or Board) against the Chico Unified School District (District) alleging retaliation against its member, Kevin Payne and unilateral change to its policy concerning the distribution of extra duty assignments. On January 30, 2013, the Union withdrew the allegation of unilateral change. On February 4, 2013, the PERB Office of the General Counsel issued a complaint as to the allegation that the District retaliated against Payne when, on June 20, 2012, it assigned him to teach courses other than the agricultural welding courses Payne had exclusively taught for eight years; as well as when, on July 19, 2012, it directed him to work on the model farm project.

A formal hearing was held on June 18 and 19, 2013. On June 19, 2013, on the second day of the formal hearing, the Union withdrew the retaliation allegation in paragraph six of the complaint, related to the model farm project. Upon receipt of the parties' closing briefs on August 21, 2013, the matter was submitted for decision. The sole remaining allegation in the complaint is that Payne's 2012-2013 class assignment was retaliatory.

FINDINGS OF FACT

The District is a public school employer within the meaning of Educational Employment Relations Act (EERA)¹ (EERA) section 3540.1(k). The Union is the exclusive representative of the District's certificated employees within the meaning of EERA section 3540.1(e).

Background:

Chico High School (CHS) is among a dwindling number of public schools throughout the State that maintains an Agriculture (Ag) Department. Over the course of recent years, the Ag Department has suffered, as so many non-core curriculum subjects have, from budget cuts. There have been times in recent history when the District has contemplated laying off one of the Ag teachers. This need has been dictated by funding concerns, as well as fluctuations in student enrollment in the Department. Nevertheless, the Department has maintained three teachers: Quinn Mendez teaches primarily plant science classes; Sheena Zweigle teaches primarily animal science classes; and from 2002 through the 2010-2011 school year, Kevin Payne taught Ag Welding.

Ag Department teachers perform a number of other duties in addition to their classroom assignments, including supervising student projects, judging teams and contests, transporting students and livestock, fundraising, report writing, and a variety of other community appearances and activities. These additional duties were typically divided among the Ag Department teachers at the beginning of the school year. Because these additional activities take place outside of classroom teaching hours, Ag Department teachers are compensated an additional 0.2 FTE (full time equivalent) to account for that extra work.

¹ EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated all statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Payne's career at Chico High School (CHS) began in the fall of 2002. Prior to beginning his teaching career at CHS, Payne studied Agriculture at California Polytechnic and earned a single subject teaching credential in Agriculture, an Agriculture Specialist credential, and a Building and Construction Trades credential. Agricultural Welding (Ag Welding) was among the course work that Payne completed both in college and while he was a student of Chico High School's graduating class of 1995.

While clearly a subject that focuses on the technical skills of welding, the primary application of Ag Welding is repairs or fabrication of new parts for farm equipment. Thus, the course work for Ag Welding has always been categorized at CHS as falling within the Agriculture Department. As taught by Payne at CHS, Ag Welding assignments could range from fabricating parts for use by private companies who supply the design specifications and materials; fixing trailers and other farm equipment; and learning the basic skills necessary to complete different types of welds and operate different types of welding equipment.

At the end of the 2006-2007 school year, long-time Ag Department teacher and Department Chairperson Dave Wemp retired. At the time, there was discussion in the District of reducing the size of the Ag Department from three to two teachers, essentially not filling the vacancy created by Wemp's retirement. In 2007 or 2008, a group of concerned citizens, calling themselves "Friends of Agriculture," organized to support the District's agriculture programs. The Friends of Agriculture donated funds that were applied directly to the salary of a third Agriculture Department teacher. It was at this time that Zweigle was hired to teach animal science and Payne took over the Department Chair duties. In addition to funding a third teaching position, the Friends of Agriculture sponsored the creation of a working student farm. This student farm, which was located on District property near Henshaw Road, became known as the "Henshaw Farm."

The Henshaw Farm was a new project for the District and the Ag Department. Not only did the creation of the farm result in additional work for Ag teachers, it also introduced a new element of scrutiny from the Friends of Agriculture with regard to the role that Ag Teachers played in the supervision and use of the Henshaw Farm. The additional work that was made necessary in order to maintain the student farm created conflict among the three members of the Ag Department staff. The added scrutiny from Friends of Agriculture, in turn, created conflict between Payne and one or more vocal members of the Friends of Agriculture.

