STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ROBERT STOLK, Charging Party, v. MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-6052-E PERB Decision No. 2651 June 24, 2019

Appearances: Anthony Vasek, Representative, for Robert Stolk; Atkinson, Andelson, Loya, Ruud & Romo, by Paul Z. McGlocklin, Attorney, for Mt. San Jacinto Community College District.

Before Banks, Shiners, and Paulson, Members.

DECISION

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Robert Stolk (Stolk) to an administrative law judge's (ALJ) proposed decision (attached) dismissing the complaint and underlying unfair practice charge. The amended charge alleged that the Mt. San Jacinto Community College District (District) suspended Stolk from his duties as an Instructional Aide (IA) in the Chemistry Department in violation of the Educational Employment Relations Act (EERA)[1] because Stolk: (1) raised safety concerns about a professor's decision to use hydrofluoric acid, an especially corrosive chemical, in a laboratory experiment; and (2) previously invoked his contractual right to appeal discipline. The District's evidence, however, led the ALJ to conclude that it had disciplined Stolk because of a pattern of unsatisfactory performance, including inappropriate behavior

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

towards coworkers, overspending the department's supply budget, and failing to follow various directives. In his exceptions, Stolk contends the ALJ erred by crediting the testimony of the District's witnesses and failing to hold the District to its burden to prove its affirmative defense that it would have suspended him even if he had not engaged in statutorily-protected activity.

We have carefully reviewed the proposed decision, the entire record, the parties' submissions,[2] and the relevant legal authorities, and we agree with the ALJ that the preponderance of the evidence did not support the allegations of the complaint. We conclude that the factual findings in the proposed decision are supported by the record and that its legal conclusions are well reasoned and consistent with relevant authorities. Therefore, the Board adopts the proposed decision as its own, as supplemented by the following discussion.

BACKGROUND

The record evidence established the following relevant facts, which we briefly summarize for purposes of our discussion.

Stolk began working in the Chemistry Department at the District's San Jacinto campus in 2000. During the relevant time period, Stolk was an IA III, the second most senior grade in the class. IAs prepare substances and instruments for experiments throughout the semester, and it was Stolk's responsibility to order the necessary supplies and set up the required lab equipment. By all accounts, he was very skilled and excelled at handling chemicals, working with students, and setting up laboratory experiments. Even the Dean of Instruction, Carlos Tovares (Tovares), who ultimately initiated the discipline at issue in this case, acknowledged Stolk's professional competence.

[2] Stolk filed a reply to the District's opposition brief, to which the District objected. We overrule the District's objection and accept Stolk's reply for the reasons stated in *City of Milpitas* (2015) PERB Decision No. 2443-M, pp. 13-14.

It is also undisputed that Stolk took safety very seriously. Many of the chemicals used in the Chemistry Department's experiments are dangerous, and Stolk was scrupulous about labeling each chemical and ensuring it was stored and used correctly. Indeed, this commitment to safety lies at the heart of Stolk's case.

In December 2013, Carol Jones (Jones), an assistant chemistry professor, requested that Stolk purchase hydrofluoric acid for use in a routine demonstration. Hydrofluoric acid is a particularly dangerous chemical that can quickly cause significant bone and other tissue damage. Stolk questioned Jones's request, believing that the use of hydrofluoric acid was unnecessary given the availability of less dangerous alternative chemicals and because the lab was not equipped with the calcium gluconate counter-ion station necessary to counteract the effects of accidental exposure to hydrofluoric acid. When Jones persisted, Stolk responded that he did not wish to order hydrofluoric acid because it was too dangerous.

Subsequently, Stolk met with Tovares and relayed his concerns about Jones's desire to use hydrofluoric acid instead of a less dangerous alternative. The meeting did not produce the desired result. Rather, according to Stolk, Tovares and other District administrators began to target him for voicing his safety concerns.

In January 2014,[3] Tovares issued Stolk a written reprimand based on perceived performance deficiencies and poor interpersonal communications with another IA. Stolk wrote a rebuttal alleging, in part, that he was being disciplined due to his opposition to the use of hydrofluoric acid.

That March, Stolk submitted a purchase request for lab equipment that exceeded the Chemistry Department's annual $15,000 budget and resulted in a deficiency of $3,828. The

[3] Unless otherwise noted, all dates hereafter refer to 2014.

District was forced to transfer funds from other budgets to cover the shortfall. Since Stolk's job duties included managing the Department's budget and ordering supplies, Tovares believed he was responsible for the cost overrun and attempted to schedule a meeting with Stolk and Jones to discuss the matter. Stolk did not respond to Tovares's e-mails to schedule the meeting. Instead, he told Jones he was only available to meet on one day during his normal work hours. Stolk suggested at the hearing that he was unwilling to stay beyond his scheduled hours because the District was generally unwilling to pay overtime. Stolk also contended that the cost overrun was caused not by him but by a Galaxy[4] malfunction or by tampering with the program by unknown persons.

On April 30, severe windstorms struck the District's San Jacinto campus. The District sent an e-mail to all employees advising them not to come to campus or, if they were already there, to remain inside until further notice. Stolk was at work that day and received the e-mail. At some point, an administrative assistant, Debbie Perez-Flores (Perez-Flores), entered the lab and made an announcement, after which students proceeded to pack up their belongings and leave. Stolk was too far away to hear what she said. He claims an unnamed student told him that Perez-Flores had told everyone to leave. Since Stolk was concerned about storm damage to his home and car, he decided to leave the worksite based on this information.

The windstorm continued into May 1, and Tovares sent an e-mail that morning to all IAs informing them that the San Jacinto campus was closed for the day. He instructed all IAs to call his office and elect either to take a vacation day or report to Menifee Valley Campus for professional development. Stolk received Tovares's e-mail after he arrived at work; he

[4] Galaxy is a software system through which authorized users may purchase items from vendors, the cost of which are deducted from the Chemistry Department's supply budget.

decided to use a vacation day and went home. However, Stolk did not inform Tovares's office of his decision.

Later that day, Tovares e-mailed Stolk to find out where he had been both that day and the day before. He also instructed Stolk to contact Perez-Flores, who would schedule a meeting between Tovares and Stolk to discuss the absences. Stolk responded the next day stating that he elected to use a vacation day for May 1. However, he did not schedule a meeting as directed or otherwise respond to Tovares's e-mail.

On May 12, Jones complained to Tovares that Stolk had set up the wrong lab and was not following the syllabus. Tovares e-mailed Stolk and instructed him to follow Jones's directions. Stolk responded via e-mail that Jones had told him in the presence of another employee not to prepare the lab she was now complaining about. Tovares then went to the lab to see Stolk. Stolk told Tovares that he set the lab schedule at the beginning of the semester and Jones should have been aware of the lab Stolk had planned for that day.

On June 16, Tovares issued Stolk a Notice of Intended Disciplinary Action recommending a two-step demotion to IA I. The stated bases for the discipline were Stolk's overspending the Chemistry Department budget, his failure to respond appropriately to meeting requests, his unreported absences during the windstorm, and his failure to prepare Jones's requested lab, as well as his failure to attend a "mandatory" meeting for IAs.

Stolk wrote a lengthy rebuttal to the charges. He also later invoked a provision of the collective bargaining agreement (CBA) between the District and Stolk's exclusive representative that entitled to him to an evidentiary hearing to contest the demotion. A hearing never took place. Rather, over the course of the next year, after a failed settlement effort and the hiring of a new Interim Vice President of Human Resources, the District decided to modify

the discipline. In April 2015, the District issued Stolk a Notice of Intent to Suspend Without Pay in Lieu of Involuntary Demotion, proposing a 5-day suspension. The proposed suspension was upheld on June 23, 2015, after Stolk requested and received a *Skelly*[5] hearing. Under the CBA, employees have the right to an evidentiary hearing before the District's governing board only in cases of termination, demotion, or suspensions lasting more than five days. Thus, the District's decision to suspend Stolk for five days eliminated his opportunity to appeal the discipline through the District's formal hearing process, though he was entitled to submit a written appeal to the governing board.

Stolk served his suspension in July 2015. On December 31, 2016, he retired from the District.

DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, we are not required to analyze arguments and contentions that have been adequately addressed in the proposed decision. (*City of Calexico* (2017) PERB Decision No. 2541-M, pp. 1-2.) Nor does the Board need to address alleged errors that would not affect the result, particularly where the excepting party has simply reasserted claims without identifying a specific error of fact or law to justify reversal. (*Los Angeles Unified School District* (2015) PERB Decision No. 2432, p. 2.) Several of Stolk's exceptions repeat arguments made to and considered by the ALJ. Because the ALJ correctly applied the law to the facts, we need not address those exceptions. Instead we consider only those exceptions that raise arguments not considered by the ALJ.

[5] A *Skelly* hearing is a pre-disciplinary procedure wherein a public employee is afforded constitutionally-required pre-deprivation due process before losing a property right. The term derives from *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194.

The ALJ Correctly Dismissed the Complaint Allegations

To establish a prima facie case of retaliation in violation of EERA section 3543.5, subdivision (a), a charging party must show that: (1) the employee exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), pp. 6-8.) Once the charging party establishes a prima facie case, the burden shifts to the respondent to demonstrate "(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 (*Palo Verde USD*), pp. 18-19.)

In the light of the record evidence, the ALJ concluded that Stolk made a prima facie showing of retaliation, i.e., there was at least some reason to think the District disciplined him because of his protected activities of opposing the use of a dangerous chemical and invoking the protections of the CBA to challenge the proposed demotion. Turning to the District's affirmative defense, the ALJ examined the record and found that the District's proffered reasons for discipline were supported by the testimony and exhibits. The ALJ thus concluded that the District would have suspended Stolk even if he had not engaged in protected activity.

Ultimately, Stolk was left with the familiar task of persuading the ALJ that the evidence of discrimination was more probative of the District's true motivation than the District's evidence of its alternative motivations. The ALJ was not persuaded; he found it more likely than not that the District issued the 5-day suspension because management believed Tovares's concerns about Stolk to be true, and it arrived at its belief without regard to Stolk's protected

activities. The ALJ also rejected as insufficient Stolk's attempts to show that the District was wrong to believe Tovares, either because the accusations were factually untrue or because they relied on unfair assumptions or inferences. In all of this, the ALJ applied the burden-shifting framework adopted in *Novato, supra*, PERB Decision No. 210, pp. 6-8, and applied in countless cases since. (See, e.g., *Palo Verde USD, supra*, PERB Decision No. 2337, pp. 18-19.)

As previously mentioned, Stolk's exceptions largely reprise the arguments he made to the ALJ, though his principal focus is on the ALJ's credibility determinations. According to Stolk, the District's proffered reasons for its decision to discipline him are unworthy of belief because the decision-makers, most notably Tovares, had "unclean hands"[6] and gave self-serving, unreliable testimony regarding their motivations for disciplining Stolk. Stolk contends that the ALJ did not sufficiently scrutinize these motivations and thus failed to detect that Tovares and the other District administrators were being less than truthful.

The Board's established policy is not to overrule an ALJ's credibility determinations unless the relevant evidence convinces us the determinations are incorrect. (*State of California (Department of Social Services)* (2019) PERB Decision No. 2624-S, p. 11, citing *Anaheim Union High School District* (2016) PERB Decision No. 2504, p. 14 [Board normally defers to an ALJ's credibility determinations "unless they are unsupported by the record as a whole"];

[6] Traditionally, the doctrine of unclean hands is considered an equitable defense and "is invoked [against] one seeking relief in equity [who] has violated conscience, good faith or other equitable principles in his prior conduct." (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists, Local 1304, United Steelworkers of America, AFL-CIO* (1964) 227 Cal.App.2d 675, 727.) Since the doctrine is not strictly applicable here, we understand Stolk to imply that the District's witnesses were not worthy of belief because they conspired against him, behaved with manifest bias, or otherwise failed to act ethically during the discipline process. In the context of this case, we believe such concerns are best addressed as issues of credibility.

Trustees of the California State University (San Marcos) (2010) PERB Decision No. 2093-H, p. 3 [Board defers to ALJ credibility determinations absent evidence to support overturning such conclusions]; *Marin Community College District* (1995) PERB Decision No. 1092, p. 9 [ALJ is much better positioned to accurately assess witness credibility based upon firsthand observation than is the Board].) Having carefully examined the entire record, we find no basis for reversing the ALJ's credibility determinations.

