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

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| ERIC MOBERG,<br><br>Charging Party,<br><br>v.<br><br>HARTNELL COMMUNITY COLLEGE DISTRICT,<br><br>Respondent. | Case No. SF-CE-2984-E<br><br>PERB Decision No. 2452<br><br>September 4, 2015 |

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

Before Huguenin, Banks, and Gregersen, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Eric Moberg from the dismissal by the Office of the General Counsel of his third amended unfair practice charge. The charge, as amended, alleged that the Hartnell Community College District (Hartnell) discriminated against Moberg in violation of the Educational Employment Relations Act (EERA)[1] by terminating Moberg's employment and/or refusing to rehire him for his assertion of protected rights, and by withholding payment of $8,418.47 in wages owed to Moberg under his terminated contract of employment. The charge also alleged that Hartnell interfered with the exercise of EERA-protected rights when a Hartnell human resources official told Moberg that she, and not Moberg, would decide who would represent Moberg in an investigative meeting.[2]

[1] EERA is codified at Government Code section 3540 et seq.

[2] The charge, as amended, also alleged that Hartnell had failed and refused to provide Moberg with certain information relating to Hartnell's position in the current litigation. The

The Board has reviewed the entire case file in light of the issues raised by Moberg's appeal and the relevant law. Based on this review, the Board reverses the dismissal of the charge and directs the Office of the General Counsel to issue a complaint in accordance with the discussion below.

## PROCEDURAL HISTORY

On November 5, 2012, Moberg filed the present charge in which he alleged that Hartnell unlawfully discriminated against him and interfered with protected rights.

On December 6, 2012, Hartnell filed a verified position statement in which it denied the material facts alleged by Moberg and denied any wrongdoing.

On June 28, 2013, Moberg filed a first amended charge which incorporated the allegations of the initial charge and included additional factual allegations.

On July 26, 2013, Hartnell filed a second position statement.

On July 31, 2013, Moberg filed a second amended charge.

On August 2, 2013, Hartnell advised the Board agent assigned to this case that, because Moberg's second amended charge added no relevant information or allegations, Hartnell considered its position statement filed in response to the first amended charge an adequate response to Moberg's second amended charge.

On September 22, 2014, the Office of the General Counsel issued a warning letter advising Moberg that his charge, as amended, failed to state a prima facie case and that, unless

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Office of the General Counsel advised Moberg in its September 22, 2014 warning letter that he lacked standing to bring this allegation. Because Moberg's appeal does not challenge the Office of the General Counsel's determination, we regard the issue as abandoned and warranting no further consideration by the Board. (PERB Reg. 32360, subd. (c); *Service Employees International Union Local 1021 (Harris)* (2012) PERB Decision No. 2275, pp. 2-3. PERB regs. are codified at Cal. Code Regs., tit. 8, § 31001, et seq.)

it was withdrawn or amended to include additional facts before October 6, 2014, the charge would be dismissed.

After being granted an extension of time, on October 17, 2014, Moberg filed a third amended charge which incorporated his previous allegations and included additional allegations concerning communications and collaboration between Hartnell and Moberg's other former employers. The third amended charge also denied both Hartnell's allegations that Moberg's academic degrees and professional credentials were illegitimate, and that Moberg's employment was terminated for falsifying information on his employment application about those degrees and credentials.

On October 21, 2014, the Board agent informed Hartnell that Moberg had filed a third amended charge and advised Hartnell that it had until November 6, 2014 to file an amended position statement in response thereto. On or about October 29, 2014, Hartnell requested an extension of time in which to file an amended position statement. Although the file gives no indication whether this request was granted, on November 21, 2014, Hartnell filed a verified amended position statement in response to Moberg's third amended charge.[3]

On December 17, 2014, the Office of the General Counsel advised Moberg that, because the third amended charge had not cured the deficiencies identified in the previous warning letter, the charge had been dismissed for failure to state a prima facie case.

On December 23, 2014, Moberg requested an extension of time in which to appeal the dismissal. Because Moberg's request included an unsigned proof of service, on December 24,

[3] Because Hartnell's November 21, 2014 position statement incorporates by reference the contents of its July 26, 2013 position statement and otherwise adds no new factual material, we rely on the July 26, 2013 filing and we consider it unnecessary to determine whether, in the absence of correspondence specifically granting Hartnell's request for an extension of time, the November 21, 2014 position statement was timely filed.

2014, PERB's Appeals Assistant denied Moberg's request for an extension of time and advised Moberg that the due date for filing his appeal remained January 12, 2015.

On December 31, 2014, Moberg filed the present appeal.

On January 14, 2015, Hartnell filed a statement in opposition to Moberg's appeal.

On February 10, 2015, Moberg filed with the Board itself a request to consider certain newly-available evidence as part of his appeal. On March 2, 2015, Hartnell filed its opposition this request.

On March 28, 2015, Moberg filed a second request with the Board itself to consider other newly-available evidence as part of this appeal. On March 31, 2015, Hartnell also opposed this request.

On July 20, 2015, Moberg filed third request with the Board to consider other newly-available evidence as part of this appeal. On August 6, 2015, Hartnell filed its opposition to this request.

## FACTUAL ALLEGATIONS INCLUDED IN THE CHARGE[4]

Moberg alleges that, from Spring 2010 until September 24, 2012, he worked for Hartnell as an adjunct faculty member, a position exclusively represented by the Hartnell

[4] The Office of the General Counsel declined to consider the factual statements included in Hartnell's second and third position statements because they were unverified. PERB Regulation 32620, subdivision (c), provides the respondent in an unfair practice case with the right to be apprised of the allegations, and to "state its position on the charge during the course of the inquiries." The respondent's position statement, if any, "must be in writing, and signed under penalty of perjury by the party or its agent with the declaration that the response is true and complete to the best of the respondent's knowledge and belief." Our review of the file indicates that, Hartnell's second position statement, filed on July 26, 2013, included proper verification by Eileen O'Hare-Anderson, one of Hartnell's designated attorneys of record in this matter. Our review further indicates that, while Hartnell's third position statement, filed on August 2, 2013, was unverified, it included no statements of a "factual" nature. Because the purpose of PERB Regulation 32620 is to verify *factual* allegations, and was not intended to preclude consideration of purely *legal* argument included in an unverified position statement, we consider Hartnell's third position statement.

College Faculty Association/CTA/NEA (Association). Moberg does not allege that he is an officer, representative or authorized agent of the Association and the Association is not a party to the present charge.

Adjunct faculty members employed by Hartnell are non-tenure track instructors assigned to teach 67 percent or less of a full-time assignment during an academic year. They are generally employed on a semester-to-semester basis, and are classified as "temporary" employees, pursuant to Education Code section 87482.5, subdivision (a).[5] The governing board may terminate the employment of a temporary employee at its discretion at the end of a day or week, as it deems appropriate. The decision to terminate employment is not subject to judicial review except as to the time of termination. (Ed. Code, § 87665.)

Although he concedes that he was hired as a "temporary" employee subject to at-will termination, Moberg alleges that he became a "contract" employee, by operation of law, because Hartnell assigned him to work more than 67 percent of a full-time teaching load. According to Moberg, he became a contract or probationary employee within the meaning of the Education Code and applicable decisional law, because he was assigned to a 91.67 percent teaching load in the Spring 2011 semester. Moberg's charge includes documents from the California State Teachers Retirement Service indicating that he earned .7855 service credit from Hartnell for the academic year 2011-2012, where 1.0 equals full-time.

Hartnell's initial, December 6, 2012 position statement "adamantly and specifically" denied Moberg's allegation that he was a probationary, rather than temporary, employee and

[5] "Notwithstanding any other law, a person who is employed to teach adult or community college classes for not more than 67 percent of the hours per week considered a full-time assignment for regular employees having comparable duties shall be classified as a temporary employee, and shall not become a contract employee under Section 87604. If the provisions of this section are in conflict with the terms of a collective bargaining agreement in effect on or before January 1, 2009, the provisions of this section shall govern the employees subject to that agreement upon the expiration of the agreement." (Ed. Code, § 87482.5, subd. (a).)

specifically asserted that he "was *never* assigned more than 67% 'of the hours per week considered a full-time assignment for regular employees having comparable duties'" within the meaning of Education Code section 87482.5, subdivision (a). (Emphasis added.) However, Hartnell's subsequent position statements of July 26, 2013 and November 21, 2014 no longer include this specific denial. Instead, they assert that Moberg was employed "as an adjunct faculty member" and, that adjunct faculty members "are untenured, non-tenure track instructors who teach 67 percent or less of a full-time assignment during an academic year, generally on semester-to-semester assignments."

Moberg alleges that on August 12, 2012, he noticed that a document seal was missing from his office. Moberg asked several staff members, including Administrative Assistant Denyss Estrada (Estrada), if they had seen the missing seal. According to Moberg, Estrada suggested that Cathy Mendelsohn (Mendelsohn), an administrator in Estrada's department, may have the seal.

On August 22, 2012, Estrada sent an email message to Hartnell's Associate Vice President for Human Resources and Equal Employment Opportunity Terri Pyer (Pyer) in which Estrada complained that Moberg had accused her of taking the missing seal or having information regarding its whereabouts, which Estrada denied. After explaining that she had previously worked in Moberg's department but had left "because there are a lot of things going on in that program that I feel are unethical," Estrada concluded her message to Pyer by stating that she "need[s] Eric Moberg to stop harassing me."

When the seal was not located, Moberg reported it missing or stolen to various law enforcement officials, including William Myers (Myers), Hartnell's Director of Security. In an August 27, 2012 email message to Myers, Moberg wrote that Pyer "may have some

information on the whereabouts of the missing document seal." Pyer, who was included as a recipient on Moberg's message to Myers, allegedly responded by denying any knowledge of the missing seal's whereabouts and by warning Moberg "to be more cautious about making implied accusations." Moberg alleges that Pyer also warned him against making any similar accusations against Mendelsohn, whom Moberg alleges is a personal friend of Pyer.

Meanwhile, in response to Estrada's email message, Pyer initiated an investigation of Estrada's complaint against Moberg. Pursuant to that investigation, Pyer requested that Moberg attend a meeting with management.

Moberg alleges that on August 29, 2012, he sent an email message to Pyer in which he invoked his right to union representation at the upcoming meeting demanded by Pyer. He further alleges that, in response to Pyer's request for a meeting, Moberg offered to meet on September 3, 4, or 5 with Moberg's representative in attendance. According to Moberg, Pyer did not respond.

Moberg further alleges that, on September 7, 2012, Pyer directed Human Resources Administrative Assistant Monica Massing to contact Moberg and schedule a meeting during the week of September 10-14. Moberg alleges that in his response to Massing, he again invoked his right to union representation and he informed Pyer that he could not meet until the following week because his representative, Phillip Tabera (Tabera), was on jury duty. Moberg alleges that in a September 10, 2012 email, Pyer responded to Moberg's previous message by insisting that she, and not Moberg, would choose Moberg's representative for the meeting.[6]

[6] Although Moberg's charge includes numerous attachments, including several email messages, it does not include copies of the email correspondence ostensibly leading up to Moberg's termination, such as his August 27 message and Pyer's response thereto, nor the August 29 and September 7, September 10 and September 12 correspondence (discussed below) which allegedly document Moberg's request for representation and Pyer's responses thereto. Hartnell has provided copies of some emails between Moberg, Pyer and Myers

Moberg's charge and supporting materials include a sworn declaration by Tabera in which he identifies himself as a former staff and faculty member at Hartnell College, who is currently employed as a faculty member at San Jose State University and who serves as an elected member and president of the board of trustees of Salinas Union High School District. Tabera also declares that he served as Moberg's "representative" in fall 2012, though his declaration does not specify in what capacity or context Tabera represented Moberg. Although the statement of Moberg's charge refers to Tabera as Moberg's "union representative," Hartnell alleges, and Moberg apparently admits, that Tabera is a not an officer, agent or representative of the Association.[7]

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

On September 24, 2012, Hartnell's Interim Vice President Stephanie Low (Low) notified Moberg by letter that, pursuant to Education Code section 87665 and Article 21 of the collective bargaining agreement between Hartnell and the Association, Moberg's employment

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regarding the missing seal; between Moberg, Estrada and Pyer regarding Estrada's complaint against Moberg; and between Moberg and Massing regarding Pyer's request to meet with Moberg to discuss Estrada's complaint. Noticeably absent, however, is any documentation of Pyer's response to Moberg's request to postpone the meeting until his designated representative was available or any indication that Pyer forwarded her response to the Association, as alleged in Hartnell's position statement.

