

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



PATIENT & PHYSICIAN SAFETY
ASSOCIATION,

Charging Party,

v.

REGENTS OF THE UNIVERSITY OF
CALIFORNIA (IRVINE),

Respondent.

Case No. LA-CE-1147-H

PERB Decision No. 2493-H

June 30, 2016

Appearances: Lawrence Rosenzweig, Attorney, for Patient & Physician Safety Association; Paul, Plevin, Sullivan & Connaughton by Richard A. Paul and Corrie J. Klekowski, Attorneys, for The Regents of the University of California.

Before Winslow, Banks and Gregersen, Members.

DECISION

GREGERSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Patient and Physician Safety Association (Association) to a proposed decision by a PERB administrative law judge (ALJ). The complaint alleged that the Regents of the University of California (Irvine) (University or UCI) violated section 3571, subdivision (a) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by dismissing Sean Darcy (Dr. Darcy) from his residency program for organizing an employee organization, violated section 3571, subdivision (d) by dominating and/or interfering with an employee organization seeking to become the exclusive representative, and violated section 3571, subdivision (f) by consulting with an academic,

¹ HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

professional, or staff advisory group on a matter within the scope of representation. The ALJ determined that the evidence failed to establish a violation of HEERA and dismissed the complaint and underlying charge. The Association excepts to that determination.

The Board has reviewed the entire record in this matter in light of the Association's exceptions, the University's response, and the relevant law. Based on this review, we affirm the conclusions reached by the ALJ for the reasons discussed below.

PROCEDURAL HISTORY

On August 26, 2011, the Association filed an unfair practice charge with PERB alleging multiple violations of HEERA by the University.

On October 14, 2011, the University filed its response and position statement.

On November 2, 2011, the Association filed an amended charge.

On November 17, 2011, the University filed its response and position statement to the amended charge.

On November 21, 2011, PERB's Office of the General Counsel issued a complaint alleging that agents of the University retaliated against Dr. Darcy because of his organizing efforts for the Association by removing him from his clinical duties on August 17, 2011, and placing him on paid administrative leave on August 23, 2011, in violation of HEERA section 3571, subdivision (a). The complaint further alleged that the University created an employee organization for the purposes of dominating it and interfering with the Association in violation of HEERA, section 3571, subdivision (d), and consulted with the organization in violation of HEERA section 3571, subdivision (f).

On December 22, 2011, the University filed its answer, denying the material allegations of the complaint and asserting several affirmative defenses.

On January 4, 2012, the parties met for an informal settlement conference but the matter was not resolved.

On January 13, 2012, the Association moved to amend the complaint to allege that the University had further retaliated against Dr. Darcy because of his organizational activities on behalf of the Association by issuing him a notice that it intended to dismiss him from the University's Graduate Medical Education (GME) training program. The University opposed the amendment.

On March 14, 2012, the ALJ granted the proposed amendment pursuant to PERB Regulation 32647.

On April 3, 2012, the University submitted an answer to the amended complaint denying any violation of HEERA.

On April 9, 10 and 11, 2012, the ALJ conducted a formal hearing.

On June 8, 2012, the University and the Association filed closing briefs.

On June 22, 2012, the University and the Association filed post-hearing reply briefs.

On December 8, 2014, the ALJ issued his proposed decision.

On December 19, 2014, the Association filed its exceptions, to which the University timely responded on February 2, 2015, after requesting and being granted an extension of time.

On February 3, 2015, PERB's Appeals Assistant informed the parties that the filings were complete and the matter was placed on the Board's docket.

FACTUAL SUMMARY²

Background

Dr. Darcy graduated from Stanford University with an undergraduate degree and from the University of California Los Angeles (UCLA) with his medical degree. After medical school, Dr. Darcy applied for admission to the integrated plastic surgery residency program with the University's Aesthetic and Plastic Surgery Institute (Plastic Surgery Institute or Institute) and was accepted. He started his residency program in late June 2007.

Gregory Evans (Dr. Evans) is the Chief of the Plastic Surgery Institute and oversees the integrated plastic surgery residency program. Dr. Evans has a number of surgeons working under his supervision including Al Aly (Dr. Aly); Keyian Paydar (Dr. Paydar); and Garrett Wirth (Dr. Wirth). These surgeons are commonly referred to as attending physicians or "attendings" and supervise the residents on a day-to-day basis. Additionally, Matthew Dolich (Dr. Dolich) oversees the general surgery residency program and sometimes works closely with Dr. Evans in overseeing Dr. Evans's residents in the integrated plastic surgery residency program. Michael Stamos (Dr. Stamos) is the administrator overseeing the UCI General Surgery Department.

The Residency Program

The integrated plastic surgery residency program is a six-year program. The first three years of the residency focus on developing residents' general surgery skills, while the final three years focus on residents' plastic surgery skills. After each year of residency, greater responsibility is assigned to the resident and the resident is expected to advance in surgical competency. By the fourth year of residency, the resident is expected to be competent in

² The Board adopts the ALJ's findings of facts to the extent they are consistent with this decision and repeats them in substantial form here.

general surgery and ready to advance to the more difficult plastic surgery component of the residency. There are 12 residents in the integrated plastic surgery residency program; two per each residency year. Additionally, a Chief Resident is appointed over the residents.

UCI's medical residency programs are accredited by the Accreditation Council of Graduate Medical Education (ACGME) through a process which includes a site visit from ACGME representatives. According to the ACGME Institutional Requirements, the sponsoring institution (i.e., UCI) must have an institutional Graduate Medical Education Committee (GMEC) which ensures that its Graduate Medical Education is in compliance with the qualities and standards required by ACGME. ACGME requires that the institutional GMEC have the following voting members: a designated institutional official, residents nominated by their peers, representative program directors, and administrators. The institutional GMEC must meet quarterly and is required to establish and implement specific policies and procedures concerning the quality of education and the work environment for the residents in all accredited programs. These specific policies and procedures include: stipends and position allocation; resident duty hours; resident supervision which is consistent with safe and effective patient care; the educational needs of residents; the progressive responsibility of the resident appropriate with the resident's education and experience; and the evaluation, discipline, and dismissal of residents.

The UCI GMEC includes three GMEC administrators, twelve residency program directors (such as Drs. Evans and Dolich), ten residents from the various residency programs and one member from each participating hospital, such as the UCI Medical Center (UCIMC), Long Beach Memorial Hospital (LBMH), and Long Beach Veterans Administration Hospital (LBVAH). The GMEC resident representatives are elected by their peers to be part of the

committee.³ The Senior Faculty Administrator over the UCI GMEC was Gerald Maguire (Dr. Maguire) who was succeeded by Khanh-Van Le-Bucklin (Dr. Le-Bucklin) on July 1, 2011. Nancy Koehring (Koehring) is the UCI Director of Graduate Medical Education and is responsible for overseeing all residency training programs and their compliance with all ACGME requirements. UCI has had an institutional GMEC since the 1970's.

Residency Academic Year 2008-2009

Dr. Darcy's evaluations covering the first academic year were overall favorable, except for an incident where Dr. Darcy was accused of being rude to a pharmacist. Dr. Darcy was advanced to the second year of residency.

Residency Academic Year 2009-2010

On October 7, 2009 and January 25, 2010, Dr. Darcy received his first and second quarter evaluations, which were overall favorable.

On February 19, 2010, Chief Resident Ramon Menon (Dr. Menon) e-mailed Dr. Darcy about leaving work for other residents to complete, not familiarizing himself with his patients, and inattention to detail. Dr. Menon's e-mail specifically focused on two events. During one incident, Dr. Darcy failed to transfer a patient to the Intensive Care Unit (ICU); failed to contact a senior resident or the chief resident about the patient when his condition worsened; and was unavailable when the nurses were attempting to page him about this patient. During another incident, Dr. Darcy abandoned an unstable patient while he went to the cafeteria.

Dr. Menon commented that Dr. Darcy was the weakest second year resident and had concerns

³ The ACGME Institutional Requirements state that the GMEC must be composed of "residents nominated by their peers." This nomination process was described by Nancy Koehring as residents of a specific residency program (i.e. obstetrics and gynecology) "getting together" and nominating two or three people to the UCI GMEC. UCI did not take part in the selection or approval of the resident representatives. This selection process had continued in this manner for years.

about his advancing to his third year of residency. Dr. Menon decided that he should receive reviews of Dr. Darcy's future performance. Dr. Menon forwarded his concerns to Dr. Evans.

On February 21, 2010, Dr. Evans issued Dr. Darcy his first "Letter of Concern" regarding the events described in Dr. Menon's e-mail. Dr. Evans believed that Dr. Darcy's efforts in "going the extra mile" had been lacking and wanted to see Dr. Darcy immediately improve. Dr. Evans drafted an improvement plan for Dr. Darcy, which included establishing relationships with chief resident(s) and attending physicians; asking senior residents for help and maintaining contact with them; and prioritizing his work and time with the most ill patients.

On or about February 22, 2010, Dr. Darcy received his American Board of Surgery In-Training Examination (ABSITE) examination score which placed him in the ninth percentile among his fellow second-year residents. Because he scored below the tenth percentile, Dr. Darcy was placed on academic probation. According to Dr. Evans, integrated plastic surgery residents usually score between the 40th and 75th percentile.

