STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

EUGENE SMITH, Charging Party, v. ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	Case No. LA-CE-6094-E PERB Decision No. 2631 March 5, 2019

Appearance: Eugene Smith, on his own behalf.

Before Banks, Shiners, and Krantz, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Charging Party Eugene Smith (Smith) to the attached proposed decision of an administrative law judge (ALJ). The complaint alleged that Respondent Antelope Valley Union High School District (District) violated the Educational Employment Relations Act (EERA)[1] by removing courses from Smith's schedule and refusing to assign him extra-duty assignments because of his participation in protected activity. The ALJ dismissed the complaint and underlying unfair practice charge, finding that although the District knew of Smith's protected conduct and took adverse employment action against him, there was no evidence that the adverse action was motivated by Smith's protected conduct.

The Board has reviewed the entire record in this matter. Based on this review, we conclude that the ALJ's findings of fact are adequately supported by the record and, except

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

where noted below, his conclusions of law are well-reasoned and in accordance with applicable law. We therefore adopt the proposed decision as the decision of the Board itself as modified and supplemented by the discussion below.

BACKGROUND

The ALJ's procedural history and factual findings can be found in the attached proposed decision. We briefly summarize those findings to provide context for our discussion of Smith's exceptions.

At all times relevant, the District was a party to a collective bargaining agreement (CBA) with Smith's exclusive representative, the Antelope Valley Teachers Association (AVTA). Pursuant to the CBA, a "regular" teaching schedule consisted of five teaching periods and one conference/preparation period. The CBA permitted teachers to earn additional compensation by working beyond their regular load. The CBA provided for such extra work to be paid hourly in certain circumstances, while in other circumstances it provided for teachers to earn an extra one-sixth of their salary as their compensation for teaching an extra period. The District distributed these "one-sixth" assignments based upon program needs, master schedule considerations, credential authorization, and other factors enumerated in the CBA, including seniority and recency of experience in teaching relevant content.

In November 1997, the District hired Smith to teach math at Littlerock High School. In 2003, the District transferred Smith to Knight High School, where he taught math for two years before becoming the school's Work Experience Coordinator. Smith was one of the District's six Work Experience Coordinators. Work Experience Coordinators' duties included issuing work permits to students, monitoring their employment activities, meeting with employers and students at job sites, checking working conditions, and teaching Work Experience classes.

Work Experience Coordinators were typically assigned to oversee students at multiple schools, and a large part of their duties were conducted off-campus at job sites. Work Experience Coordinators received a six percent pay differential plus extra salary for working 13 more days per year than a classroom teacher.

On August 19, 2011, Smith e-mailed District Assistant Superintendent of Personnel Mark Bryant (Bryant). Smith stated that the Work Experience Program had low enrollment, which he attributed to the economic recession. He offered to teach two math classes to get a full workload and ostensibly save the District the funds it was paying other math teachers he alleged were receiving additional one-sixth pay increments.

During departmental meetings in 2013, Smith objected to what he viewed as "unethical practices" by his colleagues. He suggested, without presenting details, that some of his colleagues manipulated their class enrollment numbers to keep their jobs and their one-sixth assignments. There were no administrators present in these meetings.

In Fall 2015, Smith had the following class schedule:

Period 0 – Opportunity Class
Period 2 – Work Experience Coordinator
Period 4 – Work Experience Coordinator
Period 5 – Work Experience
Period 6 – Work Experience
Period 7 – Work Experience

As part of Smith's Work Experience Coordinator duties, he worked with students at Desert Winds High School and Knight High School. Of Smith's two free periods, one was designated his preparation period and the other was a vacant period.

Smith's zero period Opportunity Class was a class in which seniors could make up credits. Brett Neal (Neal), who replaced Bryant as Assistant Superintendent of Personnel in 2013, testified that some Opportunity Classes are paid hourly while others are treated as one-

sixth assignments, but he did not testify as to what distinguishes these two types of Opportunity Classes from each other. In this instance, Smith e-mailed Knight High School Assistant Vice Principal Aaron Ritter (Ritter) on August 28, 2015, agreeing with Neal that his zero period Opportunity Class should be an hourly position and not a one-sixth assignment.

On November 6, 2015, Smith filed a grievance based on what he alleged was the District's refusal to provide him "equitable access to income opportunities over many years." He claimed the District's actions were retaliation for his protected activities. On November 13, 2015, Smith and Neal met to discuss the grievance. Neal denied the grievance at this meeting.

On November 16, 2015, Smith and AVTA President Daniel Shy met with Neal. At the meeting, Neal offered Smith two one-sixth assignments in exchange for his agreement to leave the District in June 2016. Smith rejected the offer.

On December 4, 2015, Smith submitted a written complaint to the District's Board of Trustees alleging hostile treatment by Neal. Specifically, Smith asserted that Neal refused to provide Smith with one-sixth assignments, and Smith complained about his interactions with Neal during discussions about Smith's possible mutual separation from the District. Smith believed he was being retaliated against for having approached the District about alleged unethical practices in the Work Experience department. Neal was aware of Smith's complaint.

On December 18, 2015, Ritter e-mailed Smith his Spring 2016 schedule, which was as follows:

> Period 1 – Preparation period
> Period 2 – Work Experience Coordinator
> Period 3 – Algebra 1
> Period 4 – Algebra 2
> Period 5 – Work Experience Coordinator
> Period 6 – Work Experience Coordinator

As part of the schedule change, Smith no longer served as a Work Experience Coordinator for Desert Winds High School. Neal testified that Smith's Work Experience classes were collapsed due to low enrollment. Desert Winds students were given the option of taking another elective or taking Work Experience at Palmdale High School or Lancaster High School. Smith did not lose any pay as a result of the schedule change.

On January 11, 2016, Ritter e-mailed Smith to ask whether he wanted to continue to teach the zero period Opportunity Class he had taught in the Fall of 2015, which would continue to be paid at the hourly rate. Smith declined. Smith testified that on the same date he filed a complaint against Neal regarding "all this stuff, what [Neal] was doing, changing [his] schedule." However, Smith was unable to recall with whom he filed the complaint and whether he sent it to Neal. There is no such complaint in the record.