[7] The third amended charge alleges that, "On September 10, Pyer responded [to Moberg's previous email message] by insisting that *she* [not Moberg] would chose [sic] Moberg's representative for him *but from a union to which Moberg did not belong.*" (Emphasis added.)

with Hartnell would terminate at the close of business the same day. Low's letter to Moberg provided no reason for the decision.

On October 2, 2012, Pyer summarized the results of her investigation in a memorandum to Lewallen. According to Pyer's memo, Moberg had engaged in "[m]ultiple instances of dishonesty" by providing false information in his employment application about his academic degrees, which Hartnell alleges were "fraudulent" or "fake" degrees provided by unaccredited "diploma mill[s]." Pyer's memo to Lewallen also asserted that, as part of his application for employment with Hartnell, Moberg had omitted material information about his employment history, including information about instances in which Moberg had been terminated or had resigned in lieu of termination, and that Moberg had misrepresented himself as the faculty advisor to a non-existent student newspaper at Hartnell.

Moberg denies these allegations. He alleges that he was an "exemplary" employee who received excellent performance reviews during his employment at Hartnell. He alleges that he was fully qualified and credentialed to teach all courses assigned to him by Hartnell and he denies that any of the institutions issuing his degrees and credentials were "diploma mill[s]."

On January 15, 2013, Hartnell's governing board voted to approve and/or ratify various personnel actions, including the release of Moberg, effective at the close of business on September 24, 2012. Appendix A to the board's minutes lists several other personnel actions (appointments, retirements, resignations, releases) affecting employees in management, classified and certificated positions that were ratified by the board after their effective dates. However, Moberg appears to be the only certificated faculty member whose release was ratified after the fact, at least at that particular meeting.

In addition to the present charge, Moberg has filed unfair practice charges against other former employers, including two charges against the Monterrey Peninsula Unified School District (MPUSD) (PERB Case Nos. SF-CE-2830-E and SF-CE-3002-E); and at least one charge each against the Cabrillo Community College District (PERB Case No. SF-CE-2994-E), the West Valley Mission Community College District (West Valley) (PERB Case No. SF-CE-3060-E), and the San Mateo County Superintendent of Schools (PERB Case No. SF-CE-2744-E). In M*onterey Peninsula Unified School District* (2014) PERB Decision No. 2381 (M*onterey Peninsula*), the Board affirmed dismissal of one of Moberg's charges. Attorneys for the law firm Lozano Smith represented the Monterey Peninsula Unified School District in the unfair practice charge investigation and Moberg's appeal from dismissal that resulted in the Board's decision in *Monterey Peninsula.*

Moberg alleges that Hartnell and his other former employers and their legal counsel have communicated with each other in defending against Moberg's various charges and that these entities and their attorneys have further collaborated to "blacklist" Moberg from employment. Moberg alleges, for example, that Pyer's October 2, 2012 memorandum to Lewallen "acknowledges that [the law firm of] Lozano Smith forwarded documents from the SF-CE-2830-E case" to Hartnell.

Moberg alleges that, on or about December 4, 2013, Hartnell refused to comply with Moberg's request that an employment verification form be completed and returned to Moberg and that Hartnell instead insisted on responding to any requests for employment verification "directly to the person or entity requesting the verification." Moberg further alleges that West Valley terminated his employment in February 2014, after he informed West Valley of the present charge against Hartnell.

In addition to terminating his employment, Moberg alleges that Hartnell has withheld pay that is due and owing to Moberg. Moberg alleges that he had contracts with Hartnell to teach two courses in the fall 2012 semester but, because of his early termination, which was not approved by Hartnell's governing board until January 15, 2013, well after the end of the semester fall 2012 semester, he is owed $8,418.47 in unpaid wages for the remainder of these employment contracts.

Among the materials included with Moberg's third amended charge is the Tabera Declaration which states that, to Tabera's knowledge, Hartnell has never before terminated a probationary or temporary instructor without *prior* approval from the governing board. Hartnell argues that, as interim vice president, Low had authority to terminate Moberg, even if that decision was not ratified by the governing board until months after the fact.

As a remedy, Moberg seeks reinstatement to Hartnell as a full-time, permanent (tenured) instructor as of July 1, 2013, the beginning of the 2013-2014 school year; back pay from September 25, 2012, to the present, including wages due and owing for the fall 2012 semester in the amount of $8,418.47; a broad cease-and-desist order prohibiting Hartnell and any of its attorneys from discriminating or retaliating against Moberg for protected activities and from interfering with Moberg's right to select his own representative.

DISMISSAL OF THE CHARGE

The warning and dismissal letters advised Moberg that, under PERB precedent, to demonstrate that an employer has discriminated or retaliated against an employee in violation of EERA section 3543.3, 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 Unified School District* (1982) PERB Decision No. 210 *(Novato).*)

The third amended charge alleges that Pyer's insistence that she, not Moberg, would decide who would serve as Moberg's representative "would reasonably tend to discourage participation in protected activity and thereby interfere with the rights of employees and/or employee organizations." However, the warning and dismissal letters include no discussion of Moberg's interference allegation, either as a separate violation, or as facts tending to show unlawful motive in support of Moberg's discrimination allegation. The warning letter states that the Board agent could not determine from the facts presented whether Pyer's email message asserting her right to choose Moberg's representative was conduct that was objectively adverse to Moberg's employment.

Protected Activity/Employer Knowledge

The Office of the General Counsel determined that Moberg had engaged in protected conduct by filing and pursuing an unfair practice charge against a former employer. It also determined, however, that there were no facts to suggest that Hartnell's decision makers knew of Moberg's charge against another employer, since it was not filed until after his September 24, 2012 termination by Hartnell. (*Peralta Community College District* (2003) PERB Decision No. 1576, p. 9; *San Joaquin Delta Community College District* (2010) PERB Decision No. 2091, adopting dismissal letter at p. 3.)

The dismissal letter acknowledged Moberg's theory that the law firms representing Hartnell and the other community college districts where Moberg has worked may have served as a conduit of information about Moberg's charges. However, the Office of the General

Counsel concluded that, even if such communications between the law firms and their clients could be established, under *County of San Diego* (2012) PERB Decision No. 2258-M, they were not sufficiently specific to demonstrate that the actual individual(s) who decided to take adverse action against Moberg had such knowledge.

The Office of the General Counsel also concluded that Moberg had alleged insufficient facts to demonstrate his involvement in protected conduct on August 29, 2012, when he allegedly invoked his right to representation for a meeting with management to discuss Estrada's harassment complaint against Moberg. It appears from the dismissal letter that, because it was unclear whether such a meeting ever took place, the Office of the General Counsel considered this allegation too "ambiguous" to demonstrate that any protected activity actually occurred.

Although not repeated in the dismissal letter, the warning letter had also advised Moberg that his alleged threat to file a PERB charge if Hartnell did not respect Moberg's rights under EERA was insufficient to establish protected conduct. The warning letter acknowledged that filing a charge and participating in PERB's unfair practice process are protected activities. However, the warning letter stated that it could not be determined from the facts presented whether Moberg's threat to file a PERB charge was protected. The warning letter did not explain what additional facts would be needed to determine whether Moberg's threat to file a PERB charge was protected. However, the warning letter cited to *California School Employees Association (Petrich)* (1989) PERB Decision No. 767 (*CSEA (Petrich)*) for the proposition that an individual's unauthorized filing of a unit modification petition was unprotected, thereby suggesting that a threat to file a PERB charge, or perhaps even filing a PERB charge, are only protected conduct when *authorized* or meritorious.

Adverse Action

The Office of the General Counsel determined that terminating Moberg's employment constituted an adverse action. The Office of the General Counsel also acknowledged that withholding wages owed to an employee would be "objectively adverse" within the meaning of PERB precedent, but concluded that Moberg had not alleged sufficient facts to demonstrate that he was entitled to pay for the entire fall 2012 semester, when his employment with Hartnell had ended on September 24, 2012. The Office of the General Counsel also reasoned that, although Hartnell's governing board did not ratify Moberg's termination until January 15, 2013,[8] Moberg had not alleged sufficient facts to show that early termination of his employment contracts entitled him to pay for the entire semester, including for months when Moberg performed no actual work.

Unlawful Motive

The Office of the General Counsel concluded that Moberg had not alleged sufficient facts to demonstrate his allegations that Hartnell had treated Moberg differently from other, similarly-situated employees, departed from established practices, conducted a cursory investigation, or engaged in any other conduct indicating a nexus between Moberg's alleged protected activity and the adverse action or actions.

[8] The dismissal letter incorrectly states that Hartnell's governing board allegedly did not ratify Moberg's termination until January 15, 2014. However, Moberg's appeal does not argue that this apparent typographical error had any effect on the Office of the General Counsel's determination that his charge failed to state a prima facie case and, because it does not appear to affect any of the issues presented by Moberg's appeal, we disregard the error as non-prejudicial. (*Regents of the University of California* (1991) PERB Decision No. 891-H, p. 4; *Antelope Valley Community College District* (1979) PERB Decision No. 97, pp. 24-25.)

First, the dismissal letter rejected Moberg's contention that, as of September 24, 2012, he was no longer a temporary employee, but a probationary or contract employee, within the meaning of the Education Code, and therefore entitled to notice, a pre-termination hearing and other procedural protections afforded by the Education Code. The dismissal letter observed that Education Code sections 87482 and 87482.5 provide for conversion to probationary (contract) status only when an employee is assigned more than 67 percent of the hours per week considered a full time assignment, *and* when this assignment continues *for more than two semesters* or three quarters. The Office of the General Counsel acknowledged Moberg's evidence that he had worked in excess of 78 percent of a full teaching load during the 2011-2012 academic year, but concluded that this evidence does not establish that Moberg worked *more than* two consecutive semesters or three consecutive quarters to attain probationary status, as required by the Education Code. In particular, the dismissal letter did not regard Moberg's allegation that he was "offered" additional work as relevant, apparently because Moberg did not also allege that he *accepted* the offer and/or because he did not specify *how much* "additional" work was offered, so as to allow the Office of the General Counsel to determine whether Moberg began working the fall 2012 semester at more than .67 full-time equivalent (FTE).

The Office of the General Counsel also rejected Moberg's contention that Hartnell and other community college districts where Moberg has previously worked and/or their respective legal counsel may have communicated with one another about Moberg's PERB charges. The dismissal letter reasoned that the information allegedly shared by these entities concerned Moberg's previous and current PERB charges, which is publicly available and therefore not circumstantial evidence of unlawful motive by any of the decision makers at Hartnell who decided to terminate Moberg's employment and/or withhold wages allegedly owed to Moberg.

The Office of the General Counsel also rejected as too conclusory Moberg's allegation that he could only be terminated with prior approval by Hartnell's governing board and that, the fact that his termination was not ratified by the governing board until some four months after the fact demonstrated disparate treatment, a departure from established procedures, a cursory investigation or other "'nexus' factors" recognized by PERB decisional law. Because the Office of the General Counsel did not accept Moberg's contention that his employment had converted from temporary to probationary status, it noted that, pursuant to Education Code section 87665, Hartnell's governing board was permitted to terminate Moberg's employment at its discretion at the end of a day or week, whichever is appropriate and that such decision is not subject to judicial review, except as to the time of termination.