Stolk also asserts that the District's reasons for disciplining him were pretextual because the evidence proved that he did not commit some of the alleged misconduct. But this argument fails because Stolk did not marshal sufficient admissible evidence to support his claim. As an example, Stolk failed to rebut or undermine the District's evidence that he was responsible for the budget overrun in March 2014. Stolk contends that the District's budgeting software application, Galaxy, should have alerted him to any cost overruns before processing his purchase request. Since it did not, it must have malfunctioned or been tampered with by nefarious actors. One can only arrive at such a conclusion by way of a rather lengthy series of inferences, each of which must be tethered to the evidence. But Stolk's theory rests almost entirely on his testimony and that of Rosaleen Gibbons, a Chemistry Department faculty member, who testified that Galaxy failed on two separate occasions to provide a warning of insufficient funds. Neither could explain this phenomenon. Indeed, none of the witnesses with sufficient demonstrated knowledge of the Galaxy software application testified as to how the software was supposed to function or under what circumstances it might fail to function as expected. In the absence of such evidence, we are left with the unrebutted facts that Stolk was responsible for ordering supplies through Galaxy and managing the Department budget, and IA IIIs, in general, are to ensure that such purchases adhere to the budget. Since Stolk was

unable to supply the evidence necessary to undermine the District's conclusion that he failed in his responsibility, we cannot agree with him that the budget overrun was a pretext for discipline and that retaliation was the District's true motivation.[7]

The overarching theme of Stolk's exceptions is his disagreement with the ALJ's conclusion that the District's evidence of lawful motivation for his suspension outweighed the evidence of retaliatory motive. But Stolk simply came forward with too little evidence of discriminatory intent to carry his ultimate burden to prove his case by a preponderance of the evidence. We therefore affirm the ALJ's dismissal of the complaint and underlying unfair practice charge.

The ALJ Correctly Applied the Unalleged Violation Doctrine

In addition to taking exception to the dismissal of the complaint, Stolk believes the ALJ failed to apply the unalleged violation doctrine to reach allegations not set out in the complaint, viz. that the District unlawfully denied him 2.5 hours of vacation time on April 30, 2014, and that he was constructively discharged when he was forced to retire in December 2016. We disagree.

Under the unalleged violation doctrine, PERB may consider allegations not included in

[7] Stolk argues that even if he engaged in the conduct described in the Notice of Intent to Suspend, that conduct was insufficiently egregious to warrant suspension. We reject Stolk's invitation to adopt a standard under which public employee discipline may be upheld only if the employer presents objective evidence that the employee's conduct "was so opprobrious, flagrant, insulting, defamatory, insubordinate, or fraught with malice as to cause substantial disruption of or material interference with [the employer's] operations." PERB uses this standard to determine whether an employee communication that would otherwise be protected under the relevant statute lost its protection because of its content or the manner in which it was communicated. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 16; *Rancho Santiago Community College District* (1986) PERB Decision No. 602, p. 13.) Stolk cites no authority—nor has our research uncovered any—for applying this standard outside the context of employee speech.

the charge or the complaint if: (1) the respondent has had adequate notice and opportunity to defend against the unalleged matter; (2) the unalleged conduct is intimately related to the subject matter of the complaint and is part of the same course of conduct; (3) the matter has been fully litigated; (4) the parties have had the opportunity to examine and be cross-examined on the issue; and (5) the unalleged conduct occurred within the same limitations period as those matters alleged in the complaint. (*Superior Court v. Public Employment Relations Board* (2018) 30 Cal.App.5th 158, 192-193; *State of California (Department of Social Services)* (2009) PERB Decision No. 2072-S, pp. 3–4.)

Here, the ALJ correctly applied these factors and determined that he could not consider the unalleged violations at issue in Stolk's exceptions. While Stolk argues that the District was on notice that he was seeking the lost vacation pay because he raised the issue of a make-whole remedy in his opening statement at the hearing, we agree with the ALJ that this allegation was untimely. With respect to the constructive discharge claim, Stolk alleges that he would not have retired had PERB processed his charge before his retirement date. Regardless, PERB issued the complaint approximately two months thereafter. At that time, Stolk could have amended the complaint or he could have filed another, timely charge alleging constructive discharge. He did neither. Since Stolk's arguments do not alter the analysis, we adopt the ALJ's conclusion that the unalleged violation doctrine did not apply in this case.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-6052-E are DISMISSED.

Members Shiners and Paulson joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ROBERT STOLK, Charging Party, v. MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-6052-E PROPOSED DECISION (December 15, 2017)

Appearances: Anthony G. Vasek, Representative, for Robert Stolk; Atkinson, Andelson, Loya, Ruud & Romo, by Paul Z. McGlocklin, Attorney, for Mt. San Jacinto Community College District.

Before Eric J. Cu, Administrative Law Judge.

INTRODUCTION

In this case, a former public school employee claims that a public school employer suspended him in retaliation for raising safety concerns in his workplace and for requesting a hearing to challenge proposed discipline. The employer denies that the former employee engaged in any protected activities and denies any retaliation.

PROCEDURAL HISTORY

Robert Stolk filed the instant unfair practice charge with Public Employment Relations Board (PERB or Board) on July 8, 2015. He accused his employer at the time, Mt. San Jacinto Community College District (District or College) of multiple Educational Employment Relations Act (EERA)[1] violations dating back to mid-2014. Stolk amended his charge on

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

August 24, 2015. The District filed position statements responding to both the original and the amended charge.

On November 8 2016, Stolk withdrew the allegations that the District (1) violated EERA sections 3543.5, subdivisions (b) or (d); (2) violated EERA by its conduct prior to January 8, 2015; (3) violated his right "to be free from harassment;" and (4) violated his right to a "good name." That same day, the PERB Office of the General Counsel issued a complaint alleging that the District violated EERA section 3543.5, subdivision (a), by issuing a notice of intent to suspend and administering a five-day suspension to Stolk in retaliation for refusing to procure a chemical for a colleague at the time and/or requesting a hearing regarding the District's contemplated discipline. On January 5, 2017, the District filed a timely answer to the complaint denying the substantive allegations and asserting multiple affirmative defenses.

An informal settlement conference was held on February 10, 2017, but the parties did not resolve the dispute. A formal hearing then took place over six days between June 7 and August 2, 2017.

The parties submitted closing briefs on November 9, 2017. At that point the record was considered closed and submitted for decision.

FINDINGS OF FACT

The Parties

The District is a public school employer within the meaning of EERA section 3540.1, subdivision (k). Before his retirement in 2016, Stolk was a public school employee within the meaning of EERA section 3540.1, subdivision (j). He worked at the District in classifications represented by a local chapter of California School Employees' Association (CSEA), which is an exclusive representative within the meaning of EERA section 3540.1, subdivision (e).

The Collective Bargaining Agreement

The District and CSEA are parties to a Collective Bargaining Agreement (CBA). CBA Section 2.3, states that the District may suspend provisions of the CBA during cases of extreme emergency requiring closure of the College, suspension of classes, or other substantial disruption. If this occurs, the District is required to meet with CSEA and attempt to reach agreement on which sections of the CBA are affected and for how long.

Article 5, covers hours and overtime. Full-time unit members may receive overtime or compensatory time off for work time in excess of their regular scheduled hours. Under Section 5.3, unit members are not permitted to volunteer time in an unpaid status for duties substantially similar to those contained in their job descriptions.

Article 14 covers discipline. Under Section 14.4, the District is required to notify unit members of proposed discipline, defined as termination, demotion, or a suspension greater than five days. That notice must inform the employee of his or her right to appeal the discipline through a hearing before the District's governing board or its designee under Administrative Procedure 7365 (AP 7365).[2] Section 14.5 describes the hearing process and allows the employee to present sworn witness testimony, cross-examine opposing witnesses, and present other evidence.

Section 14.10, provides for a different appeal process for suspensions of five days or less. Under that process, the unit member may appeal the process by submitting a written request to the governing board. The governing board will review the written request and, without a hearing, issue a decision within 30 days.

[2] AP 7365 governs discipline and dismissal for classified employees. It describes "discipline" as termination, demotion, and a suspension of more than five days. An employee subject to a final notice of disciplinary action is entitled to a hearing before the District's governing board or its designee.

Article 15 concerns vacation requests. Unit members should submit vacation requests at least two weeks in advance and must have prior approval from a supervisor. Under Section 15.6, unit members absent without approved vacation time may have that time deducted from their salary.

Article 19 discusses safety concerns. Unit members are expected to advise the District of unsafe conditions on District grounds. Unit members may report safety concerns either to their direct supervisor or to any faculty members they support.

The Instructional Aide Position

Chemistry Instructional Aides work with faculty in testing and preparing substances and instruments used in student or faculty laboratory experiments. This could involve physically setting up and calibrating lab equipment, mixing and handling chemical compounds, and disposing of those compounds after the lab. Faculty may ask Instructional Aides to conduct pre-runs of lab experiments to help ensure that students will be successful when they do the experiments for themselves. Some faculty request Instructional Aides to assist with actual lab work, such as helping students with lab experiments, performing demonstrations, and explaining lab and safety concepts. Dean of Instruction, Dr. Carlos Tovares explained that Instructional Aides act in a support role for faculty, but are supervised directly by him.

As one might expect, safety is an important concern in the lab. According to the job description for the position, Instructional Aide IIIs are expected to keep current on matters such as lab safety and handling hazardous materials. The position is likewise expected to implement procedures in order to comply with laws and regulations pertaining to safe operation in academic labs. Dr. Rosaleen Gibbons, currently the Department Chair for the

College Chemistry department, said she left Stolk in charge of day-to-day lab safety responsibilities, when the two worked together.

Instructional Aide IIIs also have some responsibility over the department supply budget. In the Chemistry department, Instructional Aide IIIs are assigned to order lab materials and equipment. Oftentimes, this involves using the Galaxy software system, where authorized users may purchase items from vendors. The cost of those purchases is eventually deducted from the Chemistry department supply budget. Instructional Aide IIIs may initiate purchases through Galaxy and are responsible for ensuring that purchases adhere to the budget.

The Galaxy Budget Software

Once a purchase is initiated through Galaxy, the system initiates a multi-level review process involving the department chair, the Office of Instruction, which oversees the various academic departments at the San Jacinto campus, and the District's Business Services Department. In the system, each review level is labeled an "approval" step, but Tovares described the process as merely making those in the chain aware of the various purchases as they are made. In his testimony, Tovares expressed that he would not be surprised if the other reviewers, simply indicated their "approval" without undergoing any significant review. However, he acknowledged not knowing how extensively others reviewed individual purchase requests. Tovares cited only one instance in which he rejected a purchase request through the Galaxy system, and that was because he did not believe the process could be completed before the end of the fiscal year. Tovares emphasized his expectation that Instructional Aide IIIs are primarily responsible for ensuring that the department has the funds necessary for the purchase. He said that Instructional Aide IIIs should maintain their own budget records or take other steps to ensure the budget is not exceeded.

If a purchase request made in the Galaxy system would exceed the budget, the system typically generates a pop-up style alert that there are insufficient funds in the budget category identified for the request. There was conflicting evidence about who can override this alert and continue with the purchase. In any event, the initiator of the request may try to complete the purchase by choosing another budget category or securing additional funds to cover the purchase. If a purchase request exceeds the budget and is completed without securing the funds for that purchase, it would result in an overage.

Gibbons testified about a budget overage she nearly created in or around January 2015, while initiating a purchase request for a gas chromatography mass spectrometer instrument. She said she attempted to make a purchase and was surprised to find out that the Galaxy software did not generate an insufficient funds alert. She said she notified Tovares that her purchase may exceed her budget and then she obtained the necessary funds through a grant.

Stolk's Employment History

In 2000, Stolk began working as an Instructional Aide II in the Chemistry department of the College's San Jacinto campus. His last position at the District was Instructional Aide III. It is undisputed that Stolk was very skilled when handling chemicals and lab equipment used in experiments. According to Gibbons, Stolk was very meticulous when using or storing chemicals and paid particular attention to lab safety. Tovares too, admitted that "everybody recognizes that Bob [Stolk] has these great skills" relating to setting up labs and maintaining lab equipment.

In the Fall 2013 semester, Dr. Carol Jones was the Interim Assistant Chemistry Professor at the San Jacinto campus. At that time, Gibbons worked as an adjunct faculty member, teaching Chemistry courses at both the San Jacinto and Menifee campuses. Stolk

described his working relationship with Jones as initially good. He testified that his interactions with her were "very polite, courteous, and professional." However, at some point, Stolk became concerned about Jones's attention to lab safety after a disagreement over how much yellow phosphorus to use in an unplanned combustion demonstration. Jones did not testify and had left the District by the time of the hearing in this case.

Tovares testified that Jones complained that Stolk was inflexible and not amenable to changes in her student lab schedule. Tovares also recalled Jones telling him that Stolk did not order lab supplies she requested, stating either that the items she wanted were unsafe or that alternatives were available. At some point, Jones reported to Tovares that Stolk asserted that he was responsible for having District employees fired. Tovares considered Jones's comments to be similar to those of Dr. David Bookin, who was a full-time Chemistry faculty member at the College until he retired in 2012. According to Tovares, Bookin complained that Stolk was inflexible and refused to make changes to labs or to the lab schedule. Bookin's description led Tovares to counsel Stolk about being more collaborative and working to support faculty.[3]

In or around November 2013, Leo Hayashibara was an Instructional Aide I at the San Jacinto campus Chemistry department. Tovares testified that Hayashibara reported that Stolk had called him (Hayashibara) an "idiot" during worktime. According to Tovares, Hayashibara also reported other disrespectful treatment from Stolk, including that Stolk boasted that he was responsible for having employees fired. Hayashibara did not testify and had left the District by the time of the hearing.