Smith ultimately retired from the District in June 2016.

DISCUSSION

I. Credibility Issues

Smith excepts to certain credibility determinations in the proposed decision. The Board defers to an ALJ's findings of fact involving credibility determinations "unless they are unsupported by the record as a whole." (*Anaheim Union High School District* (2016) PERB Decision No. 2504, p. 14.) This is particularly true where the ALJ's credibility assessment is based upon firsthand observation of witness testimony. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 12.) As the ultimate finder of fact, however, the Board is free to draw contrary inferences from the evidence presented, and to form its own conclusions. (*Los Angeles Unified School District* (2016) PERB Decision No. 2479, p. 13.)

Where Neal's and Smith's testimony conflicted, the ALJ credited Neal's testimony over Smith's based largely on Neal's clear and consistent responses during direct and cross-examination. Smith urges us to reach contrary credibility determinations for a number of reasons, including on the basis that Neal allegedly did not testify accurately about the inclusion of a credit retrieval class in Smith's Fall 2015 schedule. Our review of the record, however, does not reveal evidence that Neal testified inaccurately.

On the other hand, the ALJ found Smith's testimony was at times contradicted by documentary evidence. As an example, the ALJ questioned Smith's insistence that his zero period Opportunity Class was not an hourly assignment, despite the fact that the District introduced into evidence Smith's own e-mail agreeing that it should be an hourly assignment. Smith's testimony regarding his zero period class also appears to have been internally contradictory, as he testified that the Opportunity Class served as "an opportunity to retrieve credits," yet he denied that it was a credit retrieval class. Smith later confirmed that his zero period Opportunity Class was, in fact, a credit retrieval class. Although there may be a reasonable explanation for Smith's confusing testimony, no explanation has been provided, and we do not find that the record favors Smith's testimony over Neal's. In these circumstances, we decline to disturb the ALJ's credibility determinations.

II. The District's Removal of Certain Assignments from Smith[2]

For the reasons discussed below, we also agree with the ALJ that Smith did not prove by a preponderance of the evidence that the District retaliated against him for protected activity. EERA prohibits employers from retaliating or discriminating against employees because of their exercise of protected rights under the Act. (EERA, § 3453.5, subd. (a).) To demonstrate that an employer has discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210,.) In this case, Smith has established the first three elements but has not established the fourth element.

A. Protected Activity & Employer Knowledge Thereof

There is no dispute that Smith engaged in protected activity by filing a grievance on November 6, 2015, and by requesting and having union representation at the November 16, 2015 meeting with Neal. There is similarly no dispute that the District had knowledge of these protected activities.

The ALJ declined to find that Smith engaged in protected activity by filing a January 11, 2016 complaint against Neal due to insufficient evidence that Smith actually filed

[2] Although neither party excepted to the ALJ's legal conclusions regarding Smith's 2011 letter to Bryant, 2013 statements in department meetings, 2015 written complaint to the Board of Trustees, or the adverse consequences caused by the District's removal of three Work Experience classes from his work schedule, we address them sua sponte to prevent the ALJ's analysis of those issues from becoming Board precedent. (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; *ABC Unified School District* (1990) PERB Decision No. 831b, p. 4.)

such a complaint. Smith has not pointed to any reason why we should disturb this finding, and we find nothing in the record to support doing so.

We disagree, however, with the proposed decision's conclusions that Smith did not engage in protected activity in his 2011 letter to Bryant, his 2013 statements in department meetings about alleged unethical workplace practices, and his 2015 written complaint to the Board of Trustees alleging hostile treatment by Neal. In reaching these conclusions, the ALJ relied on three Board decisions holding that, to be protected under our statutes, an employee's complaints to management must relate to group activity.[3] But in *Walnut Valley Unified School District* (2016) PERB Decision No. 2495 (*Walnut Valley*), we disavowed those same decisions to the extent they suggested that an employee's complaint to management about his or her own working conditions would not be protected activity under EERA's right of self-representation. (*Id*. at pp. 17-19.) Applying *Walnut Valley*, we find that Smith's 2011 letter to Bryant, his 2013 statements in department meetings, and his 2015 written complaint to the Board of Trustees constituted exercises of his right to self-representation because each concerned his working conditions. Further, the District had knowledge of the 2011 letter and 2015 written complaint. Conversely, there is no evidence that any of the management representatives involved in establishing Smith's Spring 2016 class schedule knew he had raised allegations of unethical behavior in 2013 department meetings.

B. Adverse Action

In determining whether an employer's action is adverse, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Chula Vista Elementary*

[3] *San Joaquin Delta Community College District* (2010) PERB Decision No. 2091; *County of Riverside* (2009) PERB Decision No. 2090-M; *Los Angeles Unified School District* (2003) PERB Decision No. 1552.

School District (2018) PERB Decision No. 2586, pp. 24-25.) "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." (*Id*. at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12 (*Newark*).)

We agree the District took actions against Smith that were adverse under the *Newark* standard. On December 18, 2015, the District sent Smith a Spring 2016 schedule that did not include the zero period Opportunity Class he had been teaching, a change that would reduce Smith's compensation.[4] The ALJ also properly found the District took adverse action by refusing to offer Smith one-sixth assignments that he desired in math and Work Experience.[5]

We disagree, however, with the ALJ's conclusion that the removal of three Work Experience classes from Smith's schedule was not an adverse action. The ALJ correctly noted that Smith did not lose compensation when the District removed these classes. However, that does not end our inquiry because a charging party need not prove a loss of compensation to show that an action was objectively adverse. (E.g., *Fresno County Office of Education* (2004) PERB Decision No. 1674, pp. 13-14 [involuntary reassignment to less favorable working conditions found adverse despite no loss in pay]; *Pleasant Valley School District* (1988) PERB

[4] The ALJ properly found that the District's removal of Smith's zero period Opportunity Class via Ritter's December 18, 2015 e-mail constituted an adverse action as of that date, as the District apparently took this action without Smith's consent. If the ALJ had found the action to have been retaliatory or otherwise unlawful, then he would have had to consider, at least as a remedial matter, that the District offered Smith the zero period Opportunity Class on January 11, 2016, and he turned it down.