On March 15, 2010, Dr. Darcy was issued a group evaluation from four attending physicians concerning his acute surgery rotation for the month of February 2010. The group evaluation included a number of "unsatisfactory" ratings in the competency areas of ongoing care and medical knowledge. On the evaluation, Dr. Darcy was downgraded for his delayed response and needing constant supervision.

On June 16, 2010, Dr. Darcy's wife was involved in a tragic car accident resulting in the death of his unborn child. Dr. Darcy was greatly affected by the loss. He telephoned Dr. Evans and informed him of the event. Dr. Darcy initially asked Dr. Evans for three months off. Dr. Evans instructed Dr. Darcy to clear the time off with LBMH surgeon Dr. Grant and

the Chief Resident Dr. Lin. Dr. Darcy eventually decided to continue working during his residency.⁴

On June 18, 2010, Dr. Evans issued Dr. Darcy his annual summary evaluation where he recommended that he advance to the third year of residency. The evaluation was overall favorable, except for Dr. Darcy's score on his ABSITE examination.

Residency Academic Year 2010-2011

On July 16, 2010, Dr. Darcy received an evaluation from Brian Acker (Dr. Acker) from LBMH that Dr. Darcy's general knowledge of anatomy and physiology was "average at best."

On October 9, 2010, Dr. Darcy received his first quarter evaluation. The evaluation was favorable in many respects, but stated in part that:

Although there has been some improvement there is a general consensus that Dr Darcy is not performing at a level that he can achieve and that is consistent with other plastic surgery residents at his level.

Between June 23, 2010 and December 5, 2010, Leslie Edrich (Dr. Edrich) of LBMH noted that Dr. Darcy had "gaps in knowledge" at times.

On December 21, 2010, Dr. Evans issued Dr. Darcy a second Letter of Concern explaining that the attending physicians met and expressed their concerns about Dr. Darcy's performance. James Wells (Dr. Wells), who oversaw LBMH resident rotations, recounted an incident where Dr. Darcy stated he was familiar with the use of the tissue expander and then destroyed the device by puncturing the wrong side of it. Additionally, the letter characterized Dr. Darcy's surgical skills as "tentative and slow" when compared to his fellow residents. Dr. Evans noted additional concerns such as Dr. Darcy's lack of surgical anatomical

⁴ Dr. Darcy later testified that he was ordered not to take time off by a more senior resident, Jonathan Slone (Dr. Slone).

knowledge in the operating room and his ability to pass the upcoming ABSITE exam.

Dr. Evans formulated an action plan for Dr. Darcy to remediate these issues, which included: “scrub[bing] on” to as many operations as possible; improving his surgical skills by practicing on rats and pigs feet with the assistance of Dr. Paydar; assigning Dr. Aly as a personal mentor; reading and improving his knowledge in preparation for surgeries; and studying and practicing for the ABSITE examination. Finally, Dr. Evans offered Dr. Darcy time off or additional resources to help him. Dr. Evans closed the letter with:

Sean[,] the faculty truly believes you are a wonderful person with good communication skills and a desire to help. We remained concern[ed,] however[,] that your current performance is not on par with [the] completion of the program. If Plastic Surgery is not the interest that you have for a career, then let’s discuss this and see what might suit you better. If however this is where you want to be, then we believe that benchmarks will need to be addressed and met as outlined above in order to continue to advance in the program.

On January 2, 2011, Dr. Darcy presented a response to the second Letter of Concern. Dr. Darcy apologized for his puncturing the tissue expander and explained that he did not know the answers to questions about a surgery because he joined in at the last minute. He explained his personal struggles regarding the car accident and the loss of a child. He admitted that he had been seeing a psychiatrist since August 2010 and was taking medication to help him return to “normal” and that his psychiatrist recommended that he take time off from “on call” duties. He decided not to take any time off due to resident staffing issues and his fear of being terminated.⁵ His concerns about his family had distracted him from studying and

⁵ Dr. Darcy testified that he asked to be relieved from “on call” duties, which could remove 36 hours from his work schedule. According to Dr. Darcy, being “on call” is “emotionally and mentally draining.” And, if Dr. Darcy was removed from his “on call” duties, then other residents would have to be reassigned those duties.

practicing after he completed his daily clinical responsibilities. In the end, Dr. Darcy thanked Dr. Evans for recognizing his deficits and helping him to become a better surgeon.

In February 2011, Dr. Darcy received the results from his third year ABSITE exam. He scored in the 21st percentile. Although this score was enough to remove Dr. Darcy from academic probation, it was still not as high as the other residents.

Dr. Aly prepared a follow-up report for Dr. Evans after his second Letter of Concern to Dr. Darcy. He noted improvement in numerous areas such as his technical skills, preparation for surgery, and test scores. Dr. Aly explained that Dr. Darcy's largest problem was his "perceived lack of initiative and/or aggressiveness in his clinical duties." Dr. Aly's report was buttressed by evaluations from other LBMH attending physicians.

March 24, 2011 Meeting with Koehring

On March 24, 2011, Koehring met with Dr. Darcy. Dr. Darcy initially requested the meeting because he understood Koehring to be the person residents spoke with to obtain help when the faculty would not assist them. At the outset of the meeting, Dr. Darcy asked that the meeting be considered confidential and for Koehring not to discuss it with anyone, including Dr. Evans. Koehring agreed and honored Dr. Darcy's request. Dr. Darcy expressed concern about retaining his position in the residency program and asked whether she had heard anything about his being "fired" or not being reappointed. Koehring stated that she had not heard anything of this nature. Dr. Darcy explained that he thought he was going to be fired because two other residents had their residency programs terminated under Dr. Evans and Dr. Darcy wanted to know the details surrounding their terminations. Koehring responded by asking why Dr. Darcy thought he was going to be terminated, but he did not respond.

Dr. Darcy recounted the automobile accident of his wife and unborn child and was emotional

and crying. As the next day was a Friday and a holiday, Koehring was concerned for Dr. Darcy's well-being. Koehring gave Dr. Darcy her personal cell phone number and invited Dr. Darcy to call her over the weekend, if he wanted. Koehring also referred Dr. Darcy to UCI's psychologist counselor, Marianne Ross, Ph.D.

Dr. Darcy testified that he informed Koehring that he was working over the 80 hour a week cap and he was hoping to form an internal committee of residents.⁶ Koehring said it was fine and she would look into the idea of an internal committee. Koehring testified that she did not remember Dr. Darcy discussing these issues.

On April 21, 2011, Dr. Evans notified Dr. Darcy that he was advanced to his fourth year of residency beginning on July 1, 2011. Dr. Darcy accepted the appointment by his signature on April 28, 2011.

On April 22, 2011, Dr. Evans issued Dr. Darcy his third quarter evaluation. He received mostly satisfactory ratings in patient care; medical knowledge; interpersonal and communication skills; practice-based learning; and professionalism and system-based practice. Dr. Evans noted that Dr. Darcy had improved.

Incidents after the Third Quarter Evaluation

On May 10, 2011, Nicole Bernal (Dr. Bernal) e-mailed Drs. Dolich and Dr. Evans regarding concerns over Dr. Darcy's treatment of an LBMH patient. According to Dr. Bernal, Dr. Darcy had failed to respond to a patient's and nurse's request of suprapubic abdominal pain with no urine output; failed to inform the attending physician of the patient's problems; and placed a suprapubic tube into the peritoneal cavity without confirmatory testing, causing

⁶ Dr. Darcy thought that the work week hours cap for residents was 80 hours a week, when the ACGME guideline articulates the cap as 80 hours a week averaged over a four-week period.

leakage of urine from the patient's bladder opening from a previous suprapubic tube site.

Dr. Darcy countered that he would have needed specialized guidance to insert the suprapubic catheter and the urology resident was not aware of the procedure.

On May 23, 2011, Drs. Evans, Aly and Wirth met with Dr. Darcy. The attending physicians discussed three recent patient care issues including the incident regarding the patient with the suprapubic tube. Dr. Darcy was informed that he was average to below average as to his surgical skills during the last three months of his third year of residency and that he had not attained the level of surgical proficiency of a fourth year plastic surgery resident. Dr. Darcy was also offered time off so that he could adjust to the traumatic family loss. Dr. Evans and the attending physicians expressed their desire to see Dr. Darcy succeed and stated they did not intend to place any more pressure on him over that of any other fourth year resident. Dr. Evans summarized the meeting in a memorandum which closed with:

Despite our continued assistance of Dr Darcy along with our support, the faculty remain[s] unsure and concerned that Dr Darcy may not be able to be certified as competent and functioning as an independent surgeon required to complete the program. We have stated this to Dr Darcy. He understands the faculties['] concern and again at this point wants to continue in the program. We will continue to monitor Dr Darcy and his clinical performance. Again[,] it is the belief of the faculty that we are here to support Dr Darcy; however[,] we remain concerned in regards to patient care and the ability of Dr Darcy to manage health care and the welfare for these patients as we move forward.