Stolk admitted to calling Hayashibara an "idiot," after seeing him mock certain safety protocols Stolk had initiated. Stolk later apologized. At hearing, Stolk said that he had

[3] Bookin did not testify.

approached Tovares about his own concerns that Hayashibara was being disrespectful to him (Stolk). Stolk also testified that he tried to acknowledge it when he noticed Hayashibara doing good work. Stolk denied ever saying that he had employees fired.

In December 2013, Stolk began locking the doors to the Chemistry lab until classes started. Stolk did not consult with faculty or with Tovares before doing so. At hearing, Stolk explained that his decision was consistent with safety trainings he participated in, including those suggested by Bookin. He acknowledged that Jones did not have such a policy when she was the interim full-time Chemistry faculty at the San Jacinto campus.

The Hydrofluoric Acid Discussion

Sometime during the Fall 2013 semester, Jones asked Stolk if the department had hydrofluoric acid available to use in an electrolyte demonstration for one of her Chemistry classes.[4] Multiple witnesses testified that hydrofluoric acid is very dangerous substance. This is because the fluorine atom is highly electronegative, meaning the atom is very attracted to positively charged atoms, including those found in human tissue. One particular concern is that the fluorine atom in hydrofluoric acid can easily permeate the skin and attempt to bind to the positively-charged calcium atoms found in muscle and bone tissue. This could result in severe degradation of those tissues, causing extreme pain and possibly irreversible damage. Hydrofluoric acid also releases dangerous vapors which can be harmful if inhaled. Proper handling of hydrofluoric acid requires a calcium gluconate counter-ion station designed to counteract the electronegative properties of the substance. A standard lab cleaning station will

[4] In general, an electrolyte demonstration is designed to highlight the difference between ionic compounds, which are conductive in aqueous solutions (dissolved in water), and molecular compounds, which are not. The demonstration involves placing electrodes (wires) that are connected to a lightbulb into various solutions one at a time and then running an electric current through the electrodes to see whether and to what extent, each different solution conducts enough electricity to light the bulb.

not suffice because even a thorough rinse will not negate the effects of hydrofluoric acid on human tissue. The College Chemistry department does not have a counter-ion station.

Stolk asked why Jones wanted to use hydrofluoric acid, given the dangers of that substance and that the department already had the chemicals typically used for the demonstration in question. Stolk tried to explain the dangers of the substance but, according to him, Jones persisted. Stolk responded with words to the effect of "Dr. Jones, I really don't want to order it. It's dangerous."

Around one or two days later, Stolk and Tovares met and discussed the hydrofluoric acid incident. Stolk testified that he tried to explain his safety concerns about the substance, but Tovares asked, in a condescending manner, whether Stolk would order it for Jones. Stolk responded with words to the effect of "you know Dr. Carlos Tovares, I don't want to order it." Initially, Tovares did not recall meeting with Stolk for the specific purpose of discussing hydrofluoric acid and did not recall asking Stolk whether he would order it. On cross examination, Tovares acknowledged that Jones informed him of her discussions with Stolk about the substance. Tovares also testified that he may have had some kind of discussion with Stolk about the subject. He recalled Stolk expressing reluctance at ordering hydrofluoric acid for safety reasons and because Stolk believed that alternatives were available.

The January 15, 2014 Written Reprimand

On January 15, 2014, Tovares issued Stolk a document entitled "Written Reprimand," based on what Tovares considered unsatisfactory performance in assigned duties and interpersonal communications. At the time, the District's Vice President of Human Resources (HR) was Irma Ramos. In general, the letter addressed Stolk's treatment of Hayashibara,

deficiencies in Stolk's preparation of lab materials, his failure to properly order lab supplies and materials, and the unilateral decision to lock lab doors.[5]

At hearing, Tovares explained that he considered this conduct to be problematic because he believed Instructional Aides should act in a support role for faculty. In his opinion, Tovares felt that Stolk was trying to exert an inappropriate amount of control over academic matters in the lab, which Tovares considered to be the purview of Chemistry faculty.

Stolk issued a rebuttal to the discipline on January 24, 2014, explaining the difficulty he has working with Hayashibara. Stolk also discusses the hydrofluoric acid incident, stating that he continued to have safety concerns about using that substance, but would order it if Jones insisted upon using it.

The Chemistry Budget Overage

In or around March 2014, Stolk submitted a purchase requisition for Chemistry department materials. He submitted the request through the Galaxy system and it went through the standard review chain process, including Marlon Nance, acting in the capacity of Chemistry Department Chair at the time, Debbie Perez-Flores, Administrative Assistant in the Office of Instruction, Tovares, and presumably someone from the Business Services Office.

On or around April 23, 2014, Tovares was informed from the District's Business Services Office that the Chemistry department had overspent its annual supply budget by $3,828. At the time, the department's supply budget was around $15,000. After discovering the overage, the Office of Instruction cancelled some of the purchases and transferred funds

[5] Each party produced a different version of this Written Reprimand. The District's version was three pages long. Stolk testified that the version he received was only two pages long and that he did not receive the middle page as depicted in the District's version. I credit the District's position over Stolk's in this instance. Stolk's rebuttal acknowledges that the Written Reprimand accuses him of refusing to order chemicals he felt were too expensive. That accusation appears only on the middle page of the reprimand.

from other budgets to cover the loss. The Office of the Vice President of Instruction provided the funds to cover the remaining balance, something Tovares considered embarrassing.

On April 23, 2014, Tovares e-mailed Stolk and Jones, directing them to meet with him to discuss the negative budget. He instructed both to contact Perez-Flores with their availability. On April 24, 2014, Tovares sent a similar directive to Nance.

Nance and Jones both replied to Tovares's e-mail, providing multiple possible dates for the meeting. Stolk never replied directly, but told Jones that he was only available to meet on one day. That date conflicted with Nance's stated availability. Tovares scheduled the meeting for May 7, 2014, at 4:00 p.m., even though it was not the one date Stolk provided. At hearing, Tovares explained that he felt Instructional Aides have more flexibility in their schedule because they work a standard five day work-week. Faculty, on the other hand, are not on campus every day. In addition, Tovares said that the District can adjust classified employees' schedules for meetings outside their regular hours. Stolk acknowledges that classified employees may receive overtime or compensatory time off for attending meetings outside their shift.[6]

The Office of Instructions sent an electronic invitation for the May 7 meeting to Nance, Jones, and Stolk. On the morning of April 30, 2014, Stolk declined the invitation, stating that he had two labs scheduled for that day and was scheduled to leave between 2:30 p.m. and 3:00

[6] At hearing, Gibbons testified that, as the current Chemistry Department Chair, she disagrees with District administration's apparent policy of valuing the schedules of faculty members over classified staff. She said that the failure to consider Instructional Aides' schedules raises safety issues because Instructional Aides deal with sometimes deal with volatile compounds during lab experiments and are often expected to monitor students during a lab when the faculty member has to step away. Gibbons was not the Department Chair on May 7, 2014 and there was no evidence regarding the type of labs or other assignments Stolk had on that date. Nor was there evidence about whether Stolk's attendance outside his regular job shift created a safety concern.

p.m. Tovares directed Stolk to adjust his schedule so that he could attend the meeting. Stolk ultimately did attend. No witness testified about the details of that meeting.

Purchase Request R4024632

On or around March 10, 2014, Stolk initiated Purchase Request R4024632. According to the document, the request was for glassware in the amount of $2,610.40.[7] Stolk testified that he submitted this purchase request during the time he was accused of exceeding the Chemistry department supply budget, but no witness or other document indicated that this was the actual request that created the overage. Tovares testified that he did not recognize Purchase Request R4024632. He further testified that the purchase requests he reviews look different from the version of R4024632 Stolk submitted into the record. That document lists Tovares, Perez-Flores, Nance, and Business Services employee Elizabeth Worthington as part of the approval list for R4024632. Tovares testified that he did not recall disciplining Nance or Perez-Flores about R4024632 and he himself was not disciplined in connection with that request. He did not know if Worthington was disciplined, as she is outside his chain-of-command.

The Science Instructional Aides Meeting

District Vice President of Instruction Dr. Pat Schwerdtfeger scheduled a meeting for all Instructional Aides in science fields to meet on April 4, 2014. Tovares attended, but Stolk was not present. Tovares said that Instructional Aides discussed "shared experiences" and changes to policies and procedures at the meeting.

[7] Stolk also introduced e-mail correspondence from District representatives referring to request R4024632, but the content of that correspondence was entirely hearsay.

The Windstorm

On April 30, 2014, there was a large windstorm in the San Jacinto area. At 10:53 a.m., that morning, the District e-mailed all employees stating, in pertinent part:

> Travel to the San Jacinto Campus is not advised today due to high winds. If you planned to attend a meeting at SJC, please let your supervisor know you are advised not to travel to SJC.
>
> Employees at the San Jacinto campus are urged to remain inside buildings for their safety until further notice.

Stolk was scheduled to work a standard eight-hours that day. He confirmed that he received the e-mail. At some point that day, Perez-Flores entered the Chemistry lab during instruction. Stolk testified that he was working with a student about 30 feet away at the time and he did not hear what Perez-Flores said. He saw students packing up their belongings and preparing to leave. He asked someone in the room[8] about what Perez-Flores said and, according to Stolk, that person said that Perez-Flores told "all of us to leave." Stolk then left for the day. Stolk testified that he left right away because he was concerned over the damage the windstorm was causing to his house and vehicle. Stolk admitted that he did not notify anyone beforehand.

Tovares was at a different campus that day. He directed his staff to check the San Jacinto campus and ensure sure that all buildings were secured during the storm. Staff reported to him that the Chemistry area was dark and that no one was there.

The windstorm continued on May 1, 2014. Tovares e-mailed the Instructional Aides that morning stating:

> Dear IAs,
>
> The SJC and SGP are closed today for faculty and students. IAs are to take a vacation day or as another option you may go to

[8] Stolk did not identify the person he spoke with or state whether the individual was a student or a District employee.

> MVC and work with your counterparts at Menifee as work and as professional development/cross training.
>
> If you are going to MVC let the folks over there know you are going.
>
> Please contact this office ASAP to let us know your plans.

Stolk reported to work and saw Tovares's instructions. He elected to use a vacation day because of his continued concerns for his house and vehicle. Stolk again admitted that he did not notify anyone of his decision beforehand. He testified "[t]he reason I left to go to vacation and I didn't check in is because that morning, when I came to work, I saw roof shingles coming off my house." He also said that there was some confusion about the instructions because during a previous windstorm, the San Jacinto campus was closed for the whole week and the District paid employees for that time.

Later in the day on May 1, 2014, Tovares e-mailed Stolk asking him about his absences that day and the day before. Tovares concluded his e-mail

> Please contact Debbie [Perez-Flores] to arrange a time for you and I to meet to discuss your behavior the last couple of days during this emergency. You may want to consider having union representation for the meeting.

Stolk replied to Tovares the next day, stating that he elected to use a vacation day on May 1. He did not respond to Tovares's inquiry about April 30, and did not mention Tovares's meeting request. Stolk also never contacted Perez-Flores to arrange for a meeting, per Tovares's instructions. He also did not contact Tovares directly for that purpose.

On May 12, 2014, Stolk submitted an absence request form to the District seeking to use 2.5 hours of vacation time for his absence on April 30. He also submitted his time sheet, again indicating 2.5 hours of vacation time on April 30 and also 8 hours of vacation time on May 1. The District approved Stolk's use of his vacation time on May 1, but not for April 30.

Jones's Chemistry 102 Lab

On Monday, May 12, 2014, Jones e-mailed Tovares accusing Stolk of setting up the lab scheduled for Wednesday, instead of the lab scheduled in her Chemistry 102 syllabus. The e-mail stated that there was still time for Stolk to set up the correct lab. Tovares e-mailed Stolk directing him to comply with Jones's request. Stolk responded that Jones told him not to prepare that lab that day and that another employee could verify what Jones said. Tovares did not inquire about that other employee. Tovares went to speak with Stolk that day. According to Tovares, Stolk said that he (Stolk) sets the lab schedule at the beginning of the semester and that Jones should have been aware of his plans. Stolk did not deny this.

The June 16, 2014 Notice of Intended Disciplinary Action

Tovares decided that Stolk's conduct that semester warranted further discipline. Tovares created a Notice of Intended Disciplinary Action, in which he recommended a two-step demotion. At the time, Melissa Kane was the District's Interim Vice President of HR. Tovares issued the document to Stolk on June 16, 2014. The stated basis for the discipline was Stolk's overspending the Chemistry supply budget, his recalcitrance toward attending the scheduled budget meeting, his unreported absence on April 30, 2014, his communications failures during the windstorm, his decision to not prepare Jones's Chemistry 102 lab, and his failure to attend what Tovares described as the "mandatory" meeting for all science Instructional Aides.

Stolk submitted his response to the Notice of Intended Disciplinary Action later that day. Regarding the budget issue, Stolk questioned why the Galaxy software did not issue an insufficient funds alert during the purchases in question and suggested that the problem be investigated. Stolk pointed out that he had never previously overspent the budget, that he

maintains his own budget records, and that he has previously pointed out others' record-keeping errors.