[5] To the extent Smith argued that the District took adverse action against him by refusing to pay him at the one-sixth rate for his zero period Opportunity Class, we reject this argument. As noted *ante*, Smith conceded in his August 28, 2015 e-mail to Ritter that the class was appropriately paid at the hourly rate.

Decision No. 708, at pp. 4-5, 11-12 [same].) In the present circumstances, a reasonable person might perceive Smith's revised schedule—without the Work Experience courses—to be less prestigious, to be a step down on the career ladder, or to feature lesser working conditions. (*Regents of the University of California (Irvine)* (2016) PERB Decision No. 2493-H, p. 35.) For instance, removing all of Smith's Work Experience classes could have jeopardized his future career prospects as a Work Experience teacher. We thus find the District also took adverse action against Smith by removing his three Work Experience classes.

C. Nexus Between Protected Activity and Adverse Action

Although we find additional protected activity and adverse action beyond that found in the proposed decision, these additional findings do not change the outcome of this case. Like the ALJ, we find insufficient evidence establishing that the District took any adverse action against Smith because of his protected activity. Indeed, to the contrary, the District provided credible non-discriminatory reasons for all the actions it took, and Smith did not carry his burden of proving these reasons to be pretext or that the District had a discriminatory motive.

In sum, while Smith engaged in protected activity, the District knew of the activity, and Smith suffered adverse action, we agree with the ALJ that Smith failed to prove retaliation. We therefore affirm the proposed decision.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-6094-E are DISMISSED.

Members Banks and Shiners joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

EUGENE SMITH, Charging Party, v. ANTELOPE VALLEY UNION HIGH SCHOOL DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-6094-E PROPOSED DECISION (May 24, 2017)

Appearances: Eugene Smith on his own behalf; Bridget L. Cook, General Counsel, for the Antelope Valley Union High School District.

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

INTRODUCTION

In this case, a public school employee alleges that a public school employer violated the Educational Employment Relations Act (EERA)[1] by removing classes from his work schedule and refusing to assign him a full schedule of classes and/or extra-duty assignments. The employer denies committing any unfair practices.

PROCEDURAL HISTORY

On December 21, 2015, Eugene Smith (Smith) filed an unfair practice charge against the Antelope Valley Union High School District (District). On January 14, 2016, Smith filed first and second amended charges. On January 29, 2016, Smith filed a third amended charge.

On August 9, 2016, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging the District violated EERA

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

section 3543.5, subdivision (a), by: (1) removing work experience courses and a credit retrieval course from Smith's work schedule; and (2) refusing to assign Smith a full schedule of classes and/or any extra-duty assignments. All other allegations were dismissed.[2] No timely appeal of the partial dismissal was filed.

On September 6, 2016, the District filed its answer to the complaint denying any violation of EERA and setting forth its affirmative defenses.

On September 22, 2016, an informal settlement conference was held, but the matter was not resolved.

On November 17, 2016, Smith filed a fourth amended charge, which was considered as a request to amend the complaint. The fourth amended charge alleged the District placed Smith on paid administrative leave in February 2016 and that Smith retired under duress in April 2016.

On November 21, 2016, the request to amend the complaint was denied because the new allegations in the fourth amended charge were untimely.[3]

Formal hearing was held on December 14 and 15, 2016. Smith testified on his own behalf. Brett Neal (Neal), the District's Assistant Superintendent of Personnel, testified on behalf of the District.

On January 3, 2017, Smith filed a document titled, "separate charge to challenge sworn testimony of Brett Neal: case LA-CE-6094-E, December 15, 2015."

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[2] The dismissed allegations concerned allegations regarding the District's conduct that occurred outside the applicable statute of limitations and allegations that the District colluded with the exclusive representative against Smith.

[3] Although evidence was presented at the hearing concerning Smith's placement on administrative leave and subsequent retirement, whether those actions constituted retaliation under EERA will not be considered.

The matter was submitted for proposed decision with the submission of post-hearing briefs on February 17, 2017.

Motion to Reopen the Record

Smith's January 3, 2017 filing will be considered as a motion to reopen the record since it seeks to introduce new documents into evidence. When considering a motion to reopen the record to admit new evidence, the Board applies the standard set forth in PERB Regulation 32410, subdivision (a),[4] for a request for reconsideration based on the discovery of new evidence.[5] (*State of California (Department of Corrections & Rehabilitation)* (2010) PERB Decision No. 2136-S, pp. 2-3, citing *State of California (Department of Parks and Recreation)* (1995) PERB Decision No. 1125-S.) The regulation provides in relevant part:

> A request for reconsideration based upon the discovery of new evidence must be supported by a declaration under penalty of perjury which establishes that the evidence: (1) was not previously available; (2) could not have been discovered prior to the hearing with the exercise of reasonable diligence; (3) was submitted within a reasonable time of its discovery; (4) is relevant to the issue sought to be reconsidered; and (5) impacts or alters the decision of the previously decided case.

Smith's motion to reopen the record includes what Smith states are portions of "personnel schedules" presented to the District's Board of Trustees on August 19, 2015,

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

[5] PERB Regulations governing the conduct of unfair practice proceedings (PERB Regulations 32165 through 32230) do not have a similar regulation for reopening an evidentiary hearing record once the formal hearing has been closed. However, PERB Regulations 32190 and 32170, subdivisions (a), (d), and (f), taken together arguably authorize the ALJ to reopen the hearing to take new evidence. Regardless, it seems unlikely that the ALJ could reopen the hearing under a procedure which is less restrictive than that outlined by the Board for itself in PERB Regulation 32410, subdivision (a). The Board's own procedure, moreover, provides a useful framework form which ALJs may evaluate requests to consider new evidence, in the absence of more specific guidance from PERB's Regulations or from the Legislature.

