STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

MT. SAN JACINTO COLLEGE FACULTY ASSOCIATION, Charging Party, v. MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. LA-CE-6583-E PERB Decision No. 2865 June 28, 2023

Appearances: California Teachers Association by York Chang, Attorney, for Mt. San Jacinto Faculty Association; Atkinson, Andelson, Loya, Ruud & Romo by Paul Z. McGlocklin and John W. Dietrich, Attorneys, for Mt. San Jacinto Community College District.

Before Banks, Chair; Krantz and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on Mt. San Jacinto Community College District's exceptions to the proposed decision of an administrative law judge (ALJ). The ALJ found that the District violated the Educational Employment Relations Act (EERA) when it removed faculty members Rosaleen Gibbons and Farah Firtha as chairs of the Chemistry Department, refused to recognize their subsequent reelection as chairs, reassigned them to teach lower level classes for the Fall 2020 semester, and issued two counseling documents, each in retaliation for protected activities including raising

safety concerns and alleging that their removal as chairs was retaliatory.[1] The District excepted, primarily alleging that: (1) Gibbons's and Firtha's conduct was not protected by EERA; (2) removal as chairs, refusal to reinstate as chairs, and assignment of Fall 2020 classes were not adverse actions; (3) the Mt. San Jacinto College Faculty Association failed to establish nexus; (4) even if the Association made a prima facie case of retaliation, the District met its burden to show legitimate, nondiscriminatory reasons for its actions; and (5) the ALJ erred in his ordered remedies. The Association urges us to deny the District's exceptions and thus affirm the proposed decision.

Based on our review of the proposed decision, the entire record, and the parties' arguments in light of applicable law, we find the record supports the proposed decision's factual findings and its legal conclusions are in accordance with applicable law. We therefore affirm the proposed decision, as supplemented by our discussion below.

FACTUAL AND PROCEDURAL BACKGROUND[2]

District and Chemistry Department Structure and Background

The District is a public school employer within the meaning of Government Code section 3540.1, subdivision (k). The Association is an employee organization within the meaning of section 3540.1, subdivision (d) and an exclusive representative

[1] EERA is codified at Government Code section 3540 et seq. All further undesignated statutory references are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

[2] The District challenges the brevity of the proposed decision's factual findings, but does not except to any specific finding of fact. This factual background is drawn from the proposed decision, supplemented by the record to provide additional support for the discussion below.

within the meaning of section 3540.1, subdivision (e). Gibbons and Firtha are employees within the meaning of section 3540.1, subdivision (j).

This case primarily concerns the District's Chemistry Department, which at the time of hearing had faculty at two District campuses, the San Jacinto campus and the Menifee Valley campus. Jeremy Brown is the District's Vice President of Instruction. Brown's duties include overseeing all classes, supervising instructional deans, and working closely with faculty on the curriculum process to develop new courses, maintain existing courses, and deactivate courses that are no longer needed.

During the relevant time period, Brown supervised Dean of Instruction Marc Donnhauser. Prior to July 1, 2020, Donnhauser's duties included supervising all Menifee Valley campus Chemistry Department instructional staff, including Firtha and her instructional aides (IAs). After July 1, 2020, Donnhauser was assigned to oversee math and science departments District-wide, including the Chemistry Department at both the San Jacinto campus and the Menifee Valley campus, and he also became the direct supervisor of Rosaleen Gibbons and her IAs.

Gibbons has worked as a chemistry professor at the San Jacinto campus since 2012, and as a tenured professor since 2014. Gibbons began serving as the San Jacinto Chemistry Department chair in 2015. Prior to Fall 2020, Gibbons typically taught the majors' chemistry courses, including majors' general chemistry and majors' organic chemistry, which had more detail and complexity than non-majors' courses.[3]

[3] "Majors'" courses refer to courses taken by chemistry or other science majors.

Prior to March 2020, Gibbons had never been disciplined, and had never received an unsatisfactory performance evaluation.

Firtha has worked as a chemistry professor at the Menifee Valley campus since 2011. Firtha began serving as the Menifee Valley Chemistry Department chair in 2012. Prior to Fall 2020, Firtha typically taught only majors' chemistry classes, including general organic chemistry and biochemistry courses. Prior to March 2020, Firtha had never been disciplined, and had never received an unsatisfactory performance evaluation.

The District and the Association are parties to a collective bargaining agreement (CBA). CBA Article XI sets forth department chair compensation and duties. Article XI, section (B) provides that department chair duties include, in relevant part: recruiting part-time faculty, coordinating with deans to schedule classes and order textbooks for these classes; coordinating with departmental faculty to staff class offerings, coordinating development and revision of departmental curriculum, approving professional development activities for part-time faculty, and assigning work tasks to employees, such as IAs.[4] The District's standard practice for appointing a department chair is that every two years, the District's Academic Senate sends out a request for nominations, and then administers an election of the chair by full-time departmental faculty (tenured and tenure-track) and all currently serving adjunct faculty. Once it records the election results, the Academic Senate sends the list of elected faculty members to the Vice President of Instruction, who then contacts the elected faculty

[4] While department chairs can assign work tasks to IAs, they cannot supervise them.

members to go over the department chair duties and compensation. The Vice President of Instruction assigns the chair duties to the elected chair. There is no other regular process for appointing a department chair.

The CBA provides that department chairs may receive two forms of extra compensation. First, Article XI, section (A)(2) provides department chairs with partial release time from instructional duties. Next, Article XI, section (C) provides that "all extra duties associated with specialized departments will have coordination between the Department Chair and the area dean to determine appropriate compensation." Gibbons and Firtha received both release time and extra duty pay.

Article XI, section (D) also establishes a procedure for the removal of department chairs, which requires an evaluation at the end of the first year as department chair, at least once every other academic year thereafter, and provides for the removal of department chair duties from a department chair upon an unsatisfactory rating. Article XI, section (D)(4) provides: "The overall evaluation will be rated meets/exceeds expectations, needs improvement, or unsatisfactory. A rating of needs improvement must be accompanied by written recommendations for improvement, goals, and timeline to meet goals. Another evaluation will take place the following semester to document improvement. A rating of unsatisfactory may result in the removal of department chair duties from the Unit Member." The parties negotiated Article XI, section (D) in part because the District prioritized developing a method to remove a department chair during bargaining for the 2017-2020 CBA. Twice in recent memory, but before the events at issue here, a department chair vacated their chair position upon mutual

agreement with the District. In those instances, an administrator took over chair duties rather than appointing a new chair.

Chemistry Lab Safety Concerns

Beginning in 2017, Gibbons and Firtha began reporting Chemistry Department safety concerns to Brown and Donnhauser.[5] In brief, the college had an ongoing problem recruiting, training, and retaining IAs. IAs set up chemistry experiments and manage chemicals. The San Jacinto campus, in particular, required qualified and trained IAs to independently supervise students in the Organic Chemistry class as they worked in two separate but adjoining laboratories, with limited line-of-sight between the two. Due to the staffing shortage and frequent turnover, the work was not consistently performed. In Fall 2018, there were two lab explosions and two chemical fires that Firtha attributed to IA performance issues. Gibbons and Firtha paid close attention to these problems and the potential impacts to faculty safety, and on several occasions asked that the District take steps to address these issues. Brown and Donnhauser met with Gibbons and Firtha several times and made multiple efforts to address the problem, but it remained substantially unsolved. Gibbons and Firtha grew frustrated with the problem, Brown and Donnhauser grew frustrated with the chairs' approach, and the relationship between the chairs and administration soured.

[5] Alma Ramirez also received some of these complaints. From sometime in 2019 through July 1, 2020, Ramirez was Dean of Instruction over the Chemistry Department at the San Jacinto campus. However, Ramirez did not testify at the hearing and the parties' arguments do not substantively rely on her involvement in the events at issue in this case.