In April 2010, CHS Principal Jim Hanlon notified Payne that he was being removed from his position as Chair of the Ag Department. On May 13, 2010, Payne received a written notice that he was tentatively being involuntarily transferred from his position at CHS to Chico Junior High School where he would be assigned to teach Industrial Technology. On July 27, 2010, Hanlon formalized the involuntary transfer.

Facts Giving Rise To This Complaint:

On August 2, 2010, Payne grieved the involuntary transfer. At the same time that Payne was transferred to teach Industrial Technology classes at the Junior High School, Ronnie Cockrell, the teacher who had been teaching Industrial Technology at the Junior High School was involuntarily transferred to Chico High School and assigned to teach all the welding classes. Cockrell held an Industrial Technology credential and a Physical Education credential. Prior to his involuntary transfer to the CHS Ag Department, Cockrell had some contact with the Friends of Agriculture and had taken his Junior High School classes to visit the Henshaw Farm. Industrial Technology is primarily a "wood shop" class, and Payne had minimal experience with the materials and equipment in the junior high school wood shop. Likewise, Cockrell was similarly unfamiliar with the machinery in the CHS welding shop. However, Cockrell did not grieve his involuntary reassignment from the junior to senior high school.

During the 2010-2011 school year, the CHS Ag Department offered a course titled, "Ag Earth Science." The curriculum for Ag Earth Science was designed to satisfy the State's graduation requirement for physical science and had been vetted through the 2009-2010 Instructional Council.² Previously, earth science courses had been offered only through the Science Department. The obvious result of adding a new course to the department was a corresponding increase in the overall enrollment of the Ag Department. According to Payne, the addition of Ag Earth Science was specifically intended to boost enrollment numbers in the department to justify retention of a third Ag teacher. The first year that the course was offered was 2010-2011. Enrollment in the course decreased slightly during the 2011-2012 school year. Ultimately, Ag Earth Science was discontinued in the Agriculture Department and returned to the Science Department for the 2013-2014 school year.

During the 2011-2012 school year, a sixth section of welding was added. As Cockrell was the only welding teacher during the 2011-2012 school year, he was compensated for the additional teaching period. There was also a corresponding increase in the overall student enrollment for the Ag Department as a result of the added welding class.

Even while Payne was teaching at the Junior High School, he kept tabs on the CHS Ag Department and especially the welding classes. During this time, Payne learned from students and their parents of an incident in which one of Cockrell's students was shoved into a sandblasting box by two other students during a welding class. Although the student was not injured in the incident, there had been a very high danger of serious injury.

² Chico High School has formed an Instructional Council made up of all the department chairpersons. One of the tasks of the Instructional Council is to review new course offerings and to determine proper placement within instructional departments. During the 2009-2010 school year, Payne served on the Instructional Council as the Ag Department Chair.

Between June 1, 2011 and October 19, 2011, seven days of arbitration were held before Arbitrator Andria Knapp to resolve the grievance related to Payne's involuntary transfer.³ On March 16, 2012, Arbitrator Knapp issued her award.⁴ In sustaining the grievance, Knapp ordered the District to "return [Payne] to his prior position in the Ag Department at CHS, effective with the start of the 2012-2013 school year." Knapp's decision is lengthy and thorough. Although she ultimately found the District at fault for violating the contract, she excoriated all parties for their collective unwillingness to engage in open, honest communication with each other. She cited numerous missed opportunities when relatively minor misunderstandings and miscommunications created hurt feelings that were allowed to fester in silence, culminating in the District's decision to involuntarily transfer Payne out of the department rather than resolve the underlying tensions. In short, her award was neither sparing nor complimentary to either party. Knapp retained jurisdiction pending implementation of the remedy ordered.

In April 2012, the Union's attorney contacted the District's attorney to address a rumor that Payne's 2012-2013 teaching assignment at CHS would not include the full complement of welding classes offered at CHS for the 2012-2013 school year, but would instead include a "new position" in the Department. The District did not respond to this inquiry.