September 2, 2015, October 7, 2015, November 4, 2015, and December 9, 2015. Smith's motion states that he obtained these documents from the District's website, and Smith seeks to introduce these documents to impeach Neal's testimony regarding his knowledge of Smith and other employees' schedules.

To begin with, Smith's motion does not include the required declaration under penalty of perjury, and the motion can be denied on that basis alone. Additionally, the documents Smith seeks to enter into the record were generated prior to the hearing and available for examination on the District's website. There is nothing to indicate Smith did not have access to these documents prior to the hearing. In fact, Smith's testimony makes multiple references to his review of personnel records, which he used to form the belief that he was being inappropriately denied One-Sixth assignments and the corresponding extra-duty pay attached to those assignments. Based on these reasons, Smith's motion to reopen the record is denied.

FINDINGS OF FACT

Jurisdiction

Smith was a public school employee within the meaning of EERA section 3540.1, subdivision (j), and was employed by the District as a Work Experience Coordinator. He possesses a teaching credential that authorizes him to teach math at the secondary level.

The District is a public school employer pursuant to EERA section 3540.1, subdivision (k). There are roughly 22,000 students in the District spread across 14 school sites.

The Collective Bargaining Agreement

Neal became the District's Assistant Superintendent of Personnel in 2013. Since that time, he has served as the District's chief negotiator. All grievances also go through his office, and he participates in grievance meetings himself.

The Antelope Valley Teachers Association (AVTA) is an exclusive representative within the meaning of EERA section 3540.1, subdivision (e), and represents a unit of certificated employees within the District that includes Smith.

At all relevant times, AVTA and the District were parties to a collective bargaining agreement (CBA) whose term was July 1, 2013 through June 30, 2016. Relevant provisions are as follows:

Article 4.1

> An individual unit member's daily starting and/or ending time may be adjusted after the commencement of the regular school year (to allow for 0 and 7th period offerings) provided the number of school-based hours are in accordance with this article and the change is agreed to by the unit member. The Association shall be notified ten (10) days in advance of any such change in the unit member's workday. Notification shall be sent to the current Association President at his/her District e-mail address.

Article 4.2.2

> School Work Experience teachers will receive a regular preparation period, plus one (1) period for processing work experience permits of students enrolled in their Work Experience classes. Additionally, School Work Experience teachers will receive a release period(s) to evaluate job sites of students for whom they have issued work permits, exclusive of permits issued to students enrolled in their Work Experience classes, according to the following schedule.
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> 1 to 100 students: one (1) release period
> 101 to 200 students: two (2) release periods
> More than 200 students: three (3) release periods

Article 4.5

Unit members who are assigned or who volunteer to serve as period substitutes during conference/preparation period shall receive compensation according to the following:

First five (5) periods per month at the hourly rate of $33.18
Any additional periods per month at the hourly rate of $38.99

Article 4.6

There shall be a ratio of five teaching periods to one conference/preparation period for each two-week time period for unit members. Where a teacher agrees to undertake an assignment of an additional period of teaching beyond the regular five (5) periods of teaching, such unit member shall receive additional compensation at the prorate salary which is 0.1667 times the salary for five teaching periods for each day he/she actually teaches the additional period and for each day he/she is scheduled to teach the additional period but is absent on paid leave. All regular assignments shall include at least one conference/preparation period during each regular school day. If the District determines that there is a need for an overall increase in the number of semester class sections, the District will give notice thereof to the Association.

Article 4.7

One-Sixth assignments shall be distributed according to the following priorities:

a) Program Needs.
b) Master Schedule considerations may limit the period in which a section is offered and/or the manner in which sections may be moved or rearranged.
c) Credential authorization.
d) The District shall, where possible, give priority to teachers who are already teaching within a department which is adding sections.
e) Seniority of unit members.
f) Recency of experience in teaching the content of the section.

Article 6.0.4

> Reassignment means a change in discipline (e.g., [e]nglish, math, science) a unit member is assigned to teach within the same school upon the completion of the master schedule each semester. The provisions of this Article do not apply to changes of actual courses taught by unit members that are within the same discipline.

Article 6.0.4.2

> Involuntary reassignments are those initiated by the District and may be the result of, but are not limited to, enrollment changes, program changes, school closures, changes in curriculum or course offerings, educational needs of the pupils, or staff vacancies.

Article 6.1.3

> Before involuntary reassignments are made during the school year, the site administrator shall post for three (3) days the site opening for unit member consideration. During the summer, however, the administration shall attempt to contact only those unit members who have provided a written expression of interest in a particular area of the curriculum or a particular job classification.

Article 6.1.6

> Mid-year reassignments of unit members to meet unanticipated needs as a result of changes in enrollment, changes in graduation requirements, or changes in the composition of the bargaining unit due to retirements, resignations, dismissals or leaves, may be made by the site administrator for the balance of the school year after consultation with the site specialists and affected unit member(s).

Background

On November 3, 1997, the District hired Smith to teach math at Littlerock High School (LHS). In 2003, Smith was transferred to Knight High School (KHS) where he taught math for two years before becoming the Work Experience Coordinator at the site. Neal, who was the

principal of KHS at the time, thought Smith would be a good fit for the Work Experience Coordinator position because of his positive interactions with students.

There are six Work Experience Coordinators in the District. Work Experience Coordinators are typically assigned to oversee students at more than one school site. They are responsible for issuing work permits to students and monitoring their employment activities. Work Experience Coordinators teach a Work Experience class where they meet with students at least once a week to check up on them. Work Experience Coordinators write work permits for students in their Work Experience classes as well as any other students on campus who need a work permit, but have elected not to take the Work Experience class. Work Experience Coordinators receive a six percent pay differential in addition to extra salary for working 13 more days than a classroom teacher.