In January 2020, an IA at the San Jacinto campus, Jose Guerrero, accepted a promotion to the Menifee Valley campus.[6] Because Guerrero's move would leave the San Jacinto campus without an experienced IA for Organic Chemistry labs, and because the current Organic Chemistry instructor, Michael Martinez, was new to teaching that class, for safety reasons Gibbons and Firtha asked Brown to allow Guerrero to continue to cover some Organic Chemistry classes at the San Jacinto campus until a replacement could be sufficiently trained. Brown denied the request and Gibbons pushed the issue. In February, Gibbons and Firtha raised the workplace safety issue and their proposed solution to the Academic Senate and the Association; Gibbons also e-mailed the same concerns directly to Jeannine Stokes, then the District's Chief Human Resources Officer.[7] Their e-mails and an Association leader's response were forwarded to Brown. On February 21, Brown e-mailed the Chemistry Department faculty and administrators with his plan to provide support for the San Jacinto campus Organic Chemistry lab, which included IA Sylvia Heredia working overtime to support the class during recruitment to fill the permanent position, and continued research on duty of care standards. Brown described these solutions as "temporary", and on March 4 Heredia confirmed via e-mail that she could not continue to be present in the Organic Chemistry labs.

[6] All further undesignated date references are to 2020.

[7] Stokes held several titles from the relevant time period through her testimony at the formal hearing, but at all relevant times acted as the District's top level Human Resources administrator.

March 5 Meeting Request

On March 5, Brown e-mailed Gibbons and Firtha with the subject "Chemistry [D]epartment staffing meeting." He said, in relevant part:

> "We are working on a solution to bring [Guerrero] over to support [Martinez's Organic Chemistry] class. Cheri [Hodge] will be reaching out to him today. I have been in communication with the individuals directly involved throughout this process.
>
> "It is important that we have a broader conversation soon about the [C]hemistry [D]epartment. [Donnhauser], [Ramirez| and I are coordinating schedules, and I see availability in your teaching/office hours schedule on Monday, March 5.[8] Please make yourselves available **Monday at 11:00-12:00.** It would be best if we can meet together in my office at MVC, 915, but I can make a Zoom option available if you cannot make it to MVC.
>
> "Please let me know if you have scheduling issues with this time. You can expect a calendar invite from Debbie."

(Bold in original.)

On March 8, at 6:40 p.m., Gibbons responded to Brown's e-mail. She was critical, stating, for example, "we have lost complete confidence in your . . . abilities to manage [C]hemistry [D]epartment issues in a professionally thoughtful, reasoned, and timely manner," and "you have demonstrated dereliction of duty of such gravity that it is increasingly likely that students, staff, and faculty will suffer serious injuries, including some that might even prove to be lethal in nature." She also said that she planned to file a complaint and that she believed it was inappropriate for her to meet

[8] Though the e-mail contained the wrong date, the parties understood it to mean Monday, March 9.

with him. Brown replied at 9:25 p.m. that he expected Gibbons to attend the meeting the next day. Gibbons responded on March 9 at 12:12 a.m. Her e-mail referenced the ongoing request for Guerrero's staffing, noted that Firtha planned to attend a virtual conference Monday through Wednesday, and stated that they were scheduling a meeting with legal counsel regarding Brown's harassment related to "intimidating us into forsaking our duty-of-care concerns." Gibbons explained that for these reasons, "we will not be accepting your invitation for the 3/9/2020 meeting." The e-mail's signature line said it was from both Gibbons and Firtha, but Firtha did not send an independent e-mail or otherwise directly respond.

Brown responded by e-mail at 7:54 a.m. Brown disputed Gibbons's characterizations, asserted that Firtha could attend because it was a virtual conference, and wrote "[y]our refusal to attend this meeting is a clear demonstration of insubordination . . ." Brown responded, in part: "I have indicated in the initial [e-mail] that we are planning to arrive at the conclusion you initially asked for, and I have invited, and then directed you to attend a meeting to discuss details." Brown concluded as follows:

> "your unwillingness to communicate creates a barrier that can result in a host of problems from lack of supervision. I see no way forward with the two of you as department chairs of chemistry. As of today, you will no longer hold the position of department chair. As you have already completed the work of scheduling for the current semester and have done much of the department coordination, this will not impact your teaching load or pay for the Spring 2020 semester. Going forward, the deans and director of instructional labs will communicate directly with each faculty member and IA staff regarding matters of their own classrooms. You will not be 'required' members of any chemistry faculty department evaluations. Fall 2020

> schedules will be developed in direct conversation between deans and faculty, and departmental duties will be handled in the same manner."

Six minutes later, Brown sent a follow-up e-mail to Gibbons and Firtha, writing "I meant to add that I regret that our working relationship has reached this point. Please know that the removal of department chairs is a last resort for me, as I respect the expertise that you can bring to the management of a department. Unfortunately, when chairs and deans are completely at odds, this impacts students, faculty, and staff."

On March 10, Brown informed the chemistry faculty and staff that Gibbons and Firtha were no longer the Chemistry Department chairs. The unilateral removal of a department chair was unusual and without clear precedent at the District. On March 18, Brown appointed Professor Josh Hartman as Chemistry Department chair. The faculty did not elect Hartman at that time. The parties disagree about how exceptional it was for the District to appoint a chair without a faculty election, but it was at least unusual and had not happened recently. In early April, the chemistry faculty re-elected Gibbons and Firtha as Chemistry Department chairs, with Hartman elected as co-chair for the Menifee Valley campus. Brown acknowledged the election, but via e-mail on April 3 informed Gibbons and Firtha that "I will not be approving your assignment as chairs, for the reasons expressed earlier this semester. My decision on this still stands."

Fall 2020 Teaching Schedule

On April 22, Brown sent out the Fall 2020 teaching schedule for the Chemistry Department. In other years, Donnhauser worked directly with the Chemistry Department chairs to develop faculty staffing assignments, typically without the direct

involvement of the Vice President of Instruction. For the Fall 2020 schedule, Brown created the schedule himself without consulting Donnhauser or Hartman, though he later consulted them about implementation. Brown made the decisions about the schedule and assignments "pretty close to the time" that he announced the changed schedule. It was unusual for the Vice President of Instruction to have this level of involvement in scheduling and staffing.

The Fall 2020 schedule showed Gibbons and Firtha assigned to teach multiple classes of Introductory Chemistry, instead of the majors' level chemistry classes they typically taught. Per Gibbons, changing to teaching Introductory Chemistry doubled the number of students she taught in a semester from 48 students to 96 students, increasing her workload. Firtha also took on more students by teaching three sections of Introductory Chemistry classes, resulting in approximately 20 more students, which generated additional work. Brown testified that he did not have any particular reason for assigning Gibbons and Firtha to teach Introductory Chemistry.[9]

[9] Donnhauser, in contrast, testified that Brown told him he reassigned Gibbons and Firtha to Introductory Chemistry because they were the most senior Chemistry Department faculty at the time, and by teaching those courses they could set the foundation of knowledge and identify where incoming students had deficiencies. The ALJ did not resolve this testimonial dispute. This requires the Board to make a credibility determination itself. (*See Regents of the University of California* (2020) PERB Decision No. 2704-H, pp. 16-21.) Because Donnhauser's testimony is uncorroborated hearsay, and because it is undisputed that Brown made the decision to reassign Gibbons and Firtha without input, we do not credit Donnhauser's testimony on Brown's reasoning. (See PERB Reg. 32176.) Instead, we find Brown's inability to recall any specific justification for his own decision to be a salient factor tending to show discriminatory motive.

Gibbons responded to the new schedule with an e-mail to Brown on May 4 which she copied to several people, including Firtha and Donnhauser. Gibbons's e-mail began by noting "I'm not sure what the logic is for changing the [two] most senior faculty members schedules to Introductory Chemistry, allowing other scheduling alterations but refusing any for [Firtha] and I for the upcoming Fall schedule, but once again, this feels like harassment." Her e-mail went on to note that the new scheduling plan seemed likely to negatively impact part-time faculty who may hold other jobs elsewhere and typically keep the same schedule semester after semester in order to synchronize their course loads.

Brown responded to Gibbons's e-mail on May 5, acknowledging that Firtha had also questioned the new schedule, and stating in pertinent part "while I can see that this is a major departure from past scheduling practice of the [C]hemistry [D]epartment, I respectfully ask that you both accept the change in your assignments and work toward the goal--increased student success across all courses in the department." Brown offered to meet with Gibbons to discuss further. Gibbons replied to Brown that day, saying that Brown "completely misread the point" of her e-mail; acknowledging Brown had the right to assign classes, but reiterating her concerns that the new schedule would negatively impact part-time faculty and that Brown's actions had excluded faculty from decisions at the District.