Shortly thereafter, Dr. Darcy received another evaluation covering the period of April through June 2011 from Drs. Lekawa, Dolich, Barrios, Kong, Gaspard, and Thomas.⁷ Specifically, Dr. Darcy was rated as unsatisfactory ongoing care, medical knowledge,

⁷ The evaluation does not provide first names or titles for the doctors listed.

interpersonal and communication skills, and professionalism. The attending physicians recommended that Dr. Evans carefully assess Dr. Darcy's issues and create a plan of action.

On June 2, 2011, Dr. Darcy sent an e-mail to Koehring stating that he and other residents were interested in starting a "residents council." He wanted to start the council with the cooperation of administration. On the same day, Dr. Darcy also sent an e-mail to the University residents about starting a residents council with other residents. Dr. Darcy discussed having this council act as part of the UCI GMEC or through an exclusive representative.

On June 7, 2011, Dr. Darcy was working at the UCIMC in the surgical ICU. While placing a triple lumen central line catheter⁸ on his patient, Dr. Darcy exited the patient's room while the patient was still in the position for a central line placement with both bed rails down, a C-collar left off the patient, and a scalpel left lying on the floor near the patient. The incident was forwarded to Dr. Evans that day. That same day, Dr. Slone notified Dr. Dolich of his concerns that even though Dr. Darcy was "on call," he was not present for any of the critical traumas. Dr. Slone considered Dr. Darcy's lack of attention to be "borderline dangerous." Dr. Dolich forwarded Dr. Slone's e-mail to Dr. Evans.

On June 8, 2011, Cristobal Barrios (Dr. Barrios) e-mailed Drs. Dolich and Evans about the June 7, 2011 incidents. According to the e-mail, Dr. Barrios was uncomfortable in passing Dr. Darcy on his rotation and characterizing his behavior as "downright dangerous."

⁸ The medical terminology used here and throughout the factual summary has not been defined in the record and therefore, since such terminology is outside our purview, we decline to provide a more general description of such procedures or instruments.

Working over the 80 Hour a Week Cap

In February and March 2011, Dr. Darcy reported hours that demonstrated that he worked over the 80 hours a week cap. He reported working over 80 hours during the weeks of February 6 (83 hours), February 13 (82 hours), March 13 (86 hours) and March 20 (83 hours).

In early to mid-April 2011, Dr. Darcy stated that during his first or second week of the surgical ICU he spoke in a conference room with Dr. Dolich in the presence of a number of residents and medical students and stated that a resident who worked within the 80 hour a week cap was shunned. Dr. Dolich told Dr. Darcy to tell him who was making him work over the 80 hour a week cap. Dr. Darcy explained that the attending cardiothoracic surgeons treated him differently after he worked under 80 hours a week as compared to when he was “just basically living in the hospital.”

On June 8, 2011, Dr. Dolich asked Dr. Darcy to send him his work calendars for review. Dr. Darcy did so and commented that he was concerned about patient safety being compromised by residents working over the 80 hours a week cap. Dr. Dolich e-mailed Dr. Darcy informing him that he had reviewed his reported hours between April 25 and May 22, 2011, and between May 23 and June 19, 2011,⁹ and based upon the hours reported, Dr. Darcy was not working over the 80 hours a week cap when averaged over a four-week period. Dr. Evans reviewed the hours and concluded that the number of hours worked which Dr. Darcy provided to Dr. Dolich was different than the hours Dr. Darcy provided to Dr. Evans. Dr. Evans testified this was the first time Dr. Darcy complained about having to work over the 80 hour week cap.

⁹ The hours worked between June 8 and 19, 2011, were Dr. Darcy’s projected hours.

In June 2011, Dr. Paydar decided to meet with Dr. Darcy before his fourth year residency began in order to discuss why Dr. Darcy was having trouble and what he could do to help him. Dr. Darcy complained that he was being worked over the 80 hours a week cap. Dr. Paydar told Dr. Darcy that he needed to report his hours worked to Dr. Evans and then passed on Dr. Darcy's concern about being worked over the 80 hour a week cap to Dr. Evans. Dr. Paydar also said Dr. Darcy was under a lot of heat and that being stringent about work hours was not the right way to go about things. The next day, Dr. Darcy met with Dr. Wirth at lunch. During the meeting, Dr. Wirth told Dr. Darcy not to fight the battle for work hours as he would lose. Dr. Wirth remembers Dr. Darcy telling him how he needed sleep and was over his work hours, but did not remember stating that he should not fight the issue of work hours.

Time Off Work

On June 10, 2011, Dr. Darcy accepted Dr. Evans's offer(s) to take time off work on sick leave for the remainder of his service on the surgical ICU,¹⁰ and he would advance to his fourth year residency on July 1, 2011. On June 10, 2011, Dr. Evans e-mailed Dr. Darcy that since he was on medical leave on June 22, 2011, he should not attend the ACGME institutional site visit.¹¹ Dr. Darcy agreed. Dr. Darcy testified that Dr. Evans told him that if he did not go to the site visit meeting, he could advance to his fourth year of residency. Dr. Evans denied conditioning Dr. Darcy's advancement to the fourth year upon his agreement not to attend the site visit. Dr. Darcy testified that he wanted to attend the site visit as he wanted to report the residents' working conditions.

¹⁰ The 2010-2011 academic year ended on June 23 or 24, 2011.

¹¹ Dr. Evans testified that he sought advice both from Dr. Maguire and Koehring, who were in charge of UCI GME training programs, on this issue before prohibiting Dr. Darcy from attending the site visit while on sick leave.

On October 19, 2011, the ACGME Residency Review Committee issued its review of the UCI integrated plastic surgery residency program and issued a five-year accreditation to the program, including the approval of an addition of a resident to each residency year. The hours worked by residents were not cited as an area of substantial non-compliance.

Annual Summary Evaluation

On June 11, 2011, Dr. Darcy received his annual summary evaluation as a third year resident. Specifically, he was rated overall as “satisfactory” to “unsatisfactory.” He was rated as unsatisfactory/improvement needed in the competency areas of patient care, interpersonal and communication skills and practice-based learning. Dr. Evans closed the evaluation by stating:

Sean has had over 6 patient care issues that could have resulted in significant morbidity to patient care over the last several months. It is difficult to determine the source of these issues[,] but for a variety of personal reasons we have placed Sean on medical leave over the next 3 weeks. Sean will need to perform at a much higher level if he is to complete the plastic surgery residency. There remain significant concerns regarding his patient care, communication with staff and his ability to make decisions for patient treatment independently. We have discussed these issues through a variety of meetings and have documented these patient care and communication issues. We will determine how Sean performs when he begins his [fourth] year at UCI following this medical leave.

Dr. Darcy responded that he was placed on medical leave because Drs. Evans and Dolich were concerned with their ACGME accreditation status as he worked over his 80 hour a week cap. Dr. Darcy contended that if this situation was not remedied, he would have to report his work hours to the ACGME. He blamed his patient care mistakes on working too many hours.

Residency Academic Year 2011-2012

On July 13, 2011, Dr. Paydar sent an e-mail to Dr. Darcy detailing his need for continued improvement. Dr. Paydar stated that, Dr. Darcy had inadequately documented his physical examination of patients and had not included enough detail, especially his examination of a patient's face. Dr. Paydar had to rewrite the examination for clarity and detail. Dr. Paydar instructed Dr. Darcy to immediately improve in these areas. Dr. Paydar forwarded the e-mail to Dr. Evans and Dr. Daniel Jaffurs (Dr. Jaffurs), UCI Director of Pediatric Plastic Surgery.

On July 13, 2011, Dr. Jaffurs sent an e-mail to Drs. Evans, Paydar, Aly, and Wirth concerning Dr. Darcy. In the e-mail, Dr. Jaffurs was critical of Dr. Darcy in that he did not "round" on a cranial vault patient until Dr. Jaffurs told him to do so; did not drape a patient appropriately in preparation for surgery even though Dr. Jaffurs had instructed him how to do so; had the surgical skills of a second year resident; used the incorrect surgical instrument during the excision of a lesion on the great toe; and did not consult Dr. Jaffurs when Dr. Wirth instructed him. Dr. Jaffurs also stated that he cancelled a scheduled surgery because he could not trust Dr. Darcy to administer care to the patient or discharge the patient appropriately.

On or about July 17, 2011, Dr. Evans had reviewed Dr. Darcy's comments in response to his annual evaluation. Dr. Evans telephoned Dr. Darcy to address his concern that he was working too many hours. Dr. Evans explained that the 80 hours a week cap was computed over an average over a four-work period. Dr. Darcy replied that he thought Dr. Evans supported him, but now thinks Dr. Evans "had it out for him," as his evaluation demonstrated that he was taking the side of the general surgery faculty. Dr. Darcy stated he believed the issuance of the poor evaluation was in retaliation for his taking medical leave when he only

wanted to be removed from his “on call” schedule and accused Dr. Evans of purposely prohibiting him from the ACGME site visit. Dr. Darcy further accused Dr. Evans of issuing him a poor evaluation because of his desire to start a union to represent the residents. Dr. Evans denied knowing that Dr. Darcy was attempting to start a union.¹² Dr. Evans explained that Dr. Darcy was not performing on the same level as the other residents and that he was to ensure that Dr. Darcy function competently, safely, and independently when he graduates from the program. Dr. Evans assured Dr. Darcy that the faculty was behind him and was trying to help him.