Finally, the Office of the General Counsel determined that Hartnell had not departed from established procedures or offered shifting justifications for Moberg's termination, when it claimed to have discovered "[m]ultiple instances of dishonesty" committed by Moberg during his application and employment with Hartnell. According to the dismissal letter, it would not be a departure from established procedures for Hartnell to terminate Moberg, if it discovered that he did not meet the minimum qualifications for his position. Additionally, because Hartnell offered no reason for Moberg's termination, according to the dismissal letter, its later discovery that Moberg lacked the minimum qualifications for his position and had engaged in dishonesty did not constitute "shifting" justifications.

## ISSUES ON APPEAL

Moberg's appeal asserts several errors or omissions in the processing of his charge. First, Moberg argues that the dismissal letter neglected to acknowledge two instances of protected conduct: (a) an August 29, 2012 email message to Pyer in which Moberg allegedly

requested union representation for a meeting with Pyer, and (b) a follow up message of September 12, 2012, to Pyer and the President of the Hartnell College Board of Education in which Moberg again invoked his right to union representation for an upcoming meeting with Pyer. Moberg also asserts that his September 12, 2012 email message constituted protected conduct, because in it, Moberg threatened to file an unfair practice charge with PERB for interference and retaliation, if Hartnell did not respect his rights under EERA.

Moberg also asserts that the Office of the General Counsel misinterpreted sections 87482 and 87665 of the Education Code which guarantee Moberg "contract" or permanent status and due process rights under the circumstances. According to Moberg, Hartnell's dismissal of Moberg, without providing a reason and other procedural protections, therefore constituted a departure from established standards and procedures. To the extent the Office of the General Counsel's investigation resulted in contrary legal theories as to the meaning of the Education Code or other matters of unsettled external law, Moberg argues that, under *Eastside Union School District* (1984) PERB Decision No. 466 (*Eastside*) and other PERB precedent, fair proceedings, if not due process require that a complaint be issued and the matter proceed to a formal hearing.

Next, Moberg asserts that the dismissal letter's reliance on Hartnell's "after the fact" justifications for Moberg's termination, when no reason was offered at the time of his termination, was improper and inconsistent with *Sacramento City Unified School District* (2010) PERB Decision No. 2129 (*Sacramento City*) and other PERB authority holding that an employer's attempt to legitimize its decision *after* it has already taken an adverse action constitutes evidence of unlawful motive.

Moberg contends that the dismissal letter also failed to consider other relevant factual material, including the Tabera Declaration submitted as part of Moberg's third amended charge. According to Moberg, this information demonstrates various so-called "'nexus' factors" recognized by PERB, including disparate treatment; departure from established practice; exaggerated, vague, inconsistent or non-existent justifications offered for taking adverse action; and expressions of anti-union animus.

Moberg also asserts that the dismissal letter misunderstood his allegations that Hartnell and Moberg's other former employers, and their attorneys, have not only communicated with one another about Moberg's various PERB charges, but that they have also "collud[ed]" to interfere with or otherwise deny Moberg protected rights because of PERB charges Moberg filed against those previous employers.

Hartnell's statement in opposition to Moberg's appeal, which is approximately one page in length, does not specifically address any of the issues raised by Moberg. Instead, it asserts, without explanation or citation to authority, that Moberg has failed to identify any procedural or factual errors in the warning and dismissal letters, has not cited any relevant law or rationale to support the grounds asserted for the appeal, and has improperly sought to "re-litigate" issues previously dismissed by the Office of the General Counsel.

## DISCUSSION

### A. Standard of Review and Applicable Law

We begin with the standard of review for dismissal/refusal to issue a complaint and the elements for stating a prima facie case of discrimination and interference. We then consider Moberg's request to supplement his appeal with newly-discovered evidence, before turning to issues raised by his appeal.

Board Review of Dismissal/Refusal to Issue a Complaint. To determine whether a charge states a prima facie case, the Board agent must assume that the essential facts alleged in the charge are true. (*San Juan Unified School District* (1977) EERB[9] Decision No. 12.) It is not the function of the Board agent to judge the merits of the charging party's dispute. (*Lake Tahoe Unified School District* (1993) PERB Decision No. 994; *Saddleback Community College District* (1984) PERB Decision No. 433.) When the Board agent's investigation "results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Eastside, supra,* PERB Decision No. 466, p. 7.)

Similarly, because this matter comes before the Board on dismissal without a hearing, we are not concerned with making findings of fact or weighing the parties' conflicting allegations. (*Eastside, supra,* PERB Decision No. 466, p. 7.) Rather, at this stage of the proceedings, we treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party's case. (*San Juan, supra,* EERB Decision No. 12, p. 4; *Golden Plains Unified School District* (2002) PERB Decision No. 1489 (*Golden Plains*), p. 6.) Where the charging party offers conflicting facts, the Board accepts that version most favorable to the charging party's case and disregards others. (*California School Employees Association & its Chapter 244 (Gutierrez)* (2004) PERB Decision No. 1606, pp. 3-4.)

In addition to the charging party's factual allegations, we may also consider information provided by the respondent, when such information is submitted under oath, complements without contradicting the facts alleged in the charge, and is not disputed by the charging party. (PERB Reg. 32620, subd. (c); *Service Employees International Union #790 (Adza)* (2004)

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

PERB Decision No. 1632-M (*SEIU (Adza)*); *Lake Tahoe Unified School District* (1993) PERB Decision No. 994 (*Lake Tahoe*); *Riverside Unified School District* (1986) PERB Decision No. 562a (*Riverside*).) When the respondent can establish an affirmative defense as a matter of law based on undisputed facts, "the charge must be dismissed even when the charging party has otherwise established a prima facie case." (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2055-M (*Metropolitan Water District*), p. 4, fn. 4, citing *Long Beach Community College District* (2003) PERB Decision No. 1568.)

1. Elements of Discrimination or Retaliation

To state a prima facie case 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 adverse action because of the employee's exercise of those rights. (*Novato, supra,* PERB Decision No. 210.)

Unlawful motivation, purpose or intent is "the specific nexus required in the establishment of a prima facie case" of retaliation. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde*), p. 10.) Such nexus may be established by direct evidence, as when the employer's words or conduct reveal that its adverse action was based on union activity or other protected conduct (*Contra Costa Community College District* (2006) PERB Decision No. 1852 (*Contra Costa II*), adopting proposed dec. at pp. 10, 14-16; *Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista*), pp. 19-20), or when the natural and probable consequence of the employer's conduct is to

discourage (or encourage) protected activity, such that the Board may fairly presume that the employer intended this result. (*Santa Clara Valley Water District* (2013) PERB Decision No. 2349-M, p. 23, fn. 8; *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416, 422-424; see also *American Ship Building Co. v. NLRB* (1965) 380 U.S. 300, 311-312; and *NLRB v. Great Dane Trailers, Inc.* (1967) 388 U.S. 26, 32.) However, because unlawful motive is a subjective condition generally known only to the charged party, direct and affirmative proof is rarely available. PERB cases therefore recognize that nexus may also be established by circumstantial evidence and inferred from the record as a whole or by some combination of direct and circumstantial evidence. (*Novato, supra,* PERB Decision No. 210, p. 6; *Carlsbad Unified School District* (1974) PERB Decision No. 89 (*Carlsbad*), p. 11; *Republic Aviation Corp. v. NLRB* (1945) 324 U.S. 793, 805; *Radio Officers' Union v. NLRB* (1954) 347 U.S. 17, 40-43.)

Through its decisional law, PERB has developed several "'nexus' factors" used for identifying the circumstances which may support an inference of unlawful intent. The first of the so-called nexus factors is the timing of the employer's decision to take adverse action. Although close temporal proximity between the employee's protected conduct and an adverse action is important (*North Sacramento School District* (1982) PERB Decision No. 264 *(North Sacramento)*), timing alone is not determinative but goes to the strength of the inference of unlawful motive. (*Sacramento City, supra,* PERB Decision No. 2129; *Moreland Elementary School District* (1982) PERB Decision No. 227.)

Along with suspicious timing, facts establishing one or more of the following factors may also be used to establish a prima facie case of discrimination/retaliation: (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, p. 15); (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 (*State of CA (Parks & 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 (*Coast*), adopting proposed dec. at p. 36); (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 (*Oakland*)) or the offering of exaggerated, vague, shifting or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786; *Novato, supra,* PERB Decision No. 210, pp. 12-13); (6) employer animosity towards union activists or protected employee activity (*City of Oakland* (2014) PERB Decision No. 2387-M, pp. 28-31; *Coast, supra,* adopting proposed dec. at pp. 41-42); or (7) any other facts that might demonstrate the employer's unlawful motive. *(North Sacramento, supra,* PERB Decision No. 264; *Rainbow Municipal Water District* (2004) PERB Decision No. 1676-M (*Rainbow*), p. 1.)

If the charging party establishes a prima facie case, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same course of action, regardless of any protected activity. (*Trustees of the California State University* (2000) PERB Decision No. 1409-H, citing *Novato, supra*, PERB Decision No, 210; *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.) To prevail on its affirmative

defense, the employer must establish *both* that a legitimate, non-discriminatory reason existed for taking the adverse action, *and* that the reason proffered was, in fact, the employer's reason for taking adverse action. (*Palo Verde, supra,* PERB Decision No. 2337, pp. 12-13; *Chula Vista, supra,* PERB Decision No. 2221, p. 21.)

However, because the function of a Board agent investigating a charge is not to weigh evidence, determine credibility or make findings of fact (*SEIU (Adza), supra,* PERB Decision No. 1632-M; *Lake Tahoe, supra,* PERB Decision No. 994; *Riverside, supra,* PERB Decision No. 562a), it is generally not appropriate at this stage of the proceedings to determine the employer's true motive for taking adverse action. (*Sacramento City, supra,* PERB Decision No. 2129, p. 12, fn. 8.) An employer's affirmative defense should only be considered at the charge-processing stage of unfair practice proceedings if raised in a verified and properly served position statement (PERB Regs. 32140, subd. (a), 32620, subd. (c); *County of Santa Clara* (2015) PERB Decision No. 2431-M, pp. 17-18), and if the asserted defense rests on factual allegations that do not contradict those included in the charge, and which the charging party does not dispute. (*Oakland, supra,* PERB Decision No. 1529, pp. 11-12; *Metropolitan Water District, supra*, PERB Decision No. 2055-M, p. 4, fn. 4.)

2. PERB's Tests for Interference with Protected Rights

Unlike an allegation of discrimination, a prima facie case of employer interference with protected rights requires no showing of unlawful motive, purpose or intent, but only that the employer has engaged in conduct that tends to or does result in at least slight harm to rights guaranteed by EERA. (*Carlsbad, supra,* PERB Decision No. 89, pp. 10-11; *County of Riverside* (2010) PERB Decision No. 2119-M, pp. 16-23; *Jurupa Unified School District*

(2012) PERB Decision No. 2283 (*Jurupa*), p. 29.) A finding of interference, coercion or restraint does not require evidence that any employee subjectively felt threatened or intimidated or was in fact discouraged from participating in protected activity; rather the inquiry is an objective one which asks whether, under the circumstances, an employee would reasonably be discouraged from engaging in protected activity. (*Clovis Unified School District* (1984) PERB Decision No. 389.)