Gibbons's May 6 Counseling Memo

On May 6, Brown e-mailed Gibbons a counseling memo. The memo stated in pertinent part:

> "This memo serves as a counseling memo regarding your disrespectful communication on Tuesday, May 5, 2020 . . .

> Your message is a clear example of disrespectful behavior. I have alerted you to similar behavior in the past, (March 8, 2020), when you and Farah Firtha refused to meet with me as department chairs. On Tuesday, May 5, 2020, I respectfully requested that you accept the change in assignment and focus on the goal of bringing more students successfully through your course. I offered to meet with you, should you have other questions, and asked that you contact my executive assistant. In response, you continued to make your argument and escalated your tone to one that is clearly disrespectful. This is insubordinate behavior. 'You completely misread the point of my [e-mail],' is an inappropriate assumption. You are also assuming that 'the point of logical chemistry curriculum [has] been excluded from [my] decisions' and that 'the COVID struggles of part-time faculty is absent from consideration as well.'
>
> [¶] . . . [¶]
>
> "A copy of this memo will not be placed in your personnel file at this time. However, in the event that this issue recurs in the further and if you do not comply with this directive, this memo will be placed in your personnel file and further corrective action will be taken."[10]

[10] Though the memo stated it would not be placed in Gibbons's personnel file, she later located it there during a file review in August. The record does not reflect who placed the memo in her personnel file, or when this occurred. The District removed it from her personnel file upon her request on August 17. Per an e-mail from Stokes, the District would maintain the memo in Brown's "suspense file." Stokes's uncontradicted testimony at hearing indicated that "[s]ome counseling memos are placed in the [personnel] file depending upon the severity of the counseling memo. Most of the time they're in what we call a suspense or site file," maintained by Stokes, Brown, and Human Resources analysts. The suspense files were organized by faculty name, and the District would refer to them if any faculty member issues subsequently arose. At that point, the District could attach any documents held in the suspense file to subsequent disciplinary documents and move them all to the employee's personnel file.

Firtha's Comments at the May 6 Academic Senate meeting

Also on May 6, the District's Academic Senate convened. During the meeting, Firtha addressed the Senate and said that Brown removed her and Gibbons as Chemistry Department chairs in retaliation for advocating for workplace safety, urging the Academic Senate not to approve the list of department chairs from which she and Gibbons had been removed. On May 6, at 8:06 p.m., Brown e-mailed Firtha (May 6 admonishment). His e-mail said in pertinent part:

> "The purpose of this [e-mail] is to inform you that a statement you made in the Academic Senate meeting on 5/6/2020 was inaccurate, and may have caused misunderstanding among participants in the discussion as they made decisions. On the item 'Department Chairs,' you explained that 'we have been advocating for our program's integrity and the safety of our program, and that has resulted in the chairs being removed by admin . . . I guess we are kind of asking that you use your powers and perhaps maybe not approve this list . . . .' 'There kind of needs to be a way to protect faculty when they are advocating for their program and their program's integrity and especially for chemistry we're advocating for the safety of our program.' It appears that you perceive the reason for your removal of chair was due to your advocacy for chemical safety. In my [e-mail] to you on Sunday, March 8, I made clear that the reason for your removal was because you and [Gibbons] refused to meet with us, and that your insubordination results in a breakdown in communication and a dysfunctional supervisory relationship.
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> "In the future, it is important in public meetings to accurately represent these matters. The District is committed to your continuing success. To that end, the District wants to ensure that you have access to AP 7360 and BP 7360.3."[11]

[11] AP 7360 and BP 7360.3 are two District disciplinary policies.

Firtha later reviewed her personnel file and found a copy of the May 6 admonishment in the file. On August 24, Firtha e-mailed Stokes and requested she remove the admonishment from Firtha's file. Stokes replied the same day to confirm the e-mail was removed from the file, asserting that an analyst placed it in Firtha's file inadvertently.

Procedural Summary

The Association filed an unfair practice charge on September 3, and the District filed a position statement on October 5. PERB's Office of the General Counsel issued a complaint against the District on July 19, 2021, which alleged: (1) Gibbons and/or Firtha exercised rights guaranteed by EERA by: raising workplace and classroom safety concerns to District management staff and advocating for training and proper classifications of employees; on February 17, raising concerns with the Association regarding unsafe working conditions in the chemistry laboratories due to unstaffed course sections and lack of properly-trained classified staff; on February 18, Gibbons notifying the District's management staff regarding safety concerns at the chemistry labs; on February 29, Gibbons—on behalf of herself and Firtha—forwarding an e-mail message to management staff regarding, among other things, improperly trained staff overseeing the labs, and "liabilities" arising from understaffed labs; on March 8, declining to attend a meeting with the District's management staff due to management's lack of concern for safety and "mockery" of their recommendations, also advising Brown that they were preparing a complaint due to the non-responsiveness regarding their safety concerns; on May 6, 2020, Firtha attending the District's Academic Senate meeting to voice concerns of retaliation for their

protected activity, and to ask the Senate for support; (2) the District's management agents, including Brown, took adverse action against Gibbons and/or Firtha as follows: on March 9, Brown removing them from Chemistry Department chair positions; on April 3, Brown refusing to recognize their re-election and assignment as Chemistry Department chairs; on April 22, changing their teaching assignment for the 2020-2021 school year from "upper-level chemistry" to "remedial chemistry," which is typically taught by part-time employees and faculty with the least seniority; on May 6, Brown issuing Gibbons a "counseling memo"; and on June 29, Brown placing in Firtha's personnel file a May 6 e-mail message admonishing her to speak more accurately in public comments (e.g., during Academic Senate meetings), while also referencing Respondent's Discipline and Dismissal protocols; and (3) the District took these actions because of Gibbons's and/or Firtha's protected activities. The complaint also alleged derivative interference violations.

The District filed a timely answer. PERB held two informal conferences, but the parties did not reach a resolution, and PERB held a formal hearing on March 7-9, 2022, via PERB's Webex Platform. After receiving closing briefs, the ALJ issued his proposed decision on December 30, 2022, finding that the District violated EERA by retaliating against Gibbons and Firtha for engaging in protected activities, and also finding derivative interference violations. The District filed timely exceptions, challenging the bulk of the ALJ's legal conclusions. The Association filed a timely response, urging us to deny the District's exceptions.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City and County of San Francisco* (2021) PERB Decision No. 2757-M, p. 8.) However, the Board need not address issues that the proposed decision has adequately addressed or that would not impact the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5.) PERB Regulation 32300, subdivision (e)(1) provides that "[a]bsent good cause, the Board itself will not consider . . . issues and arguments not raised in the statement of exceptions."

Except for cases involving alleged facial discrimination, PERB considers a charging party's discrimination or retaliation claim under the framework set forth in *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*) and its progeny. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 12 & fn. 6.) Under the *Novato* framework, the charging party's prima facie case requires each of the following four elements: (1) one or more employees engaged in activity protected by a labor relations statute that PERB enforces; (2) the respondent had knowledge of such protected activity; (3) the respondent took adverse action against one or more employees; and (4) the respondent took the adverse action "because of" the protected activity, which PERB interprets to mean that the protected activity was a substantial or motivating cause of the adverse action. (*City of San Diego* (2020) PERB Decision No. 2747-M, p. 26; *City and County of San Francisco* (2020) PERB Decision

No. 2712-M, p. 15 (*San Francisco*).) If a charging party establishes a prima facie case of retaliation, and the evidence also reveals a non-discriminatory reason for the employer's decision, the respondent may prove, by a preponderance of the evidence as an affirmative defense, that it would have taken the exact same action even absent protected activity. (*Ibid*.)

The District's exceptions do not dispute employer knowledge, nor do they challenge the determination that Gibbons's May 6 counseling memo and Firtha's May 6 admonishment are adverse actions, but otherwise the District challenges all other elements of the Association's prima facie case, as well as asserts the affirmative defense that it would have taken the same actions regardless of Gibbons's and Firtha's protected activities. The District's exceptions also challenge portions of the ALJ's remedial order. We address each remaining element of the prima facie case, then address the District's affirmative defense before turning to the appropriate remedy.