On July 21, 2011, Dr. Darcy met with Dr. Maguire and Koehring to discuss his third residency year evaluation. At the time, Dr. Maguire and Koehring did not have all of Dr. Darcy’s evaluations with them.

On July 24, 2011, Dr. Evans concluded that after reviewing Dr. Darcy’s reported hours on July 8, 9, and 20, 2011, he was having trouble reconciling Dr. Darcy’s reported hours with the actual billing sheets. After reviewing the number of patients assigned to Dr. Darcy, Dr. Evans noticed that it was low compared to other residents. Dr. Evans was concerned as to how Dr. Darcy was organizing his time.

On July 27, 2011, Dr. Darcy sent an e-mail to Koehring asking her to submit his complaint for “work violations” and retaliation by Drs. Dolich and Evans to the UCI GMEC. Dr. Darcy also requested to learn how he could get appointed to the UCI GMEC. Koehring testified that she never received such a complaint from Dr. Darcy and that she had told him that the residents on the GMEC were peer-selected. Lastly, Dr. Darcy notified Koehring of the formation of the Association and requested her support to have residents and fellows actively

¹² Dr. Evans testified that this was the first time he learned that Dr. Darcy was trying to start a residents’ union.

participate in patient/physician safety issues. Koehring was not sure what Dr. Darcy was referring to regarding the formation of an association other than his intention to form a residents committee. Koehring gave the e-mail to both Drs. Maguire and Le-Bucklin. A meeting was scheduled with Dr. Le-Bucklin when she returned from vacation.

Filing of Representation Petition

On August 12, 2011, UCI Labor Relations Specialist Carl Smith (Smith) sent an e-mail to UCI resident physicians stating that the University had received a communication from the Association encouraging that they sign a petition designating it as the exclusive representative. Smith stated that the University neither supported nor discouraged unionization, but explained that if the Association collected more than 50 percent of authorization, the Association would become the exclusive representative without an election. Attached to the e-mail was a set of frequently asked questions (FAQs) about the representation process.

On August 13, 2011, Dr. Darcy, as the Association President, filed a petition recognition on behalf of the Association with PERB, stating that the Association had majority support.¹³ Dr. Darcy described the proposed unit as resident physicians, chief resident physician(s), fellows, fellow physicians, and clinical instructors. On August 17, 2011, Dr. Darcy e-mailed all UCI residents and fellows informing them that the Association had filed a petition for recognition with PERB and encouraged them to participate in the Association. The petition was received by Smith on August 22, 2011, and a Notice of Request for Recognition was posted on August 29, 2011.

¹³ On August 11, 2011, Dr. Darcy contacted UCI Labor Relations Manager Paul Kronheim (Kronheim) to ask him whom to address the petition to and how he would like to receive it.

Dr. Darcy said that he started working towards the filing of the recognition petition in late June 2011. He sent surveys to all UCI residents through their University e-mail addresses and through an online survey called "SurveyMonkey." The survey included questions about patient safety and residents' concerns about other terms and conditions of employment. He also spoke at the "Grand Rounds" as some of the program directors gave him permission to speak. Some of the issues he spoke with residents about were "attending abuse" (abuse of residents received by attending physicians), and the amount of hours residents worked.

Dr. Paydar testified that he had heard about Dr. Darcy gathering signatures to start the Association as some of the residents told him they felt "cornered" by Dr. Darcy to sign in support of the Association. Dr. Wirth also could not remember when he discovered Dr. Darcy was working on gaining recognition for the Association other than he had heard residents talk about some of the e-mails that were sent about forming an Association for the residents. Dr. Evans testified that he did not hear of Dr. Darcy's organizing efforts until he spoke with Dr. Darcy on or about July 17, 2011.

More Evaluations of Dr. Darcy

On August 15, 2011, Dr. Evans viewed Dr. Darcy at the clinic spending most of the morning reading e-mails and not participating in clinic. He also did not write a physical examination on a patient's chart. Dr. Evans noticed that a first year resident seemed to have more interest in a surgery than Dr. Darcy. Dr. Darcy claimed that he participated in clinic on the day in question and he was about to chart the physical examination when Dr. Evans grabbed the chart from him and admonished him for not charting the physical examination.

On August 17, 2011, Dr. Paydar sent a summary of his opinion of Dr. Darcy's performance over the last six weeks during his plastic surgery rotation at UCIMC. In the

summary, Dr. Paydar stated that he believed Dr. Darcy was behind in his surgical skills and knowledge and needed to be instructed on multiple occasions how to perform a specific suture and called for the wrong surgical instruments. When Dr. Darcy was questioned as to his surgical knowledge, he was deficient. Dr. Darcy often scrubbed out during short cases and left the operating room. Dr. Darcy also seemed to have bad judgment as to the priority of cases to be scheduled for surgery. In conclusion, Dr. Paydar believed Dr. Darcy had poor initiative and needed to improve by “leaps and bounds” before he could graduate from the program.

Dr. Paydar further stated that he was concerned whether Dr. Darcy could provide adequate patient care on the hospital wards or in the operating room without supervision.

Removal from Clinical Care

On August 17, 2011, Dr. Evans provided Dr. Darcy with written notification that he would be removed from providing clinical care for a two week period. The notification provided in pertinent part:

Over the last 6 weeks[,] the faculty has had an opportunity to evaluate your performance first hand while on the plastic surgery service. There remain significant concerns about your judgment, engagement in patient interactions, surgical skills and your ability to provide patient care. Because of these significant issues, effective immediately you are being removed from any clinical interactions for the next two weeks. The following will be your required duties during this time.

- 1) You will work with Dr Aly on completion of several research projects. He will assign these to you and ensure that progress is being made over this period.

[¶ . . . ¶]

- 3) You will begin microsurgery training in the laboratory. Dr Thomas Scholz and Dr Paydar put together a training program which you will demonstrate completion of the initial non-animal steps by the end of these two weeks. If you so desire[,] you may proceed with the use of rat

animal tails as the next step. Dr Paydar will monitor your progress and your surgical techniques should be videoed on your camera for review.

- 4) Finally[,] you will work with Dr Wirth on surgical skill techniques on pig's feet during these two weeks.

It will be up to you to work with these individuals and to set up a schedule for these two weeks. This needs to be presented to me for review and approval and must be in my office by [Friday,] [August] 19th. At the end of these two weeks[,] we will evaluate your progress and make further recommendations.

Dr. Darcy stated his being removed from clinical duties delayed his completion of the board certification process. Dr. Paydar stated that the period of two weeks was chosen as the attending physicians wanted to be able to assess if Dr. Darcy was improving and they did not want Dr. Darcy to fall too far behind in the program. According to Dr. Evans, this was not the first occasion where a resident had been removed from clinical duties, as another resident was removed to complete his manuscripts and a chief resident had been removed to work on her microsurgery skills.

August 23, 2011 Incident

Dr. Darcy had scheduled between 11:00 a.m. and 1:00 p.m. to meet with Dr. Wirth to practice suturing on pigs' feet in Dr. Wirth's office.

Dr. Wirth arrived approximately ten minutes late and apologized. He mentioned that his sister had been in an earthquake in Virginia and he was checking on her well-being. Dr. Wirth stated that he was going to leave his phone on as he could not verify his family's well-being until after the meeting. Dr. Wirth then left the room to get some surgical instruments and pigs' feet needed for Dr. Darcy to practice suturing. After Dr. Wirth returned, he asked Dr. Darcy if he knew why he was at his office that day. Dr. Darcy admitted he had received Dr. Wirth's e-mail which outlined the plan for their practice session.

Dr. Darcy then asked if he was present because of “the whole union thing?” Dr. Wirth responded, “What union thing? I don’t know what you’re talking about.” Dr. Wirth asked Dr. Darcy if he had any religious, ethical, or moral objection to working on the pigs’ feet. Dr. Darcy quipped that he did not and that he was “not Kosher.”

Dr. Wirth asked Dr. Darcy if he was recording their conversation. Dr. Darcy answered that he was not. Dr. Wirth then asked if he could close the door as he did not want any patients walking by seeing them working on pigs’ feet.¹⁴ Dr. Darcy did not initially object, but later retracted his objection and stated that he wanted the door open as he felt intimidated and would feel safer if the door was open. Dr. Wirth expressed disappointment with Dr. Darcy’s comment and asked him if he wanted to go to another room. Dr. Wirth then decided they should go to the conference room.

Dr. Wirth and Dr. Darcy went to a conference room and Dr. Wirth set up a table for Dr. Darcy to work at with the surgical instruments. Dr. Wirth positioned himself across the table from Dr. Darcy with a notepad to evaluate Dr. Darcy as Dr. Darcy practiced suturing on pigs’ feet. Dr. Wirth and Dr. Darcy were approximately two feet apart from each other. Dr. Wirth gave instructions to Dr. Darcy as to what type of suture to execute and Dr. Darcy attempted to execute the suture with Dr. Wirth leaning back in his chair taking notes.

