STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC M. MOBERG, Charging Party, v. CABRILLO COMMUNITY COLLEGE DISTRICT, Respondent.	Case No. SF-CE-2994-E PERB Decision No. 2622 February 4, 2019

Appearances: Eric M. Moberg, on his own behalf; Law Offices of Vincent P. Hurley, by Vincent P. Hurley, Attorney, for Cabrillo Community College District.

Before Banks, Shiners, and Krantz, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Eric M. Moberg (Moberg) to the attached proposed decision of an administrative law judge (ALJ), which dismissed the complaint and unfair practice charge against his former employer, Cabrillo Community College District (District). The complaint alleged that the District unlawfully investigated Moberg and terminated his employment in retaliation for his protected activities under the Educational Employment Relations Act (EERA).[1] Following a formal hearing, the ALJ dismissed the complaint, concluding that Moberg failed to prove that the District's investigation of his academic credentials and its resulting decision to terminate his employment for lack of minimum qualifications were unlawfully motivated by his protected activity.

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

Moberg disputes various findings and conclusions of the ALJ's proposed decision but generally argues that the ALJ failed to follow the Board's decision in *Cabrillo Community College District* (2015) PERB Decision No. 2453 (*Cabrillo*). In *Cabrillo*, we reversed the Office of the General Counsel's (OGC) dismissal of Moberg's amended charge and remanded for issuance of a complaint to resolve conflicting issues of material fact through PERB's hearing process. (*Id.* at pp. 9-10, 22.) Relying on *Cabrillo* and on evidence and inferences he contends the record supports, Moberg argues that he presented a prima facie case of retaliation and further argues that the District failed to establish an affirmative defense. Moberg also excepts to the ALJ's failure to rule on his request to take administrative notice of various documents not included in the record.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties' submissions, we conclude that the ALJ's factual findings are supported by the record and that his conclusions of law are well reasoned and consistent with applicable law. We therefore adopt the proposed decision as the decision of the Board itself, subject to the following discussion of Moberg's exceptions.

DISCUSSION

As a preliminary matter, the District argues that Moberg's exceptions are procedurally defective because they do not comply with PERB Regulation 32300.[2] PERB Regulation 32300 requires exceptions to a proposed decision to: "(1) State the specific issues of procedure, fact, law or rationale to which each exception is taken; (2) Identify the page or part of the decision to which each exception is taken; (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception; and (4) State the grounds for each

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

exception." Compliance with these requirements is necessary to afford the respondent and the Board an adequate opportunity to address the issues raised. (*Los Angeles Unified School District* (2015) PERB Decision No. 2447, p. 3; *Temecula Valley Unified School District* (1990) PERB Decision No. 836, pp. 2-3.) When a party fails to comply with PERB Regulation 32300, the Board may dismiss the exceptions without reviewing their merits. (*Los Angeles Unified School District, supra,* PERB Decision No. 2447, p. 3; *California State Employees Association (O'Connell)* (1989) PERB Decision No. 726-H, p. 3.)

Despite referring to matters that he implies are in the record, the majority of Moberg's exceptions fail to cite to any portion of the record. We nevertheless acknowledge the public policy favoring hearing cases on their merits, notwithstanding technical non-compliance with matters of form. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 7; *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912, 916.) Because this case raises an important issue regarding the effect of a Board decision remanding a case for issuance of a complaint, we exercise our discretion to address Moberg's exceptions. However, even when the Board exercises its discretion to consider exceptions that do not comply with our regulations, we need not consider arguments that the ALJ adequately addressed. (*Hartnell Community College District* (2018) PERB Decision No. 2567, p. 3 (*Hartnell*).) This is so for the majority of Moberg's exceptions, and we thus address only his exception regarding the District's investigation and his request for administrative notice. First, however, we briefly explain why our prior decision in this case did not preclude the ALJ from dismissing the complaint.

1. Limited Effect of a Board Decision Remanding for Issuance of a Complaint

Moberg primarily argues the ALJ departed from the Board's holding in *Cabrillo*. According to Moberg, the Board already found that he proved the District retaliated against him. Moberg further claims that the District failed to refute the Board's prior analysis of his prima facie case.