I. Protected Activity

PERB-administered statutes protect most union and employee speech related to legitimate labor and employment concerns. (*Carpinteria Unified School District* (2021) PERB Decision No. 2797, pp. 13-14 (*Carpinteria*).) For instance, an employee is typically protected in criticizing working conditions, management, or union leadership, if the criticism relates to advancing employee interests or is a logical extension of group activity. (*Ibid*.)[12]

[12] EERA also protects certificated employees' speech on educational policy. (*Berkeley Unified School District* (2015) PERB Decision No. 2411, pp. 16-18.)

A. Safety Complaints

The Board has long held that EERA protects an employee's pursuit of a safety-related complaint through their union. (*Oakdale Union Elementary School District* (1998) PERB Decision No. 1246, p. 17 (*Oakdale*), citing *Regents of the University of California* (1983) PERB Decision No. 319-H, p. 15, fn. 6.) EERA also protects employees' right to report safety concerns to their employer (*Pleasant Valley School District* (1988) PERB Decision No. 708, p. 15), as well as an individual employee's right report safety concerns to a third party (*Oakdale*, *supra*, PERB Decision No. 1246, p. 18).

The District argues that the ALJ erred in finding Gibbons's and Firtha's safety complaints are protected because EERA does not protect employees' complaints about safety that were solely their own, and that Gibbons's and Firtha's safety complaints were not a logical continuation of a group activity. The facts do not support the District's argument. For one, Gibbons and Firtha often jointly pursued their concerns about IA staffing, making their complaints by nature collective rather than individual. Further, their February 2020 attempts to supply IA coverage in the Organic Chemistry lab were for Martinez's Organic Chemistry classes, not their own. EERA protects complaints regarding the lab safety and related staffing concerns Gibbons and Firtha raised beginning in 2018 and their related e-mailed complaints to District management and the Association in February 2020.[13]

[13] In addition, Gibbons's and Firtha's safety complaints are also protected under EERA's express right to self-representation. (Gov. Code, § 3543.) To the extent PERB precedent ever supported the District's assertion that EERA's protection extends only to complaints about working conditions that are logical continuations of group activity, the Board overturned that precedent in *Walnut Valley Unified School District* (2016)

B. Gibbons's May 4 and May 5 E-mails

The District also excepts to the ALJ's conclusion that EERA protects Gibbons's May 4 and May 5 e-mails to Brown. As we explain, we agree with the ALJ that these communications are protected.[14]

PERB Decision No. 2495, pp. 16, 18-19 [disavowing prior PERB precedent insofar as it suggested that an employee's complaint to management about their own working conditions is only protected when it is a logical continuation of group activity].) Though the Legislature removed EERA's explicit right to self-representation in 2000, it was reinstated in 2008. (*Contra Costa Community College District* (2019) PERB Decision No. 2669, pp. 4-5.)

[14] The District argues that the ALJ erred in considering Gibbons's May 4 and May 5 e-mails because the complaint did not include the e-mails as protected activities. While the complaint does not explicitly list Gibbons's May 4 and 5 e-mails as protected activities, the complaint lists the response to these e-mails, the May 6 counseling memo, as an adverse action, which is sufficient for PERB's notice pleading standard. (*State of California (State Water Resources Control Board)* (2022) PERB Decision No. 2830-S, pp. 14-15; *County of San Joaquin* (2021) PERB Decision No. 2761-M, p. 21.) Moreover, even if the complaint were deficient, this allegation would meet the standard for an unalleged violation. Nothing precludes the Board from considering an unalleged violation (including unalleged protected activity) on exceptions to a proposed decision if all of the necessary criteria are met. (*Alliance College-Ready Public Schools* (2017) PERB Decision No. 2545, p. 13 (*Alliance*); *State of California (California Correctional Health Care Services)* (2019) PERB Decision No. 2637-S, p. 13.) "Under the unalleged violations doctrine, PERB has the discretion to consider allegations not included in 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 Bd.* (2018) 30 Cal.App.5th 158, 192-193.) Each factor is met here, including because the Association put the District on notice that it considered these e-mails protected during opening statements at the formal hearing, and the parties fully litigated the pertinent issues.

The District advances two reasons why EERA does not protect Gibbons's May 4 and May 5 e-mails responding to the new Fall 2020 schedule. Primarily it argues that Gibbons's e-mails did not relate to her safety complaints as found by the ALJ, but rather solely expressed concerns on behalf of employees in a different bargaining unit. Further, the District argues it issued the memo "entirely because of the disrespectful and insubordinate tone of [Gibbons's] May 4 and May 5 [e-mail] communications."

We first find that Gibbons's e-mails are protected as an extension of her earlier safety complaints. Her statement in the May 4 e-mail in response to the change in her and Firtha's schedules that "once again, this feels like harassment" reiterated her complaints about Brown's reaction to her safety concerns in February and March. Even were this not the case, the e-mails also contain protected advocacy on behalf of adjunct faculty. Protected activity does not lose its protection under EERA merely because the advocacy is on behalf of another bargaining unit. (See *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 309-311.) Gibbons's e-mails clearly and directly criticized Brown with the purpose of advancing the interests of adjunct faculty. EERA protects such speech even though the employees for whom Gibbons advocated were in a different bargaining unit.

The District also argues that Gibbons's e-mails are not protected because her May 5 e-mail was insubordinate. EERA allows employee and union speech on protected topics to be impulsive, intemperate, disparaging, or inaccurate, and thereby engender ill feelings and strong responses, unless the employer meets its burden to prove such speech was maliciously dishonest or so insubordinate, opprobrious, or

flagrant as to cause substantial disruption in the workplace. (*Carpinteria*, *supra*, PERB Decision No. 2797, pp. 13-14, 16; *Mt. San Jacinto Community College District* (2018) PERB Decision No. 2605, pp. 9-14; *County of Riverside* (2018) PERB Decision No. 2591, p. 9 (*Riverside*); *Chula Vista Elementary School District* (2018) PERB Decision No. 2586, p. 16 (*Chula Vista*).) Where an employer claims that speech was so flagrant or insubordinate[15] as to disrupt operations, PERB conducts a fact-intensive inquiry that considers all relevant circumstances, including but not limited to: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of what occurred; and (4) the extent to which the speech or conduct at issue can fairly be said to have been provoked by the employer. (*Carpinteria*, *supra*, PERB Decision No. 2797, p. 14.) When the speech at issue occurred by text message, e-mail, social media, or in another manner that was not face-to-face, there tends to be less likelihood of disruption. (*Id*. at p. 14, fn. 10.)

Each of these factors favor the protected nature of Gibbons's May 4 and May 5 e-mails. Gibbons sent her concerns via e-mail where they were unlikely to cause disruption. The subject matter was both the retaliatory reassignments and the change in schedule that negatively affected both Gibbons and her adjunct coworkers. Because the new schedule included changes to long-standing schedules, and to the typical faculty input into such changes, they were likely to engender strong feelings. The extent of Gibbons's allegedly insubordinate tone, as described by Brown, were

[15] Insubordination means an intentional refusal to follow directions. (*Visalia Unified School District* (2022) PERB Decision No. 2806, p. 29 [judicial appeal pending].) To prove insubordination, therefore, an employer must prove willfulness. (*Ibid*.)

her purported assumptions that Brown misread the point of her e-mail, excluded the logical point of curriculum, and failed to consider the COVID-19 struggles of part-time faculty. None of these statements are insubordinate or disruptive on their face, or in context. Finally, as we discuss *post*, the District's conduct was unlawfully retaliatory, and this unlawful conduct provoked Gibbons's e-mails. The District cannot meet its considerable burden to prove Gibbons's e-mails lost protection.