After a number of instructions, Dr. Darcy asked Dr. Wirth if Dr. Maguire was a genius. Dr. Darcy asked the question in order to ease the tension between them by engaging in “small talk.” Dr. Wirth was confused by the question and responded that he did not personally know Dr. Maguire and never stated he was a genius. Dr. Darcy explained that he was just trying to engage in “small talk” and Dr. Wirth should not get upset about it. Dr. Darcy then asked about

¹⁴ Dr. Wirth’s office is located in the clinical area.

Dr. Wirth's work with the California Angels (baseball team). Dr. Wirth stated that he was not interested in "small talk" and they should keep things on a professional level. Dr. Darcy responded that it was unprofessional for Dr. Wirth to show up to their meeting ten minutes late. Dr. Wirth explained that he was only five minutes late and he was checking on the well-being of his sister. Dr. Darcy asked Dr. Wirth if he could speak quieter so others did not overhear them.¹⁵

Dr. Darcy and Dr. Wirth then resumed working on sutures and closures for an extended period of time. Dr. Paydar joined them intermittently and observed Dr. Darcy. At the end of the suturing session, both Drs. Wirth and Paydar critiqued Dr. Darcy. Dr. Darcy stated he told both attending physicians to lower their voices and that it was a "wonderful day" to be abused by "attendings." Dr. Paydar asked Dr. Darcy what he meant by his response as they were trying to teach him. Dr. Darcy replied that both of them were there to "ruin" his day and Dr. Wirth stated earlier that he was there to ruin his day.¹⁶ Dr. Darcy accused Dr. Paydar of not being an adult or a "man," as he reported his concerns about Dr. Darcy to Dr. Evans instead of confronting Dr. Darcy directly.

As it was 2:00 p.m., Dr. Darcy asked Dr. Wirth whether he had a family issue to deal with at 1:00 p.m. Dr. Wirth loudly replied to leave his family out of it. Dr. Darcy testified that he was attempting to diffuse the increasing intensity of the meeting.

The next incident that occurred was disputed between the witnesses: Drs. Wirth and Paydar and Dr. Darcy. Dr. Wirth's and Dr. Paydar's testimonies were consistent and only varied slightly from each other. Both testified that Dr. Darcy next sat up high, raised his arms

¹⁵ Dr. Wirth admits that he naturally speaks in a louder tone than others because of his hearing difficulties.

¹⁶ Dr. Wirth denied making this comment.

outwards,¹⁷ and stated, “What do you want to do? Hit me? Bring it on!” Dr. Paydar responded, “No Sean, nobody wants to hurt you” and “we are here to teach you.” Dr. Darcy then grabbed the “15 blade” scalpel, raised it six inches to one foot off the table,¹⁸ and with an underhand grip pointed it toward Dr. Wirth for approximately three to five seconds.¹⁹ Dr. Darcy then closed the cover over the scalpel and put it down and responded, “come on, did you think I was going to do something like that?” Dr. Wirth then backed up further in his chair, stood up and told Dr. Darcy to put the scalpel down and immediately leave the building.

Dr. Darcy testified that Dr. Wirth stood up and stated, “Don’t talk about my family. Don’t you ever talk about my family,” leaned toward Dr. Darcy’s personal space, and put his arms up with clenched fists. Dr. Wirth then looked toward the scalpel and Dr. Darcy, while remaining seated, put his hand over the scalpel in order to prevent Dr. Wirth from grabbing it and closed the safety cover over it. Dr. Wirth then yelled, “He’s got a weapon. He’s got a weapon.” Dr. Wirth then approached Dr. Darcy and instructed him to immediately leave.

After Dr. Darcy left the conference room, he walked over to the mail room to get some of his evaluation(s), but they were not there. Dr. Wirth saw Dr. Darcy and told him to leave. Dr. Darcy explained he was trying to get something from his mailbox. Dr. Wirth again instructed Dr. Darcy to leave. Then Dr. Darcy walked over to the UCIMC Security Department.

¹⁷ The interview of Dr. Wirth by the UCI police department detective describes Dr. Darcy’s posture with greater detail. Specifically, Dr. Darcy swung both arms outward and fully extended at shoulder level with his palms facing Dr. Wirth.

¹⁸ Dr. Wirth’s contemporaneous notes of the training session reflected Dr. Darcy’s comments of whether Dr. Wirth wanted to hit Dr. Darcy and “[b]ring it on,” as well as Dr. Darcy picking up the scalpel and Dr. Wirth telling him to put it down.

¹⁹ Dr. Paydar described the sharp part of the scalpel as pointing away from Dr. Darcy.

Dr. Wirth went to Dr. Evans' office and recounted what occurred and told him how he felt very threatened and did not want Dr. Darcy around him anymore. According to Dr. Evans, Dr. Wirth was shaken and visibly upset.

According to the ALJ, not only was Drs. Wirth's and Paydar's testimony about Dr. Darcy inviting Dr. Wirth to become physical, picking up the scalpel, and pointing it toward Dr. Wirth consistent, it was buttressed by Dr. Wirth's contemporaneous notes taken at the time as well as Dr. Evans's physical observations of Dr. Wirth's demeanor immediately after the incident. For these reasons, the ALJ credited Drs. Wirth's and Paydar's testimonies over that of Dr. Darcy where there was conflict.

At 2:00 p.m., Dr. Darcy spoke to UCIMC Security Department and was interviewed by Gregory Lawritson (Lawritson). Dr. Darcy complained of being harassed by two attending physicians and thought it was because he and a few doctors were trying to establish a residents union and "maybe the physicians were trying to dissuade him from doing so." Lawritson suggested to Dr. Darcy that he could file an on-line incident report if he felt strongly about the incident.

At 3:48 p.m., Dr. Maguire contacted UCI Campus Police Detective Roland Chiu (Detective Chiu) and reported the incident to the UCI Police Department for investigation. Detective Chiu interviewed Drs. Wirth, Paydar, and Darcy. In the police report, Dr. Darcy blamed the scrutiny on him because he filed an August 10, 2011 whistleblower complaint and because of the residents union he was trying to start. He explained that he was attempting to get fair working conditions for the residents and expose the abuse of residents.

At 5:00 p.m., Dr. Darcy received a text page notifying him that he was being placed on administrative leave.

At 10:48 p.m., Dr. Wirth e-mailed Dr. Evans and described his recollection of what occurred that day in the conference room.

Initial Threat Assessment

On August 24, 2011, UCI Chief of Police Paul Henisey (Chief Henisey) contacted clinical and forensic psychologist Manny Tau (Dr. Tau) to conduct a threat assessment of Dr. Darcy and his actions on August 23, 2011.²⁰ On September 22, 2011, Dr. Tau provided his “Initial Findings” to Chief Henisey. In short, after Dr. Tau reviewed the police report and interviewed witnesses other than Dr. Darcy,²¹ he found that Dr. Darcy’s “brandishing a scalpel appeared to have an intent of intimidating Wirth, as opposed to that of stabbing him.”

Notice of Investigatory Leave

On August 25, 2011, Dr. Evans issued Dr. Darcy a written “Notice of Investigatory Leave,” stating that he was being placed on paid administrative leave through September 30, 2011, while UCI investigated him for alleged “unprofessional and threatening behavior in a teaching environment.” He was not allowed on campus grounds or the UCIMC, or the various hospital sites affiliated with UCI. He was required to surrender his identification badge and keys.

²⁰ Dr. Tau has specialized in assessing threats and advising employers as to active threat management for 15 years.

²¹ Dr. Tau did not interview Dr. Darcy, who was in the process of retaining an attorney.

Electronic Complaint submitted to the Joint Commission

On December 19, 2011, Dr. Darcy submitted an electronic complaint with the Joint Commission,²² an independent, not-for-profit organization that accredits and certifies health care organizations and programs in the United States, about physician employees working an excess number of hours, which caused a dangerous working environment for the employees and patients. The complaint mentioned that the matter had been brought before numerous physicians including Drs. Evans, Dolich, Paydar, Wirth, and Le-Bucklin.

Final Threat Assessment Report

In preparation of Dr. Tau's final threat assessment report, he reviewed a number of documents and interviewed a number of witnesses. Some of the documents he reviewed were related to the Association, letter(s) filed with PERB, and a formal grievance filed on behalf of one of the residents. Additionally, there was a comment from one of his interviews that Dr. Darcy "cornered" individuals to sign the union recognition petition.

On December 26, 2011, Dr. Tau issued his final threat assessment report of the August 23, 2011 incident to Koehring. Dr. Tau characterized Dr. Darcy's threat potential for targeted physical violence upon others as "low - moderate." Dr. Tau explained his rating as follows:

The low component of the low - moderate threat potential rating was applied due to Darcy's grossly inappropriate behaviors and the presence of significant psychological risk factors. The moderate component of the rating was also applied due to the presence of threat posturing with a scalpel. Though there did not appear to be any rehearsal fantasies of physical violence, Darcy's obsessive thoughts of being victimized by others and conspiracy themes have similar dynamics of energizing issues and impelling one into action. Mitigation of threatening behaviors, containment to minimize exposure to possible targets and management

²² Formerly referred to as the Joint Commission on the Accreditation of Hospitals.

of Darcy to minimize triggers for future escalations are highly recommended.