If the harm to protected rights is slight and the employer offers justification based on operational necessity, the competing interests are balanced. (*Carlsbad, supra,* PERB Decision No. 89, p. 10; *John Swett Unified School District* (1981) PERB Decision No. 188 (*John Swett*), pp. 6-7; see also S*tate of California (Department of Personnel Administration)* (2011) PERB Decision No. 2106a-S.) If the harm to employee rights outweighs the asserted business justification, a violation will be found. (*Omnitrans* (2009) PERB Decision No. 2030-M, pp. 22-24.) Where the employer's conduct is inherently destructive of protected rights, it will be excused only on proof that it was caused by circumstances beyond the employer's control and that no alternative course of action was available. (*Santa Monica Community College District* (1979) PERB Decision No. 103, pp. 19-20, affirmed by (1980) 2 Cal.App.3d 684; *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.) Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. (*Monterey Peninsula, supra*, PERB Decision No. 2381, p. 42; *Carlsbad, supra*, PERB Decision No. 89, pp. 10-11.)

An employer may freely express or disseminate its views, arguments or opinions on employment matters, unless such expression contains a threat of reprisal or force or promise of benefit. (*Rio Hondo Community College District* (1980) PERB Decision No. 128, pp. 18-20; *City of Oakland, supra,* PERB Decision No. 2387-M, pp. 26-27.) The safe harbor for employer speech does not apply, however, to advocacy on matters of employee choice such as urging employees to participate or refrain from participation in protected conduct, statements that disparage the collective bargaining process itself, implied threats, brinkmanship or deliberate exaggerations. (*County of Riverside, supra,* PERB Decision No. 2119-M, pp. 16-23; *NLRB v. Gissel Packing Co.* (1969) 395 U.S. 575, 619-620.) The Board will look to the surrounding circumstances in which employer speech occurs, including the employer's power to control terms and conditions of employment and the economic dependence of employees on the employer, to determine whether, when viewed in context, employer speech conveys a threat of reprisal or force, a promise of benefit or a preference for one employee organization over another. (*City of Torrance, supra*, PERB Decision No. 1971-M, pp. 20-21; *Los Angeles Unified School District* (1988) PERB Decision No. 659, pp. 9-10; *Coachella Valley Mosquito & Vector Control District* (2009) PERB Decision No. 2031-M, pp. 20-21; *John Swett, supra,* PERB Decision No. 188, pp. 5-8, adopting proposed dec. at pp. 27-28.) Although the above test requires a balancing of employee rights against the employer's asserted justification of operational necessity, because, as noted above, during the initial investigation of a charge. PERB accepts the charging party's factual allegations as true, it is generally not appropriate to dismiss without a hearing interference allegations on the basis of an affirmative defense, such as an employer's right to free speech, unless the defense can be established as a matter of law

based on undisputed facts. (*County of Santa Clara, supra,* PERB Decision No. 2431-M, pp. 17-18; *Metropolitan Water District, supra*, PERB Decision No. 2055-M, p. 4, fn. 4.)

In addition to the *Carlsbad* and *Rio Hondo* tests used for allegations of garden-variety interference and coercive employer speech, PERB has adopted a more specific test for alleged violations of the representational rights of employees and/or employee organizations in employer-initiated investigative or disciplinary proceedings. In such cases, the charging party must demonstrate: (1) the employee or the representative invoked the right to representation on behalf of the employee; (2) for an investigative, disciplinary or other employer-initiated meeting; (3) which the employee reasonably believed might result in disciplinary action; and (4) the employer denied that request. (*Capistrano Unified School District* (2015) PERB Decision No. 2440 (*Capistrano*), p. 16; *Lake Elsinore Unified School District* (2004) PERB Decision No. 1648, p. 5; see also *Social Workers' Union, Local 535 v. Alameda County Welfare Department* (*Social Workers*) (1974) 11 Cal.3d 382, 386-388.)[10]

Before turning to the issues raised by Moberg's appeal, we consider his request to present evidence in support of the appeal that was not provided to the Office of the General Counsel during its investigation of the charge.

[10] Where California's public-sector labor relations statutes are similar or contain analogous provisions, agency and court interpretations under one statute are instructive under others. (*Redwoods Community College Dist. v. Public Employment Relations Bd.* (1984) 159 Cal.App.3d 617, 623-624 (*Redwoods*).) Additionally, private-sector precedent established under the National Labor Relations Act (NLRA), 29 U.S.C. section 151 et seq., and California's Agricultural Labor Relations Act, Labor Code sections 1140-1166:3, is persuasive for interpreting parallel or comparable provisions in the PERB-administered statutes. (*Fresno County In-Home Supportive Services Public Authority* (2015) PERB Decision No. 2418-M, p. 12, fn. 8, and pp. 24-37; *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 311 (*McPherson*).)

B. Whether Good Cause Exists to Consider New Evidence on Appeal

On February 13, and July 20, 2015, Moberg submitted to the Board requests to present and have the Board consider new evidence in conjunction with the present appeal. The ostensibly new evidence consists of a reporter's transcript of January 12, 2015 generated in separate proceedings before the State of California Commission on Teacher Credentialing (CCTC) to determine whether to revoke Moberg's teaching credentials, performance and student evaluations from other community college districts where Moberg has worked, a literary article by Moberg published in The Explicator Vol. 73, No. 1 in 2015, and correspondence from the CCTC, dated June 26, 2015, notifying Moberg of dismissal of an accusation against him, effective July 26, 2015.

The District opposes these requests on various grounds. It disputes Moberg's contentions that some of the evidence was not previously available and it argues that, even if considered, none of the evidence is relevant to the issues raised by Moberg's appeal.

Pursuant to PERB Regulation 32635, subdivision (b), the Board may supplement the record of an appeal with new supporting evidence only for "good cause." PERB has generally found "good cause" to do so, when the new allegations or supporting evidence presented in an appeal could not have been discovered by the charging party with the exercise of reasonable diligence before the charge was dismissed. (*American Federation of State, County, and Municipal Employees, Local 2620 (McGuire)* (2012) PERB Decision No. 2286-S.) Thus, "good cause" may be found when the events giving rise to the new evidence did not occur until after the charge was dismissed. (*Claremont Unified School District* (2014) PERB Decision No. 2357, p. 5.) Moberg points out that the credential revocation hearing did not occur until almost one month after his charge was dismissed, while the CCTC decision to dismiss the

accusation against Moberg was not effective until July 26, 2015. Because these documents could not have been submitted to the Board agent as part of her investigation of the charge, we agree that good cause exists for the Board to consider them as part of this appeal.

The transcript of the CCTC hearing consists of approximately 33 pages, most of which concerns the testimony by Hermelinda Rocha (Rocha), who was in charge of coordinating the Academy for College Excellence (ACE) Program at Cabrillo College during the approximately three-or four-year period when Moberg worked there.[11] Rocha testified as to Moberg's skills and abilities "to work collaboratively with everyone," and that Moberg was instrumental in providing a positive experience for the students in the ACE Program. She also testified that she was unaware of any complaints from anyone about working with Moberg. Moberg's accompanying declaration asserts that this evidence is relevant because it demonstrates that Moberg was fully qualified and credentialed to teach his assigned courses and rebuts Hartnell's allegations that the institutions issuing Moberg's degrees and credentials were "diploma mill[s]." According to Moberg, the evidence "impacts and alters the decision to dismiss the charge" because it demonstrates that Hartnell's after-the-fact justification for terminating Moberg was pretextual.

The Board has reviewed the transcript, in its entirety, and finds it only marginally relevant, if at all, to any of the issues raised by Moberg's appeal. Because we must accept the charging party's factual allegations as true at this stage of the proceedings, and because

[11] The third amended charge includes a similarly laudatory quote from Rocha about Moberg's skills and abilities, though it identifies her only as Moberg's "faculty lead" in the ACE Program and makes no mention of Cabrillo College or any other institution. The implication is that the ACE Program where Moberg worked existed *at Hartnell* and that Rocha was Moberg's faculty lead *at Hartnell* rather than at Cabrillo College, as indicated in the newly-presented evidence provided by Moberg. Although the apparent discrepancy is puzzling, we need not attempt to resolve it at this stage of the proceedings. (*Eastside, supra,* PERB Decision No. 466, p. 7.)

Moberg denies each of the justifications offered by Hartnell for his termination, whether Hartnell had a legitimate, non-discriminatory justification for terminating Moberg is not before the Board in the current posture of this case. Resolving factual disputes raised by the employer's affirmative defense should be considered in a formal hearing and not during the initial investigation into a charge or upon Board review of a dismissal/refusal to issue a complaint. (*Oakland, supra,* PERB Decision No. 1529, pp. 11-12; *Golden Plains, supra,* PERB Decision No. 1489, p. 6.) Moreover, while Rocha's testimony goes to Moberg's qualifications, skills, abilities and performance *at Cabrillo*, the issue presented by this appeal is whether Moberg has alleged sufficient facts to state a prima facie case of discrimination *by Hartnell*, a separate employer, where Moberg presumably taught different courses.

To the extent the transcript supports Moberg's allegation that he was an "exemplary" employee who received excellent performance reviews during his employment *at Hartnell*, it does so only indirectly and tentatively, at best. Indeed, on cross-examination, Rocha admitted that she was unaware of what led to Moberg's termination at Cabrillo, and that she was even *less familiar* with the circumstances surrounding his employment by or departure from Hartnell.

Moreover, the issues before the Board in this appeal do not require weighing evidence, resolving conflicting versions of the facts, making credibility determinations or deciding whether Hartnell has proved that it was justified in taking adverse action against Moberg regardless of any protected activity. (*Eastside, supra,* PERB Decision No. 466, p. 7; *San Juan, supra,* EERB Decision No. 12, p. 4; *Golden Plains, supra*, PERB Decision No. 1489, p. 6.) We therefore conclude that each of the other items of newly-available evidence, including favorable performance and student evaluations, an article authored by Moberg and published in

a literary journal, and the CCTC's dismissal of the accusation against Moberg, are, at most, only marginally relevant at this stage of the proceedings and do not affect any of the issues on appeal. Assuming, as Moberg contends, this evidence demonstrates that he met the minimum qualifications for employment by Hartnell, that and other issues bearing on Hartnell's affirmative defense are only properly considered in PERB's hearing process.

We next consider the issues raised by Moberg's appeal, turning first to his discrimination allegation.

C. Whether Moberg Has Sufficiently Alleged Discrimination

1. Adverse Action

The third amended charge alleges three adverse actions by Hartnell: (1) termination of Moberg's employment on September 24, 2012; (2) withholding wages allegedly owed to Moberg either for time actually worked and/or for the executory portion of his employment contract following his termination; and (3) conspiring with other former employers of Moberg and their attorneys to deny Moberg future employment opportunities.

The Office of the General Counsel determined that termination from employment was an adverse action. It likewise determined that withholding wages owed to an employee "would be objectively adverse to his or her employment" within the meaning of PERB decisional law (see *Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 12; *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.) However, the Office of the General Counsel determined that Moberg had provided insufficient facts to support his allegation that his employment contract with Hartnell entitled him to wages for work not actually performed following his termination.

The Office of the General Counsel did not address Moberg's allegation that Hartnell also withheld wages owed to Moberg *for time actually worked.* The third amended charge alleges that Moberg's contracts to teach English and Education courses during the fall 2012 semester totaled $10,036.41 and that "Hartnell paid Moberg only $1617.94, *less even than Moberg had earned up until September 24, 2012.*" (Emphasis added.) According to the third amended charge, Moberg completed "Assignment #2" on August 16, 2012, which "was worth $2155.01 itself," while "Assignment 1," and "Assignment #3," if prorated to the date of Moberg's termination, were worth $991.11 and $1,414.28. The third amended charge also alleges that Moberg repeatedly requested back pay for all amounts *earned before* September 24, 2012, but not paid. In support of this allegation, the third amended charge includes a copy of Moberg's October 19, 2012 email correspondence with Hartnell's Payroll Supervisor Dora Sanchez disputing the amount paid to Moberg on or about October 5, 2012.

Hartnell's position statement admits that one of Moberg's time sheets was misplaced "for a short period of time," but asserts that it has since paid Moberg all sums owing. However, Moberg's appeal reiterates the above allegations that Hartnell has not paid him wages due and owing for all time actually worked, an allegation that was never addressed by the Office of the General Counsel.