Moberg's reliance on *Cabrillo* is misplaced because it fails to recognize the limited scope of a Board decision remanding a case for issuance of a complaint. At the charge investigation stage, "the charging party's burden is not to produce evidence, but merely to allege facts that, if proven true in a subsequent hearing, would state a prima facie violation." (*County of Santa Clara* (2013) PERB Decision No. 2321-M, p. 13, fn. 8; *Oakland Unified School District* (2009) PERB Decision No. 2061, p. 7 (*Oakland USD*).) Accordingly, on appeal of the OGC's dismissal of an unfair practice charge, there is no evidentiary record for the Board to consider. The Board's inquiry is thus focused on the legal *sufficiency* of the charging party's allegations, and the Board does not attempt to determine whether a preponderance of the evidence will ultimately establish the factual allegations as true. (*Hartnell, supra*, PERB Decision No. 2567, p. 6; *Cabrillo, supra***,** PERB Decision No. 2453, p. 9.) The Board must therefore treat the charging party's factual allegations as true and consider them in the light most favorable to the charging party's case. (*Hartnell, supra*, PERB Decision No. 2567, p. 6; *Cabrillo, supra*, PERB Decision No. 2453, p. 8.)

In *Cabrillo*, the Board reviewed the OGC's dismissal of Moberg's amended unfair practice charge under the above standard and decided that the facts alleged in the amended charge stated a prima facie case of retaliation. In directing the OGC to issue a complaint, the Board made no conclusive factual findings; the Board's order simply allowed the case to

proceed to formal hearing where an evidentiary record could be fully developed. (*Hartnell, supra*, PERB Decision No. 2567, p. 7.) Once the OGC issued it on remand, the complaint—not the Board's decision on his dismissal appeal—became the operative document for purposes of what Moberg had to prove at the hearing. (See *City of Roseville* (2016) PERB Decision No. 2505-M, p. 19 ["the complaint is the operative document for framing the issues for hearing"]; *Oakland USD, supra*, PERB Decision No. 2061, p. 7 [Board's decision on appeal of dismissal does not meet the charging party's evidentiary burden at hearing].)

As we indicated in *Cabrillo*, it was incumbent upon Moberg to prove the complaint allegations through competent and admissible evidence during PERB's hearing process. (*Cabrillo, supra*, PERB Decision No. 2453, p. 8; *Oakland USD, supra*, PERB Decision No. 2061, p. 7 [following issuance of a complaint, the burden is on the charging party to present evidence during the formal hearing proving the allegations in the complaint]; PERB Reg. § 32178 [charging party bears burden of proof at hearing].) Nothing in *Cabrillo* precluded the ALJ from concluding based on the evidence presented at the hearing that Moberg did not meet his burden of proving the complaint allegations. (See *Sonoma County Superior Court* (2017) PERB Decision No. 2532-C, pp. 28-29 [Board's decision on appeal of dismissal does not preclude an ALJ from reaching his or her own conclusions based on evidence presented at hearing, nor has the Board prejudged the merits of the case].) We therefore reject Moberg's argument that the ALJ erred in dismissing the complaint and unfair practice charge because the Board, in *Cabrillo*, had reversed the OGC's dismissal of his charge.

2. Exception Regarding the District's Investigation

Turning to the merits of the exceptions, in order to demonstrate that the District retaliated against him for participating in protected activities, Moberg must prove that: (1) he exercised rights under the EERA; (2) the District had knowledge of his exercise of those rights; (3) the District took adverse action against him; and (4) the District took the adverse action because of his exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp. 6-8.)

It is undisputed that the first three elements are satisfied. Therefore, this case turns on whether Moberg proved by a preponderance of the evidence that his protected conduct was the District's true motivation for placing him on involuntary paid administrative leave on November 6, 2012, or subsequently terminating his employment. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3; PERB Reg. § 32178.)

Most of Moberg's exceptions rely on various "nexus" factors PERB has developed to assist in assessing circumstantial evidence of unlawful motive. These arguments are adequately addressed in the proposed decision and need not be addressed again here. (*Hartnell, supra*, PERB Decision No. 2567, p. 3.) His exception claiming that the District's investigation into his academic credentials was pretextual, however, warrants discussion.

The *Cabrillo* Board found that a complaint should issue because the charge contained sufficient allegations suggesting that the District's investigation was pretextual. (*Cabrillo, supra*, PERB Decision No. 2453, pp. 19-20.) Based on the evidence presented at hearing, we agree with the ALJ that Moberg failed to carry his burden of proving that the District's investigation was a pretext for retaliation.