During the Spring 2012 semester, Hanlon began preparation of the CHS master calendar for the upcoming Fall 2012 semester. The master calendar contains all the major

³ During the seven-day arbitration hearing, one witness made disparaging remarks about Superintendent Staley. This witness knew Staley in a personal rather than a professional capacity. Ultimately, the Arbitrator did not make any mention of this witness's testimony in her final Award. However, the subject matter of the witness's testimony was elicited at the PERB Hearing as evidence of motive in Payne's 2012-2013 teaching assignment.

⁴ Although her decision is dated March 16, it may have taken a week or more for the parties to receive their copies. One copy submitted by the Union bears a received date stamp of March 23, while the District's witnesses could not remember the exact date they first received a copy of the Award.

events that happen during the semester, as well as which courses will be offered, when, and by whom they will be taught. Creation of the master calendar is primarily Hanlon's responsibility and begins with a pre-registration of the in-coming senior class in February to determine their preference for courses in the coming year. Surveys are typically completed by the incoming seniors in mid-April, with final responses from the remaining student body received by Hanlon in mid-May. Once the pre-registration surveys have been completed by the entire student body, Hanlon can determine which courses will be offered and who will teach them.

Thus, in Spring 2012, there was an increased overall enrollment in the Ag Department such that Hanlon was faced with a staffing conundrum: should the District hire a fourth Ag teacher for the coming school year and keep class sizes small, or should the District keep staffing levels at three teachers in the Ag Department and add sections to each teacher's schedule? The first option was problematic because having a fourth teacher could place the District in the position of overstaffing the Ag Department. The second option was problematic because in adding sections to the Ag Department teachers' schedules, the District ran a risk of violating the collective bargaining agreement's rule that no teacher be assigned to teach greater than the contractual maximum number of students per day. Shortly after receiving the arbitration award, Hanlon, Feaster and Staley discussed the staffing issue for the CHS Ag Department.

Both Hanlon and Feaster testified as to the District's rationale for the 2012-2013 class assignments. By the time Hanlon learned of the arbitrator's decision in late March, the pre-registration for seniors was well underway. Both the Advanced Welding course and the Ag Econ courses were populated entirely by seniors. In addition, Advanced Welding was a two hour block class. Not only did these peer courses need to be balanced against other seniors' classes in the master schedule, but the two hour block of Advanced Welding needed to be placed on the master schedule before other classes, as moving a block course after other

classes had been set on the master schedule was highly disruptive to the scheduling process. Hanlon recalled that there had been some reason why Advanced Welding was scheduled after lunch, though he could not recall the specific reason. In any event, Hanlon conceded that there was nothing inherent in the Advanced Welding course that required that it be set in the afternoon; it was an issue particular to this year's course offerings that necessitated placing the class on the afternoon schedule. Once peer classes and block classes were set in place, other classes were placed on the master schedule.

When determining which teacher would be assigned to teach each class, Hanlon discovered that he was hampered by the fact that Cockrell did not have an Agriculture credential like the other teachers in the Ag Department. The Ag Department is a department of electives. Some of the electives like Environmental Horticulture, Ag Biology, and Ag Econ/Government satisfy State mandated graduation requirements but other Ag Department courses like Ag Welding do not correlate to any State mandated graduation requirements. While Cockrell's Industrial Technology credential provided the necessary qualifications to teach the welding courses offered at CHS, Cockrell's Industrial Technology and PE credentials did not permit him to teach Ag Econ/Government and many of the other Ag Department classes. There was also a restriction on the total number of welding classes that could be scheduled in a given day, considering that there was only one welding shop. Thus, there could be no more than six hours of welding taught in any given day. Payne, on the other hand, was able to teach a wide variety of agriculture-based classes given his Agriculture credential and other certifications.