The charging party is entitled to a warning letter identifying any deficiencies before the charge is dismissed. (PERB Reg. 32620, subd. (d); *County of San Joaquin* (2003) PERB Decision No. 1570-M, p. 8.) Charge allegations that are not investigated before dismissal must be remanded either for further investigation or for issuance of a complaint. (*Trustees of the California State University* (2014) PERB Decision No. 2384-H (*Trustees of CSU*), pp. 4-5; *County of Alameda* (2006) PERB Decision No. 1824-M, pp. 4-5.) We conclude that Moberg

has sufficiently alleged that Hartnell took adverse action by withholding wages for time actually worked.

Moberg's appeal also asserts that the Office of the General misunderstood his blacklisting allegation. According to the appeal, the third amended charge alleges that Hartnell and other former employers and the law firms representing them not only communicated with one another about Moberg's various PERB charges, but that they also "collud[ed]" with one another to retaliate against, interfere with or otherwise deny Moberg employment opportunities because of Moberg's protected activity. We disagree with Moberg's contention that the Office of the General Counsel misunderstood this allegation.

The warning letter characterizes Moberg's allegation as follows: "Charging Party alleges that, since dismissing him from employment, 'Hartnell ... has also contacted Moberg's other employers in order to influence them to assist Hartnell in retaliating against Moberg.'" The warning letter also states: "Charging Party contends that [the law firm of] Lozano Smith is assisting the Hartnell Community College District and its attorneys, Leibert, Cassidy, Whitmore, in retaliating against him." Thus, it appears the Office of the General Counsel fully grasped the nature of Moberg's allegation, but dismissed it as too conclusory and speculative to support a prima facie case of discrimination.

We agree with the Office of the General Counsel that Moberg's blacklisting allegation is too conclusory to state a prima face case. (*Service Employees International Union Local 250 (Stewart)* (2004) PERB Decision No. 1610-M, p. 3.) Although a refusal to hire or consider for employment because of the applicant's protected activity is an unfair practice (*Contra Costa Community College District* (2003) PERB Decision No. 1520 (*Contra Costa I*); *Contra Costa II, supra*, PERB Decision No. 1852; *Trustees of the California State University*

(2008) PERB Decision No. 1970-H, adopting proposed dec., in relevant part, at p. 20), Moberg has not alleged sufficient facts to suggest that Hartnell refused to re-hire Moberg or that Hartnell's agents improperly colluded with other employers to deny Moberg employment or otherwise to discriminate against him. As such, we affirm the dismissal of this allegation.

We therefore conclude that Moberg has sufficiently alleged two adverse actions taken by Hartnell: his termination from employment and withholding wages for hours already worked. We next consider whether Moberg has sufficiently alleged participation in EERA-protected conduct.

2. Protected Activity

Moberg's appeal argues that the Office of the General Counsel failed to consider facts demonstrating his participation in protected activity, including his requests for representation by Tabera, and his "threat" to file a charge with PERB, if Hartnell failed to respect his rights under EERA.[12] We review each of these contentions.

a. Moberg's Request for Representation

EERA section 3543 guarantees public school employees the right to "participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations," while section 3543.1 guarantees employee organizations the right "to represent their members in their employment relations with public school employers." (EERA, §§ 3543, subd. (a), 3543.1, subd. (a); *Capistrano, supra,* PERB Decision No. 2440, pp. 10-11; *Sonoma County Superior Court* (2015) PERB Decision

[12] As discussed in the warning letter, Moberg also engaged in protected activity by filing unfair practice charges against several other public employers. However, as explained below, we agree with the Office of the General Counsel that there is insufficient information to suggest that Hartnell's decision makers were aware of these charges against other employers at the time they took adverse action against Moberg, or that they conspired with other employers or their attorneys because of these charges.

No. 2409-C *(Sonoma)*, p. 14.)[13] It is well-settled that an investigative or disciplinary interview or other meetings called by management under unusual circumstances is an "employment relation" within the scope of representation and that the representational rights afforded employees and employee organizations thus attaches. (*Redwoods, supra,* 159 Cal.App.3d 617, 624; *Robinson v. State Personnel Bd.* (1979) 97 Cal.App.3d 994, 1001; *Civil Service Assn. v. City and County of San Francisco* (1978) 22 Cal.3d 552, 568.) These rights are coterminous, as there can be no right of an employee to representation without an organizational right to represent. (*Sonoma, supra*, PERB Decision No. 2409-C, p. 9; *North Sacramento, supra,* PERB Decision No. 264, p. 7.)

However, to promote EERA's purpose of "providing a *uniform* basis for recognizing the right of public school employees ... to be represented by [employee] organizations in their professional and employment relationships with public school employers" (EERA, § 3540, emphasis added), the Legislature has made these rights of employees and employee organizations subject to the principle of exclusive representation by majority rule. Thus, "once an employee organization is recognized or certified as the exclusive representative of an appropriate unit ... only that employee organization may represent that unit [of employees] in their employment relations with the public school employer." (EERA, §§ 3543, subd. (a), 3543.1, subd. (a).)

Moberg's appeal asserts that the Office of the General Counsel improperly concluded that his "assertion of his right to union representation at the meeting with Pyer" was not protected activity, because, under *County of Riverside* (2009) PERB Decision No. 2090-M and similar PERB decisional law, "[s]eeking the assistance of [a] representative in connection with

[13] Although *Sonoma* is currently under superior court review pursuant to a Petition for Writ of Mandate under California Code of Civil Procedure, section 1085, the Board is unaware of any authority prohibiting citation to a Board decision pending review by a superior court.

a workplace issue is protected activity." (Appeal, p. 1.) The warning letter states that the charge included insufficient detail to allow the Board agent to determine whether Moberg's choice of a particular representative was protected. We agree that, on the facts alleged, Moberg has not shown that he requested *union* representation, as the third amended charge and supporting materials include no facts to suggest that Moberg's chosen representative, Tabera, was an officer, representative or authorized agent of the Association or, indeed of any employee organization.

To the extent EERA section 3543.1 guarantees Moberg a right to *union* representation at the meeting with Pyer, that right was limited to representation *by the Association*, the exclusive representative of adjunct faculty employed by Hartnell. Except for Moberg's conclusory assertion that he requested union representation, he has alleged no facts to suggest that Tabera was an officer or representative of the Association or otherwise had any authority to act on its behalf. To the contrary, the third amended charge alleges that Pyer insisted that she would choose Moberg's representative for him "*but from a union to which Moberg did not belong,*" which we interpret as an admission that Tabera was *not* authorized to act on behalf of the Association. (Emphasis added.) Because Moberg has not alleged that Tabera was an officer, representative or agent of the Association, Moberg had not sufficiently alleged that he exercised an EERA-protected right to *union* representation by requesting Tabera's presence for the meeting called by Pyer.[14]

[14] Additionally, while the charge and supporting materials do not identify Tabera as an officer, representative or agent of another employee organization, to the extent that is the case, he could not act in that capacity to provide "union" representation to Moberg without violating the principle of *exclusive* representation by majority rule set forth in EERA section 3543.1, subdivision (b). (*Mount Diablo Unified School District, et al.* (1977) EERB Decision No. 44 (*Mt. Diablo*), pp. 8-9; *Chaffey Joint Union High School District* (1982) PERB Decision No. 202, pp. 6-7.)

For the same reason, we reject Moberg's contention that he had a protected right to representation by Tabera under EERA section 3543's guarantee of *employee* rights "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." Notwithstanding differences in the statutory language, California courts and PERB have long held that this language includes rights similar to those afforded private-sector employees under section 7 of the NLRA.[15] (*McPherson, supra,* 189 Cal.App.3d 293, 308-309; *Redwoods Community College District* (1983) PERB Decision No. 293, p. 6, affd. 159 Cal.App.3d 617, 623-624; *Modesto City Schools* (1983) PERB Decision No. 291 (*Modesto*), pp. 61-62; *Jurupa, supra,* PERB Decision No. 2283, p. 28.) As the Board explained in *Modesto*:

> The only difference ... between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process.

(*Modesto, supra*, at p. 62.)

Thus, EERA generally guarantees public school employees the right to act in concert with other employees for the purpose of bargaining collectively *or* for providing mutual aid or protection to one another. This right is not limited to acting in concert with employees in the same bargaining unit or employees of the same employer. (*McPherson, supra*, 189 Cal.App.3d 293, 305-311; *Regents of the University of California* (2004) PERB Decision No. 1638-H, p. 4;

[15] Section 7 of the NLRA provides in relevant part: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8, subdivision (a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

*Oxnard Harbor District* (2004) PERB Decision No. 1580-M, pp. 9-10; see also *Fresno County IHSS Public Authority, supra*, PERB Decision No. 2418-M, pp. 24-37, esp. 32.) It may even protect acting in concert with persons who are not currently or have never been employed by the public school employer charged with violating employee rights. (*Contra Costa I, supra*, PERB Decision No. 1520; *Contra Costa II, supra*, PERB Decision No. 1852; *Trustees of the California State University, supra*, PERB Decision No. 1970-H, adopting proposed dec. at p. 20.)[16]

However, like the rights of employee organizations, where a majority of employees has chosen a representative, EERA expressly limits the rights of all unit employees, including their rights to self-representation and to act in concert with others, to further the statutory scheme of collective bargaining through exclusive representation, "which is the cornerstone of the Act." (*Lake Elsinore School District* (1986) PERB Decision No. 563, p. 4; see also *Clovis Unified School District* (2002) PERB Decision No. 1504, pp. 22-25.) Even with respect to grievances, where the Legislature has carved out an exception to the principle of exclusive representation, by allowing public school employees to present grievances to their employer and to have such

[16] EERA section 3543.5, subdivision (a), makes it unlawful for a public school employer to "[i]mpose 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." In 1989, the Legislature amended the statute to state that, for the purposes of this subdivision, the term "employee" includes "an applicant for employment or reemployment." (SB 342, Craven, 1989 Cal. Legis. Serv. 313 (West).) In doing so, the Legislature overruled PERB decisional law to the contrary and codified the view previously expressed by Member Craib. (*Hacienda La Puente Unified School District* (1989) PERB Decision No. 741, p. 4, Member Craib, dissenting opinion; *Los Angeles Unified School District* (1988) PERB Decision No. 686, p. 3, Member Craib, concurring opinion; and *Hacienda La Puente Unified School District* (1988) PERB Decision No. 685, pp. 24-41, Member Craib concurring and dissenting opinion.)

grievances adjusted without the intervention of the exclusive representative,[17] PERB has determined that, to the extent employees retain a right to present grievances individually to the employer, this "right" is qualified and limited by the overriding statutory purposes served by exclusive representation through majority rule. (*Chaffey, supra,* PERB Decision No. 202, pp. 6-7; *Mt. Diablo, supra,* EERB Decision No. 44, pp. 8-9.) Like other exceptions, this right is to be construed narrowly.