Regarding the meeting that followed the budget overage, Stolk stated that he initially declined the meeting invitation because he believed that the District disfavors giving employees compensatory time off for working outside of their regular hours and that he had hoped that Tovares would have contacted him with an alternative date.

Regarding his absences during the windstorm, Stolk stated he had heard from Perez-Flores that the District was shutting the San Jacinto campus down and that she did not tell him or the faculty member he was working with to stay on campus. As for his absence the next day, Stolk admitted that he did not notify the District of his plans to use vacation time, again citing concerns about damage to his house and vehicle. His response did not specify why he did not contact the Office of Instruction to schedule a meeting, as directed by Tovares.

Regarding the Chemistry 102 lab setup, Stolk said that Jones had informed both him and another Instructional Aide, Sylvia Heredia, that she did not want the lab setup, only to later change her mind. Stolk wrote that he felt it was unsafe to prepare the lab in the short amount of time remaining before class. Stolk wrote that Heredia could corroborate his account.

Stolk again raised the hydrofluoric acid incident, in response to Tovares's assertion that Stolk was improperly attempting to determine what faculty can teach and when it can be taught. Stolk wrote that he had serious concerns about using that substance and that his efforts to inform them of its dangers should not be interpreted as insubordination.

Regarding the Instructional Aides meeting, Stolk said he wanted to attend, but was assisting a faculty member with a lab that day.

Tovares no longer had a formal role Stolk's disciplinary matter after issuing the Notice of Intended Discipline.

The 2014 *Skelly*[9] Meeting

On June 26, 2014, the District scheduled a *Skelly* meeting for Stolk to respond further to the charges in the Notice of Intended Disciplinary Action. That meeting occurred on or around July 10, 2014, before Vice President of Student Services Bill Vincent, who served as the *Skelly* officer. CSEA representative Edward Saucedo represented Stolk during the meeting. On July 23, 2014, Vincent issued written findings, supporting the recommendation for the involuntary two-step demotion. Around this time Victor Collins replaced Kane as Interim Vice President of HR.

On August 22, 2014, the District issued Stolk a Final Notice of Disciplinary Action, stating its intent at the time to administer the two-step involuntary demotion for largely the same reasons already written in the Notice of Intended Disciplinary Action. This new notice notified Stolk of his right to appeal the District's decision to its governing board by filing a written answer to the charges and submitting a hearing request to HR.

Subsequently, Stolk requested a hearing to appeal the disciplinary decision. Although the record does not specify when Stolk first made this request, the District appears to have considered the request timely.

The Settlement Discussions

At some point during the Fall 2014 semester, the District, Stolk, and CSEA engaged in settlement discussions, whereby Stolk would admit wrongdoing and agree to a voluntary

[9] The term *Skelly* meeting refers to a pre-disciplinary procedure that complies with the due process requirements set forth in *Skelly v. State Personnel Board* (1975) 15 Cal.3d 194, in which public employees may challenge the sufficiency of the evidence in certain proposed discipline.

unpaid suspension in lieu of demotion. Gibbons, who was the Interim Full-Time Chemistry faculty that semester, recalled that Tovares approached her about Stolk's possible suspension that school year. Gibbons expressed concern over how faculty could conduct labs in Stolk's absence.

The District initially proposed a 10-day voluntary suspension. By December 30, 2014, the District prepared a draft agreement for a seven-day suspension. Stolk rejected the proposal and elected instead to go forward with his appeal.[10] Around this time, Stolk contacted Dr. Anthony Vasek, a faculty member, for assistance in his discipline.

Stolk's 2014 Performance Evaluation

Tovares issued Stolk a performance evaluation in October or November 2014. In general, Tovares praised Stolk's skills in handling chemical compounds and lab equipment. However, the evaluation was largely critical of Stolk in areas of interpersonal communications, taking direction, and attitude. In one area of the evaluation, Tovares wrote that "[s]afety is important, but the goal should be to create a great safe learning environment. [Stolk] uses safety as a cudgel to get his way in the operation of the lab." Unlike with typical Instructional Aide evaluations, Tovares did not seek substantive faculty input before issuing Stolk's evaluation. Gibbons reviewed the evaluation and disagreed with its conclusions. She issued her own assessment of Stolk's performance in December 2014, describing him as exceeding standards in all performance areas.

[10] Stolk testified that he "elected to go on in the *Skelly* procedure and testify in my defense." I interpret this to mean he expressed his desire to continue with his right to an evidentiary hearing to challenge the demotion.

Vasek's E-Mails About Hydrofluoric Acid

In March 2015, Vasek e-mailed District faculty members, classified employees, and administrators about possible exposure to toxic chemicals on District property. In one e-mail, dated March 10, 2015, entitled with the subject line "Risk of Lethal Exposure to Toxic Chemicals," Vasek mentions that he reported his concerns to the local police and district attorney's offices, U.S. Occupational Safety and Health Administration, the California Division of Occupational Safety and Health, the Office of the Chancellor for California Community Colleges, and the District's governing board. His e-mail included links to letters he submitted to those entities. There was no evidence of any response from any outside entity.

The text of Vasek's e-mail does not identify Stolk by name or state that hydrofluoric acid is the substance at issue, but the links provide significant information on both, from Vasek's perspective. Some faculty members or other recipients responded to Vasek's e-mail resulting in various perspectives about the danger of hydrofluoric acid and faculty members' prerogative to use potentially dangerous substances.

The April 16, 2015 Notice of Intent to Suspend

Jeff Horsley replaced Collins as Interim Vice President of HR in January 2015. On April 16, 2015, he issued Stolk a document entitled Notice of Intent to Suspend Without Pay in Lieu of Involuntary Demotion (Suspension Notice). Horsley testified that he reviewed the documents relating to Stolk's discipline history, including the January 15, 2014 Written Reprimand, the June 16, 2014 Notice of Intended Disciplinary Action, and Stolk's responses to those documents. He also spoke to Tovares about his concerns with Stolk.

The Notice of Intent to Suspend included seven charges, and was similar to the Notice of Intended Disciplinary Action drafted by Tovares. The charges included: (1) Stolk's failure

to attend the April 4, 2014 science Instructional Aides meeting;[11] (2) Stolk's role in the $3,828 Chemistry supply budget overage; (3) Stolk's initial refusal to meet to discuss the overage; (4) Stolk's unexcused absence on April 30, 2014; (5) Stolk's unexcused absence on May 1, 2014; (6) Stolk's failure to follow Tovares's directives to schedule a meeting to discuss his absences; (7) Stolk's failure to set up the proper Chemistry 102 lab for Jones. The Notice of Intent to Suspend also outlined Stolk's right to respond. Under CBA Section 14.10, classified unit members have the right to submit a written appeal to the District's governing board. There is no right to an evidentiary hearing.

At hearing, Horsley testified that he understood at the time that the proposed suspension had a different appeal process from the earlier-proposed demotion, but testified that the available appeal process did not factor into his determination to pursue a suspension in lieu of demotion. He explained that he saw some recurrence of earlier misconduct in the current claims about Stolk, but nevertheless concluded that a demotion was too harsh of a punishment. Horsley testified that he considered a five-day suspension more appropriate and more consistent with progressive discipline principles.

Horsley acknowledged seeing Vasek's March 2015 e-mail communications about the toxic substances. Horsley testified that he did not view the links in Vasek's e-mails. It is unclear whether he understood that those e-mails related to Stolk's personnel matter.

Horsley assigned then-Interim Associate Dean of HR Jeannine Stokes to serve as the *Skelly* officer in Stolk's pending disciplinary matter. Horsley retired from the District when his contract ended, on or around April 30, 2015.

[11] Unlike the Notice of Intended Disciplinary Action, the Suspension Notice did not describe this meeting as "mandatory."

The April 23, 2015 *Skelly* Meeting

The *Skelly* meeting regarding the Notice of Intent to Suspend occurred on April 23, 2015. Stokes served as *Skelly* officer. Stolk appeared with CSEA representative Gary Snyder. At the outset of the meeting Stokes informed Stolk and Snyder that this was their opportunity to respond to the charges and that she had not yet reviewed Stolk's personnel documents or the documents attached to the Suspension Notice. She was also not aware at the time of the District's prior effort to demote Stolk.

Stokes was the only witness who testified about the meeting in any detail. She said that she went through each of the charges with Stolk and that he explained his position. She recalled that Stolk focused the discussion on his relationship with Jones, describing her as "incompetent." Stolk did not mention either the hydrofluoric acid incident or his earlier request for a hearing to appeal the then-contemplated demotion. During this discussion, Stolk referred to a written statement, which he later provided to Stokes. The statement was based on Stolk's written response to the District's June 16, 2014 Notice of Intended Disciplinary Action.

Stokes testified that Stolk confirmed that he did not set up the Chemistry 102 lab, as instructed to by Jones, because he felt doing so would be unsafe and would take around three hours. Stolk also admitted to not notifying the District before leaving campus on April 30, 2014 and not reporting to work on May 1, 2014. Stolk also admitted to not attending the Vice President's Instructional Aides meeting, stating that he had to set up a lab for an instructor at the time.

Regarding the issue with the Chemistry budget, Stokes recalled that Stolk said that he lacks the authority to override the safeguards preventing excess purchases. He also said that he

was trying to avoid using overtime to attend the budget meeting called by Tovares. He said that he did attend the meeting, as scheduled.

After the meeting, Stokes reviewed the documents related to the charges, including Stolk's prior discipline and his recent performance evaluation by Tovares. She did not specifically recall reviewing Stolk's responses to any disciplinary document, but it is her practice to review all documents in the file. In addition, Stolk provided her with a statement based on his response to the Notice of Intended Disciplinary Action. She also met with Tovares and Perez-Flores. She did not speak to Jones, who had left the District by then.

At the end of her review, Stokes concluded that the proposed five-day suspension was warranted. She found that it was Stolk's responsibility to ensure that the Chemistry department stayed within its budget and she believed that Stolk overrode the safeguards in the Galaxy system. She also found it problematic that Stolk did not inform anyone even after the overage occurred. She found Stolk's contention that the system had a glitch to be unlikely given that she never encountered such a problem, despite using Galaxy nearly every day. She also credited Perez-Flores's statement over Stolk's that he never attended the subsequent meeting about the Chemistry budget. Stokes found this to be one of multiple instances in which Stolk was unreceptive to attending scheduled meetings or non-compliant with making arrangements to meet. She found that Stolk failed to notify the District of his absences during the windstorm and failed to follow Tovares's directive to schedule a meeting over those absences. She also found that Stolk's failure to attend the Vice President's meeting to be insubordinate and believed that Stolk could have attended if he planned his work schedule more effectively.

Regarding the Chemistry 102 lab, Stokes credited Jones's written statements that it would have only taken Stolk one hour to set up the lab in question, rather than three hours, as Stolk contended. She did not take steps to verify whether Heredia supported Stolk's account of this incident.

Stokes informed Stolk of her determination in writing on June 23, 2015. On June 24, 2015, Stolk submitted his written request to appeal that determination, under CBA Article 14.10. Neither party presented evidence about the results of this appeal.

The Five-Day Suspension

Stolk served the unpaid suspension during the District's summer session term in July 2015. He resumed working for the District afterwards. On September 9, 2016, Stolk elected to retire through the early retirement incentive offered by the District to employees at the time. His retirement became effective on December 31, 2016.

ISSUES

1. Did the District suspend Stolk because of EERA-protected activities?
2. Should PERB consider Stolk's unalleged violations? If so, was there any violation?

CONCLUSIONS OF LAW

1. Stolk's Retaliation Claim

To demonstrate that a public school employer discriminated or retaliated against an employee in violation of EERA section 3543.5, subdivision (a), the charging party must show that: (a) the employee exercised rights under EERA; (b) the employer had knowledge of the exercise of those rights; (c) the employer took adverse action against the employee; and (d) the employer took the action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato USD*), pp. 6-8.) If the charging party satisfies

all the elements of the prima facie case, the burden shifts to the respondent to prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in protected activity. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 12, citing *Martori Bros. Dist. v. Agricultural Labor Relations Board* (1982) 29 Cal.3d 721 (*Martori Bros.*), *Trustees of the California State University* (2000) PERB Decision No. 1409-H; *Novato USD*.)

a. Stolk's Protected Activities

The PERB complaint alleges that Stolk engaged in protected activity by refusing to procure and/or provide hydrofluoric acid to faculty member Jones for a Chemistry lab demonstration. EERA section 3543 protects individuals' right self-representation, including the right to present complaints to the employer about unsafe working conditions. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086 (*Garden Grove USD*); *Los Angeles Unified School District* (1995) PERB Decision No. 1129, proposed dec., p. 8.)

EERA similarly protects employees' right to report safety matters in a manner consistent with procedures negotiated with the exclusive representative. (*Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, p. 18.) In *Pleasant Valley School District* (1988) PERB Decision No. 708 (*Pleasant Valley SD*), the Board found that "[s]afety matters are clearly an implicit part of any employment relationship." (*Id*. at p. 15.) In that case, a groundskeeper reported to his supervisor that it was unsafe to drive a riding mower between non-adjacent schools sites because the mower should not be operated on public streets. The supervisor later directed the groundskeeper to drive the mower to a site more than a mile away. The groundskeeper refused, and complained to his union. (*Id*. at pp. 3-4.) The Board found the groundskeeper's actions were a reasonable way to report safety

issues in his work assignment and were consistent with the complaint process in the CBA. (*Id*. at p. 15.)