Ultimately, Hanlon, Feaster and Staley decided to slightly overstaff the department rather than slightly understaff the department. Though the District claims that the possibility of staffing the Ag Department with four teachers instead of three was discussed before the Arbitration Award was issued, Hanlon acknowledges that a final decision was not reached until

after the Arbitration Award had been issued in March 2012. Hanlon concedes that the manner in which he had completed the master calendar for the Fall 2012 semester was a departure from how he had completed the master calendar in prior years—he would not ordinarily have included Staley and Feaster in the decision to such a degree as he did this year. This year presented a new concern: the arbitration award was issued several days after the statutory deadline for notifying school district employees of a possible layoff, such that the only option for reducing the Ag Department from four to three teachers would have been to involuntarily transfer one of the other teachers out of the department. The obvious choice would have been to transfer Cockrell out of the department. The possibility of transferring Cockrell back to the junior high school was rejected because it would have created disruptions beyond Chico High School. Transferring Cockrell to the Physical Education (P.E.) Department at CHS was rejected because the P.E. Department was in need of a female teacher to monitor the girls' locker room and Cockrell could not fill that need. Ultimately, Hanlon, Feaster and Staley determined that keeping Cockrell in the Ag Department at CHS was the least disruptive option available to them for the 2012-2013 school year.

On May 30, 2012, the Union's attorney sent a letter to the District's attorney stating that if Payne were not returned to the same class schedule he had maintained prior to the involuntary transfer, the Union would seek enforcement of the Arbitrator's decision through the superior court. On June 4, the District responded to the May 30 letter, stating that compliance with the Arbitrator's decision was achieved by reassigning Payne to the Agriculture Department at CHS; compliance with the award did not require that Payne be reassigned to the same class schedule he had taught before the involuntary transfer.

In early June 2012, Hanlon convened a meeting with all four CHS Ag Department teachers—Payne, Cockrell, Mendez and Zweigle. The meeting was called for the purpose of distributing the extra assignments associated with the Ag Department. Hanlon's recollection is

that at that time, the master calendar had been completed and the teachers all learned what their class assignments would be for the Fall 2012 semester. According to Hanlon, after discussing the assignments and making some minor adjustments, consensus was reached among the teachers as to the equitable distribution of extra duties. Payne testified that when he learned that he wouldn't be the only welding teacher at the high school, he believed this to be an attempt by the District to circumvent the arbitrator's decision.

On June 29, 2012, the Union sought clarification from Arbitrator Knapp whether the District's intention to assign Payne to "two minor welding classes and three Ag classes that he has never taught before" would violate the award. On July 10, 2012, Knapp responded that the District's proposed assignment for the 2012-2013 school year would achieve compliance with her award. Knapp went on to state:

The Award that ordered Mr. Payne's return to the Agriculture Department did not guarantee that he would be assigned to teach exactly the same courses as he did before the transfer, nor could it have done: that would have been tantamount to ordering the District to offer those courses regardless of whether there was an educational need for them. Nor did the award order that the individual who had replaced Mr. Payne be returned to his original school, nor—again—would it have been appropriate for me to make such an order. The mix of faculty in a subject area will determine who is assigned to teach the various courses offered in that area. Once the District has made a determination that it will offer certain courses in the Ag Department for the next academic year, it then must decide which Ag teachers will be assigned to teach each individual course. As a highly experienced Ag educator, Mr. Payne has the capability to teach a wide variety of Ag courses—more, if memory serves, than the individual who was assigned to replace him, who did not (at the time of the arbitration hearing) have significant Ag teaching experience. . . . Teachers suffer the consequences [of their rapidly diminishing budgets] in myriad ways. They have no guarantees that they will be teaching the same courses that they have in the past, and Mr. Payne is no different. The Award in this case ordered him returned to the Ag Department at Chico High, but did not guarantee, nor could it that he would be assigned to teach the same courses that he had in the past.

On July 19, 2012, Union Representative Kevin Moretti sent an e-mail to Hanlon raising concerns about the extra duty assignments for Payne and Cockrell. In response to Moretti's e-mail, on July 20, 2012, Hanlon sent a lengthy response containing the following statements:

Kevin Payne fought to come back to CHS and since he won the arbitration regarding the transfer he has gone to you about his class assignment and now the expectations of his extra duties. His reluctance to actually do the job he fought so hard to get back is becoming unacceptable.