The fact that an employee participates in protected activities does not immunize the employee from otherwise legitimate employment decisions, including an employer's workplace investigation. (*Ventura County Community College District* (1999) PERB Decision No. 1323, p. 10; *Regents of the University of California* (1996) PERB Decision No. 1159-H, adopting warning letter, p. 2 [employer may investigate charging party's conduct pursuant to its rules as it would investigate the conduct of any other employee alleged to have engaged in misconduct].) When an employer initiates an investigation into an employee's conduct prior to any knowledge of the employee's protected activity and follows its customary practices in the investigation, it is difficult to demonstrate that the employee's protected activity motivated the employer's actions, absent other factors raising an inference of unlawful motivation. (*Ventura County Community College District*, *supra*, PERB Decision No. 1323, pp. 11-12; *Los Angeles Community College District* (1989) PERB Decision No. 748, adopting proposed decision, pp. 18-20.) However, an employer may be found to have engaged in retaliation where it alters its investigation practices or related employment decision in response to any intervening protected activity. (*County of Lassen* (2018) PERB Decision No. 2612-M, pp. 5-7 (*Lassen*).)

In *Lassen*, the County discovered that a probationary employee was not qualified for the position for which she was hired and proposed to temporarily reclassify the employee until she earned the degree necessary for the position. Thereafter, the employee's union interceded on her behalf regarding several payroll issues. (*Lassen*, *supra*, PERB Decision No. 2612-M, pp. 2-5.) The County changed its decision to reclassify the employee because it did not know how to respond to the union's inquiries and instead notified her that it was terminating her employment. The County's cancellation of its plan to continue employing the employee

merely because the employee's union raised questions was quintessential retaliation for protected activity. (*Id.* at pp. 5-7.)

The facts here are very different. The District began its investigation into Moberg's academic credentials on November 1, 2012,[3] when Vice-President Kathleen Welch (Welch) e-mailed Director of Human Resources Lorree McCawley (McCawley), instructing McCawley to verify Moberg's transcripts and degrees. On November 2, Welch contacted Dean of Business, English, and Language Arts James Weckler (Weckler), expressing her concerns with Moberg's credentials. Both Welch and Weckler investigated further and developed significant concerns regarding Moberg's educational history. The District then learned of Moberg's protected activity on November 4, when Weckler received an e-mail from Moberg referencing an unfair practice charge he was filing against Hartnell Community College District.

On November 6, the District placed Moberg on paid administrative leave pending the outcome of its investigation. In response to Weckler's scheduling of a meeting on November 14 to discuss the District's concerns about his credentials, Moberg said that he needed to confirm the availability of his union representative to attend the meeting. Weckler, Moberg, and a union representative later agreed to meet on November 13, though Moberg ultimately chose not to attend the meeting. On November 15, Welch notified Moberg that she was recommending the termination of his employment based on his lack of valid academic credentials. Moberg's union representative engaged in e-mail correspondence with Welch over the proposed termination. On December 13, Welch notified Moberg that the District had found him unqualified to teach English at a community college under California law and terminated

[3] All dates are in 2012 unless otherwise indicated.

his employment. Moberg then filed a grievance over his termination, which the District denied on February 5, 2013.

A preponderance of the evidence shows that the District began its investigation into Moberg's academic credentials three days before it learned of his protected activity. The evidence also shows that Moberg's protected activity did not influence the District's investigation, which proceeded as a matter of course as it would have for any other employee alleged to have engaged in similar misconduct. The evidence further supports the District's contention that it reached a valid determination based on the results of its investigation, and that Moberg's protected activity did not sway the District at all in its choice of termination as the appropriate level of discipline. For these reasons, and because the evidence does not establish that the District's investigation and subsequent determinations were a pretext to cover up an unlawful motivation, we reject Moberg's exception on this issue and affirm the dismissal of the complaint.

3. Request for Administrative Notice

As he did before the ALJ, Moberg also asks the Board to take administrative notice of two California regulations concerning minimum qualifications for community college faculty, and a Government Accounting Office (GAO) report.

California regulations are subject to mandatory notice under Evidence Code section 451, subdivision (b). (*Santa Clara County Superior Court* (2014) PERB Decision No. 2394-C, p. 16 [PERB's taking of administrative notice is governed by Evidence Code sections for judicial notice].) We therefore grant Moberg's request for administrative notice of the two regulations, though we would have considered them without any such request because Moberg cited both regulations in support of his exceptions. Nevertheless, Moberg fails to

explain how the regulations he quotes demonstrate error in the ALJ's analysis of the District's minimum qualification and equivalency procedures. We therefore decline to address them further. (*Hartnell*, *supra*, PERB Decision No. 2567, p. 3.)

The GAO report is subject to optional or permissive notice under Evidence Code section 452, subdivision (c), unless sufficient notice of the request for administrative notice was provided to each adverse party and there is "sufficient information" for the ALJ or Board to determine whether administrative notice is proper. (*Santa Clara County Superior Court*, *supra*, PERB Decision No. 2394-C, p. 16; Evid. Code, §§ 452, subd. (c), 453.) We do not have "sufficient information" to take administrative notice of the GAO report because Moberg did not provide a copy of it with his request to the Board, nor did he provide a copy to the ALJ or to any PERB Board agent at any time during these proceedings. Therefore, we are not required to take notice of the GAO report. *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 520-521; Evid. Code, § 453, subd. (b).)