A large part of a Work Experience Coordinator's duties are conducted off campus, including meeting with employers at the job site, checking working conditions, and visiting students at their work site. They are also responsible for ensuring that students progress in school while fulfilling their obligations at work. As a Work Experience Coordinator, Smith spent a considerable amount of time in the community interfacing with employers and checking up on students at their workplace. This would sometimes require him to work odd hours, such as very early in the morning or very late at night.

Neal oversees the Work Experience department's budget. Although he monitors the program in terms of its overall performance in the District, he does not manage its day-to-day operations.

The Current Dispute

On August 19, 2011, Smith e-mailed a letter to Mark Bryant (Bryant), the District's then Assistant Superintendent of Personnel. Smith's letter stated the Work Experience program had low enrollment, which he attributed to the economic recession. As a result, Smith believed his workload did not justify his salary. He offered to teach two math classes to get a "full load," which he believed would relieve the District of having to pay other teachers One-Sixth extra-duty pay to teach those classes.

On September 7, 2012, Smith mailed a letter to all teachers on campus regarding the issue of student tardiness on campus. Smith urged the union to demand more supervision in the hallways from classified staff so teachers would not be required to divert their attention from their classes to do so.

Smith testified that during department meetings in 2013, he raised objections to what he viewed as "unethical practices" where some of his colleagues devised ways to manipulate their numbers to keep their jobs and their One-Sixth assignments. Smith did not articulate specifics regarding how his colleagues were manipulating their numbers. There were no administrators present in these meetings.

In Fall 2015, Smith's class schedule was as follows:

Period 0 – Opportunity Class
Period 2 – Work Experience Coordinator
Period 4 – Work Experience Coordinator
Period 5 – Work Experience
Period 6 – Work Experience
Period 7 – Work Experience

Smith was also assigned to be the Work Experience Coordinator for students at Desert Winds High School (DWHS) in addition to KHS. Of Smith's two free periods, one was designated his preparation period and the other was a vacant period.

Smith's zero period Opportunity Class was a class where high school seniors could make up credits. Neal testified that he plays a predominant role in determining staffing needs for sites. He stated the Opportunity Class Smith taught was not eligible for One-Sixth extra-duty pay because it was deemed part of the supplemental instruction program, which is assigned on an hourly basis per Article 4.5. However, he also testified there are Opportunity Classes that are treated like subject matter classes instead of as part of the supplemental instruction program. Some of these classes are also taught during zero period. Neal did not testify as to what distinguishes the two types of Opportunity Classes from each another, but Smith admitted to sending an e-mail to KHS Assistant Vice-Principal Aaron Ritter (Ritter) on August 28, 2015, agreeing with Neal that his zero period Opportunity Class should be an hourly position and not a One-Sixth assignment.

There were roughly twenty students enrolled between Smith's Work Experience classes in Fall 2015, which Smith considered to be low enrollment. If there are low enrollment numbers in a program, the District will work with site administrators to collapse those classes and move funds into successful or growing programs.

On October 19, 2015, Neal received a letter from Smith where Smith offered to retire from the District effective June 30, 2016, in exchange for being placed on paid administrative leave or in a role that did not require regular attendance on site. Prior to this offer, Smith had sent an e-mail to Neil on February 12, 2014, offering to resign his position in exchange for the District "buying out" his contract ending on June 30, 2014. Neal met with Smith on November 2, 2015, and discussed Smith's offer. Neal testified that he never told Smith he was going to take away his job. However, he did discuss Smith's low enrollment in his Work Experience classes and how that may result in the need to collapse some of his classes.

On November 6, 2015, Smith filed a grievance stating in part:

> This complaint addresses the refusal of the district to provide equitable access to income opportunities over many years. I have been denied work on a regular basis while colleagues in my department have reaped substantial benefit. I argue these actions are retaliatory in nature due to my advocacy activities.

Smith believed that he was being inappropriately denied opportunities for One-Sixth assignments. He testified that he reviewed documents presented to the Board of Trustees that showed upwards of 56 One-Sixth assignments in the District. However, Smith did not know which teaching credentials the teachers who received these assignments possessed or what their circumstances were. None of them were teachers at KHS.

On November 13, 2015, Smith met with Neal to discuss Smith's grievance. Neal denied the grievance at this meeting. He also discussed the type of assignment Smith would have if his Work Experience classes needed to be collapsed. Since Smith was credentialed to teach math, the District wanted Smith to teach math to supplement his assignment as a Work Experience Coordinator.

On November 16, 2015, Smith and Daniel Shy (Shy), the AVTA President, met with Neal. Neal offered to give Smith two One-Sixth assignments in exchange for his agreement to leave the District in June 2016. Smith rejected the offer. At the hearing, Smith testified Neal stated he would not receive any One-Sixth assignments unless he agreed to leave the District. Neal denied making these statements.

On November 18, 2015, Smith e-mailed Neal restating his willingness to retire from the District on June 30, 2016, if certain terms were met. In addition to his retirement, Smith stated he would drop his grievance. Later that day, Smith e-mailed David Vierra, the District's

Superintendent, and stated he made an offer to Neal where he would teach four Algebra 1 classes and write work permits for two One-Sixth assignments until June 2017 then retire.

On November 30, 2015, the District sent Smith a proposal where he would retire on June 30, 2016, in exchange for being placed on paid administrative leave and withdrawing all claims against the District. On December 1, 2015, Smith rejected the District's proposal because he did not want to waive his right to pursue his grievance or charges filed with the Equal Employment Opportunity Commission (EEOC).

In December 2015, Smith sent Neal a letter asserting that Smith had been the target of retaliation in the work place and had filed a complaint with the EEOC. He also stated he had been ostracized when he reported alleged corruption in his department to Neal. Smith's letter also offers a proposal that he would retire in June 2017 in exchange for teaching four periods of Algebra 1 and three periods of handling work permits at his school site with payment for two One-Sixth assignments.