Although PERB generally follows federal precedent regarding the scope of employee rights (*McPherson, supra*, 189 Cal.App.3d 293, 310), where, as here, the Legislature has expressly provided for broader or different rights or employee organizations to serve other purposes, we are not free to disregard rights expressly provided by the statute as mere surplusage. (*Capistrano, supra*, PERB Decision No. 2440, pp. 14-15; *Redwoods, supra*, 159 Cal.App.3d 617, 623.) In the absence of some indication by the Legislature, we decline to extend the specific and narrowly defined exception to exclusive representation with respect to employee grievances to the different context and circumstances implicated by investigative or disciplinary interviews called by the employer. (*Sonoma, supra*, PERB Decision No. 2409-C, pp. 13-14.)

b. Moberg's Threat to File a Board Charge

We next consider Moberg's alleged threat to file a Board charge if Hartnell failed to respect his rights under EERA. As the Office of the General Counsel observed, filing an unfair

[17] EERA section 3543, subdivision (b), provides that an employee may at any time present grievances to his or her employer, and have those grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect, provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

practice charge or otherwise participating in PERB's unfair practice resolution process is protected activity, regardless of the merits of the charge. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342 (*Coachella Valley*), p. 13.) A statement of intention to pursue legal remedies, such as a threat to "seek the legal assistance of the Union," is also protected. (*California State Employees Association (Hutchinson)* (1999) PERB Decision No. 1355-S, adopting warning letter at pp. 4, 6; *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S (*State of CA (CDC)*), adopting proposed dec. at pp. 25-27, 34-35.) An employee's threat to engage in protected conduct is thus protected, so long as it is made in good faith and not an abuse of process. (*NLRB v. City Disposal Systems, Inc.* (1984) 465 U.S. 822, 837 [individual employee's reasonable, good-faith assertion of a collectively-bargained right is an extension of the concerted action that produced the agreement and therefore affects the rights of other employees]; see also *Willits Unified School District* (1991) PERB Decision No. 912, pp. 2-3, adopting proposed dec. at p. 27, fn. 22; and *Los Rios College Federation of Teachers, Local 2279 (Deglow)* (2003) PERB Decision No. 1515, p. 4.)

We disagree with the implication of the warning letter that a threat to file an unfair practice charge is only protected if "authorized" or meritorious. In the case relied on by the Office of the General Counsel, the Board went to considerable lengths to distinguish the facts of that case, in which an individual employee filed a unit modification petition with PERB, from the filing of an unfair practice charge:

> The conduct at issue here is to be distinguished from the situation where an individual employee files an unfair practice charge with PERB, which filing is an expressly granted right pursuant to EERA section 3541.5(a). Where an individual exercises a statutory right, such as in the case of filing an unfair practice charge, the merit (or lack thereof) of the charge is immaterial to a determination of the status of the conduct. In other words, the conduct is protected even if the charge is found to be meritless.

(*CSEA (Petrich), supra,* PERB Decision No. 767, p. 3.)

Thus, *unlike* the unit modification petition considered in *CSEA (Petrich)*, the Board's discussion of filing unfair practice charges makes no distinction between charges that are meritless for lack of standing, lack of jurisdiction, untimeliness, failure to state a prima facie case, or any of the other possible reasons for rejecting a charge. In *North Sacramento, supra,* PERB Decision No. 264, the Board reasoned:

> An employee's attempt to assert rights established by the terms of a negotiated agreement clearly constitutes "participation" in the activities of an employee organization and is, therefore, expressly protected by section 3543 of the Act. Were this not the case, an employer could freely retaliate against employees because of their assertion of contractual rights, thereby effectively undermining the collective negotiation process.

*North Sacramento, supra*, at p. 6; see also *Interboro Contractors, Inc.* (1966) 157 NLRB 1295, 1298-1299, enforced (2d Cir. 1967) 388 F.2d 495; and *NLRB v. City Disposal Systems, supra*, 465 U.S. 822, 829-837; *El Gran Combo de Puerto Rico v. NLRB* (1st Cir 1988) 853 F.2d 996, 1002.) Although *North Sacramento* involved contractual rights under a collectively-bargained agreement, the assertion of statutory rights, including participation in the Board's unfair practice process, is certainly no less protected. (*Golden Gate Bridge Highway & Transportation District* (2011) PERB Decision No. 2209-M, adopting warning letter at p. 5; *Coachella Valley, supra,* PERB Decision No. 2342, p. 13.) The Board's position on this matter is premised on the view that, to ensure the policies of EERA and other PERB-administered statutes are effectuated, employees must be able to participate in the Board's administrative process without fear of reprisal. (*Filmation Associates, Inc.* (1977) 227 NLRB 1721.) To protect the integrity of that process and guard against any chilling effect on employees, we reaffirm that EERA protects not only filing a charge or appearing as a witness in PERB proceedings, but also "threatening" to do so.

Here, Moberg has alleged that he asserted a right to representation at an upcoming meeting with management. Although the facts included in the charge and supporting materials provide little information about his email exchanges with Pyer and Lewallen, nothing in his charge or the appeal suggests that his threat to file a PERB charge was not made in good faith. Because use of the Board's unfair practice process is itself protected, Moberg has alleged sufficient facts to establish that his *threat* to file a PERB charge was protected, regardless of the merits of his allegations.

3. Employer Knowledge

PERB precedent requires actual or imputed knowledge of the charging party's protected activity by those agents of the employer who decided to take adverse action. (*Santa Clara Valley Water District, supra*, PERB Decision No. 2349-M, pp. 34-37.) The term *knowledge* is not limited by what is factually correct. Even when an employer is mistaken in believing an employee has engaged in union activity, a violation of EERA occurs, if the employee is discriminated against because of the employer's belief he or she engaged in protected activity. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 9; *McPherson, supra,* 189 Cal.App.3d 293, 310.) Unlawful animus may also be imputed to high management officials where, even innocently, they rely on inaccurate or biased information from lower-level personnel acting with a discriminatory motive. (*State of CA (CDC), supra,* PERB Decision No. 1435-S, adopting proposed dec. at p. 32; *Jurupa, supra*, PERB Decision No. 2283, p. 29; *City of Modesto* (2008) PERB Decision No. 1994-M, p. 12; *Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572, pp. 3-4.)

As Hartnell's Associate Vice President for Human Resources and Equal Employment Opportunity, Pyer was not a lower-level supervisor with no input into the decision to terminate Moberg. (See, e.g., *Regents of the University of California* (1998) PERB Decision No. 1263-H, proposed dec. at p. 45; cf. *Regents of the University of California (Los Angeles)* (2008) PERB Decision No. 1995-H, p. 2; see also *Santa Ana Unified School District* (2013) PERB Decision No. 2332, p. 11 (*Santa Ana*), fn. 8; and *Trustees of CSU, supra,* PERB Decision No. 2384-H, p. 41.) By virtue of her position and responsibilities, and her involvement in investigating the various complaints against Moberg and her follow-up memorandum of October 2, 2012 informing Hartnell's President of Moberg's termination, it appears that the charge and Hartnell's position statements include sufficient information to demonstrate that, even if Pyer was not the sole or ultimate decision-maker, she had at least some input into and/or authority to effectively recommend Moberg's termination.

Because Moberg alleges that he made his threat to file an unfair practice charge directly to Pyer, a high-ranking human resources official, we conclude that he has sufficiently alleged that his participation in EERA-protected conduct occurred with the requisite knowledge of a decision-maker acting on behalf of Hartnell. (*Sacramento City, supra*, PERB Decision No. 2129, pp. 4, 7; cf. *County of San Diego, supra,* PERB Decision No. 2258-M, adopting warning letter at pp. 2-3.)

4. Allegations Supporting Inference of Unlawful Motive

As discussed above, Moberg has sufficiently alleged that Hartnell took adverse actions against him, including terminating his employment and withholding wages earned. He has also alleged that, with Hartnell's knowledge, he exercised protected rights on September 12, 2012, when he advised Pyer and Lewallen that he would file a PERB charge, if Hartnell would not

respect Moberg's rights under EERA. We next consider his allegations that Hartnell took the above adverse actions *because of* Moberg's protected activity.

a. Close Temporal Proximity

Moberg has sufficiently alleged that his employment with Hartnell was terminated on September 24, 2012, and that, beginning in October 2012 and continuing thereafter, Hartnell withheld from Moberg wages for time worked before his termination. The above factual allegations establish close temporal proximity, and thus "highly suspicious" timing, between Moberg's alleged participation in protected conduct on September 12, 2012, and Hartnell's adverse actions against him. (*Jurupa, supra*, PERB Decision No. 2283, pp. 22, 23.) In addition to highly suspicious timing, Moberg's appeal asserts that several other "nexus" factors recognized by PERB were sufficiently alleged in the third amended charge but ignored, misinterpreted or improperly rejected by the Office of the General Counsel. We examine each of these contentions.

b. Whether Moberg Has Sufficiently Alleged that Hartnell Offered an After-the-Fact Justification for Its Actions.

Related to the issue of timing are the circumstances surrounding Pyer's October 2, 2012 memorandum to Lewallen which summarizes various allegations that Moberg had falsified information about his credentials and qualifications and did not meet the qualifications for his position. Because Pyer's memo post-dates Moberg's termination by almost three weeks, and because Hartnell's position statement does not disclose *when* Pyer became aware of Moberg's alleged misconduct, it is unclear even whether it was part of Hartnell's decision to terminate Moberg's employment. According to the warning letter, "It appears these reasons were not used as a basis for the termination, and that much of this information was discovered as a result of an

investigation [Hartnell] conducted in connection with the termination," i.e., after Moberg's termination. No explanation is offered by Hartnell why it was necessary to conduct an investigation after Moberg had already been terminated.

As discussed in the warning and dismissal letters, Moberg was hired as adjunct faculty, a temporary position subject to at-will employment. No reason was necessary for his termination and none was offered in the September 24, 2012 letter advising Moberg of his termination. Hartnell's position statement denies even that it was necessary for its governing board to ratify Moberg's termination. However, during the investigation of this charge, Hartnell's position changed from "adamantly and specifically" denying that Moberg was a probationary employee or that he was *ever* assigned more than 67 percent of a full-time teaching load, to instead asserting only that he was *hired* as an adjunct faculty member *generally* assigned to perform non-tenure track work at 67 percent or less of a full-time assignment. An employer's shifting or after-the-fact justifications for adverse action suggest that the reasons offered are pretextual and may therefore support an inference of unlawful motive. (*State of CA (Parks & Recreation), supra,* PERB Decision No. 328-S, pp. 14-15; *San Diego Community College District* (1983) PERB Decision No. 368, p. 21.) Moreover, any legitimate, non-discriminatory reason for terminating Moberg would have already been known to Pyer as of September 24, 2012. Subsequent investigation was, by definition, for another purpose, since Moberg was no longer employed at Hartnell. Hartnell's efforts to discover and provide a legitimate, non-discriminatory reason for Moberg's termination after he was already terminated provide at least some support for inferring nexus. (*Chula Vista, supra*, PERB Decision No. 2221, p. 19.)

c. Whether Moberg Has Sufficiently Alleged that Hartnell Departed from Established Procedures by Denying Moberg Notice and Other Procedural Protections Afforded Probationary Faculty under the Education Code

The appeal argues that the Office of the General Counsel misinterpreted provisions of the Education Code and applicable decisional law. According to Moberg, his prior service at Hartnell entitled him to probationary or contract, rather than at will status and Hartnell therefore departed from established procedures by dismissing Moberg without notice and a pre-termination hearing. (*Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 826.) Moberg also argues that Hartnell departed from established procedure by terminating his employment without obtaining *prior* approval from Hartnell's governing board and that the dismissal letter ignored the Tabera Declaration and improperly credited Hartnell's "after the fact" justification for Moberg's termination. According to Moberg, an employer's attempt to legitimize its decision *after* it has already taken adverse action against an employee constitutes a separate and additional factor showing "nexus" or unlawful motive. (*Sacramento City, supra,* PERB Decision No. 2129.) Because each of these contentions turns on interpretation of the Education Code, we discuss them together.

As a threshold matter, we agree with the Office of the General Counsel that Moberg has not alleged sufficient facts to demonstrate that he was entitled to probationary or contract status.[18] Under the Education Code, a community college district must classify its academic employees as "regular," "contract" or "temporary." (Ed. Code, § 87604.) A "regular" employee is one who has achieved tenure. "Contract" status, sometimes also referred to as "probationary"

[18] While PERB has no authority to enforce or order remedies for violations of the Education Code, we may interpret its provisions where necessary to administer EERA or to harmonize the Education Code's provisions with EERA. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 865; *Santa Ana USD, supra*, PERB Decision No. 2332, p. 13; *Coachella Valley, supra,* PERB Decision No. 2342, pp. 12-13.)

status, is the first step toward tenure. According to the Education Code, a "temporary" employee is one employed to teach adult or community college classes for not more than 67 percent of the hours per week considered a full-time assignment for regular employees having comparable duties. (Ed. Code, § 87482.5.) Contract employees also enjoy some procedural protections against summary dismissal from employment, including notice and a pre-termination hearing. (Ed. Code, § 87671.)[19] By contrast, temporary employees are "at will." The governing board may terminate the employment of a temporary employee at its discretion at the end of a day or week, as it deems appropriate and the decision to terminate employment is not subject to judicial review except as to the time of termination. (Ed. Code, § 87665.)