Notice of Intent to Dismiss and Subsequent Dismissal of Dr. Darcy

On December 21, 2011, UCI Residency Director Charles Vega (Dr. Vega) issued a report to Dr. Stamos concerning the August 23, 2011 incident. After reviewing the police report and interviewing Drs. Wirth and Paydar,²³ Dr. Vega issued a report which concluded that the remediation effort on August 23, 2011 was appropriate. Additionally, Dr. Vega concluded that Dr. Wirth was impacted by the incident in that he was now concerned when other staff members were handling sharp instruments around him and that he could not imagine trying to teach Dr. Darcy again. Dr. Vega's report did not include any reference to Dr. Darcy's organizational or representational activities on behalf of the residents.

On January 10, 2012,²⁴ Dr. Stamos issued a Notice of Intent to Dismiss Dr. Darcy from his residency program. Dr. Stamos described Dr. Darcy's performance during his residency as "lackluster" and his conduct on August 23, 2011 as "professionally, socially and ethically unacceptable; it has no precedent in my experience here." Dr. Stamos explained that both Drs. Evans and Dolich had been recused in participating in this decision. Dr. Stamos stated that he reviewed Dr. Darcy's academic file and Dr. Vega's December 21, 2011 report in coming to this decision. Dr. Darcy was given the right to provide a written response to Dr. Le-Bucklin.

²³ Dr. Darcy declined an interview request as he had already been interviewed on numerous occasions by UCI personnel. Additionally, Dr. Vega had not reviewed Dr. Tau's December 26, 2011 final threat assessment report at the time Dr. Vega issued his report, as it had not been issued yet. Therefore, Dr. Vega did not review some of the documents referenced in Dr. Tau's report regarding Dr. Darcy's organizational or representational (grievance) activities.

²⁴ The actual Notice is dated January 10, 2011, which appears to be a typographical error considering it discusses conduct occurring well after that date.

On March 19, 2012, Dr. Le-Bucklin issued her findings pending her informal review. As part of the informal review, Dr. Le-Bucklin reviewed Dr. Darcy's academic file, the police report, Dr. Wirth's e-mail describing the August 23, 2011 incident, Dr. Vega's report, and Dr. Darcy's response for the informal review. She interviewed Drs. Wirth and Paydar. She offered Dr. Darcy an interview, but he submitted a written statement instead. During Dr. Le-Bucklin's interview with Dr. Wirth, he stated that he would not feel safe if Dr. Darcy was returned to his program. Dr. Le-Bucklin's informal review findings did not mention any of Dr. Darcy's organizational or representational activities on behalf of the residents.

Dr. Le-Bucklin closed her findings with:

It is the responsibility of the University to protect its employees and patients. Common sense supports that an employer would be justified to remove an employee from his/her position if he/she behaved in a threatening manner with a knife at work. Even a high performing employee would be removed from his/her position if he/she behaved in this manner. Therefore, this informal review concludes that the intent to dismiss has merit based on Darcy's actions on August 23, 2011. The University has the responsibility to protect the safety of its employees and patients and the intent to dismiss appropriately serves this purpose.

On March 21, 2012, Dr. Stamos, assuming the role of Dr. Darcy's program director, forwarded Dr. Le-Bucklin's decision to Dr. Darcy and stated that he was dismissed from the residency program on that day. Dr. Stamos stated that it was Dr. Le-Bucklin, who occupied the role as the department chair, to uphold the decision to dismiss Dr. Darcy from the residency program. Dr. Darcy was informed of his right to appeal the dismissal.

ACGME, GMEC and the Residents Forum

From the late 1990's until 2007 or 2008, the UCI GMEC used to have a "Residents Forum,"²⁵ which met on a quarterly basis.²⁶ Koehring facilitated the scheduling of the meeting and ensured that lunch was provided. Koehring only started meetings and afterwards did not participate while the residents discussed matters among themselves. The Residents Forum did not have any officers and was an opportunity for the residents to "get together" and discuss whatever common issues they wanted to discuss. After a while, it seemed that the residents' attendance was minimal and on some occasions no residents attended. The UCI GMEC then disbanded the Residents forum for lack of interest.

On July 15, 2011, the ACGME Institutional Review Committee (IRC) issued a notification that it would continue to accredit the UCIMC residency programs for another three years. Such notification was provided to Koehring. The IRC stated that the UCIMC was not

²⁵ Specifically, the ACGME Institutional Requirements provides:

II.F. Resident Educational and Work Environment

II.F.1. The Sponsoring Institution and its programs must provide an educational and work environment in which residents may raise and resolve issues without fear of intimidation or retaliation. Mechanisms to ensure this environment must include:

II.F.1.a) An organization or other forum for residents to communicate and exchange information on their educational and work environment, their programs, and other issues.

II.F.1.b) A process by which individual residents can address concerns in a confidential and protected manner.

(Emphasis added.)

²⁶ Koehring explained that the program directors also met quarterly.

in substantial compliance with the ACGME Institutional Requirements by failing to provide a “Residents Forum.” Specifically, the notification provided:

The sponsoring institution must provide an organization or other forum for residents to communicate and exchange information on their educational and work environment, their programs, and other resident issues.

Although the Institution appears to provide multiple avenues (intra-program meetings, the GMEC, the resident hotline, and an ombudsman) through which residents may raise concerns and issues, no organized forum exists through which residents and fellows from all programs can meet to discuss problems and issues of mutual concern.

Subsequent to receiving the letter, Dr. Le-Bucklin and Koehring spearheaded the reinstatement of the Residents forum. At the time of receiving the ACGME letter, Dr. Le-Bucklin was newly appointed as Dr. Maguire’s replacement and went on vacation during the first week of August 2011. Dr. Le-Bucklin and Koehring met on a number of occasions in July and August 2011 to discuss the institution’s program accreditation.

Dr. Le-Bucklin and Koehring decided that the Residents Forum could be scheduled at each site where residents worked, including LBVAH and LBMH, over multiple days so that residents would have more of an opportunity to attend one of the Residents Forum meetings. The UCI GMEC residents’ representatives believed it would be best to schedule the forum during the noon hour. The UCI GMEC then scheduled quarterly meetings for the Residents Forum at all three training sites (UCIMC, LBVAH and LBMH) starting with the 2011-2012 academic year.

On September 15, 2011, Dr. Le-Bucklin announced the 16 resident representatives who had been elected by their peers to serve on the UCI GMEC.²⁷ The first quarterly meeting for the Residents Forum was to meet with other residents and the UCI GME administration on September 26, 2011. Attending physicians, program directors, and medical students would not be present. Koehring denies that the reinstatement of the Residents forum had anything to do with Dr. Darcy's petition for the Association's recognition, but was only reinstated in order to comply with the ACGME accreditation standards.

DISCUSSION

Discrimination/Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571, subdivision (a) the charging party must show that: (1) the employee exercised rights under HEERA; (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. (*Regents of the University of California (Los Angeles)* (2008) PERB Decision No. 1995-H, p. 8, citing *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), pp. 6-8.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento*)), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing

²⁷ Dr. Le-Bucklin described the UCI GMEC as providing program oversight, creating institutional policies and developing new programs. The UCI GMEC was announced to meet monthly. Residents and fellows were encouraged to forward topics for discussion at these meetings to their new resident representatives.

one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529 [*Oakland*]) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento, supra*, PERB Decision No. 264; *Novato, supra*, PERB Decision No. 210.)

Adverse Actions and Retaliation

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

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

the action to have an *adverse impact on the employee's employment.*

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

Thus, a counseling memorandum that threatens future disciplinary action is an adverse action. (*City of Long Beach* (2008) PERB Decision No. 1977-M; *Los Angeles Unified School District* (2007) PERB Decision No. 1930.) The action need not specifically threaten discipline, however, if it otherwise has an adverse impact on the employee's employment.

(See, e.g., *County of Yolo* (2009) PERB Decision No. 2020-M [loss of alternative work schedule]; *Regents of the University of California* (1984) PERB Decision No. 403-H [loss of flexible work schedule].) PERB has found that the involuntary reassignment of duties is an adverse action when the working conditions of the new position are less favorable than those of the previous position, even if the reassignment does not result in loss of pay or benefits.

(*Trustees of the California State University* (2009) PERB Decision No. 2038-H; *Fresno County Office of Education* (2004) PERB Decision No. 1674.) PERB has also found adverse action when a reasonable person would consider the duties of the new position to be a step down from those of the previous position. (*Trustees of the California State University* (2006) PERB Decision No. 1853-H [warehouse worker reassigned to "count discarded supplies"].)

Finally, PERB has held that placing an employee on involuntary paid administrative leave is an adverse action. (*San Mateo County Community College District* (2008) PERB Decision No. 1980 (*San Mateo*); *Oakland, supra*, PERB Decision No. 1529.)