On December 14, 2015, Smith submitted a letter to the District's Board of Trustees complaining of hostile treatment from Neal. Specifically, Smith complained of Neal's refusal to provide Smith with One-Sixth assignments and his interactions with Smith during discussions about Smith's possible mutual separation from the District. The letter expressed Smith's belief that he was being retaliated against for having approached the District about alleged unethical practices in the Work Experience department. Smith sought to negotiate directly with the Board of Trustees regarding his mutual separation from the District. Neal testified that he had seen Smith's complaint and recalled it being presented to the Board of Trustees.

On December 18, 2015, Ritter e-mailed Smith with his new Spring 2016 schedule, which was as follows:

Period 1 – Preparation period
Period 2 – Work Experience Coordinator
Period 3 – Algebra 1
Period 4 – Algebra 2
Period 5 – Work Experience Coordinator
Period 6 – Work Experience coordinator

In addition to the new schedule, the District told Smith he no longer had to perform Work Experience Coordinator duties for DWHS. Neal testified that Smith's Work Experience classes were collapsed due to low enrollment. The students were given the option of taking another elective or taking Work Experience at Palmdale High School or LHS. Three students went to LHS and took Work Experience from Robin Stump-Whetzel (Stump-Whetzel), another Work Experience Coordinator. She did not receive any additional pay for taking on those students. Neal testified he reviewed Smith's enrollment numbers because Smith specifically mentioned his low enrollment. He did not review the enrollment numbers of other Work Experience Coordinators. Neal testified that he was aware that the Spring 2016 schedule gave Smith one more Work Experience Coordinator period than he was entitled to under the CBA, but it was Neal's hope that Smith could use that time to grow the program. Smith did not suffer any loss of pay as a result of the schedule change.

On December 28, 2015, Smith e-mailed Neal stating that he had filed a complaint against Neal with the California Commission on Teacher Credentialing (CCTC). Neal testified that apart from Smith's e-mail, he did not receive any notice of a complaint being filed against him with the CCTC. A copy of the complaint was not submitted into the hearing record.

In January 2016, Smith submitted a proposal to the District stating that he would retire from the District effective December 31, 2016, and withdraw all claims against the District in exchange for the following schedule:

Period 0 – Senior Opportunity
Period 1 – Coordinator
Period 2 – Coordinator
Period 3 – Algebra
Period 4 – Algebra
Period 5 – Work Experience
Period 6 – Coordinator

The District responded by presenting Smith with a settlement agreement resolving all claims that he had against the District in exchange for the following class schedule up to his retirement on December 31, 2016:

Period 0 – Senior Opportunity
Period 1 – Coordinator
Period 2 – Coordinator
Period 3 – Algebra
Period 4 – Algebra
Period 5 – Work Experience
Period 6 – Coordinator

Neal testified that this configuration of classes would entitle Smith to two One-Sixth assignments because he would be teaching seven full periods of classes, with his zero period Opportunity Class constituting a full class and not a part of the supplemental instruction program. Smith rejected the offer because it did not explicitly grant him two One-Sixth assignments and did not adequately resolve his grievance, which he believed to be worth $135,000.

On January 11, 2016, Ritter e-mailed Smith asking if he wanted to continue to teach his zero period Opportunity Class, which would be at the hourly rate. Smith replied that he did not wish to do so. Smith testified that on the same date he filed a complaint against Neal regarding

"all this stuff, what [Neal] was doing, changing [his] schedule." However, he was unable to state who he filed the complaint with or whether it was sent to Neal.

On January 21, 2016, Smith e-mailed Patricia Beane (Beane), another Work Experience Coordinator, stating:

> pat [sic], someone told me they were suspicious about your immigration status when you were hired by the district.
>
> I have known this for a long time, but I never knew what the deal was. I just wanted to share this with you.

Smith testified at some point in time he heard a rumor that Beane did not have proper immigration status. However, apart from the rumor, Smith had no independent knowledge of Beane's immigration status. Beane forwarded Smith's e-mail to Shy, who then forwarded it on to Neal.

On February 5, 2016, Smith e-mailed Stump-Whetzel stating:

> i [sic] have filed a grievance on the placement of KHS work experience students at LHS[.] in [sic] the grievance, i [sic] cite the rumored illegal immigration status of one coordinator and the lack of certification of half the staff.
>
> regrettably [sic], i [sic] do not feel like i [sic] have any other choices at this time.
>
> as [sic] department chair, I feel obligated to advise you of this action.

Stump-Whetzel forwarded Smith's e-mail to Neal.

On February 8, 2016, Smith sent a text message to Beane stating:

> Pat. [Neal] is trying to take my job. I am fighting with everything I have to stop this threat. Everything.

On February 9, 2016, Smith sent two more text messages to Beane stating:

> Immigration info came from [Stump-Whetzel]. She was talking trash about u [sic] and brought it up. [Neal] is trying to take my job. And so it goes.
>
> Ask yourself how else I would know.

On February 11, 2016, Smith sent an e-mail to members of the California Association of Work Experience Educators questioning Stump-Whetzel's character, stating that she took students away from him and was putting his job in jeopardy. The e-mail also stated the District's Work Experience Coordinators lacked appropriate certification, had plotted to "scam" the District, and at least one of them had unresolved immigration issues. Stump-Whetzel forwarded Smith's e-mail to Neal.

On February 14, 2016, Stump-Whetzel filed a formal complaint against Smith based on what she described to be "erratic behavior" and expressed concern over the safety of all female Work Experience Coordinators. Neal placed Smith on paid administrative leave and initiated an investigation into the complaint.

On April 12, 2016, Smith submitted his retirement from the District, effective June 30, 2016. He testified that he submitted his retirement because he feared that the District was going to take action affecting his medical benefits. Neal testified that at the time Smith submitted his retirement, the District had concluded its investigation, but had made no decision as to what course of action to pursue.

ISSUES

1. Did the District retaliate against Smith by removing Work Experience courses and a credit retrieval course from his work schedule in December 2015?

2. Did the District retaliate against Smith by refusing to assign him One-Sixth assignments from November 2015 through February of 2016?