When Hanlon was asked about the June 6 e-mail, he stated that he was frustrated at the time that he sent the e-mail; that the parties had "just" gone through arbitration and he was already hearing that Payne was unhappy about his assignment.

On August 3, 2012, the District published the Ag Department class assignment for 2012-2013. While the assignments for teachers Mendez and Zweigle were largely unchanged from the previous year, Payne's class assignment for the 2012-2013 school year was very different from the classes he had been accustomed to teaching prior to the involuntary transfer. Instead of teaching all the Ag Welding courses at CHS, Payne was only teaching two beginning Welding classes and was assigned to teach two classes of "Ag Econ/Gov" and one class of "Intro to Ag." Ronnie Cockrell, the teacher who had been teaching all of the Ag Welding classes in Payne's absence, was scheduled to teach two beginning Welding classes, a two-hour block class of Advanced Welding, and one after-school class titled "Ag Marketing." In prior years, CHS had offered both Ag Econ/Gov and Intro to Ag, though Payne had never taught them. Although it was placed on the schedule for the first time as a class, AG Marketing was intended to encompass all the work associated with the Henshaw Farm.

During the 2012-2013 school year, Payne had occasional opportunities to observe Cockrell's teaching style. Payne's observation of Cockrell, combined with the rumors heard from students and teachers in previous years led him to the conclusion that Cockrell was a less effective welding teacher than Payne was. While Hanlon acknowledged that Payne was the

more technically skilled welding teacher, he also stated that Cockrell was a competent welding teacher whose teaching skills had shown improvement over the course of the two years Cockrell had been teaching the welding classes.

On June 6, 2013, just before the hearing in this case, Hanlon sent an e-mail message to all the teachers in the Ag Department stating:

Ag Teachers...it looks like there is a possibility that we may be overstaffed next year in the Ag Department. I want to make you aware of this situation so that you can explore the possibilities for openings around the district. If you are interested in transferring to another site for 2013-2014 please let me know.

Neither Payne nor Cockrell asserted any interest in transferring from CHS for the 2013-2014 school year.

ISSUE

Whether Payne's class assignment in the 2012-2013 school year was in retaliation for his August 2, 2010 grievance.

POSITIONS OF THE PARTIES

The Union argues that the Ag Department at CHS had a decades long practice of assigning one teacher to teach all the welding courses; one teacher to teach all the plant science courses; and one teacher to teach all the animal science courses. Even after Payne was transferred out of the Ag Department, this practice was continued, merely substituting Cockrell for Payne. However, the Union argues that after the arbitration award, the District deliberately manipulated the attendance numbers and the master calendar so that Payne would not be returned to teaching all welding classes. According to the Union, this was done in retaliation for the fact that Payne enforced his collective bargaining right not to be involuntarily transferred and in the process, embarrassed the superintendent by exposing her personal life to public scrutiny. Instead of manufacturing reasons for keeping four teachers in the Ag Department, the District should have undone the unlawful involuntary transfer completely by

removing Cockrell from the Ag Department and assigning Payne to teach the same welding classes he had always taught. The timing of the arbitrator's award in late March did not preclude the District from assigning Payne to teach all welding classes.

The District argues that enrollment levels in the Ag Department had been trending upward in the 2010-2011 and 2011-2012 school years. Toward the end of the 2011-2012 school year, the District was already considering hiring a fourth Ag Department teacher. The arbitrator's award simply coincided with the creation of the 2012-2013 master calendar in a way that made it possible to absorb Payne back into the department while retaining Cockrell and expanding the course selections in the department to include business courses. The assignment of classes within the now four-person department was determined based on the needs of the department as a whole, and not with regard to any one teacher. The District was not required by the arbitration decision to assign Payne to teach any particular classes and its class assignment was in no way retaliatory for Payne's enforcement of contract rights.