C. Firtha's Comments at the May 6 Academic Senate Meeting

The District alleges that EERA does not protect Firtha's comments to the Academic Senate because it was untrue that the District removed Gibbons and Firtha as chairs in retaliation for their safety complaints. We again disagree. EERA protects on its face Firtha's communication to the Academic Senate that she and Gibbons lost their chair positions in retaliation for safety complaints. (*City of Santa Maria* (2020) PERB Decision No. 2736-M, p. 26 [finding a communication presumptively protected where its central purpose was to apprise others of a workplace dispute and to enlist their support].) If an employer challenges the accuracy of speech, the employer faces a heightened burden, and it must prove by clear and convincing evidence that the speech was maliciously false, meaning that the speaker either knew of its falsity or recklessly disregarded whether it was true or false. (*Riverside*, *supra*, PERB Decision No. 2591, pp. 9-10; *Chula Vista*, *supra*, PERB Decision No. 2586, pp. 16-17 & fn. 8.) Gross or extreme negligence as to a statement's truth does not rise to the level of actual malice. (*Riverside*, *supra*, PERB Decision No. 2591-M, p. 9; *Chula Vista*, *supra*, PERB Decision No. 2586, p. 17.) The District's assertion that Brown believed Firtha's comments were untrue does not establish by clear and convincing evidence that

Firtha's statements were maliciously false. It is more than enough that Firtha had a good faith belief that her statements were true, and the District raises no evidence suggesting otherwise. Further, as the ALJ found and as we affirm *post*, the Association established by a preponderance of the evidence that what Firtha claimed at the May 6 meeting was in fact true – the District removed Gibbons and Firtha as chairs and ignored their reelection in retaliation for their protected activities. Firtha's comments at the May 6 Academic Senate meeting remain protected activity.

II. Adverse Action

PERB uses an objective test to determine whether an employer's action is adverse. (*City of San Diego*, *supra*, PERB Decision No. 2747-M, p. 27.) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse impact on the employee's employment." (*Ibid*.) Context is highly relevant in determining whether non-punitive directives are adverse. (*Ibid*.)

The District's exceptions dispute that removing Gibbons and Firtha as chairs, refusing to acknowledge their subsequent reelection as chairs, and placing Gibbons and Firtha as Introductory Chemistry instructors on the Fall 2020 schedule are adverse actions. As we explain, the District's exceptions are not well-taken.

PERB has found that a reasonable employee would view the loss of compensation, including paid release time, as an adverse action. (*Fresno County Office of Education* (2004) PERB Decision No. 1674, pp. 13-14 [adverse action found when it resulted in the loss of a preparation period during which a teacher did not have

normal teaching duties, but still received compensation].) Gibbons's and Firtha's positions as Chemistry Department chairs included the opportunity for paid release time and extra duty time that they lost when the District decided they would no longer serve as chairs. While we leave to compliance the specific monetary value of this time, it is clear that the change affected their compensation. PERB case law has also found an adverse action when an employer strips an employee of duties. (*San Diego Unified School District* (2019) PERB Decision No. 2683, pp. 9-10 [reassignment of a teacher to a position without any duties was adverse even without a loss of pay or benefits].) The Board has found the mere threat of assigning an employee to a position that was "a step down" was adverse. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H, pp. 11-12.) Gibbons and Firtha, senior chemistry faculty members, suffered a loss of compensation, prestige, and duties when the District removed them from their departmental leadership positions via a department-wide e-mail, and replaced them with Hartman without an Academic Senate election. A reasonable employee serving as a department chair would find a public removal from an elected and compensated position adverse.

The District's failure to recognize Gibbons's and Firtha's subsequent re-election as chairs was adverse for the same reasons. It deprived Gibbons and Firtha of compensation, prestige, duties, and a voice in their working conditions which, by the District's usual practice, they would otherwise receive.

Gibbons's and Firtha's reassignment to Introductory Chemistry for the Fall 2020 schedule is a closer question. While the complaint described this course as "remedial" chemistry, students typically took Introductory Chemistry as an introductory course for

non-science majors, a prerequisite for additional chemistry courses for students without qualifying high school classes, or potentially as a remedial course if a student was not succeeding in majors' chemistry. Requiring employees to perform a known less-desired assignment, which can include removing desired courses or assigning undesired courses, is often objectively adverse. (*Coachella Valley Unified School District* (2013) PERB Decision No. 2342, adopting proposed decision at p. 18; *Newark Unified School District* (1991) PERB Decision No. 864, pp. 12-13.) Furthermore, the record establishes that neither Gibbons nor Firtha had recently taught Introductory Chemistry. While the new assignments may have decreased the variety of classes they taught, moving from classes they had taught recently to classes they had not taught for many years increased the amount of effort to prepare for each class. Gibbons and Firtha also each testified that Introductory Chemistry significantly increased the number of students they would teach each semester, which increased their workload. That changes to the schedule typically happened in collaboration with the department chairs, and by extension the faculty, but here happened without any input save Brown's, is further relevant to how it is objectively viewed: a reasonable employee would find a unilateral assignment to teach unfamiliar classes with more students to be adverse. (*Woodland Joint Unified School District* (1990) PERB Decision No. 808, pp. 5-6 [verification of employee absence was objectively adverse where it would reasonably be seen as sending a negative message about protected activity].)

III. Nexus

While PERB considers all relevant facts and circumstances in assessing an employer's motivation, we have identified the following factors as being the most common means of establishing a discriminatory motive, intent, or purpose: (1) timing of the employer's adverse action in relation to the employee's protected conduct; (2) disparate treatment; (3) departure from established procedures or standards; (4) an inadequate investigation; (5) a punishment that is disproportionate based on the relevant circumstances; (6) failure to offer a contemporaneous justification, or offering exaggerated, questionable, inconsistent, contradictory, vague, or ambiguous reasons; (7) employer animosity towards union activists; and (8) any other facts that might demonstrate the employer's unlawful motive. (*San Francisco*, *supra*, PERB Decision No. 2712-M, p. 21.)

The ALJ found sufficient evidence to establish nexus between Gibbons's and Firtha's safety complaints and the removal of chair duties and Fall 2020 teaching assignments through timing, departure from established procedures, and inadequate investigation. We agree that the Association established nexus through timing and departure from established procedures, as well as through other circumstantial and direct evidence.

A. Timing

If an employer takes adverse action shortly after an employee's protected activities, this tends to suggest more strongly that the two are linked, and the inference of discrimination weakens as the gap in time grows. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, p. 45.) However, timing alone is typically not

determinative, and there is no bright line rule for determining how close in time the protected activity must be to the alleged retaliatory conduct. (*Id.* at p. 46.) Thus, while a charging party typically needs more than just timing evidence to prevail, if the timing inference is weak a charging party will normally need to marshal a stronger array of other, non-timing facts. (*Ibid*.)

Gibbons and Firtha communicated their safety complaints in late February, and the District removed them as chairs on March 9. This timing of only a few weeks between the protected activities and the adverse action strongly suggests unlawful motive. It is true that Gibbons and Firtha had been advocating for lab safety and IA staffing in various forms since at least 2018. If an employee engages in protected activity for a long period of time and the employer only takes adverse action toward the end of this time frame, PERB assesses whether animus built over time, or the employer lacked earlier opportunities to engage in such action. (*City of Santa Monica*, *supra*, PERB Decision No. 2635a-M, pp. 46-47.) Here, the record shows Brown's animus progressively increased. Brown's e-mail immediately following his removal of Gibbons and Firtha references that he "regret[s] that our working relationship has reached this point", calls the removal a "last resort," and notes his belief that the department cannot function "when chairs and deans are completely at odds". This phrasing suggests his frustration with Gibbons's and Firtha's dogged pursuit of safety complaints built over time and came to a head in early March 2020.[16]

[16] While the District asserts that these statements were solely in response to Gibbons's and Firtha's refusal to attend Brown's requested March 9 meeting, as we explain *post*, the District failed to prove that this was the true reason for its actions.

Brown's April 3 decision not to honor the faculty election was likewise close enough in time to support a finding of unlawful motive, occurring within two months of Gibbons's and Firtha's protected activity. Further, Brown wrote that it was "for [the] reasons expressed earlier this semester. My decision on this still stands." This suggests it was merely a continuation of his earlier decision to remove Gibbons and Firtha as chairs.

Likewise, the April 22 announcement of the Fall 2020 scheduling changes was only two months after Gibbons's and Firtha's safety complaints. Brown admitted that he made the decision to place Gibbons and Firtha as instructors in introductory classes "close in time to when they were announced." While the record shows that the District had considered changes to the structure of the Chemistry Department schedule beginning earlier in the 2019-2020 school year, the decision to change Gibbons's and Firtha's assignments did not happen until after their critical protected activities. The confluence of these events over the course of two months strongly supports unlawful motive.