CONCLUSIONS OF LAW

To demonstrate that an employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 5-6 (*Novato*).)

A. Protected Activity

The complaint enumerates six protected acts by Smith: (1) sending a letter to Bryant in 2011 regarding the manner in which the District assigns classes; (2) notifying the District in 2011 of unethical practices in the Work Experience department at KHS; (3) filing a grievance on October 30, 2015; (4) requesting representation from AVTA for meetings with the District in September, October, and November 2015; (5) sending a complaint to the District's Board of Trustees on December 14, 2015, regarding class assignments; and (6) filing a complaint against Neal on January 11, 2016.

During the formal hearing, Smith also presented evidence of a September 7, 2012 letter he sent to staff at KHS regarding student tardiness on campus. Consideration of protected acts not described in the PERB complaint is appropriate where those activities are related to the claims in the complaint and where the parties have had the full opportunity to litigate all issues. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, proposed decision at p. 15, citing *Lake Elsinore Unified School District* (2012) PERB Decision No. 2241.) These conditions are not met in this case. The September 7, 2012 letter is not mentioned in any of Smith's unfair practice charges, nor is it related to the claims in the

complaint. Additionally, Smith did not adequately put the District on notice that he intended to assert the letter constituted protected activity, which deprived the District of its ability to fully litigate the claim. Accordingly, the September 7, 2012 letter will not be considered.

1. 2011 Letter to Bryant

An employee can engage in protected activity when individually seeking to enforce rights stated in a collective bargaining agreement or when employees jointly prosecute alleged violations of workplace rights. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342, p. 13 (*Coachella*), citing *Jurupa Unified School District* (2012) PERB Decision No. 2283). PERB has held that individual complaints related to employment matters made by an employee to his superior are protected under an employee's right to self-representation. (*San Joaquin Delta Community College District* (2010) PERB Decision No. 2091, p. 3, citing *Pleasant Valley School District* (1988) PERB Decision No. 708.) However, the right to self-representation is not unlimited. (*Ibid.*) Employee complaints are only protected when those complaints "are a logical continuation of group activity." (*Ibid*., citing *County of Riverside* (2009) PERB Decision No. 2090-M and *Los Angeles Unified School District* (2003) PERB Decision No. 1552.) Where, however, an employee's complaint is undertaken alone and for his sole benefit, that individual's conduct is not protected. (*Ibid.*, citing *County of Riverside*, *supra*, PERB Decision No. 2090-M, *Los Angeles Unified School District*, *supra*, PERB Decision No. 1552, and *Oakdale Union Elementary School District* (1998) PERB Decision No. 1246.)

Smith's letter to Bryant is simply a request for a "full load" for himself so he can be eligible for a One-Sixth assignment with the corresponding extra-duty pay. It is not a continuation of group activity. There is no indication the letter was the result of any

conversations with his colleagues about their schedules or that it was generated as part of any negotiated dispute resolution procedure. It also does not seek to enforce any particular provisions of the CBA. Therefore, the letter does not constitute protected activity.[6]

2. 2013 Notice to the District of Unethical Practices

The Board's jurisdiction is limited to the determination of unfair practices arising under EERA and the other public sector labor statutes that it administers. (*Coachella, supra,* PERB Decision No. 2342, p. 12.) Whistleblowing in California K-12 public school is protected under Education Code section 44100 et seq. (*Ibid.*) It is well established under PERB precedent that the Board does not have jurisdiction to enforce a whistleblower statute or pure Education Code violations. (*Ibid*., citing *Union of American Physicians & Dentists (Menaster)* (2007) PERB Decision No. 1918-S; *Alvord Educator's Association (Bussman)* (2009) PERB Decision No. 2046; *American Federation of State, County and Municipal Employees, Council 36 (Moore)* (2011) PERB Decision No. 2165-M; *San Francisco Unified School District* (2009) PERB Decision No. 2040; *Wygant v. Victor Valley Joint Union High School Dist.* (1985) 168 Cal.App.3d 319, 323.)

While the specifics are unclear, the gravamen of Smith's complaints to his coworkers in 2013 were that some of them were misrepresenting enrollment numbers to maintain their positions and avoid layoff. Student enrollment and certificated employee layoffs are governed by the Education Code, and Smith's complaints are whistleblower complaints under the

[6] Even if Smith's letter to Bryant in 2011 was protected activity, it could not support a prima facie case of retaliation because it is unclear if Neal knew that Smith sent the letter to Bryant and a four-year gap between the letter and the adverse actions in 2015 and 2016 is too remote to support a finding of nexus based on temporal proximity.

Education Code. They do not seek to enforce workplace rights or other rights stated in the CBA. Therefore, Smith's complaints do not constitute protected activity.[7]

3. October 30, 2015 Grievance

Filing a grievance constitutes protected activity. (*Los Angeles Unified School District* (2012) PERB Decision No. 2244, p. 7, citing *San Bernardino City Unified School District* (1998) PERB Decision No. 1270.) Therefore, Smith engaged in protected activity when he filed a grievance on November 6, 2015.[8]

4. Requesting AVTA Representation

Requesting union representation for a meeting with a supervisor constitutes protected activity. (*Los Angeles Unified School District* (1991) PERB Decision No. 874, p. 5.) Therefore, Smith engaged in protected activity when he asked Shy to accompany him to a meeting with Neal on November 16, 2015. However, the record does not support the allegations in the complaint that Smith also asked for AVTA representation in September and October 2015. There is no evidence of Smith meeting with administrators in September 2015, and while Smith met with Neal in October 2015, there is no evidence that he asked for AVTA representation at that meeting.

5. December 14, 2015 Complaint to the Board of Trustees

Smith's complaint to the Board is essentially a complaint against Neal for not agreeing to Smith's terms for a mutually agreed separation from the District and is an attempt to

[7] Similar to Smith's letter to Bryant in 2011, even if his complaints of "unethical practice" in 2013 were protected activity, they could not support a prima facie case for retaliation because there is no evidence Neal knew about the complaints and a two-year gap between the complaints in 2013 and the adverse actions in 2015 and 2016 are too remote to support a finding of nexus based on temporal proximity.