CONCLUSIONS OF LAW

The Association bears the burden of proving the allegations of the complaint by a preponderance of the evidence. (*California State University (San Francisco)* (1986) PERB Decision No. 559-H; PERB Reg. 32178.) Preponderance of the evidence has been defined by the courts as "evidence that has more convincing force than that opposed to it." (*Glage v. Hawes Firearms Co.* (1990) 226 Cal.App.3d 314, 324 (*Glage*)). Preponderance of the evidence is usually defined in terms of the probability of the truth, or such evidence which, when weighed against opposing evidence, has the greater probability of truth. (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133.) If the evidence is so evenly balanced that one is unable to say that the evidence on either side preponderates, the finding on that issue must be against the party who has the burden of proving it. (*Glage* at p. 324.)

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 because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).

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); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529), or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's

unlawful motive (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210).

Once the Charging Party demonstrates that the employer's actions were motivated, at least in part, by union animus, the burden shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. (*Mountain Empire Unified School District* (1998) PERB Decision No. 1298; *Healdsburg Union High School District* (1997) PERB Decision No. 1185.)

The District does not dispute that Payne engaged in protected activity by filing a grievance and pursuing it through arbitration. Clearly, the District's knowledge of the protected activity is not in dispute. The District does not dispute that it assigned Payne to teach classes for the 2012-2013 school year that differed from the class assignment he had been teaching prior to his involuntary transfer. However, the District maintains that its decision to assign Payne to different classes was neither adverse nor in retaliation for his protected activity.

Was the Decision To Assign Payne to Teach Non-Welding Classes Adverse?

In determining whether an adverse action is established, the board uses an objective test and will not rely upon the subjective reactions of the employees. (*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 actions to be adverse, but whether a reasonable person under the same circumstances would consider the action to have had an adverse impact on the employee's employment.

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

Indisputably, Payne believes that the District's decision to assign him to teach non-welding courses was adverse. More importantly to Payne, he was assigned fewer welding

courses than Cockrell despite being the more technically skilled welder, was only assigned to teach beginning level welding classes and was denied the two-hour block of Advanced Welding. Payne seemed to take particular offense at this disparity—the classes he most sought to teach were assigned to a teacher with less technical experience and who, in his opinion, had demonstrated poor classroom control over his students.

In most cases, a change in teaching assignment will not be deemed an adverse act unless the Charging Party can demonstrate that it caused an increase in the employee's workload or work hours. (*Compton Unified School District* (2003) PERB Decision No. 1518.) There are several ways to parse Payne's class assignment for 2012-2013. The Union seems to argue that there was a history of having only one welding instructor at CHS and that teaching the advanced welding classes in particular conferred on Payne a degree of professional prestige. Payne appears to view his 2012-2013 class assignment as a demotion. Similar arguments regarding a loss of prestige associated with a particular assignment were argued in *Palo Verde Unified School District* (1988) PERB Decision No. 689, and rejected by the Board.

In addition to the above, however, The Union points out that Payne was assigned more "prep" classes—that is, classes that require separate planning and curriculums—than he had ever been assigned before. Although all the classes assigned to him were within the subject matter of his credential, Payne was assigned to teach courses in 2012-2013 that he had never taught before and that would require him to spend time planning lessons and studying curriculum. This assignment undoubtedly created more work for Payne. This is a quantifiable measure that objectively demonstrates less favorable working conditions. Further, Hanlon acknowledges that the assignment of more preps was more onerous, and he made a deliberate decision to assign Payne, as the more experienced teacher, the more difficult schedule of classes. Under these circumstances, it appears that the 2012-2013 class assignment to Payne, as compared to his pre-transfer schedule, was objectively adverse.

Was Payne's 2012-2013 Class Assignment Motivated by Union Animus?

Charging Party characterizes the District's failure to assign him to teach all welding courses as a retaliatory work assignment, citing *Regents of the University of California* (1998) PERB Decision No. 1263-H and *RGC (USA) Mineral Sands, Inc. v. NLRB* (4th Cir. 2002) 281 F.3d 442. In *RGC (USA) Mineral Sands, Inc. v. NLRB*, the Fourth Circuit Court of Appeals held that, even if the employer has authority under the contract to take the disputed action, it may not "exercise contractual rights to punish employees for protected activity." (*Id.* at p. 449.) PERB adopted this principle in *Novato Unified School District, supra*, PERB Decision No. 210, holding that an employer's prerogative is not absolute and its exercise cannot be protected where the motive for its conduct is unlawful. Thus, even assuming the District had authority to exercise its discretion to assign Payne any subject matter within his credential, if it acted from an unlawful motive, its actions would be deemed an unfair practice in violation of EERA.