In this case, the PERB complaint alleges that Stolk refused to procure hydrofluoric acid for a faculty member sometime in or around 2014. The record shows that discussions about this substance began sometime during the Fall 2013 semester. During those discussions, Stolk described his safety concerns with handling hydrofluoric acid with both faculty member Jones and Dean of Instruction Tovares. He described its hazardous properties and the lack of proper safety equipment in the Chemistry department. Stolk reiterated those safety concerns at least twice in 2014, i.e., in Stolk's January 24, 2014 response to the 2014 Written Reprimand, and in Stolk's June 16, 2014 response to the Notice of Intended Disciplinary Action.

CBA Article 19, specifies that unit members are required to advise the District immediately of any unsafe working conditions at a school site. Tovares explained that employees comply with that procedure by raising safety concerns with either a faculty member or with his office. As in *Pleasant Valley SD*, *supra*, PERB Decision No. 708, Stolk acted consistently with CBA policy by mentioning his safety complaint to Jones, the faculty member seeking to use the substance, and Tovares, Stolk's direct supervisor. The District disputes that Stolk and Tovares ever discussed the substance, but this position is contradicted by the record. Stolk testified that the meeting occurred. While Tovares did not recall a meeting specifically to discuss hydrofluoric acid with Stolk, he did recall Jones reporting Stolk's position to him and also recalled Stolk expressing that the substance was unsafe. For these reasons, the District's position is rejected.

The District also claims that complaints about hydrofluoric acid unprotected under EERA because the concerns over substance is unrelated to employee relations. However, the

District produced no evidence disputing Stolk's extensive evidence about the dangers of hydrofluoric acid and its ability to damage human skin, muscle, and organ tissue. Stolk also produced unrebutted evidence that the San Jacinto Chemistry department lacks the proper safety station to abate the effects of unintentional human contact with hydrofluoric acid. Stolk's expressed concerns pertain directly to the working conditions of those employees who work in or around the chemistry lab. Therefore, I conclude that Stolk's expressed concerns about Jones using hydrofluoric acid in the lab are protected.

The PERB complaint also alleges that Stolk engaged in protected activity on or around January 13, 2015, by requesting a hearing to address the District's then-proposed two-step demotion. Using dispute resolution procedures contained in a collectively bargained agreement constitutes protected activity under EERA. This includes both grievances under the formally negotiated grievance procedure (*Scotts Valley Union Elementary School District* (1994) PERB Decision No. 1052 (*Scotts Valley UESD*), proposed dec., p. 17), as well as complaints filed under other collectively bargained dispute resolution mechanisms. (*Jurupa Unified School District* (2012) PERB Decision No. 2283, p. 16.) On the other hand, individual complaints filed under an internal employer policy bear no apparent relationship to concerted action and do not qualify for protected status. (*Regents of the University of California* (1991) PERB Decision No. 872-H, proposed dec., p. 24.) Likewise, in *Rocklin Unified School District* (2014) PERB Decision No. 2376, the Board gave "some credence" to the employer's argument that mere attendance at a layoff hearing, prescribed for exclusively through the Education Code, was not protected under EERA. (*Id*. at pp. 4-5.)

In this case, the District and CSEA have negotiated discipline procedures for classified unit members, including Instructional Aides, into their CBA.[12] Section 14.5, defines unit members' right to appeal proposed discipline before the District's governing board. By invoking this process, Stolk requested to participate in a negotiated procedure for addressing disciplinary disputes. The District disputes that Stolk ever made a request for hearing, stating there is "no direct evidence" of such a request. Although it is true that the record does not clearly specify when Stolk made this request, Stolk testified that he rejected the voluntary suspension agreement under consideration on or around December 30, 2014, and instead elected to proceed with his appeal of the then-proposed demotion.[13] In addition, the April 16, 2015 Suspension Notice specifically references the fact that Stolk had requested a hearing before the governing board. Vice President of HR Horsley authored that notice.[14]

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[12] CBA Article 14.1 defines "discipline" as termination, involuntary demotion (excluding a layoff), and an unpaid suspension for more than five days.

[13] The District points out that Stolk testified that he rejected the settlement agreement and requested to go forward with the *Skelly* process, not the disciplinary appeal hearing process. I consider this to be merely a matter of semantics. Stolk had already completed the *Skelly* process around five months earlier. At that point, the only remaining means to challenge his discipline was through the hearing process under CBA Article 14.5, and AP 7365. Moreover, Stolk's statement that he wished to "testify" in his defense likely refers to his intent to participate as a witness in an evidentiary hearing, not to meet with a *Skelly* officer under the District's process. I find it more likely than not that Stolk was referring to his appeal, but simply used a different term.

[14] The content of the April 16, 2015 letter is hearsay. Under PERB Regulation 32176, hearsay evidence is admissible in PERB proceedings, "but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." PERB has interpreted this regulation to mean that hearsay evidence admitted into the record cannot form the sole basis for a factual finding absent an exception to the hearsay rule. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337 (*Palo Verde USD*), pp. 19-20; *County of Riverside* (2009) PERB Decision No. 2090-M, p. 12, fn. 9.) Horsley acting as the head of the District's HR office at the time he wrote the letter. As such, the statements in the letter qualify under the party admissions exception to the hearsay rule. (Evid. Code, § 1220; see also *Bellflower Unified School District* (2014) PERB Decision No. 2385 (*Bellflower USD*), pp. 10-

Accordingly, I conclude that Stolk did in fact request a District board hearing over the then-proposed demotion and that doing so was protected activity.

b. The District's Knowledge of Stolk's Protected Activities

Stolk must also show that relevant individuals at the District were aware of his protected activities. This element is met where the evidence shows that "individual(s) who made the ultimate decision to take adverse action against the employee" knew of the employee's protected acts. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 7.) Applying this standard here, this proposed decision will consider the extent to which the individuals primarily involved in the adverse actions here knew of Stolk's protected acts. This includes: (1) Tovares, who drafted the Notice of Intended Disciplinary Action, which later became part of the basis for the suspension; (2) Horsley, who drafted the Suspension Notice; and (3) Stokes, then-Interim Dean of HR, who served as the *Skelly* officer for the suspension.

All three of these individuals knew that Stolk raised safety issues concerning hydrofluoric acid. As already explained above, Tovares admitted to hearing about Stolk's safety concerns both from Jones and from Stolk himself during the Fall 2013 semester. Tovares also acknowledged reading Stolk's responses to both the January 2014 Written Reprimand and the June 2014 Notice of Intended Disciplinary Action. Both responses reference Stolk's safety concerns. Horsley and Stokes likewise acknowledge reviewing written statements from Stolk referencing his safety concerns.

Less evidence was offered about whether the people responsible for the discipline at issue here knew about Stolk's request for a hearing during the time that the District was

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11; *Gonzales Union High School District* (1993) PERB Decision No. 1006, proposed dec., p. 15.)

considering demoting Stolk by two levels. Tovares said he was not formally involved with the District's discipline proceedings against Stolk after drafting the June 2014 Notice of Intended Disciplinary Action. This was well-before Stolk requested an appeal to challenge the proposed demotion.[15]

Horsley became involved in the issue of Stolk's discipline sometime in January 2015. As stated above, Horsley testified that he did not recall whether he knew about Stolk's hearing request. But, because the April 2015 Suspension Notice he authored explicitly references Stolk's hearing request, I find this to be a sufficient basis for concluding that Horsley was aware of that request. Stokes also acknowledges reviewing the Suspension Notice in her role as *Skelly* officer. This is sufficient to establish their knowledge of Stolk's hearing request.

c. Adverse Employment Actions

PERB uses objective measures to determine whether an adverse employment action occurred. The issue is "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; *Palo Verde Unified School District* (1988) PERB Decision No. 689, pp. 7-8. 12.) Formal discipline is clearly adverse to employment. (See *Fallbrook Union Elementary School District* (2011) PERB Decision No. 2171, p. 8.) Along those lines, both the unequivocal notice of the intent to pursue discipline, such as a suspension, and the final notice of discipline constitute adverse actions. (*Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 34-35; see also EERA, § 3543.5, subd. (a); *Los Angeles County Superior Court* (2008) PERB Decision

[15] There was some evidence that Tovares was involved in some discussions about a voluntary suspension in lieu of the demotion sometime in Fall 2014. There was also evidence that Horsley spoke to Tovares before issuing the April 2015 Suspension Notice. Neither fact demonstrates that Tovares knew of Stolk's appeal request.

No. 1979-C (*LA Superior Court*), p. 18, citing *County of Merced* (2008) PERB Decision No. 1975-M, *Regents of the University of California* (1983) PERB Decision No. 310-H.) In this case, the PERB complaint alleges that both the April 16, 2015 Suspension Notice and the District's decision to actually administer Stolk's five-day suspension were adverse employment actions. Although suspensions of five days or less do not fit the definition of "discipline" under the CBA, it is undisputed that Stolk was not was not paid for the equivalent of five working days and record of the suspension is maintained in Stolk's personnel file. A reasonable person consider this adverse to employment. The District does not dispute this conclusion.

d. Circumstantial Evidence of a Retaliatory Motive

The final element of a prima facie case is whether there is a causal connection, or nexus, between the charging party's protected activity and the respondent's adverse action. The existence or absence of nexus is usually established circumstantially after considering the record as a whole. (*San Bernardino City Unified School District* (2012) PERB Decision No. 2278, warning ltr., p. 3, fn. 2, citing *Moreland Elementary School District* (1982) PERB Decision No. 227 (*Moreland ESD*).)

i. Timing as Evidence of Motive

Temporal closeness between the charging party's protected activity and the employer's adverse actions is typically an important circumstantial factor to consider in proving or disproving nexus. (*North Sacramento School District* (1982) PERB Decision No. 264, proposed dec., p. 23) PERB has held that "[t]iming is important in an unlawful motivation inquiry to the extent that it shows that [the respondent] responded to protected activity by

initiating [a] negative personnel action against the [charging party]." (*State of California (Department of Social Services)* (2000) PERB Decision No. 1413-S, proposed dec., p. 11.)

In this case, the District contends that the timing of events does not support Stolk's prima facie case, because Stolk first raised his safety concerns in Fall 2013 and the District did not issue the Suspension Notice until April 2015. The actual suspension occurred in July 2015. Generally speaking, this separation of time between the protected activity and the adverse actions is not indicative of a causal connection. (See e.g., *Jurupa Unified School District* (2015) PERB Decision No. 2450 (*Jurupa USD*), proposed dec., p. 25; *Los Angeles Unified School District* (1998) PERB Decision No. 1300, dismissal ltr., p. 1.) However, in this case, Stolk's conversations with Jones and Tovares were only the first instance in which he raised his safety concerns with the District. As the PERB complaint suggests, Stolk reiterated his concerns multiple times in 2014. And, while it is true that the District did not begin Stolk's suspension proceedings until April 2015, there is no dispute that the District contemplated some form of discipline for Stolk as early as June 2014, when Tovares first drafted the Notice of Intended Disciplinary Action. This was roughly five months from when Stolk reasserted the hazards of hydrofluoric acid in his January 24, 2014 response to earlier discipline. Between June 2014 and April 2015, there was no evidence that the District ever equivocated on its desire to subject Stolk to some form of corrective action. To the contrary, the District proceeded with its disciplinary process for the then-contemplated demotion from June through August 2014. Afterwards, the District and CSEA participated in negotiations where Stolk would serve an unpaid suspension in lieu of demotion if he admitted to engaging in misconduct. It was only after those negotiations fell through, around December 2014 or January 2015, that the District proceeded with the Suspension Notice. Based on this sequence

of events, I conclude that the timing of the District's actions in relation to Stolk's safety complaints provides some support for Stolk's retaliation claim.

Stolk initially requested a hearing over the Notice of Intended Disciplinary Action sometime after the 2014 *Skelly* meeting, about the then-proposed demotion. Then, the parties engaged in settlement discussions until around December 2014, when Stolk rejected the District's offer and voiced his desire to proceed with the hearing. The District issued the Suspension Notice around three months later. The timing between these two events supports Stolk's case that the District possessed an unlawful motive. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019, p. 28, citing *Mountain Empire Unified School District* (1998) PERB Decision No. 1298.) The timing of these two events is particularly interesting because the District's decision to pursue a five-day suspension instead of a demotion, eliminated Stolk's right to have an evidentiary hearing.