Removal from Clinical Duties and Remedial Training

As discussed above, PERB has found changes in working conditions constitute adverse action if a reasonable person would consider such changes to have an adverse impact on the employee's employment. (*Newark, supra*, PERB Decision No. 864.) The August 17, 2011 written notification from Dr. Evans made several changes to Dr. Darcy's working conditions, including removing him from clinical duties and requiring remedial training. In addition the written notice informing Dr. Darcy that he was to be removed from clinical care stated: "There remain significant concerns about your judgment, engagement in patient interactions, surgical skills and your ability to provide patient care. Because of these significant issues, . . . you are being removed from any clinical interactions for the next two weeks." Dr. Darcy was then assigned to further microsurgery training and several research projects. Not only would a reasonable person consider these changes to have an adverse impact on working conditions, such action can be considered akin to receiving a poor evaluation, which the Board has long held to constitute an adverse action. (*California State University, Long Beach* (1987) PERB Decision No. 641-H.) Therefore, we conclude that the August 17, 2011 removal from clinical duties and requirement for remedial training to be an adverse action.

Notice of Investigatory Leave

It is well established that being placed on involuntary administrative leave, even with no loss in pay, is an adverse employment action. (*Trustees of the California State University (East Bay)* (2014) PERB Decision No. 2391-H; *Oakland, supra*, PERB Decision No. 1529.) On August 25, 2011, Dr. Evans issued Dr. Darcy a written notice placing him on paid administrative leave in order for the University to conduct an investigation into the events of

August 23, 2011. Therefore, we conclude that the decision to place Dr. Darcy on paid administrative leave also constitutes an adverse action.

Notice of Intent to Dismiss and Notice of Dismissal

PERB has also held that an employer's unequivocal notice to impose discipline is an adverse employment action. (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C [*LA Superior Court*]; *County of Merced* (2008) PERB Decision No. 1975-M.) In *Monterey County Office of Education* (1991) PERB Decision No. 913, the Board held that an employer committed an adverse action by issuing a notice of intent to terminate the charging party followed by actual termination. (*Id.* at proposed dec., p. 3.) Here, on January 10, 2012, the University issued Dr. Darcy a Notice of Intent to Dismiss. The Notice of Intent to Dismiss was followed by Dr. Darcy's actual dismissal from the residency program on March 21, 2012. These actions, too, constitute an adverse action.

Exercise of Protected Rights

HEERA protects a higher education employee's right to organize an employee organization for purposes of representing a bargaining unit and meeting and conferring with the higher education employer. (§ 3565.) In the instant case, Dr. Darcy attempted to gather signatures for recognition of the Association and spoke in support of forming such an Association. Such conduct, therefore, is protected by HEERA.

Likewise, "an employee's action . . . might qualify as [protected] organizational activity if 'engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.'" (*Regents of the University of California* (1991) PERB Decision No. 872-H, quoting *Meyers Industries, Inc.* (1986) 281 NLRB 882.) The critical question is whether the individual's efforts are the "logical continuation of group activity." (*Jurupa*

Unified School District (2012) PERB Decision No. 2283, citing *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246 (*Oakdale*); see also *Regents of the University of California* (2010) PERB Decision No. 2153-H.) Accordingly, an individual's reporting of workplace safety concerns to one's employer is protected activity. (*City of Alhambra* (2011) PERB Decision No. 2161-M; *Garden Grove Unified School District* (2009) PERB Decision No. 2086 (*Garden Grove*)). In the instant case, Dr. Darcy advocated that the residency program comply with the 80 hour a week cap for purposes of protecting employee and patient safety. Such conduct constitutes protected activity, as it was a logical continuation of a group activity.

Employer Knowledge

An employer's knowledge of protected activity is another element of the prima facie case. To establish this element, at least one of the individuals responsible for taking the adverse action must be aware of the protected conduct. (*Oakland Unified School District* (2009) PERB Decision No. 2061, pp. 8-9; *California State University (San Francisco)* (1986) PERB Decision No. 559-H, pp. 5-6.)

The decision to remove Dr. Darcy from his clinical duties and provide him with remedial training was made by Dr. Evans. Additionally, it was Dr. Evans who issued Dr. Darcy the Notice of Investigatory Leave. Dr. Evans had knowledge of Dr. Darcy's protected activities before the August 17, 2011 removal of Dr. Darcy from his clinical care duties and before the issuance of the August 25, 2011 Notice of Investigatory Leave.

The Notice of Intent to Dismiss Dr. Darcy from his residency program and the subsequent dismissal were issued by Dr. Stamos. However, no facts were introduced to support a finding that Dr. Stamos had knowledge of Dr. Darcy's protected activities. Despite

Dr. Darcy's argument that "everyone in the medical community at UCI knew about the organizing drive and Dr. Darcy's concerns about working conditions," no documentary evidence demonstrates that Dr. Stamos received any information regarding Dr. Darcy's protected activity before he issued Dr. Darcy the Notice of Intent to Dismiss or the subsequent dismissal. Therefore, these allegations must be dismissed for failure to meet the knowledge element. Regardless, we provide further analysis assuming that Dr. Stamos did, in fact, have some knowledge of Dr. Darcy's protected activities.

Nexus/Unlawful Motive

The final element of a prima facie case is whether there is a causal connection, or nexus, between the adverse action and the protected activity demonstrating unlawful motivation. Unlawful motivation is an essential element of a charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (*Carlsbad Unified School District* (1979) PERB Decision No. 89, *Novato, supra*, PERB Decision No. 210.)

Timing as Evidence of Nexus

The timing between the employer's adverse actions and the protected activity is an important circumstantial factor to consider in establishing or disproving nexus. (*Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H, p. 9, citing *North Sacramento, supra*, PERB Decision No. 264, proposed dec., p. 23) Typically, the passage of only one or two months between an employee's protected activity and the employer's adverse actions may suggest an unlawful motive. However, there is no bright line rule for determining how close in time the protected activity must be to the adverse action in order to establish a strong inference of unlawful motive based on "close" temporal proximity.

In *Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H, the Board found that a seven month gap in time between the protected activity and the adverse action created a “minimally sufficient temporal proximity” sufficient to establish an inference of unlawful motive.

In the instant case, the removal of Dr. Darcy from clinical duties and the remedial training requirement was issued on August 17, 2011. The Notice of Investigatory Leave was issued on August 25, 2011. Both actions occurred within weeks of Dr. Darcy filing the recognition petition with PERB and approximately a month after Dr. Darcy complained about having worked over the 80 hour a week cap. The Notice of Intent to Dismiss was issued on January 10, 2012, and the Notice of Dismissal was issued on March 21, 2012. These actions occurred approximately five months and seven months respectively after filing the recognition petition with PERB and a little over six months and eight months respectively after complaining about working over the 80 hour a week cap. Therefore, we find that the timing factor has been met.

Animosity toward Protected Activity

Additional factors that support a finding of nexus in this case include the University’s animosity toward protected activity and contradictory explanations provided by the University’s decision makers. Both Drs. Wirth and Paydar appear to have discouraged Dr. Darcy from pursuing his claim that residents were working over the 80 hour a week cap. While Dr. Wirth disputed whether he had discouraged Dr. Darcy from pursuing this claim, Dr. Paydar never denied telling Dr. Darcy that pursuing the issue was “not the way to go about it.” In addition, Dr. Wirth denied knowledge of any “union thing” as late as August 23, 2011 despite obtaining knowledge of Dr. Darcy’s organizing efforts in June earlier that year.

Therefore, we conclude that the Association has established an unlawful motive for the removal of Dr. Darcy from clinical duties and requiring remedial training; the issuance of the Notice of Investigatory Leave and the Notice of Intent to Dismiss based on the factors of timeliness; expressed animus toward protected activity; and the contrary explanations provided.

Employer's Burden

After establishing the elements of a prima facie case for the issuance of the Notice of Investigatory Leave, the Notice of Intent to Dismiss, and the subsequent dismissal, the burden shifts to the University to prove that the notices would have been issued even if Dr. Darcy had not engaged in protected activity. (*Trustees of the California State University* (2000) PERB Decision No. 1409-H, proposed dec., p. 18, citing *Novato, supra*, PERB Decision No. 210; *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.) In cases where an adverse action appears to have been motivated by both protected and unprotected conduct, the issue is whether the adverse action would have occurred “but for” the protected acts. (*LA Superior Court, supra*, PERB Decision No. 1979-C, p. 22.) This requires the employer to establish both:

- (1) that it had an alternative non-discriminatory reason for the challenged action; and
- (2) that it acted because of this alternative non-discriminatory reason and not because of the employee's protected activity.

(*Palo Verde Unified School District* (2013) PERB Decision No. 2337, pp. 18-19; see also *County of Orange* (2013) PERB Decision No. 2350-M, p. 16.)

The removal from clinical duties and the remedial training were issued as a result of Dr. Darcy's failure to perform at an acceptable level, highlighting the preceding six weeks. In support of its action, the University had a long record of negative performance evaluations

issued to Dr. Darcy, many of which predated his protected activity. The University warned Dr. Darcy multiple times that he needed to show significant improvement to continue in the program. Those warnings included multiple conferences, memoranda, letters of concern, and performance evaluations. We thus conclude that the University proved it would have removed Dr. Darcy from clinical duties and assigned him to remedial training even if he had not engaged in protected activity.