According to the Union, the evidence establishes a number of nexus factors connecting the decision to assign Payne non-welding courses and Payne's enforcement of contract rights through the arbitration. First, the Union asserts that the District manipulated the attendance numbers in the Ag Department to appear higher than they were, in order to justify retaining a fourth Ag teacher. The Union's assertions were not supported by any evidence at the hearing. Even if true, the origin of this alleged scheme pre-dates Payne's protected activity. The decision to add Ag Earth Science to the Ag Department, which inflated the attendance numbers in the department, was made while Payne was still the Department Chair. The course was offered during the years that Payne was assigned to the junior high school, and ultimately discontinued after Payne was reinstated to the Ag Department. Thus, it cannot be said that the addition of Ag Earth Science was in any way motivated by Payne's protected conduct.

(*Santa Clarita Community College District* (1996) PERB Decision No. 1178.)

Not only did the decision to offer Ag Earth Science predate Payne's protected activity, but there was testimony from both Payne and Hanlon that in previous years, fluctuations in enrollment in the Ag Department had caused the District to consider staffing changes. In other words, when the same courses were offered over and over again, enrollment in the department trended downward. When new courses were offered in the department, enrollment trended upward. Rather than being part of some nefarious scheme to manipulate the class assignment for the 2012-2013 school year, the introduction and elimination of Ag Earth Science appears to have been a failed experiment that roughly coincided with the events giving rise to this charge. There are no facts demonstrating that any of these decisions involving the Ag Department curriculum were motivated by union animus in general or Payne's protected conduct in particular.

Next, the Union asserts that Payne was subjected to less favorable working conditions than any of the other Ag Department teachers when he was assigned a greater number of prep courses than any other teacher. In addition to the fact that Payne's 2012-2013 assignment was objectively more onerous than his pre-transfer assignment, by virtue of a greater number of prep classes, no other Ag teacher was assigned to teach three prep classes in the Fall 2012 semester, arguably making Payne's assignment more onerous than that of any of his coworkers. While this is an accurate assessment of Payne's 2012-2013 schedule, it presents only part of the overall picture. As noted above, Cockrell was not credentialed to teach several courses that were offered in the Ag Department that satisfied the graduation requirements. Like Payne, both Zweigle and Mendez held credentials that permitted them to teach courses that would satisfy graduation requirements. And also like Payne, both Zweigle and Mendez were assigned to teach classes outside of their preferred specialty: Zweigle was assigned to teach two Ag Earth Science classes in addition to three animal science classes; Mendez was assigned to teach one Ag Earth Science class in addition to four plant science classes. Thus,

both Zweigle and Mendez each had multiple prep classes as well as classes outside the field of their specialty. Payne's argument that he had a less desirable assignment is a matter of degrees.

The Union argues that because Payne had never taught anything other than welding, the assignment of any new courses was especially onerous for him as compared to Zweigle and Mendez who both had a history of teaching multiple different prep classes. But Payne and Cockrell could not simply swap assignments in order for Payne to have more welding classes, as that would leave Cockrell with a teaching assignment outside of his credential. Presumably, Payne would not wish to give up his two welding classes in order to reduce the number of prep classes in his schedule; nor would it have reduced the number of Payne's prep classes if he had swapped his afternoon classes with those of either Zweigle or Mendez. In short, given the roster of classes that were offered in 2012-2013, the schedule would not permit Payne to teach fewer preps and still work a full schedule of classes. This circumstance was not easily manipulated either for or against Payne's preference—there were a certain number of courses that needed to be taught and each teacher holding an Ag credential was assigned to teach multiple prep classes.