The District argues that the timing of Stolk's hearing request does not support his case because the Suspension Notice was based on Tovares's June 2014 Notice of Intended Disciplinary Action, which pre-dates Stolk's hearing request. The District cites to cases where PERB found no causal connection between protected activities and adverse employment decisions that pre-dated those activities. (See e.g., *Peralta Community College District* (2003) PERB Decision No. 1576, p. 9.) The District's position misconstrues the nature of PERB's inquiry. The issue is not whether the factual basis behind the Suspension Notice preceded the protected activity. Rather, the pertinent question is whether the respondent decided to take the adverse action identified in the complaint before or after the protected act. (See *Id*.; see also *Grossmont Union High School District* (2010) PERB Decision No. 2126, proposed dec., p. 6.) Here, the April 2015 Suspension Notice clearly post-dates Stolk's January 2015 hearing

request. Moreover, in *Regents of the University of California (UC Davis Medical Center)* (2013) PERB Decision No. 2314-H, the Board held that:

> Where there has been a substantial change in the adverse action, as here, the temporal relationship between the relevant events changes. [citations] In such an instance, the protected activity will be found to have preceded the adverse action, thus establishing the correct temporal relationship for retaliation purposes.

(*Id*. at p. 11.)[16]

Applying that logic here, even though the District began disciplinary proceedings against Stolk in June 2014, the discipline contemplated at the time was a two-step demotion. After Stolk requested a hearing to challenge the planned demotion, the District changed the nature of the contemplated discipline to a five-day suspension which, perhaps conveniently, does not include a right to challenge through hearing under the CBA. Accordingly, the District's argument is unpersuasive.

Stolk makes numerous other arguments that there is ample circumstantial evidence of the District's motives here. Those arguments are highlighted below.

[16] In *UC Davis Medical Center*, *supra*, PERB Decision No. 2314-H, the employer originally proposed involuntarily assigning an employee to an adverse shift assignment. After the employee stated his intent to seek union assistance on the matter, the employer assigned him to the adverse shift and added other adverse aspects to the assignment as well. The Board found that his statement of intent to seek union assistance was protected and occurred before the ultimate decision regarding the assignment was made. (*Id*. at pp. 11-12.)

ii. Departure From Established Procedures

PERB has found that it may infer unlawful motive from a respondent's departure from existing practices in its dealings with the charging party. (*Garden Grove USD*, *supra*, PERB Decision No. 2086, dismissal ltr., p. 4.) To establish such an inference, the charging party must typically demonstrate what the respondent's practice is and how the respondent deviated from that practice. (*Ibid*.; see also *Los Angeles Unified School District* (2014) PERB Decision No. 2390 (*LAUSD*), pp. 11-12, proposed dec., p. 16.)

In this case, Stolk asserts that the District reduced its planned discipline from a two-step demotion to a five-day suspension, thereby removing Stolk's right to have a hearing before the District's governing Board. According to Stolk, the District's actions departed from the established disciplinary procedures contained in AP 7365 and CBA Article 14.5. However, the right to a hearing under both policies attaches when the District takes action to terminate, demote, or suspend a classified employee for more than five days. Neither procedure addresses the right to a hearing to appeal a five-day suspension, which is the adverse action in question in this case. Neither policy precludes the District from reducing earlier contemplated discipline against an employee particularly where, as here, the District had to replace its Vice President of HR four times before the end of the disciplinary process. Therefore, Stolk has failed to meet his burden of proving that the District's conduct departed from the procedures set forth in AP 7365 or CBA Article 14.5.[17]

[17] Stolk also asserts that the District's failure to provide him with a hearing violates his rights to due process under the U.S. and State Constitutions. PERB lacks jurisdiction to enforce constitutional due process rights. (*Bakersfield City School District* (1997) PERB Decision No. 1191, dismissal, p. 3; *Los Angeles Unified School District* (1990) PERB Decision No. 835, pp. 2-3.) Stolk, moreover, provided no factual or legal support for his assertion that he has a constitutionally protected right to a hearing before the District's governing board under the facts of this case. Finally, even if the District's disciplinary procedures were

Stolk also asserts that the District acted inconsistently with CBA Article 2.3. Stated briefly, this section requires the District and CSEA to discuss which contract provisions, if any, should be suspended during an emergency. Stolk contends that the District failed to undergo this procedure with CSEA before including events from the windstorm in Stolk's Suspension Notice. This assertion was not proven at hearing. No evidence was presented about what steps the District did or did not take to comply with Article 2.3, or even whether the District and CSEA concluded that negotiations under this section were necessary during the windstorm. Therefore, this argument is unpersuasive.[18]

iii. Disparate Treatment

Stolk asserts that the District treated him differently from other employees involved with overspending the Chemistry department supply budget. Evidence that the charging party was treated differently from similarly situated employees may be evidence of nexus. (*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241, pp. 14-15.) Here, Stolk contends that the District singled him out for discipline regarding the overage. Disparate application of disciplinary procedures may support an inference of unlawful motive. (*Regents*

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inconsistent with a protected constitutional right, it would not necessarily mean that the District has acted inconsistently with its own established procedures.

[18] Stolk also argues that the District departed from its evaluation procedures when Tovares issued Stolk's performance evaluation in October and November 2014. According to Stolk, the Dean of Instruction typically consults with faculty members when assessing the work performance of Instructional Aides. He argues that Tovares's failure to do so in this evaluation is evidence of a retaliatory motive. However, this evaluation occurred more than six months after Tovares's formal role in the discipline ended. In addition, the evaluation described different events from those in the Suspension Notice. PERB has found that not all departures from existing practices evidence an unlawful motive. (*Regents of the University of California* (2012) PERB Decision No. 2302-H (*UC Regents*), proposed dec., p. 25, fn. 7 [holding that deviations in the evaluation procedures had no apparent bearing on the employer's disciplinary decisions]; see also *Rio School District* (2015) PERB Decision No. 2449, proposed dec., pp. 31-32.)

of the University of California (1998) PERB Decision No. 1263-H, proposed dec., pp. 55-57.) Stolk's argument was based on Purchase Request R4024632, which he contends became the order that created the overage. Stolk concedes that he originated the request, but points out that several other individuals, including Business Services Office employee Worthington, Tovares, Instructional Office employee Perez-Flores, and faculty member Nance were also in the approval chain for that request and were not disciplined. This argument fails for at least three reasons. First, there is insufficient evidence in the record to conclude that request R4024632 was the purchase request that created the budget overage. Stolk testified that he made this request during the time he was accused of overspending the budget, but no witness or other evidence verified that this request created or contributed to the overage. Stolk produced some District e-mails referring to R4024632, but the content of those e-mails is entirely uncorroborated hearsay. No witness testified about the substantive communications in those e-mails and there was insufficient evidence to apply any exception to the hearsay rule. It was not even clear that the document Stolk submitted as R4024632 is a District record. No evidence was presented about how Stolk obtained it and no one from the District said they saw the document before or any document like it.[19] The dollar amount at issue in R4024632 ($2,610.40), moreover, does not match the amount the District maintains was overspent ($3,828). So, although Tovares testified that neither he, nor Nance, nor Perez-Flores were disciplined in connection with R4024632, his testimony does not necessarily establish that those individuals were not disciplined in connection with the purchase that created the overage.

[19] The content of this document is also hearsay. The document does not qualify under the official records hearsay exception because Stolk did not demonstrate who authored it, when it was created, for what purpose, or even whether it was maintained by the District at all. (Evid. Code, § 1280; *Bellflower USD*, *supra*, PERB Decision No. 2385, pp. 9-11.)

Second, even if Stolk established that Purchase Request R4024632 was the one that created the overage, no evidence was presented about whether Worthington was disciplined for her role in the transaction. Thus, it remains unclear if Stolk was treated differently from all other employees named in that purchase request.

Third, Stolk's argument assumes without evidence that the other named individuals have some responsibility over managing department budgets. He presented no evidence challenging the District's assertion that the Instructional Aide III position is primarily responsible for monitoring the San Jacinto campus Chemistry supply budget. Tovares said that he uses the system review to what purchases are made, where they originate, and where they will go. He said that he expects the Instructional Aide III to ensure that the department has sufficient funds for the purchase. There was no witness testimony or other evidence establishing what role the other individuals have in the approval process. Thus, it remains unclear whether any of these individuals should be subject to discipline for budget overages. For all these reasons, Stolk has not demonstrated that he was treated differently from other similarly situated employees.

iv. Cursory Investigation

Stolk contends that the District failed to undertake an adequate investigation before either issuing the Suspension Notice or following through with the actual suspension. An employer's inadequate or cursory investigation prior to taking disciplinary action may be evidence that the discipline was unlawfully motivated. (*Jurupa USD*, *supra*, PERB Decision No. 2450, p. 17, citing *City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560 (*Coast CCD*).) In *Jurupa USD*, the Board found an HR representative's investigatory interview process suspicious because she

interviewed students who had complaints against the charging party, and declined to interview those who had positive things to say. The Board concluded that this suggested an inordinate focus on corroborating the employer's charges, as opposed to an impartial examination into the underlying events. (*Id*. at p. 23, proposed dec., p, 31.) In contrast, in *City of Santa Monica* (2011) PERB Decision No. 2211-M, the Board found no evidence of any retaliatory motive in an employer's decision not to interview an employee before releasing him from probation for workplace misconduct. In that case, the employer had a video recording of the misconduct and there was no evidence that the employer had a practice of conducting interviews before releasing employees from probation. (*Id*. at p. 15.)

In this case, Stolk maintains that the District failed to contact individuals who might refute claims in the charges. I agree. On May 12, 2014, Tovares e-mailed Stolk accusing him of failing to set up the proper lab experiment for faculty member Jones's Chemistry 102 class and demanding that he do so. Stolk responded, stating that Jones instructed him not to prepare that lab that day. Stolk also mentioned that there was a witness who could verify this. However, Tovares took no steps to verify Stolk's account or identify Stolk's witness before including this incident in the Notice of Intended Disciplinary Action. Stolk raised this issue again with Stokes during the *Skelly* meeting over the Suspension Notice. He informed her that Instructional Aide Heredia could corroborate his account. Yet, Stokes did not contact Heredia for her version of this event and instead concluded that these charges were true based only Jones's written statements.

Stokes also looked into whether Stolk attended the May 7, 2014 budget meeting, as directed to by Tovares. According to Stokes, Stolk claimed that he attended the meeting, but Perez-Flores said he did not. Stokes said she credited Perez-Flores's account over Stolk's and

concluded that he did not attend. But Stokes could have easily resolved these conflicting accounts by asking Tovares, who she had already spoken to in connection with other parts of her review. Tovares would have confirmed that Stolk did attend. As in *Jurupa USD*, *supra*, PERB Decision No. 2450, Stokes's failure to do so is some evidence that the District was predisposed to disbelieve Stolk even when there may have been support for his assertions.

Stolk also contends that both Horsley, who drafted the Suspension Notice, and Stokes failed to review Stolk's responses to discipline taken against him, including Stolk's January 24, 2014 response to the Written Reprimand, and Stolk's June 16, 2014, response to the Notice of Intended Disciplinary Action. With respect to Stokes, Stolk misstates the record. Stokes testified that she did not review any documentation other than the Suspension Notice before the *Skelly* meeting. Afterwards, Stokes said that she reviewed Stolk's personnel file, including both disciplinary documents and any responses he submitted for the file as well. Although she testified that she could not recall all of the specific documents that she reviewed, I find this to be insufficient evidence that she conducted an inadequate review.

Horsley also said he reviewed existing disciplinary documents and Stolk's responses to those documents. He specifically recalled seeing Stolk's June 16, 2014 response to the Notice of Intended Disciplinary Action, but did not recall whether he also reviewed Stolk's January 24, 2014 response to the Written Reprimand. I conclude that these facts do not establish, as Stolk contends, that Horsley "completely ignored" this response. Because Horsley based the charges in the Suspension Notice on conduct that post-dated the Written Reprimand, I do not find it unusual that Horsley would lack specific recall of that document. For the same reason, I also find, if Horsley in fact did not review this response, it would not demonstrate any significant failure to investigate the charges in the Suspension Notice.

Stolk also asserts that neither Horsley nor Stokes reviewed the attachments to Dr. Vasek's March 2015 e-mail, with the subject line "Risk of Lethal Exposure to Toxic Chemicals" sent to all District employees. According to Stolk, this is further evidence of an inadequate investigation. However, Vasek's original e-mail does not mention either Stolk or hydrofluoric acid.[20] Nor was it clear that Vasek was speaking on behalf of Stolk or with Stolk's approval. There was no evidence that Stolk himself asked anyone at the District to review those e-mails as part of the District's investigation. Under these facts, I find it more likely than not that Horsley and Stokes did not associate Vasek's e-mail with the District's disciplinary proceedings against Stolk. For that reason, I decline to infer any retaliatory motive from their failure to review Vasek's attachments.

Stolk also faults Stokes for not speaking with Gibbons who, according to Stolk, has expertise in the field of chemistry and could have also provided her experience with the Galaxy system. At hearing, Gibbons described a 2015 instance where she initiated a purchase that exceeded her budget and did not receive an insufficient funds pop-up message.[21] However, there was no showing that Stolk ever informed Stokes that Gibbons had any insight into the Galaxy system or the factual basis for any of the charges in the Suspension Notice. Nor was there any evidence that Stokes should have reasonably come to that conclusion on her own. Therefore, I decline to find this is additional support for Stolk's retaliation claim.

[20] Subsequent e-mails by Vasek and other employees do reference hydrofluoric acid and the attachments to Vasek's original e-mail references both Stolk and hydrofluoric acid.