Although adjunct faculty members at Hartnell are hired as temporary employees, the Education Code mandates conversion from temporary to contract status under certain circumstances. For example, subject to certain exceptions, which are not at issue here, a community college district may not employ a temporary employee for more than two semesters

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[19] Education Code section 87671 provides:

> A contract or regular employee may be dismissed or penalized if one or more of the grounds [for misconduct] set forth in Section 87732 are present and the following are satisfied:
>
> (a) The employee has been evaluated in accordance with standards and procedures established in accordance with the provisions of this article.
>
> (b) The district governing board has received all statements of evaluation which considered the events for which dismissal or penalties may be imposed.
>
> (c) The district governing board has received recommendations of the superintendent of the district and, if the employee is working for a community college, the recommendations of the president of that community college.
>
> (d) The district governing board has considered the statements of evaluation and the recommendations in a lawful meeting of the board.

or three quarters within any period of three consecutive years. (Ed. Code, § 87482.) Additionally, if a community college district fails to provide an academic employee with a written statement at the beginning of each academic year indicating that the employee is temporary, the employee shall be deemed to be a contract employee, unless already employed as a regular employee. (Ed. Code, § 87477.) Although Moberg cites this section of the Education Code in his appeal, the third amended charge does not allege that Hartnell failed to provide Moberg with a written statement indicating that his employment status was "temporary." He has therefore not alleged sufficient facts to demonstrate that Hartnell departed from established procedures under Education Code section 87477.

Moberg's appeal also argues that he has taught community college classes for more than 67 percent of the hours per week considered a full-time assignment for regular employees having comparable duties, and that he was therefore entitled to contract status, pursuant to Education Code section 87482.5, subdivision (a). The information in the third amended charge and supporting materials sufficiently alleged that Moberg worked in excess of 67 percent of a full teaching load during the 2011-2012 academic year, that is, for two consecutive semesters. However, the charge and supporting materials do not sufficiently allege that Moberg continued to work in excess of 67 percent of a full teaching load "for more than two semesters," as required by the Education Code. We therefore agree with the Office of the General Counsel that Moberg has not alleged sufficient facts to demonstrate that he was entitled to probationary status, by operation of the Education Code, or, consequently, that Hartnell departed from established procedure or law by dismissing Moberg in accordance with the requirements of a temporary employee. As noted in the dismissal letter, Moberg alleged only that he was "offered" additional work, but did not specify the relevant time period of this offer or how much "additional" work

was offered, nor did he allege that he *accepted* the offer, so that it was unclear whether he began working the fall 2012 semester at more than .67 FTE.

Apart from whether Moberg was a temporary employee whose employment was subject to termination "at will," his appeal raises the separate question of *who* within Hartnell had the authority to terminate his employment. Moberg contends that Hartnell's governing board may not properly delegate this power and that Hartnell therefore departed from established procedures by terminating his employment at the end of the day on September 24, 2012 without prior approval by the governing board. We reject this argument as well.

As a general rule, Moberg is correct that, the "powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization." (*California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal.3d 139, 144 (*CSEA v. Personnel Commission*).) Moreover, "[u]nder normal circumstances and absent statutory provisions to the contrary the dismissal of employees involves the exercise of judgment or discretion." (*Ibid.*; cf. *American Federation of Teachers v. Board of Education* (1980) 107 Cal.App.3d 829, 834 [governing board may delegate to subordinates ministerial acts such as acceptance of employee resignation].) Although the Education Code expressly grants a community college district's governing board discretion to terminate a temporary employee at the end of a day or week, as the board deems appropriate (Ed. Code, § 87665), as the Supreme Court has observed, the Education Code does not expressly authorize a governing board to delegate to subordinates the power to suspend, demote or dismiss employees. (*CSEA v. Personnel Commission, supra,* at p. 145.) By contrast, the Government Code section pertaining to the dismissal of *state* civil service employees vests the authority to dismiss in the appointing power, "*or any person authorized by him....*" (*Id.* at p. 145, fn. 3, emphasis added.)

However, an agency's delegation of authority is lawful if "there has been no 'total abdication' of ... authority." (*Taylor v. Crane* (1979) 24 Cal.3d 442, 452.) Moreover, under California law, ratification by a governing board serves as "the equivalent of prior authorization" (*Mott v. Horstmann* (1950) 36 Cal.2d 388, 392), so that, even if the initial delegation of authority was unlawful, "an agency's subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself." (*Southern California Edison Company v. Public Utilities Commission* (2014) 227 Cal.App.4th 172, 195, as modified (June 18, 2014), citing *CSEA v. Personnel Commission, supra,* 3 Cal.3d 139, 145.) We therefore reject Moberg's contention that his summary dismissal constituted a departure from established procedures because, without prior approval by Hartnell's governing body, it was unlawful.

Regardless of whether Hartnell's summary dismissal of Moberg violated the Education Code, the third amended charge also alleged that it was a departure from Hartnell's own established practice. The pertinent information in support of this allegation appears in the Tabera Declaration, which, according to Moberg's appeal, the Office of the General Counsel improperly ignored. Although the dismissal letter makes no reference to the Tabera Declaration, we agree with the implicit determination of the Office of the General Counsel that the third amended charge and Tabera Declaration do not include sufficient facts to demonstrate that Hartnell has an established practice of obtaining prior approval from Hartnell's governing body before dismissing temporary employees, or that Hartnell violated such a practice in this instance.

The declaration identifies Tabera as having worked "as both a staff and faculty member at Hartnell College since the 1980s." According to the declaration, Tabera "*currently* serve[s] as [a] faculty member at San Jose State University." (Emphasis added.) The implication is that Tabera no longer works for Hartnell though the declaration includes no facts to indicate when Tabera's employment with Hartnell ended. Thus, while the declaration states that Hartnell has

an established practice of obtaining prior governing board approval "of even temporary employees," that Tabera "was shocked to learn that Professor Moberg was terminated in the middle of the semester ... without approval of the governing board," and that "Hartnell has never violated [sic] any of the above practices ... as long as I have been employed here," absent additional information about Tabera's employment with Hartnell, including when he ceased working for Hartnell, the declaration does not establish that Tabera has personal knowledge of Hartnell's employment practices at any time relevant to the present dispute.

Because it is unsupported by the statement of the charge and accompanying materials, the allegation that Hartnell departed from an established practice of securing prior approval by its governing body before dismissing temporary employees is too conclusory to support a prima facie case of discrimination. (*Oakland Unified School District* (2003) PERB Decision No. 1512, p. 3; *Alum Rock Education Association, CTA/NEA (Kirkaldie)* (1995) PERB Decision No. 1118, adopting warning letter at p. 11.)

d. Whether Moberg Has Sufficiently Alleged Employer Hostility to Protected Activity or Other Facts That Might Demonstrate Unlawful Motive

Employer hostility to the exercise of protected rights, including allegations of separate unfair practices by the same employer, may suggest unlawful motive in support of a discrimination allegation. (*City of Oakland, supra*, PERB Decision No. 2387-M, pp. 28-31; *Jurupa, supra*, PERB Decision No. 2283, pp. 9-10, 26, 28-29; *Rainbow, supra*, PERB Decision No. 1676-M, p. 1.) Whether analyzed as a departure from established procedures, under the catch-all nexus factor ("other relevant facts" tending to show animus), or as direct evidence of hostility to protected rights, a manager's statement to an employee discouraging the exercise of protected rights is probative evidence that the employer acted with an unlawful motive, intent or

purpose when later disciplining or discharging the employee. (*Coast, supra,* PERB Decision No. 1560, adopting proposed dec. at pp. 42-43.) As explained below, because Moberg has alleged sufficient facts to state a *separate* prima facie case of interference with protected rights, those factual allegations also support an inference of nexus in support of Moberg's discrimination allegation.

Because Moberg has also alleged suspicious timing, both as to the adverse actions taken against him and as to Hartnell's after-the-fact investigation of Moberg, we conclude that he has stated a prima facie case of unlawful discrimination.

D. Moberg's Interference Allegation

In response to section 6.b of PERB's charge form, which asks the charging party to identify the specific provision(s) of law alleged to have been violated, Moberg's original charge form states two separate theories of liability: "Government Code section 3543(a) interference" and "Government Code section 3543.5 retaliation."[20] Paragraph 9 of the narrative statement filed with the original charge recounted the events leading up to September 10, 2012, and alleged that, on that date, Pyer responded to Moberg's previous email message "by insisting that she would chose [sic] Moberg?s [sic] representative for him but from a union to which Moberg did not belong."

[20] As indicated above, EERA section 3543, subdivision (a) sets forth the substantive rights of employees, including the right to participate in the activities of employee organizations, while section 3543.5, subdivision (a), makes it unlawful for a public school employer to interfere with the exercise of these rights or to discriminate against employees because of their exercise of these rights. Pursuant to PERB precedent, we disregard discrepancies or omissions in the specific provisions of EERA cited and focus instead on the substantive theories identified by the charging party's factual allegations, which, in this case, include *both* discrimination *and* interference. (*Los Banos Unified School District* (2007) PERB Decision No. 1935 (*Los Banos*), adopting warning letter at p. 2, citing *Los Angeles County Office of Education* (1999) PERB Decision No. 1360; *Sacramento Municipal Utility District* (2006) PERB Decision No. 1838-M, p. 1, fn. 2.)

Moberg's first amended charge identified the same provisions of law alleged to have been violated as had been listed on the original charge form, including "inference (Government Code section 3543(a))." In addition, the first amended charge included a more detailed narrative statement of the charge. Under the heading "Issues Presented," Moberg asks: "Did Hartnell interfere with Moberg's right to chose [sic] his own representation?" The narrative statement of the first amended charge alleges substantially the same chronology of events as those previously alleged, including Moberg's allegation that, on September 10, 2012, Pyer insisted "that she would chose [sic] Moberg?s [sic] representative for him but from a union to which he did not belong." Under the heading "Argument," paragraph 4 of the statement asserts that "Hartnell provides no documents supporting its position that 'Tabera is not a representative' of Moberg" and that, "PERB, therefore, should disregard this claim by Hartnell as false and irrelevant." The first amended charge reiterates Moberg's factual allegations about Pyer's statement as examples of adverse action and disparate treatment in support of Moberg's discrimination analysis. However, among the "Remedies Sought," by the first amended charge is item number 5: "A cease and desist order prohibiting Hartnell from interfering with Moberg's right to choose his own representative."

The second and third amended charges dispensed with PERB's unfair practice charge form, so there is no response to section 6.b of the form requesting that the charging party identify the specific statutory provisions alleged to have been violated. However, like the first amended charge, the second and third amended charges begin by fully incorporating the original and each subsequent version of the charge. The statement of "Issues Presented" in the second and third amended charges again asks "Did Hartnell interfere with Moberg's right to chose [sic] his own representation?" and includes the same or substantially the same narrative account of events

leading up to the September 10, 2012 statement previously attributed to Pyer. Both the second and third amended charges repeat item number 5 in the list of "Remedies Sought," i.e., "A cease and desist order prohibiting Hartnell from interfering with Moberg's right to choose his representative." For good measure, the third amended charge also alleges that, by insisting that she, not Moberg, would decide who would serve as Moberg's representative, Pyer's statement "would reasonably tend to discourage participation in protected activity and thereby interfere with the rights of employees and/or employee organizations."