According to the District, it had legitimate business reasons for the decision to assign more prep courses to Payne than to another teacher. As noted above, the District was maximally restricted in the number of welding classes that could be offered in any given day. Additionally, the District was restricted by Cockrell's credential in the courses that it could assign him to teach. The Union intimates that Cockrell's credential was much broader than the District presented it to be, and that the District could easily have scheduled Cockrell to teach courses that didn't conflict with Payne's preferred assignments. However, there was testimony regarding the process for developing new courses through the Instructional Council. New courses had to be presented and vetted through the Industrial Council prior to being placed on

the master calendar. Furthermore, logic dictates that this process needed to occur prior to or immediately after the beginning of the prior year's Spring semester if students were to be able to select the new course for the upcoming year. By the time the arbitrator's award issued in March 2012, it would have been too late to develop a new class or classes that fell within the subject matter of Cockrell's Industrial Technology credential yet didn't conflict with Payne's preferred assignment and use of the campus's only welding shop, in time to approve the curriculum and assign students to the class.

The Union also asserts that the grievance hearing elicited testimony of a personal nature that could be embarrassing to Superintendent Staley. Staley was involved in the decision to overstaff the Ag Department for 2012-2013. According to the Union, Staley's lingering resentment against Payne for exercising his contractual rights at the arbitration motivated her decision to overstaff the Ag Department in 2012-2013. Staley did not testify, and any supposition that she was or would have been embarrassed or influenced by testimony at the arbitration was entirely speculative. At any rate, there is scant evidence regarding what, if any, influence Staley exerted over the final decision to overstaff the department. I decline to give weight to such insubstantial and intentionally provocative assertions. Notably, the arbitrator declined to make any mention of the assertedly damaging testimony in her award.

Interlaced throughout the Union's whole argument is the suggestion that one or more members of the Friends of Agriculture were dictating to the District that Payne be removed from (or forced out of) the Ag Department. Before the Friends of Agriculture helped to establish a student farm, Payne had a happy working relationship with coworkers and administrators at CHS. It was only after Payne resisted attempts by the Friends of Agriculture to dictate curriculum through its financial influence over the District that administrators, coworkers and "community members" allegedly had difficulties with Payne. Payne even testified that he didn't mind working on the student farm "when [he] was able to have any type

of input in how the farm was developed or ran [*sic*].” Whatever influence, proper or improper, the Friends of Agriculture had or did not have over Hanlon, Staley, or any other District administrator, Charging Party has not articulated how any influence exerted by the Friends of Agriculture was motivated by Union animus that would constitute a violation of the EERA.

There were undoubtedly other ways to plan and execute the school calendar for 2012-2013 that would have placed Payne in exactly the same class schedule he had maintained prior to the involuntary transfer. For example, the District could have transferred Cockrell back to the Junior High School and shifted the difficulty of the last-minute course assignments to that campus rather than the CHS Ag Department. The arbitration award did not require that outcome, however, and permitted the District to exercise discretion over how to return Payne to the Ag Department. When all the circumstances surrounding this case are viewed in their totality, Charging Party has failed to establish by a preponderance of the evidence that the decision to assign him classes other than welding in the 2012-2013 school year was motivated by union animus.

Each of the scheduling decisions made by the District had a carryover effect on the subsequent scheduling decisions. At the root of these decisions was the District’s decision to retain all four teachers in the Ag Department. Clearly, the District would not have been in this position had it not committed the earlier contract violation in which it transferred one of the few teachers in the District holding an Agriculture credential out of the District’s only Ag Department. As a result of its earlier contract violation, it cannot be said that the District’s decisions with regard to course offerings and schedules in 2012-2013 were entirely unrelated to Payne’s protected activity. Ultimately, however, I cannot find that the decision to retain four Ag teachers was motivated by union animus. Once the decision to retain all four teachers had been made, the creation of the master calendar and assignment of classes was dictated by many factors bearing no relation to Payne’s exercise of rights under EERA. Even assuming

Payne's protected conduct had some influence over the decision to retain four Ag Department teachers, to assign welding classes to Cockrell, or to assign three prep classes to Payne, the facts presented establish that the District would have taken the same action in the absence of Payne's protected activity.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case number SA-CE-2658-E, *Chico Unified Teachers Association v. Chico Unified School District*, are hereby dismissed.

Right of 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(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).)