B. Departure from Established Procedures

The Board finds departure from established procedures when an employer takes an adverse action in a way that is inconsistent with the way it normally goes about doing so. (*Lake Elsinore Unified School District* (2019) PERB Decision No. 2671, p. 7.) We may infer unlawful motive from a respondent's departure from existing practices in its dealings with the charging party. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086, adopting dismissal letter at p. 4.) To establish such an inference, the charging party must demonstrate what the

respondent's practice is and how the respondent deviated from that practice. (*Ibid*.; *Los Angeles Unified School District* (2014) PERB Decision No. 2390, pp. 11-12 & adopting proposed decision at p. 16.) The ALJ found that Brown departed from established procedures by appointing a replacement Chemistry Department chair and by refusing to recognize Gibbons and Firtha when the faculty subsequently reelected them as chairs. The District excepted to these findings, arguing that the record did not support that the District departed from established procedures; while the failure to recognize Gibbons's and Firtha's reelection was unique, it was not unprecedented.

We find the District departed from established procedures in several ways when it removed Gibbons and Firtha as chairs, refused to recognize their reelection, and assigned them to Introductory Chemistry for Fall 2020. First, the Association presented uncontradicted evidence that, to the extent the District removed another department chair in recent memory, the chair and the District mutually agreed that the faculty member would not continue to serve as chair. In contrast, Brown unilaterally removed Gibbons and Firtha without notice.

The District's subsequent appointment of Hartman to take over the chair duties was likewise out of the norm. In past instances where the District removed a department chair, the District did not replace the chair. In the two examples in the record, the District administrator simply took on the coordinating and scheduling responsibilities of the department chair until the faculty conducted a new election.

We also find that the District departed from its usual procedure when it failed to recognize Gibbons and Firtha as chairs after the faculty subsequently reelected them. The Association established that the District's long-time practice included the Vice

President for Instruction honoring the results of the Academic Senate elections for department chairs.[17] While the District emphasizes that Brown as the Vice President of Instruction had the right to approve or deny an elected chair, the evidence reflects that in practice, the Vice President of Instruction honored the Academic Senate elections. That Brown treated Gibbons and Firtha differently further supports our finding of District unlawful motive.

The District also departed from its typical procedures in the Chemistry Department course assignments for Fall 2020, both in the process of making the assignments and the nature of the assignments themselves. While typically the Vice President of Instruction developed the schedules in collaboration with the departmental dean and the department chairs, Brown developed and decided on the Fall 2020 Chemistry Department schedule all on his own. Though not involving Gibbons and Firtha in the development of the schedule was a natural consequence of their removal as chairs, the District offers no explanation for why neither Donnhauser nor the appointed chair Hartman were involved. Further, in Brown's May 6 e-mail to Gibbons, he stated the Fall 2020 schedule was "a major departure from past scheduling practice of the [C]hemistry [D]epartment." The District's departure from the norm in developing the Fall 2020 schedule serves as evidence that the District changed the Chemistry Department schedules for retaliatory reasons.

[17] The District argues that the record includes precedent for its failure to recognize a chair election, but those instances, where a chair vacated their position by mutual agreement with the District, are distinguishable from the instant circumstances.

C. Other Facts Relevant to Motive

We also find it relevant that Brown removed Gibbons and Firtha from their chair positions, without notice, warning, or progressive discipline, for a single alleged act of insubordination and despite significant mitigating circumstances. First, while Brown accused them of refusing meetings in the past in his March 8 e-mail, the record does not establish those accusations.

Second, one cannot ignore the context. In Fall 2018, there were two lab explosions and two chemical fires in the department. Gibbons and Firtha believed that significant steps were needed to make their own working conditions safe, as well as to assure other staff and student safety.[18] Gibbons and Firtha repeatedly sought administrators' help, including meeting with both Brown and Donnhauser. These efforts reflect a sincere attempt to solve the problem. When Brown announced a meeting via his March 5 e-mail, he mislabeled the date of the meeting and neither inquired about the professors' availability nor indicated any flexibility. Gibbons, in e-mailing to say that she and Firtha would not be attending, expressed that they were consulting legal counsel. Given these mitigating circumstances, it is apparent that Gibbons and Firtha were exercising their right to self-representation on a workplace issue they considered critical, and removing them as department chairs for missing a single, hastily-scheduled meeting without asking them their availability reflects a disproportionate response to the circumstances, which again supports unlawful

[18] A lab fire at another Southern California college in 2008 killed a research assistant and led to criminal prosecution of a college professor. (https://www.latimes.com/local/lanow/la-me-ln-ucla-professor-avoids-prison-fatal-lab-fire-20140620-story.html [as of June 27, 2023].)

motive.[19] (See *Regents of the University of California*, *supra*, PERB Decision No. 2704-H, pp. 39-40.)

Third, the CBA includes a specific process for evaluating department chairs and for removing an underperforming department chair after giving them a semester to improve. The parties negotiated Article XI, section (D) in part because the District expressed that having a method to remove a department chair was a priority. That provision for removal includes regular evaluations, and provides in part "[a] rating of unsatisfactory may result in the removal of department chair duties from the Unit Member." Yet the District made no attempt to utilize the CBA process to evaluate Gibbons's or Firtha's performance or provide them the required semester to improve, and instead escalated from the direction to attend the meeting to unilateral removal of both from their chair positions over a single weekend.[20]

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[19] When Gibbons indicated in the early hours of Monday that Firtha had a time conflict, Brown presumptuously declared that Firtha attending a virtual conference would not conflict with Brown's unilaterally chosen meeting time. Given the significant timeframe over which Gibbons and Firtha had been seeking to improve lab safety, the record simply does not support Brown's repeated insistence between Sunday evening and Monday morning that Gibbons and Firtha attend the Monday morning meeting, even before consulting their legal counsel and despite Firtha's scheduling conflict.

[20] Article XI(D)'s procedures for evaluating and removing department chairs were part of the CBA effective July 1, 2017. While the District argues that the parties intended to negotiate an evaluation tool for department chairs during the term of the 2017-2020 CBA, Article XI contains no language permitting the District to disregard the CBA's evaluation and due process requirements pending such negotiations. Absent any such qualifier, Article XI(D) was in effect when Brown suddenly removed Gibbons and Firtha nearly three full years into the 2017-2020 CBA. It is therefore not tenable for the District to claim that it had total discretion to remove department chairs under any procedure it wanted (or no procedure at all). Precipitously removing

D. Direct Evidence

In addition to a variety of circumstantial nexus evidence, the ALJ also found that the content of Gibbons's May 6 counseling memo and Firtha's May 6 admonishment, as well as the acts of their issuance, constituted direct evidence that the District was unlawfully motivated by protected activity. "Where the employer's words or actions reveal that the adverse action was taken in response to the employee's protected activity, such conduct serves as direct evidence of unlawful motive." (*Chula Vista*, *supra*, PERB Decision No. 2586, p. 26.) The District issued Gibbons the May 6 counseling memo and Firtha the May 6 admonishment in direct response to protected speech. We thus have no difficulty affirming the ALJ's conclusion that the Association demonstrated sufficient nexus between Gibbons's and Firtha's protected activities and the May 6 counseling memo and May 6 admonishment to establish a prima facie case of retaliation.

Taking together the variety of circumstantial evidence of the District's unlawful motivation, and the direct evidence that the May 6 counseling memo and May 6 admonishment were issued explicitly in response to protected activity, we find that the Association established a nexus between Gibbons's and Firtha's protected activities and the District's adverse actions of removing Gibbons and Firtha as chairs of the Chemistry Department, refusing to recognize their subsequent reelection as chairs, reassigning them to teach lower level classes for the Fall 2020 semester, and issuing

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Gibbons and Firtha without evaluation and a chance to improve constitutes strong evidence of retaliation for protected activity.

each a counseling document. The Association thus established its prima facie case of retaliation for each of these allegations.

IV. Affirmative Defense

If a charging party establishes a prima facie case of retaliation, and the evidence also reveals a non-discriminatory reason for the employer's decision, the respondent may prove, by a preponderance of the evidence as an affirmative defense, that it would have taken the exact same action even absent protected activity. (*San Francisco*, *supra*, PERB Decision No. 2712-M, p. 15.) In such "mixed motive" or "dual motive" cases, the question becomes whether the adverse action would not have occurred "but for" the protected activity. (*Id.* at p. 16.) To make this determination, we weigh the evidence supporting the employer's justification for the adverse action against the evidence of the employer's unlawful motive. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, p. 19; *Rocklin Unified School District* (2014) PERB Decision No. 2376, p. 14; *Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 33.) As a result, the outcome of a discrimination or retaliation case ultimately is determined by the weight of the evidence supporting each party's position. (See *Novato*, *supra*, PERB Decision No. 210, p. 14 ["[a]fter all the evidence is in, it is a question of the sufficiency of the proof proffered by the various parties"].) Even direct evidence of unlawful motivation does not bar a respondent from proving that an employee's protected activity was not the true motivation for its action. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 4.)