The Notice of Investigatory Leave was issued solely for the purpose to allow the University to investigate Dr. Darcy for his “alleged unprofessional and threatening behavior” on August 23, 2011. An employer’s concern for an employee’s potential for violence in the workplace is a legitimate, non-discriminatory reason for adverse action. (*Ventura County Community College District* (1999) PERB Decision No. 1323.) By extension, this concern is also a legitimate, non-discriminatory reason to place an employee on paid administrative leave while the matter is being investigated. The University’s action in issuing the Notice of Investigatory Leave was a prudent action to secure the integrity of the investigation as well as protect University employees. We conclude that the University has met its burden that it would have issued the Notice of Investigatory Leave regardless of Dr. Darcy’s protected activities.

We reach the same conclusion as to the University’s decision to issue Dr. Darcy the Notice of Intent to Dismiss and to subsequently dismiss him from the residency program. In *City of Santa Monica* (2011) PERB Decision No. 2211-M, the Board found that, had the charging party established a prima facie case for retaliation, the employer would have nevertheless been justified in terminating his employment because of the long history of complaints made by the employer’s customers coupled with the employer’s concerns for

customer and public safety. (*Id.* at p. 9.) The Board also noted that the charging party had been warned repeatedly of his performance deficiencies prior to engaging in protected activity. (*Id.* at p. 17.) The Notice of Intent to dismiss referenced both Dr. Darcy's academic deficiencies and unprofessional behavior surrounding the events of August 23, 2011. As discussed above, the University showed Dr. Darcy's extensive record of conferences, memoranda, letters of concern, and negative performance evaluations in support of its action. Despite all of this, Dr. Darcy continued to fail to perform at an acceptable level. The University also relied on the extensive report from Dr. Vega detailing the August 23, 2011 incident. In light of these facts, we conclude that the University issued the Notice of Intent to Dismiss and subsequently dismissed Dr. Darcy from the residency program because of his sub-par academic performance and actions on August 23, 2011, and not his protected activity.

Domination/Interference/Consultation

Higher education employers are prohibited by HEERA from dominating or interfering with the formation of any employee organization. They are also prohibited from contributing financial or other support to an employee organization or "in any way" encouraging employees to join one organization in preference to another. (§ 3571, subd. (d).) Where there is an allegation of employer domination or unlawful support, the first inquiry is whether the employer's actions involve an "employee organization" under the statute. An "employee organization" must include higher education employees among its members and must have as one of its primary purposes dealing with those employees in their relations with the higher education employer.²⁸ Therefore, two elements are necessary: participation by employees of the higher education employer and a representational purpose.

²⁸ Section 3562 sets out the following definition:

It is not difficult for a group of employees to qualify as an employee organization. An organization need not have a formal structure, seek exclusivity or be concerned with all aspects of the employment relationship in order to constitute an employee organization. (*Oak Grove School District* (1986) PERB Decision No. 582 [*Oak Grove*].) The Board’s inquiry is whether the group has as a central focus the representation of employees in employment-related matters. (*State of California (Department of Developmental Services)* (1982) PERB Decision No. 228-S.) Accordingly, a faculty forum established “to improve communications and solve problems” and where negotiable subjects were discussed qualified as an employee organization. (*Oak Grove, supra*, PERB Decision No. 582.) Because the term “dealing with” is broader than “negotiations,” it was irrelevant that negotiations never took place between the school district and the forum. (*Ibid.*; see also *Cabot Carbon Co.* (1957) 117 NLRB 1633, enforced by the Supreme Court in *NLRB v. Cabot Carbon Co.* (1959) 360 U.S. 203.)

However, the Board has also held that employee groups may exist apart from exclusive representatives and may lawfully communicate with the employer. For this to occur, such groups must remain outside the representational environment. This point was first made in *Oak Grove, supra*, PERB Decision No. 582 and then reemphasized in *Redwoods Community College District* (1987) PERB Decision No. 650 (*Redwoods*). In *Redwoods*, the Board set out two circumstances in which employee groups could conduct lawful relationships with employers. (*Redwoods, supra*, PERB Decision No. 650.) The first is where the employee group engages “in a mere discussion with management, rather than making recommendations

(f)(1) “Employee organization” means any organization of any kind in which higher education employees participate and that exists for the purpose, in whole or in part, of dealing with higher education.

to management.” (*Ibid.*) The second is where “management has delegated actual decision-making authority” to the group. (*Ibid.*)

In *Redwoods, supra*, PERB Decision No. 650, the classified employees council (CEC) at issue did not meet either exception because its activities “went beyond discussions, but fell short of constituting delegated managerial decision-making authority.” (*Ibid.*) The Board concluded in adopting the ALJ’s proposed decision that the CEC participated in an extensive program review with the district and the union, which resulted in recommendations with an impact on hiring and working conditions. The CEC was also allowed a place on school board meeting agendas, whereas the union was not. The Board found that the pervasive involvement of the employees in the formation, support and participation of CEC equaled domination.

In *Ventura Community College District* (1994) PERB Decision No. 1073 (*Ventura*), the Board found that classified employees’ senates had a representational purpose, and thus, constituted an “employee organization” within meaning of EERA. In that regard, senate constitutions and bylaws stated purpose as follows: “to address the non-union concerns of the classified staff and interface with College management in the implementation of solutions.” Evidence also showed that the district allowed the senates free use of copy machines while requiring the union to pay. In addition, the district dealt with senates on negotiable topics, including layoffs, early retirement, change in hours, and agency-shop fee. Also in *Ventura*, the Board cited *E. I. Du Pont De Nemours & Co.* (1993) 311 NLRB No. 88 in which the NLRB raised the question of employer relationships with employee groups the year prior. There, the NLRB found the activities of all but one employer-dominated employee committee to be unlawful. In a discussion about the types of organizational activities that would be lawful, the NLRB described several examples. A “‘brainstorming’ group” would be permissible because

its purpose would be solely to gather a host of ideas. Also permissible would be a committee “for the purpose of sharing information” if that committee makes no proposals to the employer and the employer, after gathering the information, does with it as it wishes. Also permitted would be a decision-making committee where management representatives were in the minority and the committee had the power to decide rather than just make proposals.

GMEC

The GMEC is tasked by the ACGME with providing program oversight, creating institutional policies and developing new programs, and has existed in this capacity since the 1970’s. It is a construct of the ACGME standards rather than one from the University. It is made up of both administrators and program directors, as well as residents. It has delegated authority to establish specific policies and procedures concerning the quality of education and the work environment for residents including areas which fall within the scope of representation. It does not appear to “interface” with the University or otherwise participate with or deal with the University in executing its policymaking. Therefore, the GMEC appears more akin to the groups where “management has delegated actual decision-making authority” as contemplated in *Redwoods, supra*, PERB Decision No. 650 and subsequently *Ventura, supra*, PERB Decision No. 1073. For these reasons, we find that the GMEC is not an “employee organization” as defined by HEERA section 3562, subdivision (f)(1). As such, the University did not violate HEERA section 3571, subdivision (d).

Residents Forum

With respect to the Resident’s forum, the ACGME Institutional Requirements requires:

- II.F.1.a) An organization or other forum for residents to communicate and exchange information on their educational and work environment, their programs, and other issues.

The Residents forum, according to ACGME standards, is a mode of communication for the residents to “exchange information on their education and work environment, their programs and other issues.” (Transcript Vol. II, p. 43.) While arguably there may be some discussion amongst the residents of topics within the scope of representation, no evidence was presented showing any discussion between participants in the residents forum and University management. No evidence was presented showing that the Residents forum ever made a recommendation to management or was ever tasked with making recommendations to management. Regardless, to the extent that the GMEC’s presence at the meetings might lead to discussion on negotiable subjects, such conduct would appear to fall within the other circumstance contemplated in *Redwoods, supra*, PERB Decision No. 650. It appears that any discussion forum participants would have with management would be “a mere discussion with management, rather than making recommendations to management.”

For these reasons, we find that the Resident’s forum is also not an “employee organization” as defined by HEERA section 3562, subdivision (f)(1). As such, the University did not violate HEERA section 3571, subdivision (d).

HEERA section 3571, subdivision (f) makes it unlawful for a higher education employer to:

[c]onsult with any academic, professional, or staff advisory group on any matter within the scope of representation for employees who are represented by an exclusive representative, or for whom an employee organization has filed a request for recognition or certification as an exclusive representative until such time as the request is withdrawn or an election has been held in which “no representative” received a majority of the votes cast. This subdivision is not intended to diminish the prohibition of unfair practices contained in [HEERA section 3571,] subdivision (d).

This section, which is unique to HEERA and has no counter-part in either federal or state law, has never been interpreted by the Board. Here, however, the record is devoid of any facts showing that the University engaged in any consultation with either the GMEC or the Residents forum. As such, we conclude that the University did not violate HEERA section 3571, subdivision (f).

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1147-H are hereby DISMISSED.

Members Winslow and Banks joined in this Decision.