[8] There is no evidence of Smith filing a grievance on October 30, 2015.

negotiate directly with the Board of Trustees. It is not a continuation of group activity. The complaint deals only with Smith's specific situation and does not seek to improve the terms and conditions of employment for any other employee or otherwise advocate on their behalf. Therefore, the complaint does not constitute protected activity.

6. January 11, 2016 Complaint against Neal

There is insufficient evidence to support a finding that Smith filed a complaint against Neal on January 11, 2016. A copy of the complaint is not in the record, and Smith's testimony alone is insufficient to corroborate the contents of the complaint. (See Cal. Evid. Code § 1523.) In addition, it is unclear with whom Smith filed the complaint. Accordingly, it has not been established that Smith engaged in protected activity by filing a complaint against Neal on January 11, 2016.[9]

B. Knowledge of Protected Activities

The charging party must prove that those responsible for the adverse acts knew of the protected activity. (*Los Angeles Unified School District* (2014) PERB Decision No. 2390, proposed decision p. 12; *Oakland Unified School District* (2009) PERB Decision No. 2061, pp. 8-9; *Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 5-6.)

Of the protected activities established in the record, Neal was aware Smith filed the grievance on November 6, 2015, because he met with Smith about the grievance on November 13, 2015. Neal was also aware Smith asked Shy to attend the meeting on November 16, 2015, because he was present at the meeting.

[9] Although Smith stated he filed a complaint against Neal with the CCTC on December 28, 2015, this complaint is also not in the record, and Smith's testimony alone is again insufficient to corroborate the contents of the complaint.

C. Adverse Action

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, p. 12.) In a later decision, the Board further explained that:

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

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

1. Removal of Work Experience and Opportunity Classes

The removal of Smith's three Work Experience classes did not have an adverse impact on his salary or benefits. He continued to receive the same pay as he did before those classes were removed from his schedule, including the six percent salary differential and the extra pay associated with him working 13 extra days each school year. Although his Work Experience classes were removed from his schedule, he remained a Work Experience Coordinator and had the same duties as he did before. Where an assignment does not result in any change in pay or benefits, the Charging Party must show that the assignment was objectively adverse in some other way. (*Compton Unified School District* (2003) PERB Decision No. 1518, proposed decision pp. 30-31.) Here, Smith made no such showing. Accordingly, the removal of his Work Experience classes from his schedule was not an adverse action.

The removal of the Opportunity Class impacted Smith's salary. The CBA entitled Smith to receive additional pay at an hourly rate for teaching the Opportunity Class. By removing this class from his schedule, he was deprived of the opportunity to receive extra

income. Accordingly, the removal of the Opportunity Class from Smith's schedule constituted an adverse action.

2. Refusal to Provide One-Sixth Assignments

The CBA entitles teachers who perform One-Sixth assignments to a pay differential equal to one-sixth of their salary. The refusal to provide Smith with One-Sixth assignments deprived him of the opportunity for this extra pay and constituted an adverse action.

D. Nexus

The adverse actions above occurred in close temporal proximity to Smith's protected activity. However, while 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, p. 23.), 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, p. 13.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S, p. 6.); (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. 20.); (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, p. 13.); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 17, citing *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, p. 10.) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786, p. 12.); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M, pp. 15-16.); or (7) any other facts that might demonstrate the employer's unlawful motive (*Novato*, *supra*, PERB Decision No. 210, pp. 6-7).

1. Removal of Opportunity Class

The record does not contain any circumstantial evidence besides timing to suggest the District removed Smith's Opportunity Class because of his protected activities. Smith did not establish which procedures the District must follow (if any) when removing classes that are part of the supplemental instructional program. Smith argues the Opportunity Class was never an hourly assignment and always part of his regular assignment. However, he admitted to sending an e-mail to Ritter on August 28, 2015, agreeing that the class was properly characterized as an hourly assignment. Therefore, it is found to have been part of the supplemental instructional program.

Smith argues the District failed to follow Article 4.1 of the CBA when it removed the Opportunity Class from his schedule because he never agreed to the removal of the Opportunity Class. However, on January 11, 2016, Smith explicitly told Ritter that he did not wish to teach the Opportunity Class. Therefore, the change to Smith's start time caused by the removal of the Opportunity Class was done with Smith's agreement.

Based on the above, Smith did not establish a nexus between his protected activity and the removal of his Opportunity Class. Accordingly, he did not establish a prima facie case for retaliation, and that allegation is dismissed.

2. Refusal to Provide One-Sixth Assignments

The record also does not contain any circumstantial evidence besides timing to suggest the District refused to assign Smith One-Sixth assignments because of his protected activities. Smith argues that he was treated differently than other employees who received One-Sixth assignments, but he does not states *how* he was treated differently apart from the fact that other employees received One-Sixth assignments and he did not. Smith admitted he did not work with any of those teachers and was unaware of those employees' circumstances, such as what their teaching credential authorized them to teach. Without any information about the teachers who received the One-Sixth assignments, it is not possible to determine whether Smith was qualified to teach those positions and was denied the opportunity to do so.

Smith asserts that Neal told him he would never receive a One-Sixth assignment unless he mutually agreed to separate from the District. Neal denied making any such statement. Neal's testimony is credited over Smith's where they conflict. The record includes statements from Smith that were later contradicted by evidence, such as his insistence that his Opportunity Class was not an hourly assignment. On the other hand, Neal's testimony was always clear and consistent throughout direct and cross-examination.

Based on the above, Smith did not establish a nexus between his protected activity and the District's failure to assign him One-Sixth assignments. Accordingly, he did not establish a prima facie case for retaliation, and that allegation is dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-6094-E, *Eugene Smith v. Antelope Valley Union High School District*, are hereby DISMISSED.

Right to Appeal

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served

on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)