The District asserts that it established an affirmative defense to the five adverse actions against Gibbons and Firtha. We address each in turn.

The District argues that it removed Gibbons and Firtha as chairs solely based on their allegedly insubordinate refusal to meet with Brown. We reject that argument for all the reasons noted above. Moreover, while Brown asserted that the sole reason for the removal was the refusal to meet at 11:00 a.m. on Monday, March 9, the weight of evidence shows that Brown was retaliating for a series of protected acts. For one, Brown's e-mail six minutes after removing Gibbons and Firtha as Chemistry Department chairs stated that he did so as a "last resort," and he described their relationship as "completely at odds." This points to an ongoing dispute. The record conclusively establishes this ongoing dispute: Gibbons's and Firtha's repeated attempts to address lab safety and related staffing concerns.

The District insists the record evidence shows that "the [C]hemistry [D]epartment cannot function if its department chairs flatly refuse to meet with administration." But in his March 9 e-mail at 7:54 a.m., Brown contradicted any urgent need for someone to complete department chair duties, stating that:

> "[a]s you have already completed the work of scheduling for the current semester and have done much of the department coordination, this will not impact your teaching load or pay for the Spring 2020 semester. Going forward, the deans and director of instructional labs will communicate directly with each faculty member and IA staff regarding matters of their own classrooms . . . "

Thus, at the time the District removed Gibbons and Firtha as chairs, Brown indicated that the Chemistry Department could continue to function without a department chair. Brown did not appoint Hartman to fill the position until nine days later, on March 18. Brown's subsequent actions undercut the District's justifications for quickly removing Gibbons and Firtha as chairs, without first allowing them to meet with legal counsel,

much less evaluating progressive discipline options, using the CBA provision on department chair evaluations, or warning Gibbons and Firtha that their chair positions were in danger should they not reschedule the meeting for later in the week.[21]

The District further argues that Brown's decision on March 9 to remove Gibbons and Firtha as chairs justified subsequently denying their reelection. The motive for denying Gibbons's and Firtha's reelection is inextricable from their removal a month prior. Because we find the District failed to prove its legitimate business justification for the initial removal, the same justification for the denied reelection also fails.

The District argues that, well before removing Gibbons and Firtha from their department chair positions, it engaged in a lengthy, objective review of student outcomes in the Chemistry Department that served as the basis for assigning Gibbons and Firtha new courses. But Brown contradicted this explanation when he confirmed that he first arrived at the idea of reassigning Gibbons and Firtha to Introductory Chemistry close to the time that he e-mailed a departmental announcement of those reassignments on April 22. Furthermore, the District's justification is also at odds with Brown's March 9 e-mail statement that "Fall 2020 schedules will be developed in direct conversation between deans and faculty." Brown's e-mail corroborates his

[21] The ALJ did not address one way or the other whether Gibbons or Firtha was insubordinate in refusing to attend the meeting, but rather found that the alleged insubordination was pretext for the District's unlawful retaliation. The parties' arguments do not specifically ask us to determine whether refusing the meeting was sufficient to constitute insubordination. (See *Visalia Unified School District*, *supra*, PERB Decision No. 2806, p. 29.) In any case, we need not answer this question, because whether the refusal constituted insubordination or not, the District took the drastic step of removing Gibbons and Firtha from their chair positions in retaliation for protected activity.

testimony that the District developed the Fall 2020 Chemistry Department schedule after March 9.

Brown's admissions at hearing also undercut the rationale that the District reassigned Gibbons and Firtha to improve student achievement. Brown justified the changes represented in the Fall 2020 schedule by stating he believed the District could improve student outcomes by reassigning faculty to single subjects, thus freeing up preparation time and mental "bandwidth" so that the chemistry faculty could better focus on how to improve student outcomes. But Brown also testified that in his Fall 2020 reassignment decisions, he never fully considered or investigated how the reassignments would impact faculty workload, or how a professor's specific qualifications, experience or knowledge in the reassigned subject could impact student outcomes. The ALJ correctly concluded that the District did not prove it would have reassigned Gibbons and Firtha to Introductory Chemistry absent their protected activity.

Finally, while the District claims that it had legitimate, nondiscriminatory reasons for issuing Gibbons's May 6 counseling memo and Firtha's May 6 admonishment, in reality the District merely reiterates its argument that these adverse actions responded to allegedly unprotected activities. Having disposed of that argument *ante*, we find the District failed to meet its burden to prove it would have issued either document absent Gibbons's and Firtha's protected conduct.

We therefore find that the District retaliated against Gibbons and Firtha for their protected conduct by removing them as chairs, refusing to recognize their subsequent reelection, assigning them to teach Introductory Chemistry in Fall 2020, and issuing

the May 6 counseling memo and May 6 admonishment. By this same conduct, the District derivatively interfered with the rights of bargaining unit employees to be represented by the Association in violation of section 3543.5, subdivision (a) and derivatively denied the Association its right to represent bargaining unit employees in violation of section 3543.5, subdivision (b).

V. Remedy

The Legislature has vested PERB with broad authority to decide what remedies are necessary to effectuate the purposes and policies of EERA and the other acts we enforce. (EERA, § 3541.5, 1st par. & subd. (c); *Mt. San Antonio Community College Dist. v. Public Employment Relations Bd.* (1989) 210 Cal.App.3d 178, 189.) PERB remedies must serve the dual purposes of compensating for harms that an unfair practice causes and deterring further violations. (*County of San Joaquin v. Public Employment Relations Bd.* (2022) 82 Cal.App.5th 1053, 1068; *The Accelerated Schools* (2023) PERB Decision No. 2855*,* p. 16 (*Accelerated Schools)*; *Bellflower Unified School District* (2022) PERB Decision No. 2544a, p. 26.) Our de novo review on exceptions to a proposed decision includes review of the proposed remedy. (*Accelerated Schools*, *supra*, PERB Decision No. 2855, pp. 16-31).)

The District excepts to two alleged errors in the remedial order: (1) that there should be no order to remove the May 6 counseling memo and the May 6 admonishment from Gibbons's and Firtha's respective personnel files because the record demonstrates that both documents were removed from the personnel files before the hearing; and (2) that no back pay is warranted because the record did not conclusively establish that Gibbons or Firtha actually suffered any loss in pay, and the

compensation for chair duties was provided in release time, not pay. The District's exceptions are without merit. We explain and supplement the remedial order to fully remedy the proven harms.

First, while the record indicates that the District removed the May 6 counseling memo and May 6 admonishment from Gibbons's and Firtha's official personnel files prior to the hearing, Stokes confirmed that the District also maintains several suspense files where the documents may remain. The ALJ ordered that the District should both remove and destroy these documents. We order that the District must remove the documents from all District files in which they may remain, and subsequently destroy all copies.