[21] It is worth noting that Gibbons testified that immediately after discovering the problem, she contacted Tovares and took other steps to secure the funding for the purchase without creating an overage. There was no evidence that Stolk took similar steps.

v. Inconsistent Justifications

Stolk also asserts that the District gave conflicting statements about Stolk's conduct and the District's response and these shifting positions suggest that Stolk's discipline was retaliatory. An employer's inconsistent and/or contradictory explanation for taking adverse employment actions against a charging party may be evidence that those actions were taken for unlawful reasons. (*Livingston Union School District* (1992) PERB Decision No. 965, p. 4, proposed dec., p. 30.) However, it does not necessarily follow that an employer's inconsistency on other matters demonstrates a retaliatory motive. Here, Stolk points to several inconsistencies in the record. First, Stolk contends that Tovares initially denied meeting with Stolk over the hydrofluoric acid incident, only to later admit that the meeting occurred during cross-examination. This contention misstates Tovares's testimony. On direct examination, the District's counsel asked Tovares whether he and Stolk ever had a meeting "specifically about Mr. Stolk not ordering hydrofluoric acid." Tovares responded "No." On cross-examination, Tovares testified that he recalled having some kind of discussion with Stolk about the substance during one of Tovares's visits to the Chemistry department and that Stolk expressed reluctance in ordering the acid because of its dangerous properties and because alternatives were available. This does not necessarily conflict with what Tovares said on direct-examination because it remains possible that he and Stolk discussed hydrofluoric acid outside the context of what Tovares considered to be a formal meeting. Moreover, because the discussions about this substance occurred sometime during the Fall 2013 semester, it is not

surprising that Tovares would have some variance in his testimony at PERB almost four years later.[22] Therefore, I find this argument to be unpersuasive.

Stolk also maintains that it is inconsistent for the District to claim that faculty, not Instructional Aides, have the final say in the substances used in labs, and also hold the Instructional Aide III position responsible for ordering lab materials and maintaining the supply budget. However, Stolk has not demonstrated that a substantial conflict exists here as it pertains to Stolk's five-day suspension. According to Tovares, Stolk could have expressed any legitimate concerns over the cost of a particular substance or experiment in a more collaborative fashion, such as by explaining the effect of a requested purchase on the overall department budget, or suggesting ways to absorb the cost of the purchase through other savings. Furthermore, there was no evidence that any faculty member ever requested Stolk to make a purchase that exceeded the Chemistry department supply budget. Accordingly, I find this argument to be unpersuasive.

Stolk also asserts that it was inconsistent for District representatives to reject Stolk's assertion that the Chemistry supply budget overage was caused by a glitch in the Galaxy software system. According to Stolk, Tovares knew of the software glitch at the time he drafted the June 2014 Notice of Intended Disciplinary Action, because by that time, Tovares had approved of Purchase Request R4024632, and had participated in e-mails about that request. Stolk points out that nothing on R4024632 indicates that there was an "insufficient funds" message on the request. This claim is unsupported by the record. As already explained above, Stolk did not establish that R4024632 was the request that caused the overage. The document was also hearsay. In addition, there was no evidence that an "insufficient funds"

[22] Even Stolk himself could not recall when his discussion with Tovares about hydrofluoric acid occurred with any precision.

message should have been displayed on the request. And, on top of that, Tovares credibly testified that the purchase requests he sees are not formatted in the same way as the version of R4024632 Stolk submitted into the record. Neither party explored what information is available on the purchase requests that are available to Tovares. For these myriad reasons, there is insufficient evidence to support Stolk's argument.[23]

Though not raised specifically by either party, I find one inconsistency with the District's handling of Stolk's suspension to be cause for suspicion. The April 2015 Suspension Notice accuses Stolk of being absent without justification during the windstorm on May 1, 2014. But, on May 12, 2014, Tovares had approved Stolk's request to use vacation time that day. The Suspension Notice is also inconsistent with the June 2014 Notice of Intended Disciplinary Action Tovares drafted on this issue. Tovares accused Stolk of failing to properly communicate with him about his absence that day, but did not specifically contend that Stolk's use of vacation time on May 1 was improper. The District offered no explanation for this inconsistency. I find that this provides some support for the assertion that the District had an ulterior motive for the suspension.

vi. Vague Claims in the Charges

Stolk also asserts that that the District justified its disciplinary actions against him using ambiguous terms. An employer's vague or ambiguous reasons for taking the adverse action may give rise to the inference that the action was unlawfully motivated. (*Baker Valley Unified School District* (2008) PERB Decision No. 1993 (*Baker Valley USD*), p. 10, citing *McFarland Unified School District* (1990) PERB Decision No. 786.) However, to support such an

[23] Stolk also contends that Tovares inaccurately claimed that only one person is involved in approving purchases under the Galaxy system. This contention is inconsistent with the record.

inference, the reasons provided "must be essentially meaningless to the employee under the circumstances." (*Id*., citing *Los Angeles Unified School District* (2003) PERB Decision No. 1532, *Novato USD*, *supra*, PERB Decision No. 210; *Keller Ford* (2001) 336 NLRB 722; *Sam Tanksley Trucking, Inc.* (1972) 198 NLRB 312.)

In this case, Stolk argues that the District suspended Stolk based on vague claims. Stolk asserts that both the January 15, 2014 Written Reprimand and the June 16, 2014 Notice of Intended Disciplinary Action are full of vague claims such as that Stolk was rude, insubordinate, failed to order supplies, and had communication problems. Stolk argues that these accusations lack specificity. Stolk also claims that Tovares described Stolk's conduct using vague language, such as using "safety as a cudgel" to get his way in the lab.[24] According to Stolk, these accusations are so vague that they support his retaliation claim.

It should be noted none of the seven charges in the Suspension Notice were based on any of these comments. Even if that were not the case, Stolk has not shown that any of these assertions by the District were so vague that they were meaningless to Stolk under the circumstances. Stolk should have reasonably understood that comments relating to his rude demeanor and lack of cooperation refer primarily to his interactions with Instructional Aide Hayashibara, and faculty member Jones. Stolk demonstrated this understanding through his responses to Tovares's disciplinary documents as well as during the *Skelly* meeting with Stokes. There was no evidence that Stolk expressed confusion about the specificity in any of these claims. In addition, Tovares provided unrebutted testimony that he had previously counseled Stolk about his uncooperative interactions with others. It is likewise reasonably clear that comments about Stolk's alleged lack of communication refer to failure to

[24] That comment was made in Tovares's October-November 2014 performance evaluation of Stolk, which post-dates Tovares's role in Stolk's discipline.

communicate his absence to administration and his failure or reluctance to schedule meetings with Tovares. Tovares's reference to using safety as a "cudgel" reasonably refers to Tovares's belief that Stolk purposefully sought to avoid direction and accountability from others.[25] Whereas Stolk may strongly disagree with all of these assertions, I decline to find that the District's claims were so vague that they were meaningless to Stolk under the circumstances.

Stolk claims that the District exaggerated one of its charges against him by describing the April 4, 2014 Instructional Aides meeting "mandatory" in the Notice of Intended Disciplinary Action. However, Stolk failed to establish that the meeting was not, in fact, mandatory. Moreover, the Suspension Notice at issue in this case does not describe that meeting as "mandatory." Therefore, this argument is unpersuasive.

vii. Conclusion

In summary, Stolk has presented sufficient circumstantial evidence that the District's adverse actions were unlawfully motived. The timing between Stolk's protected activities and the District's adverse actions supports his retaliation claim as does the District's suspicious investigation and its inconsistent treatment of Stolk's May 1, 2014 absence. Even though I found Stolk's other unlawful motive arguments unpersuasive, I conclude that he has nevertheless established a prima facie case for retaliation.

e. The District's Justification

The District now bears the burden of proving that it would have taken the same actions against Stolk even if he did not engage in any protected activity. (See *Chula Vista Elementary School District* (2011) PERB Decision No. 2221 (*Chula Vista ESD*), p. 21, citing *Novato USD*,

[25] Under some circumstances, an employer's hostile comments towards protected activity might create demonstrate animosity towards such activity (see *Jurupa USD*, *supra*, PERB Decision No. 2450, pp. 18-19), but I decline to make that inference here. Tovares preceded this comment by stating that safety is an important concern.

supra, PERB Decision No. 210; *Martori Bros.*, *supra*, 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 USD*, *supra*, PERB Decision No. 2337, pp. 18-19, citations omitted; see also *County of Orange* (2013) PERB Decision No. 2350-M, p. 16.)

The Board applied this standard in *California State University, Long Beach* (1987) PERB Decision No. 641-H (*CSULB*). There, an employee frequently insisted on revising her relationship with her supervisor to obtain more autonomy. She also disagreed with priorities set by her superiors on matters such as preparing detailed statistical reports and conducting recruitments at local community colleges. As a result, the employee did not perform those duties to the satisfaction of her superiors. (*Id*. at proposed dec., pp. 52-54.) PERB found that it was more likely than not that the employer's adverse actions were motivated by management's desire to conduct its programs according to its own judgments and preferences, and that management was dissatisfied with the employee's apparent resistance to accepting direction and constructive criticism. (*Id*. at proposed dec., pp. 54-55.) Without deciding the correctness of management's assessment, PERB found that it was these concerns, and not the employee's protected activities, that motivated the adverse actions taken against her. (*Ibid*.)

In *Coachella Valley Unified School District* (2013) PERB Decision No. 2342, PERB found that the employer was justified in taking adverse action against one of its teachers based

on well-documented concerns about the teacher's failure to accept direction or meet his supervisor's expectations. PERB rejected the teacher's argument that his supervisor lacked the ability to understand the educational purpose behind his opposition to certain directives, reasoning that it was the employer's prerogative to determine the direction of its educational programs. PERB concluded that the teacher's unwillingness to abide by managerial directives constituted a non-retaliatory reason for the adverse actions. (*Id*. at proposed dec., pp. 23-24.)

In *Coast CCD*, *supra*, PERB Decision No. 1560, an employee and his supervisor were "constantly in adversarial mode," over matters unrelated to protected activity. There was also evidence that the employee had serious confrontations with both administrators and rank-and-file employees. Although the employee was "a very capable instructor," the employer was justified in taking the adverse actions against him due to his inappropriate confrontations with others and his failure to comply with the chain of command. (*Id*., at proposed dec., pp. 43-44; see also *Scotts Valley UESD*, *supra*, PERB Decision No. 1052, proposed dec., pp. 24-25.)

In *Baker Valley USD*, *supra*, PERB Decision No. 1993, an employer stated that it decided against renewing the employment of a probationary teacher "because of problems with student engagement in the classroom." (*Id*. at p. 13.) The Board found that explanation to be pretext for retaliation because there was no commentary about problems in that teacher's performance evaluations and there was no record of any counseling or discipline in his personnel file. (*Id*., citing *Simi Valley Unified School District* (2004) PERB Decision No. 1714.) The Board concluded that the employer in that case failed to carry its burden of proving that it would have made the same decision even if the teacher did not engage in any union activity. (*Id*. at p. 14.) In *Jurupa Community Services District* (2007) PERB Decision No. 1920-M, the Board similarly found pretext where the employer's notice of termination

included trivial incidents such as slamming doors, technical violations of the employer's sick leave policy, and exaggerated statements of verbal abuse. (*Id*. at proposed dec., pp. 17-19.) The employee in that case was also accused of altering his time card, but no witnesses testified about that incident during the PERB hearing. (*Id*. at proposed dec., p. 19.) Under those circumstances, the Board found that the employer did not meet its burden of proof and concluded that the employee's termination was retaliatory. (*Id*. at p. 4; see also *Chula Vista ESD*, *supra*, PERB Decision No. 2221, at proposed dec., pp. 6-7.)

In the present case, Tovares explained that he felt that Stolk's conduct demonstrated an aversion towards collaborating with certain others in the Chemistry department and the Office of Instruction. Tovares also believed that Stolk exhibited an unwillingness to be held accountable or to act as support for faculty in academic matters. As in *CSULB*, *supra*, PERB Decision No. 641-H, Tovares considered Stolk's actions to be inconsistent with what he thought an Instructional Aide's role should be in the Chemistry department. Tovares detailed some of his concerns in a counseling meeting with Stolk in 2012. He followed up with the Written Reprimand in January 2014 after, in his opinion, Stolk continued to exhibit problematic behaviors when interacting with certain colleagues. Then, in June 2014, Tovares drafted the Notice of Intended Disciplinary Action, which details additional concerns about Stolk's willingness to collaborate with and support certain faculty and to hold himself accountable to others. Many of those concerns were later detailed in the charges from the April 2015 Suspension Notice.

Stolk devotes a considerable proportion of his closing brief responding directly to the validity of the charges against him, and arguing that his actions were justified. For that reason, this proposed decision will examine the reasoning behind the charges in the Suspension Notice.