Moreover, PERB typically declines to take permissive notice of documents "that are of no probative value to the issues before it." (*State of California* (2011) PERB Decision No. 2178-S, p. 3.) Without the benefit of reviewing a copy of the report, we are unable to assess its probative value. For these reasons, we deny Moberg's request for administrative notice of the GAO report.

ORDER

The complaint and underlying unfair practice charge in Case No. SF-CE-2994-E are DISMISSED.

Members Banks and Krantz joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

ERIC M. MOBERG, Charging Party, v. CABRILLO COMMUNITY COLLEGE DISTRICT, Respondent.	UNFAIR PRACTICE CASE NO. SF-CE-2994-E PROPOSED DECISION (May 24, 2017)

Appearances: Eric M. Moberg, in propria persona; Law Offices of Vincent P. Hurley, by Vincent P. Hurley and Ryan M. Thompson, Attorneys for Cabrillo Community College District.

Before Donn Ginoza, Administrative Law Judge.

PROCEDURAL HISTORY

Eric M. Moberg initiated this action by filing an unfair practice charge against the Cabrillo Community College District (District) on January 31, 2013. Three amended charges were subsequently filed. Following Moberg's successful appeal of the initial dismissal of his unfair practice charge (*Cabrillo Community College District* (2015) PERB Decision No. 2453-E (*Cabrillo*)), the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on November 2, 2015, alleging that the District engaged in a retaliatory termination of him because he exercised rights under the Educational Employment Relations Act (EERA or Act) by informing the District he had previously filed an unfair practice charge against another employer.[1] The District's adverse actions include (1) placing Moberg on involuntary paid administrative leave and withdrawing his tentative

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

teaching assignments for the spring 2013 semester, and (2) declaring the District would no longer consider him for employment. This conduct is alleged to violate section 3543.5(a) of the Act.

On November 30, 2015, the District filed its answer to the complaint, denying the material allegations of the complaint and raising affirmative defenses.

On December 15, 2015, an informal settlement conference was held, but the matter was not resolved.

On June 20, 21, and 22, 2016, a formal hearing was held in Oakland.

On August 22, 2016, the matter was submitted for decision with the filing of post-hearing briefs.

FINDINGS OF FACT

The District is a public school employer within the meaning of EERA section 3540.1(k). At times relevant to this matter, Moberg was a public school employee within the meaning of section 3540.1(j).

Background

Moberg submitted an application for employment at Cabrillo College on the District's standard form, dated July 20, 2011. Under the education section, Moberg listed a bachelor's degree in history at the "CSUEB," a master of fine arts degree in composition and doctoral degree in at "Prescott," a master's degree in education from "SFSU," credentials from "NDNU" and "Chapman." The application form boxes, though cramped, allow for more characters than used by Moberg. The resume attached to Moberg's cover letter states that a master's and doctoral degree were obtained from "Prescott University," though its location is not given. The unofficial transcripts submitted by Moberg for Prescott indicate he maintained

a 3.75 grade point average for his master's coursework and a 4.0 for the his doctoral coursework. His cover letter and resume indicate he was a 2012 candidate for a master of fine arts in creative writing from National University.

Moberg was hired by the District on January 30, 2012, as an adjunct faculty member to teach English classes. He became a member of the bargaining unit exclusively represented by the Cabrillo College Federation of Teachers (CCFT). Moberg taught two classes in the spring semester of 2012, and two classes in the fall semester of 2012.

In early February, 2012, Moberg provided official transcripts from Prescott University, resulting in Academic Personnel Technician Debra Barnett revising his placement on the salary schedule to reflect possession of a doctoral degree as of February 7. During this time, Moberg was also teaching at Hartnell Community College District, but his employment there was terminated in September 2012. Moberg was employed by several other community college districts in the Bay Area at the time as well. Moberg undertook litigation against Hartnell by filing a PERB unfair practice charge.[2]

Dean of Business, English and Language Arts James Weckler evaluated Moberg during the spring semester of 2012 based on a classroom observation of an English class conducted by another instructor. According to the written evaluation, Weckler found the class effective, the classroom environment positive, and the teaching performance effective. At the hearing, Weckler testified that the evaluation was "pretty average."

[2] Administrative judicial notice is taken of the case sua sponte. (*Moberg v. Hartnell Community College District*, PERB case no. SF-CE-2984-E.) Moberg testified that he has filed approximately 20 PERB charges.