Next, we agree with the ALJ that backpay with interest is the appropriate make whole remedy for Gibbons's and Firtha's loss of chair positions. An unfair practice finding creates a presumption that employees suffered some financial loss as a result of the employer's unlawful conduct. (*Bellflower Unified School District* (2019) PERB Order No. Ad-475, p. 10; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 31-32.) Consistent with the presumption, it is appropriate to give the Association an opportunity to establish in compliance proceedings that Gibbons and Firtha suffered a financial loss due to their removal as chairs. While the record did not conclusively establish the monetary value of the release time and extra duty pay provided as compensation for chair duties in the parties' CBA, the Association will have an opportunity to establish its value and related losses in compliance. (See, e.g., *Desert Sands Unified School District*, *supra*, PERB Decision No. 2092, pp. 31-32 [allowing charging party an opportunity to establish in compliance proceedings that

bus drivers actually lost pay because of the district's unlawful contracting out of field trip work when the record did not contain information demonstrating a financial impact].)[22]

Finally, we correct an error in the ALJ's remedy for Gibbons's and Firtha's removal as chairs, and we order an additional related remedy. The ALJ ordered the District to "[r]eturn Gibbons and Firtha to their positions as co-chairs unless the position or positions are currently held by an elected faculty member, in which case that chair may finish their term at which point Gibbons and Firtha may compete to be elected chairs and the District must recognize Gibbons and Firtha as chair/co-chairs if either or both are elected by the faculty." In justifying this order, the ALJ noted that "[t]hough Hartman was innocent, Brown appointing him – rather than him being elected by the faculty – was not. Thus, if Hartman is still chair, his appointment is void and Gibbons and Firtha shall be returned to their positions. But if the faculty has since elected a chair, that chair will remain to finish their term at which point Gibbons and Firtha may compete to be elected chairs." However, the record reflects that the chemistry faculty elected Hartman as Chemistry Department co-chair for the Menifee Valley campus in April 2020 when Brown refused to recognize Gibbons's and Firtha's reelection, therefore whether he or another currently holds the chair or co-chair positions, it is via election rather than Brown's placement.

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[22] After this decision is no longer subject to appeal, a compliance officer shall undertake a compliance process to determine, among other things, the damages owed. During the compliance process, the parties typically supplement the record through one or more means, subject to the compliance officer's direction. (*Bellflower Unified School District*, *supra*, PERB Decision No. 2544a, pp. 7-15; *Bellflower Unified School District* (2021) PERB Decision No. 2796, pp. 20-22.)

We agree with the ALJ's assessment that Gibbons's and Firtha's lost chair positions are similar in one respect to failure-to-promote cases, where PERB often prefers not to remove an innocent incumbent in favor of a discriminatee. (See *State of California (Correctional Health Care Services)* (2021) PERB Decision No. 2760-S, p. 42.) We thus limit the status quo remedy to ordering the District to allow Gibbons and Firtha to compete in future chair elections, and to subsequently honor the results of those elections. But because that remedy does not fully restore the status quo, and particularly because the District's pervasive retaliatory conduct has likely harmed Gibbons's and Firtha's reputations in a way which may impact their ability to compete in future chair elections, we supplement the remedy to include a verbal reading of the notice posting by a District representative to those District employees in Gibbons's and Firtha's bargaining unit.

A spoken notice reading is one example of a non-standard remedy that is warranted "whenever customary remedies are insufficient." (*Regents of the University of California* (2021) PERB Decision No. 2755-H, p. 56.) In the past, the Board has twice decided against ordering spoken notice. (*County of San Joaquin (Sheriff's Department)* (2018) PERB Decision No. 2619-M, p. 14, fn. 14; *Alliance*, *supra*, PERB Decision No. 2545, pp. 17-18.) Here, however, declining to reinstate Gibbons and Firtha as chairs—out of concern for innocent incumbents—could leave employees chilled by Brown's retaliatory acts. This case therefore calls for a non-standard remedy. "Notice reading is a way to let in a 'warming wind of information' to not only alert employees to their rights but also impress upon them that, as a matter of law, their employer or union must and will respect those rights in the future. Reading the

notice (and any explanation of rights) aloud disseminates that information through the work force in a clear and effective way." (*Noah's Ark Processors, LLC D/B/A WR Reserve* (2023) 372 NLRB 80, p. 6, citations omitted.)[23]

Such an order is needed here to blunt the impact of the District's unlawful conduct, which may otherwise persist to some degree through any subsequent Chemistry Department chair election. We stop short in these circumstances from ordering a particular reader of the Notice, but we direct that the District shall conduct the reading in a manner designed to reach the most employees possible, and that the District shall allow an Association representative to be present.

ORDER

Based upon the foregoing factual findings and legal analysis, and the record in this case, the Public Employment Relations Board (PERB) finds that Mt. San Jacinto Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by retaliating against Rosaleen Gibbons and Farah Firtha for engaging in protected activities. By this conduct, the District also interfered with the rights of bargaining unit employees to be represented

[23] Although California public sector labor relations precedent frequently protects employee and union rights to a greater degree than does federal precedent governing private sector labor relations, PERB considers federal precedent for its potential persuasive value. (*Operating Engineers Local Union No. 3 AFL-CIO (Wagner et al.)* (2021) PERB Decision No. 2782-M, p. 9, fn. 10; *City of Santa Monica*, *supra*, PERB Decision No. 2635a-M, p. 47, fn. 16; *City of Commerce* (2018) PERB Decision No. 2602-M, pp. 9-11.) As noted, PERB's touchstone in assessing non-standard remedies is whether customary remedies are adequate. While this standard overlaps with the National Labor Relations Board's approach, it may or may not turn on the severity of the violation.

by the Mt. San Jacinto College Faculty Association (Association) and denied the Association its right to represent bargaining unit employees in violation of EERA sections 3543.5, subdivisions (a) and (b).

Pursuant to sections 3541.3, subdivisions (i) and (n), and 3541.5, subdivision (c) of the Government Code, we hereby ORDER that the District's governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activities.

2. Interfering with the rights of bargaining unit employees to be represented by the Association.

3. Denying the Association its right to represent bargaining unit employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF EERA:

1. Remove from all files and destroy Gibbons's May 6, 2020 counseling memo and all electronic or paper versions or copies thereof.

2. Remove from all files and destroy Firtha's May 6, 2020 admonishment and all electronic or paper versions or copies thereof.

3. Make Gibbons and Firtha whole, including but not limited to paying them back pay for lost release time and extra duty pay, plus seven percent interest.

4. Allow Gibbons and Firtha to compete to be elected Chemistry Department chairs, at their option, in the next Academic Senate election and all

subsequent elections. If either or both are elected by the faculty, the District must recognize Gibbons and/or Firtha as chair/chairs.

5. Within 10 workdays after this decision is no longer subject to appeal, post at all work locations where notices to Association-represented employees are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that the District will comply with the terms of this Order. Such postings shall remain in place for a period of 30 consecutive workdays. The District shall take reasonable steps to ensure that the Notice is not altered, defaced, or covered with any other material. In addition to physically posting this Notice, the District shall post it by electronic message, intranet, internet site, and other electronic means the District uses to communicate with Association-represented employees.[24]

6. Within 60 workdays after this decision is no longer subject to appeal, or, at the request of the Association, to coincide with the beginning of the semester, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached Notice (the Appendix) is to be read aloud to Association-represented employees in Gibbons's and Firtha's bargaining unit. An Association representative shall be allowed to attend the meeting or meetings.

[24] Either party may ask PERB's Office of the General Counsel (OGC) to alter or extend the posting period, require further notice methods, or otherwise supplement or adjust this Order to ensure adequate notice. Upon receipt of such a request, OGC shall solicit input from all parties and, if warranted, provide amended instructions to ensure adequate notice.

7. Notify OGC of the actions the District has taken to follow this Order by providing written reports as directed by OGC and concurrently serving such reports on the Association.

Chair Banks and Member Krantz joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. LA-CE-6583-E, *Mt. San Jacinto College Faculty Association v. Mt. San Jacinto Community College District*, in which all parties had the right to participate, it has been found that the Mt. San Jacinto Community College District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq., by retaliating against Rosaleen Gibbons and Farah Firtha for engaging in protected activities. By this conduct, the District also interfered with the rights of bargaining unit employees to be represented by the Mt. San Jacinto Faculty College Association (Association) and denied the Association its right to represent bargaining unit employees.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activities.

2. Interfering with the rights of bargaining unit employees to be represented by the Association.

3. Denying the Association its right to represent bargaining unit employees.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS TO EFFECTUATE THE POLICIES OF EERA:

1. Remove from all files and destroy Gibbons's May 6, 2020 counseling memo and all electronic or paper versions or copies thereof.

2. Remove from all files and destroy Firtha's May 6, 2020 admonishment and all electronic or paper versions or copies thereof.

3. Make Gibbons and Firtha whole, including but not limited to paying them back pay for lost release time and extra duty pay, plus seven percent interest.

4. Allow Gibbons and Firtha to compete to be elected Chemistry Department chairs, at their option, in the next Academic Senate election and all

subsequent elections. If either or both are elected by the faculty, we will recognize Gibbons and/or Firtha as chair/chairs.

Dated: _____

MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.