In light of the above, we agree with the appeal that the original charge and each of its amended versions, includes sufficient information to put the Office of the General Counsel on notice of his interference allegation and that the Office of the General Counsel erred in not addressing this allegation. A Board agent assigned to investigate an unfair practice charge has the duty to assist the charging party to state in proper form the categories of information required by PERB to process the charge. These include, among other things, a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice," a "statement of the remedy sought by the charging party," and the section of the statute, regulation, rule alleged to have been violated. (PERB Regs. 32620, subd. (b)(1), 32615, subds. (a)(4), (5) and (6).) Under the fact pleading standard followed by PERB, the charging party's primary responsibility is to provide the facts necessary to support the charge. (*National Union of Healthcare Workers* (2012) PERB Decision No. 2249-M, pp. 14-15.) The charging party is not required to provide legal authority or identify the legal theory or theories of the case. (*City of San Jose* (2013) PERB Decision No. 2341-M, p. 46, citing *County of Inyo* (2005) PERB Decision No. 1783-M, p. 2.) Where the charge cites an incorrect statute, an incorrect provision of the statute, or no statutory

provision at all, the investigating Board agent will supply the relevant provisions of law. (*Los Banos, supra,* PERB Decision No. 1935, adopting warning letter at p. 2, citing *Los Angeles County Office of Education, supra,* PERB Decision No. 1360; *Sacramento Municipal Utility District, supra,* PERB Decision No. 1838-M, p. 1, fn. 2.) Additionally, "[w]here the same employer conduct concurrently violates more than one unfair practice provision, it is the duty of the Board to find more than one violation." (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, p. 15.)

While Moberg's charge and its various amendments were not always "concise," we think they were more than adequate to place Hartnell and the Office of the General on notice of his inference allegation. Hartnell's various position statements confirm that it clearly understood the nature of Moberg's allegation. Although Hartnell denied that the meeting called by Pyer was "investigative" in nature, its position statement discusses the federal *Weingarten*[21] doctrine and PERB decisional law on the representational rights of employees and employee organizations in investigative meetings in an effort to show that Hartnell had not interfered with Moberg's right to representation because, under the circumstances, Moberg had no right to representation. Although it provided no supporting documentation, Hartnell also claimed to have forwarded Pyer's email correspondence to the Association, ostensibly to advise it of Moberg's request for representation. Moberg's original charge and each of its various amendments not only satisfied PERB's fact pleading standard, they also included more than enough information to identify the nature of his interference allegation. Although a charging party is entitled to an investigation of all charge allegations and a warning letter identifying any deficiencies in the charge before it is

[21] *NLRB v. Weingarten, Inc.* (1975) 420 U.S. 251 (*Weingarten*).

dismissed (PERB Reg. 32620, subd. (d); *County of San Joaquin, supra,* PERB Decision No. 1570-M, p. 8; *County of Alameda, supra,* PERB Decision No. 1824-M, pp. 4-5), it is unnecessary to remand this issue for further investigation, because the charge and supporting documents already contain sufficient information to state a prima facie case of employer interference with protected employee rights. (*Trustees of CSU, supra,* PERB Decision No. 2384-H, pp. 4-5.)

The third amended charge alleged that, after Moberg exchanged words with another employee about a personal property item missing from Moberg's desk, Pyer launched an investigation into the coworker's complaint against Moberg. As part of that investigation, in late August and early September 2012, Pyer contacted Moberg via email to schedule a meeting. In response, on or about August 29, 2012, Moberg offered to meet with Pyer on September 3, 4, or 5, 2012, if accompanied by Tabera as Moberg's representative. Moberg alleges that Pyer did not respond until more than a week later, and Hartnell has neither alleged nor provided any information to suggest that scheduling the meeting was urgent or that it advised Moberg as much. To the contrary, Hartnell's position statement denied even that the meeting was "investigative" in nature and asserted that Moberg could not reasonably have believed that it might result in discipline. On September 7, Pyer, through her assistant, again contacted Moberg to suggest scheduling the meeting for September 10 or 14, 2012. Moberg responded that Tabera was on jury duty and therefore unavailable on the requested dates, but that Moberg and Tabera were available to meet the following week. According to the third amended charge, in a September 10, 2012 email message, Pyer insisted that she, not Moberg, would decide who would serve as Moberg's representative at the meeting.

EERA's statutory scheme protects both the employees' choice of a representative and their representative's designation of its agents from employer interference. (*McPherson, supra*, 189 Cal.App.3d 293, 312; *Westminster School District* (1982) PERB Decision No. 277, p. 7; *State of California (Department of Personnel Administration)* (1998) PERB Decision No. 1305-S, pp. 7-8; *Jurupa, supra*, PERB Decision No. 2283, p. 30; see also *City of Monterey* (2005) PERB Decision No. 1766-M; and *Smith's Food & Drug Centers, Inc.* (Dec. 16, 2014) 361 NLRB No. 140.) Where there is no exclusive representative or, in the limited circumstances in which employees may self-represent or present grievances through an alternative representative (see *Mt. Diablo, supra*, EERB Decision No. 44), the choice of a representative belongs to the employees, *and not the* employer. Where a majority of unit employees has chosen a representative, unit employees are no longer free to negotiate their terms and conditions of employment directly with the employer nor to demand representation on matters within the scope of representation by anyone other than the exclusive representative. In either event, the employer has *no* role in deciding or influencing matters of employee choice or the administration of an employee organization's internal affairs. (*San Ramon Valley Unified School District* (1982) PERB Decision No. 230 (*San Ramon*), p. 16; *Fresno Unified School District* (1982) PERB Decision No. 208, pp. 21-22; *Trustees of CSU, supra,* PERB Decision No. 2384-H, p. 33; see also *NLRB v. Wooster Division of BorgWarner Corporation* (1958) 356 U.S. 342.)[22] Consequently, employer statements that

[22] Only where persuasive evidence establishes a clear and present danger to the bargaining process may the employer object to the presence of an individual serving as the union's representative. (EERA, § 3543.4; *Fitzsimons Mfg. Co.* (1980) 251 NLRB 375, enf'd. (6th Cir. 1982) 670 F.2d 663; see also Gov. Code, § 3580.5, subds. (a)-(d); *Trustees of CSU, supra,* PERB Decision No. 2384-H, p. 33; *State of California, Department of Health* (1979) PERB Decision No. 86-S; *United Clerical Employees v. County of Contra Costa* (1977) 76 Cal.App.3d 119, 127.) Even then, the extent of the employer's right to object to a particular individual is limited to a "veto" power, i.e., a refusal to meet with that individual, rather than a

assert a right to influence or direct the employee's choice of a representative interfere with protected rights, because they convey the impression that engaging in union or other concerted activity is futile. (*County of Riverside, supra*, PERB Decision No. 2119-M, pp. 18-20; *Dayton Hudson Corp.* (1995) 316 NLRB 477; *Holiday Inn-Glendale* (1985) 277 NLRB 1254, 1271.)

Although Hartnell is thus correct that, under the circumstances, Moberg had no protected right to representation by anyone other than an agent of the Association, that fact will not excuse a manager's assertion that Hartnell has *any* legitimate interest in determining who will represent an employee in an investigative meeting or other matters within the scope of representation. Contrary to EERA's scheme for employee choice and collective bargaining, the statement attributed to Pyer suggests that *the employer* may legitimately choose who will represent employees in investigative proceedings or other matters within the scope of representation. As such, it could not but tend to discourage employees from the exercise of protected rights by suggesting that the entire enterprise is futile. (*County of Riverside, supra*, PERB Decision No. 2119-M, pp. 18-20; *The Regents of the University of California* (1997) PERB Decision No. 1188-H, pp. 21-26; *Office of Kern County Superintendent of Schools* (1985) PERB Decision No. 533, adopting proposed dec. at pp. 63-64; *Quality Engineered Products* (1983) 267 NLRB 593, 596.) While Moberg has not sufficiently alleged a violation of his right to representation in an investigative meeting, because he had no right to representation by another employee, we conclude that he has sufficiently stated a garden variety interference allegation under PERB's *Carlsbad* test because the statement attributed to

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right to select *or even suggest* who should serve as a representative of employees. Moreover, the employer risks liability if its refusal to meet and negotiate with the union's designated agent is unfounded. (*City of Monterey, supra*, PERB Decision No. 1766-M, adopting proposed dec. at pp. 10-21; *Anaheim Union High School District* (2015) PERB Decision No. 2434, pp. 20-22; *KDEN Broadcasting Co.* (1976) 225 NLRB 25, 35.)

Pyer would reasonably tend to discourage the free exercise of employee choice and participation in protected activity. (EERA, §§ 3500, 3543, subd. (a), 3543.5; *City of Monterey, supra*, PERB Decision No. 1766-M, adopting proposed dec. at pp. 9-10, citing *San Ramon, supra,* PERB Decision No. 230, p. 16.)[23]

Hartnell's position statement alleges that Pyer responded to Moberg's message regarding Tabera's unavailability by "informing Moberg that he could not insist upon a specific representative." Citing Exhibit 4 to its July 26, 2013 position statement, Hartnell further alleges that Pyer copied her response to the president of the Association "so that the Association could arrange to have a representative available." Hartnell's position statement also cites Exhibit 4 in support of its allegation that Pyer "arranged for the [Association], the exclusive representative, to make someone available to assist Moberg." However, while Exhibit 4 includes Moberg's September 10, 2012 email response to Massing (with Pyer copied), it includes no response from Pyer.

However, in the current procedural posture of this case, we make no determination as to whether Hartnell has sufficiently asserted an affirmative defense based on operational necessity or other legitimate reason. When the investigation of a charge "results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process,

[23] Because Moberg lacks standing to assert rights on behalf of an employee organization (see *Oxnard Educators Association (Gorcey and Tripp)* (1988) PERB Decision No. 664, pp. 9-10), we do not address his charge to the extent it alleges that Pyer's statement interferes with employee organizational rights. Moreover, it does not appear from the facts alleged that Moberg wished to be represented by the Association. However, the fact that Moberg was not *actually* discouraged from representation by the Association is not material here, because a finding of interference does not require that any employee felt subjectively threatened or intimidated, or was *in fact* discouraged from participating in protected activity. (*Clovis, supra,* PERB Decision No. 389.) Rather, under PERB's *Carlsbad* test, the inquiry is an objective one which asks only whether, under the given circumstances, the employer's conduct would reasonably tend to discourage employees from engaging in protected activity.

demand that a complaint be issued and the matter be sent to formal hearing." (*Sacramento City, supra*, PERB Decision No. 2129, p. 6, citing *Eastside, supra*, PERB Decision No. 466.) In the absence of undisputed evidence that complements but does not contradict the allegations in the charge and its supporting materials, we cannot rely on Hartnell's version of the facts to dismiss Moberg's interference allegation at this stage of the proceedings. (PERB Reg. 32620, subd. (c); *SEIU (Adza), supra,* PERB Decision No. 1632-M; *Lake Tahoe, supra,* PERB Decision No. 994; *Riverside USD, supra,* PERB Decision No. 562a; *Metropolitan Water District, supra,* PERB Decision No. 2055-M, p. 4, fn. 4.) Because this issue turns on disputed facts, it is more appropriately resolved on the basis of a fully-developed factual record before an administrative law judge.

We reverse and remand for issuance of a complaint.

ORDER

It is hereby ORDERED that the dismissal of the unfair practice charge, as amended, in Case No. SF-CE-2984-E is REVERSED and the matter REMANDED to the Office of the General Counsel for issuance of a complaint alleging that Hartnell Community College District discriminated against Eric Moberg and interfered with protected rights, both in violation of the Educational Employment Relations Act, Government Code section 3543, subdivision (a), in accordance with this decision.

Members Huguenin and Gregersen joined in this Decision.