On November 1, 2012, Vice President Kathleen Welch, while attending a Chief Instructional Officer conference, emailed Director of Human Resources Lorree McCawley, in pertinent part, the following:

> At the CIO conference I learned that we have an adjunct English faculty member whose transcripts/degrees need to be verified. Eric Moberg. Please call your counterpart at Hartnell. He no longer is a faculty member at Hartnell, but they went through threats of lawsuits . . . so we need to do this carefully.

McCawley testified that when Welch initiated the inquiry, she provided no "context" for the investigation. Welch, not McCawley, was the decisionmaker in the case. McCawley admitted she was aware in a "general sense" that Moberg had a "history of litigation." She recalled no mention to her of his litigation with Hartnell. She also recalled having no discussions with Welch about the matter after she was directed to start the inquiry. McCawley directed Assistant Director of Human Resources Barbara Shingai to pursue the matter. Welch testified that Moberg's history of litigation was a concern, but the greater concern arose from a faculty member teaching classes without minimum credentials and the harm to the students as a result.

On November 2, Welch emailed Weckler stating she believed Moberg's degrees were "not real degrees." Weckler emailed Welch indicating that he believed Moberg's degrees from Prescott College[3] and National University were both legitimate based on a quick internet search he conducted involving the Western Association of Schools and Colleges (WASC), an accrediting organization. Welch then told Weckler to check Prescott University in the United Kingdom. Weckler's subsequent internet search resulted in him viewing Prescott University by Google Earth which revealed what appeared to be a warehouse or storage facility. Weckler forwarded this information to Welch and McCawley. Further investigation of Prescott

[3] There is a Prescott College located in the United States.

University's website fueled Weckler's concern, specifically the quick time estimated for completion of the doctoral degree as well as information suggesting the institution had "made up their own accreditation firm so they could say they were accredited." In Weckler's experience, a doctoral degree required five to twelve years of work.

Discrepancies in Moberg's Employment Applications

Since he maintained that his master's degree is from Prescott University located in the United Kingdom, and he has never asserted that the degree is from a university accredited in California or the United States so as to satisfy the District's "stated minimum qualifications,"[4] Moberg was required by District policy to request consideration for equivalency by submitting supporting documentation, including a supplemental application for equivalency determination. Foreign transcripts, even those in English, must be "translated to determine equivalency to U.S standards." The District selects an agency to determine whether the foreign university degree meets equivalency standards. The District also maintains a standing Equivalency Committee for the purpose of deciding any questions ensuing from a claim of equivalency. Moberg gave no indication on the application that Prescott was located in a foreign country.

Other discrepancies came to light in terms of employment applications at other employers. In his 2009 employment application to Hartnell, Moberg lists a 2001 master of arts degree in English from Corllins University in Santa Clara. At the hearing, Moberg admitted he never was physically at a Corllins building and does not know why he listed Santa Clara on the application. In a 2011 employment application to Hartnell, Moberg lists a master of arts degree in education from San Francisco State University and a doctorate in humanities from

[4] See California Code of Regulations, title 5, section 53406.

"Prescott" in Basingstoke, United Kingdom. The attached resume lists a 2003 master of arts degree in English from "Collins University."[5] In applications to West Valley College and University of San Francisco in 2013, Moberg lists a 2003 master of arts degree in English from National University. In a 2014 employment application to Napa Valley College, Moberg lists the National University master's degree without a date of completion, while attaching transcripts indicating his graduate studies were undertaken between February 2010 and June 2013. Moberg testified that the National University degree was an "on-line" degree, that his transcripts for Corllins University came from Dubai, and that he never personally attended classes at Walden University because it is a fully on-line school. Moberg testified that he sought out Prescott University on-line after realizing that Corllins had "bad press."

District Investigation into Moberg's Minimum Qualifications

On November 2, Barnett, at Shingai's direction, emailed Prescott University to request verification of the degrees awarded to Moberg. Prescott University Head of Admissions William Graham responded that Moberg had received a master of fine arts degree in composition on April 15, 2003, and a doctoral degree in humanities on April 2, 2010.

On either November 2 or 3, Prescott inquired of Moberg whether he agreed to release his transcripts to the District, and Moberg answered yes.