In doing so, however, it is important to recognize that PERB's inquiry is not whether Stolk's discipline was just and proper. Rather, the issue here is whether Stolk's protected activity was the true motive behind the adverse actions. (*UC Regents*, *supra*, PERB Decision No. 2302-H, p. 3, citations omitted.) Accordingly, PERB's authority extends only to remedying those decisions that were the product of retaliation and PERB is not empowered to resolve whether those decisions were based on any number of other unlawful or unjustified reasons. (*UC Regents*, p. 3, citing *San Bernardino City Unified School District* (2004) PERB Decision No. 1602; *Moreland ESD*, *supra*, PERB Decision No. 227.) This proposed decision will therefore not assess whether the suspension was just and proper. It will only consider the extent to which the District's justifications for the discipline were pretext for retaliation.[26]

i. The April 4, 2014 Instructional Aides Meeting

Stolk admits that he did not attend the April 4, 2014 science Instructional Aides meeting called by Vice President Schwerdtfeger. Stolk asserts that his absence was justified because he was assisting faculty member with setting up and conducting a lab experiment at the time. Stolk also claims that this was a "no-harm/no-foul" scenario because the District could have easily asked him to review any materials from the meeting on his own time afterwards. These assertions might have been more persuasive had there been any showing that Stolk tried to adjust his schedule or suggest an alternative to attending beforehand. There was not even any evidence that Stolk notified anyone that he could not attend. Based on this

[26] For example, Stolk argues that Tovares only included the budget overage allegations in the Notice of Intended Disciplinary Action because he was embarrassed at having to seek financial assistance from the Vice President of Instruction. Even if Stolk's argument were true, it would tend to show that Tovares's actions were motivated by something other than retaliation for EERA-protected activities. (See *LAUSD*, *supra*, PERB Decision No. 2390, p. 11.)

record, it is unsurprising that the District concluded that his absence was unjustified, and insubordinate. I conclude that these were non-retaliatory reasons for suspending Stolk.

ii. The Chemistry Supply Budget Overage

Stolk also does not dispute initiating the purchase which resulted in the Chemistry department exceeding its supply budget by roughly 25 percent. Stolk argues at length that the Galaxy budget software malfunctioned and failed to notify him that his purchase request would exceed the budget. However, even if that were true, it would not change the underlying facts that Stolk, as an Instructional Aide III, was primarily responsible for monitoring the Chemistry department budget and that he failed to detect the overage before it occurred. Stolk himself emphasizes that he does his own meticulous bookkeeping, and he asserted as much to both Tovares and to Stokes. Tovares, likewise, testified that he expects Instructional Aide IIIs to maintain their own budget records as part of their responsibility over their respective departmental budgets. Stolk not only failed to detect the overage beforehand, but he also failed to report it afterwards. Then, when Tovares attempted to schedule a meeting with Stolk to discuss the matter, Stolk does not dispute that he initially declined to attend. He once again claims that this decision was justified because he was assisting a faculty member that day, which he contends was more important than the meeting. Stolk points to Tovares's general testimony that there may be some occasions where an Instructional Aide's duty in assisting during a lab might be more important than a scheduled meeting. However, the meeting in question took place at 4:00 p.m., after Stolk's regular shift. Stolk was aware that the District could have given him overtime or compensatory time off to attend the meeting. And yet, he did not even mention these issues before rejecting Tovares's request to attend. Stolk only attended the meeting after being given a direct order from Tovares. Under the circumstances,

the District considered Stolk's behaviors to be non-cooperative, and an attempt to avoid responsibility for the budget overage. I conclude that these were non-retaliatory reasons for pursuing Stolk's suspension.[27]

iii. Stolk's April 30, 2014 Absence

The District also accused Stolk of leaving his post before his shift ended and without notifying anyone during the windstorm that started on April 30, 2014. Stolk acknowledges leaving, but defends this decision by stating that Tovares's administrative assistant, Perez-Flores entered the classroom Stolk and told everyone to leave due to the storm. Stolk also points out that the District's e-mail to staff "urged," but did not require, staff on campus to stay indoors until further notice. Stolk admitted to both Tovares and Stokes that he did not hear Perez-Flores clearly and relied on others to explain what she had said. Setting aside the fact that Perez-Flores does not control Stolk's schedule and does not approve his leave requests, I conclude that the District found it genuinely problematic that Stolk would leave during duty time without seeking clarification first. And, regardless of whether the District's e-mail "urged" or required staff to stay on campus during the windstorm, it was reasonable for the District to expect that Stolk to contact a supervisor before leaving his post during his shift. The District presented evidence that other employees who sought to leave because of the storm contacted their supervisors beforehand and received permission. Stolk offered no explanation

[27] Stolk also presented evidence that District policy prioritizes faculty's schedules over classified staff regarding meetings. Stolk's witness, Gibbons testified that she considered this policy unwise because Instructional Aides have an important role in maintaining lab safety. In this case, however, the meeting in question did not conflict with any of Stolk's lab duties. Setting that aside, even if the meeting was scheduled pursuant to a misguided policy which wrongly deemphasizes Instructional Aides' role in lab safety, this would still not tend to support Stolk's case. The issue here is whether the District engaged in retaliation for protected activity; it is not a general assessment on the District's scheduling policies.

for not doing the same, even though the record shows that he had access to e-mail that day and actually e-mailed Tovares about another subject.

Stolk also suggests that the District "constructively approved" his absence based on Tovares's testimony that he directed a staff member to lock or secure doors on the San Jacinto campus that day. According to Stolk, Tovares would not have given such an order unless he already knew that all classrooms had been vacated. This argument ignores the possibility that the District had other reasons for securing its facilities during the windstorm, such as safeguarding equipment and protecting occupants sheltering inside. Furthermore, even if it were true that Tovares knew that Stolk had left, it would not necessarily mean that Tovares approved of Stolk's absence.

Finally, Stolk contends that it was improper for the District to discipline him for his absence that day because he had serious concerns about the damage the windstorm was causing to his home and his personal vehicle. But, the District did not suspend Stolk out of indifference to his property concerns. Rather, the Suspension Notice states that the discipline was based on Stolk's failure to provide notice or any justification whatsoever until he had already taken the leave. And, coupled with the fact that there was no showing that Stolk's concerns required him to leave without first proving notice, the District determined that Stolk was absent without approval on April 30, and that this was a non-retaliatory reason for suspending him.

iv. Stolk's May 1, 2014 Absence and His Failure to Schedule a Meeting with Tovares

As already stated above, I find it suspicious that the District included Stolk's May 1, 2014 absence among the charges in the Suspension Notice, because it had already approved his request to use vacation time for that absence by then. Nevertheless, the Suspension Notice also

described other troubling aspects of Stolk's behavior that day. That morning, Tovares directed San Jacinto Instructional Aides, including Stolk, that because of the windstorm, they should either report for duty at the Menifee campus or use vacation time. Tovares directed the Instructional Aides to notify the people at Menifee if they intended on going there and to notify his office of their plans either way. Stolk elected to use vacation time and he does not dispute that he failed to inform anyone of this decision beforehand. Stolk asserts that he did not contact Tovares's office before using vacation that day because he thought he only had to check in if he intended on going to the Menifee campus. I find that the District concluded that Tovares's e-mail clearly directed Instructional Aides to notify his office of their plans and that it interpreted Stolk's failure to respond as ignoring Tovares's order.[28]

In addition, Stolk had the opportunity to explain his actions because Tovares directed Stolk to schedule a meeting to discuss the matter. And yet, Stolk acknowledges that he did not comply with this directive. Stolk contends that he did not feel the need to comply because he eventually e-mailed Tovares about using vacation time on May 1. Stolk argues that Tovares himself could have arranged the meeting if he felt the need to discuss the matter further. This argument does not address the fact that Stolk failed to follow Tovares's directive. Moreover, since Tovares said he wanted to discuss both Stolk's absences on April 30 and May 1, it is difficult to understand why Stolk believed that his response about only one of the two days at issue would have fully obviated the need for the meeting. Under the circumstances, I find that

[28] Stolk contends in his closing brief that he reported for work at the San Jacinto campus that day and spoke with faculty member Jones about his schedule before leaving. He suggests that this conversation satisfied any duty he had to report his whereabouts before leaving. This claim apparently refers to a statement in Stolk's written response to the June 2014 Notice of Intended Disciplinary Action. In that document Stolk states that he arrived at work and discussed his schedule *for the following week* with Jones. There was no evidence that Stolk discussed his plans for that day with Jones, or anyone else, before leaving campus.

the District concluded that Stolk failed to follow Tovares's directive about scheduling the meeting and that this was another non-retaliatory reason for pursuing the suspension.

v. The Chemistry 102 Lab

As already discussed above, I find it unusual that the District declined to investigate whether another employee, Heredia, could have corroborated Stolk's version of events regarding this charge. However, I also note that this charge in the Suspension Notice was based, in part, on Stolk's statement to Tovares that he (Stolk) determines the lab schedule. Tovares testified that he remembered Stolk making this comment and Stolk provided no contrary evidence. Nor did Stolk dispute making this statement either during his *Skelly* meeting with Stokes or in the written materials he provided to her.[29] Under the circumstances, I conclude that the District considered Stolk's statement to be another example of Stolk seeking to exert control in matters Tovares felt should be determined by faculty. This is another non-retaliatory reason for the suspension.

vi. Conclusion

The record in this case demonstrates that there is both circumstantial evidence of retaliation and also evidence that the District had concerns about Stolk's behavior that was unrelated to Stolk's protected activity. Weighing all of this evidence together, I conclude the District suspended Stolk for non-retaliatory reasons. It is curious that the District reduced the contemplated discipline from a demotion to a five-day suspension shortly after Stolk expressed his desire for an appeal hearing. Perhaps conveniently for the District, there is no right to a hearing for suspensions of less than five days. While one might question the timing of this

[29] Stolk's written statement provided to Stokes does claim that he works collaboratively with faculty, but this statement did not include any detail about Stolk's meeting with Tovares or statements he made about controlling the lab schedule.

change, the shift is at least partially explained by the fact that the District had gone through four different Vice Presidents of HR between the time the District initiated the discipline against Stolk and the time it decided on a five-day suspension. Horsley credibly testified that he felt a demotion was too significant of a jump in punishment from the January 2014 Written Reprimand.

There were also some inconsistencies in the nature of the charges and the District's investigation of those charges, but a large proportion of the charges in the Suspension Notice were based on undisputed conduct. The District found that this conduct demonstrated a follow clear directives, a lack of willingness to be held accountable, and a resistance to collaborating with others in a manner consistent with Tovares's instructions. While I recognize that Stolk firmly believes that his actions were appropriate and did not warrant discipline, it is beyond the scope of this proceeding to resolve the parties' disagreement. I hold that the District's concerns with Stolk's behavior constitute non-retaliatory reasons for pursuing discipline against Stolk and that those concerns were the true reason for the suspension. Stolk's claim that his suspension was retaliatory is accordingly dismissed.

2. Stolk's Unalleged Violations

Stolk appears to raise two additional causes of action against the District in his closing brief. First, Stolk asserts that the District wrongly denied him 2.5 hours of vacation time for his absence on April 30, 2014. Second, Stolk seems to assert that the District constructively discharged him, by forcing him to agree to retire in September 2016. Neither claim is part of the PERB complaint. PERB has the authority to review unalleged violations when the following criteria are met: (1) adequate notice and opportunity to defend has been provided to respondent; (2) the acts are intimately related to the subject matter of the complaint and are

part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on the issue. (*Claremont Unified School District* (2015) PERB Decision No. 2459, p. 3, citing *County of Riverside* (2010) PERB Decision No. 2097-M; *Fresno County Superior Court* (2008) PERB Decision No. 1942-C.) The unalleged violation must also have occurred within the applicable statute of limitations period. (*Ibid*.)

Applying that standard here, both of Stolk's unalleged violations are untimely under the six month statute of limitations period for EERA cases. (*Los Angeles Unified School District* (2014) PERB Decision No. 2359, p. 3). Stolk first contends that the District improperly deprived Stolk of 2.5 hours of paid vacation time on April 30, 2014. Tovares denied Stolk's leave time on or around May 12, 2014, outside the statute of limitations period by several years. Moreover, on November 8, 2016, PERB withdrew, at Stolk's request, all claims of adverse actions taken by the District before January 8, 2015. This necessarily includes the District's conduct from May 12, 2014. Although that withdrawal was without prejudice to refile, Stolk provided no notice that he would attempt to revive such claims. Therefore, the standards for unalleged violations are not satisfied here, and this claim will not be considered.

Stolk's constructive discharge claim is likewise untimely. Constructive discharge is a legal term describing an essentially involuntary resignation from employment resulting from an employer's intolerable working conditions. (*Visalia Unified School District* (2004) PERB Decision No. 1687, proposed dec., p. 23.) The statute of limitations period in constructive discharge cases runs from the date the employee submits his or her resignation. (*Id*. at proposed dec., pp. 24-25.) Here, Stolk submitted his resignation on September 9, 2016, which is more than six months from when Stolk first raised this issue at PERB. In addition, Stolk

was informed during the hearing that it would be problematic to assert his constructive discharge claim because it was not in the PERB complaint and he did not indicate his intent to do so earlier. Stolk gave no indication at that point that he intended to pursue his alleged constructive discharge as an unalleged violation. Therefore, I find that the District lacked notice of his intent to pursue this claim. This claim will also not be discussed further.

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-6052-E, *Robert Stolk v. San Jacinto Community College 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, subdivision (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).)