On November 4, Moberg sent an email to nine "colleagues" at the District (including Weckler), San Mateo Community College District, and Evergreen Valley College, as well as the American Federation of Teachers, with the subject line, "Lozano Smith, Police Report, PERB Charge, Petition for Writ of Mandate, and Graham Spanier." Moberg began by asserting that Jerry Sandusky was allowed to commit his crimes because employees feared

[5] Moberg testified that Collins was a misspelling of Corllins.

retaliation for whistleblowing and because former Penn State University President Spanier engaged in a cover-up to protect Sandusky. That was a prelude to the following:

> I understand that, here in California, Lozano Smith or Hartnell College has contacted some of my current and past employers on behalf of their clients: Monterey Adult School and Hartnell College. If you were contacted or are contacted in the future, please ask for any statements to be put in writing and forward the statements to me. Also, please ask about the attached police report, Petition for Writ of Mandate currently before the Sixth Court of Appeal, and the Hartnell PERB charge I have filed relating to racial discrimination against my students and retaliation against me as a whistleblower.[6]

Moberg testified that his purpose in sending the email to Weckler was to encourage the District "not to collude or conspire or to blacklist me." He added:

> It was letting them know that I expected them not to do that, that was my goal, and telling them that I expect them to be ethical and treat me according to my behavior at Cabrillo and not based on claims from other entities, and if someone was contacting them, like I knew Lozano Smith had called, contacted Hartnell, I wanted a copy of it.

Weckler immediately forwarded the email to Welch and McCawley with the comment, "The plot thickens. . . . I have no idea what prompted it – certainly no contact from this end." Weckler testified that the "plot" referred to the new "weird" event of the unsolicited email adding to the narrative that started with his initial steps to investigate Prescott University. Weckler did not read the attached brief and narrative from the Hartnell PERB charge because the reference to Sandusky signaled to him it would be a chase down a "rabbit hole." Weckler admitted he ceased further investigation, at least at his end.

[6] Moberg referenced the fact that Lozano Smith represented Monterey Adult School in his petition for writ of mandate then at the Court of Appeal, Sixth Appellate District. Moberg testified that he obtained a $170,000 settlement as a result of litigation with San Mateo County Office of Education.

By letter dated November 6, 2012, in a joint decision by Weckler and Welch, Weckler placed Moberg on paid administrative leave and withdrew his tentative spring class assignments based on the need to investigate whether Moberg's academic credentials met the minimum qualifications to teach his assigned classes, whether those credentials justified his salary placement, and whether he accurately reported his employment experience and education on his employment application. Weckler stated there was reasonable cause to question Moberg's minimum qualifications. Spring semester schedules were in need of finalization and the District's budget was tight. Weckler set a meeting for Wednesday, November 14 and informed Moberg that the District's attorney, Vincent Hurley, would be present and that the interview would be recorded. Weckler requested contact information for Prescott University and stated his intention to investigate Moberg's diplomas and academic transcripts from that school. He further requested the identities of academic institutions not listed on his employment application.

Moberg responded on November 6 by email, stating he needed to check on the availability of his union representative, "Maya." The following day, Moberg emailed Weckler stating Wednesday was not good due to his teaching schedule at another school and his planned preparation for a Court of Appeal hearing that Thursday.

On November 7, the District's Human Resources Department contacted Graham and obtained the physical address and telephone number for Prescott University the following day: Building 190, Office 6, Slington House, Rankine Road, Basingstoke, United Kingdom; telephone number 44-709-288-4595.

On November 9, Moberg told Weckler he was available on Tuesday or Friday. Weckler responded, "Let's meet at 10 am, Tuesday, November 13."

In a November 11 email, Moberg informed Weckler he could meet on Tuesday, November 13, but that he needed to confirm the meeting time with CCFT Representative Eric Hoffman. He forwarded the email to Hoffman. Moberg testified he had not agreed to meet because it was not clear if Hoffman had teaching obligations at that time. Moberg also requested that Weckler provide answers to three questions he had sent on November 7. In one question he states:

> If the issue is with my Prescott degree in composition, are you aware that I have also earned an M.A. in education from SFSU, with over 24 units in reading? I mention this because I notice that Cabrillo is looking for a reading instructor currently, and the chair informed me this August that Cabrillo had to cancel classes in Watsonville this semester for lack of instructors. You may also notice on my CV that I taught reading at MPC and SMCOE.

In a second question, Moberg asks to know whether anyone at Cabrillo had contacts with Hartnell College or the law firm of Lozano Smith regarding him.

On November 11, Hoffman acknowledged his availability to attend the District's proposed Tuesday, November 13 meeting. He informed Moberg of information gleaned from speaking with the District's representative:

> Loree McCawley, head of HR, says that there was a question raised about whether you meet minimum qualifications for the job, so the meeting is to confirm you meet minimum qualifications and that your application is correct. She refused to discuss how that question was raised, but she said their lawyer will be present because of your history of litigation (not a direct quote, but that summarizes what she said), so it's clear there has been some communication with other colleges going on. She reiterated that Cabrillo is only interested in confirming you meet qualifications, and is not interested in getting involved in any issues at other schools.

Weckler responded to Moberg's email, expressing concern about Moberg's lack of cooperation and stating that Moberg's non-appearance would lead to termination of his paid leave status.

Moberg testified he did not attend the November 13 meeting in protest of the District's insistence on Hurley's attendance and the District's intention to record the meeting. Weckler emailed Moberg on November 14, stating he understood from Hoffman that Moberg required "more information." Weckler invited Moberg to "provide any [additional] information." He proposed a November 15 meeting and stated it was the District's last offer of a meeting time. Moberg stated that time was not acceptable due to his Court of Appeal appearance that day. He stated, "I should have something for you by Friday, and could meet next Tuesday or the Tuesday or Thursday after Thanksgiving." Weckler did not agree to those dates because a decision needed to be made expeditiously in light of the scheduling of the coming semester's teaching assignments.

By letter dated November 15, 2012, Welch informed Moberg that she was recommending termination of his employment based on three grounds, which in essence rested on Moberg's lack of a valid master's degree or equivalent foreign degree as defined by California Code of Regulations, section 53410 (of title 5). The letter asserted that the academic record represented to be a master's degree from Prescott University was a false or fraudulent document, and that the doctoral degree from Prescott was also false or fraudulent, submitted for the purpose of obtaining additional compensation. Welch further noted that Dean Weckler had offered two meetings to Moberg for the purpose of explaining the academic records and that Moberg had failed to personally attend either meeting. Moberg was informed that he had been relieved of his fall semester assignments and that his spring semester

assignments had been withdrawn. Welch offered a December 3, 2012 meeting to allow Moberg to prevent the recommendation from becoming final. Welch confirmed from the witness stand that Moberg's failure to list employment with Monterey Peninsula Unified School District or Monterey Adult School was not a factor. Weckler testified that for him the sole basis for the District's decision to withdraw his future teaching assignments was the lack of a qualifying degree from an accredited institution.

By email dated November 25, 2012, Moberg responded to Welch. He asserted that the meeting dates offered by Weckler were unreasonable. As to the "main issue," Moberg asserted that he met minimum qualifications at "MPC, Hartnell College, CSUM, EVC, and Cabrillo." He demanded to know how Welch determined otherwise and to explain the basis for claim of "fraudulent" degrees. Moberg did not agree to the December 3 meeting date, but countered with an offer to meet on a Tuesday or Thursday of November or December. Moberg testified he also objected to Hurley's planned presence at the meeting.

Welch replied by letter dated November 28, 2012, withdrawing the offer of the December 3 meeting due to Moberg's rejection of that offer. She countered with an opportunity for Moberg to respond in writing by the close of business on December 4.

By letter dated December 1, Moberg answered with an explanation of his degrees from Prescott University, indicating that he "completed all of his work . . . online." He added, "I understand that their international headquarters are in Basingstoke, United Kingdom." As to his masters of fine arts degree in composition, Moberg stated that he earned the degree based on a "theoretical thesis that was later updated and published by the United States Department of Education," then expanded and published as a textbook entitled *The Art of Composition*. Prescott accepted for transfer over 45 graduate units that did not count toward degrees at four

California universities. Prescott awarded Moberg additional credit for 12 years of teaching experience, and writing the lyrics to 26 songs. As to his doctoral degree in humanities, Moberg stated that he wrote a dissertation that "was later adapted for publication as a popular monograph and featured in the December 2011 edition of *The Progressive* magazine." Prescott accepted over 60 graduate units that did not count toward degrees at three additional universities (Walden University, Notre Dame de Namur University, and Chapman University). It awarded him credit for work experience, teaching dance at Sir Francis Drake Hotel's Starlight Room and three California community colleges, music at a fourth community college, and history at an academy. Additional credit was awarded for writing two novels and nine reports published by the Department of Education, editing a collection of poetry, founding a dance festival, and performing internationally as a dancer, singer, and guitarist.

Moberg admitted at the hearing that he had no idea if Prescott University had classrooms and he had never been in the United Kingdom. He presumed that the courses listed on the Prescott transcripts were credits for courses he had taken elsewhere that were determined to be equivalent to the Prescott offerings. He received the transcripts with completed credits in 2009 or 2010, approximately one month after applying to the school. His tuition costs at Prescott were approximately $750 for the master's degree and $1,000 for the doctoral degree. The master's degree was backdated to 2003, closer to the time he took graduate level courses in the United States. Moberg did not write an original thesis dissertation for either degree, but submitted a number of his existing publications. Prescott required Moberg to submit a "culminating" writing for both degrees, with the page requirement being longer for the master's than the doctorate. Moberg actually applied for the doctoral degree prior to the master's degree. For the master's degree, Moberg submitted a textbook

entitled *The Art of Composition*, which Amazon accepted for publication and sold in quantities between 500 and 1,000 copies. For the doctoral degree, Moberg submitted a paper which Moberg believed was entitled "Rhetoric of Rebellion," a document that has been in revision for a lengthy period of time. There was no formal defense of the doctoral dissertation with Prescott.

By email dated December 3, Hoffman forwarded Moberg's letter to Welch. He asserted Moberg's right to full disclosure of the basis of the District's belief that Moberg lacked minimum qualifications. He ended with:

> CCFT is not challenging the District's right to investigate the veracity of an employee's application. We agree that people who do not meet minimum qualifications should not be teaching in our classrooms, especially if they have claimed qualifications they do not possess. We do, however, expect the College to base their decision on such serious matters on clear evidence, and we have not seen any such evidence.

By letter dated December 13, 2012, Welch rejected Moberg's submission. After recounting the procedural history once again, Welch stated that the District had found Moberg unqualified to teach English at a community college under California law. Welch noted compensation still due to Moberg as a temporary, at will employee (Ed. Code, sec. 87482.5, subd. (a)) by virtue of his adjunct instructor status. In support of the finding that Moberg lacked proper qualifications, Welch cited California Code of Regulations, sections 53406,[7]

[7] The regulation requires that degrees and units to satisfy minimum qualifications to teach at California community colleges must come from "accredited institutions," defined as a "postsecondary institution accredited by an accreditation agency recognized by either the U.S. Department of Education or the Council on Postsecondary Accreditation."

53407, subdivision (a), [8] and 53410, subdivision (a)[9] (of title 5), as well as Education Code section 87357. In addition, Welch found that Moberg had improperly received a doctoral stipend. She cited provisions of the MOU that require "acceptable proof of degrees" and a requirement that stipends for graduate coursework be earned at an accredited college or university.[10]

Subsequent Actions by Moberg and the District

On December 13, Hoffman informed Moberg by email he understood the District's issue to be that Moberg's graduate degrees were not from a California accredited institution, and, if that was the case, that Moberg should be entitled to have an equivalency analysis performed after the fact if the District failed to undertake one at the time of his employment and simply accepted his stated degrees.

On or about December 30, Moberg filed a grievance challenging the District's action.

In January, the District retained a private investigator in the United Kingdom, Stephen Sweet, to investigate the authenticity of Prescott University after providing him with the

[8] The regulation adopts a list produced by the Chancellor's Office of the California Community Colleges identifying disciplines for which a master's degree is required and others for which it is not. According to the list, a master's degree is required to teach English. The master's degree may be in English, literature, comparative literature, or composition, or, if a bachelor's degree is possessed in one of these primary disciplines, then a master's degree in linguistics, Teaching English as a Second Language, speech, education with a specialization in reading, creative writing, or journalism suffices. "The equivalent" is also listed as an alternative to the preceding two methods.

[9] The regulation requires that a faculty member teaching a course for credit at a community college must possess a "master's degree, or equivalent foreign degree, in the discipline of the faculty member's assignment." Alternatively, a faculty member without a master's degree in the discipline taught must have a bachelor's degree or equivalent foreign degree in the discipline and a master's degree in a "directly related" discipline. Professional work experience only qualifies when a master's degree is not generally expected.

[10] Neither party offered a copy of the MOU as evidence.

contact information provided by Graham. Sweet went to the Rankine Road location and determined it was what is known as an "access storage facility," or, a facility used by companies as a "registered office" for purposes of receiving mail.[11] Sweet found no college or university at the location. He spoke with the attendant at the storage company, who gave him a telephone number to the university for further inquiries. When Sweet called that number, the person who answered was the same person at the storage company who gave him the number.

On January 27, Moberg emailed Welch to request the ability to apply for equivalency and obtain an assignment to teach a reading class. The District did not respond to the request. Welch testified a request for equivalency determination was by procedure required at the time of application, and so the request was not granted. There is no evidence the District told Moberg he could not file a new application for employment, and Welch testified it would accept such an application.

On January 31, Moberg called into level 2 grievance meeting with the District. When he learned that Hurley would be attending he terminated the call. Hoffman was present for the meeting. After the meeting Hoffman provided Moberg a written summary of the meeting. After noting the District had retracted its claim that Moberg had fraudulently obtained employment, Hoffman stated, as he understood the history, that the District made a "mistake" accepting his degrees without noticing that Prescott was a foreign college so as to require an equivalency review, but that "[a]t some point, 'a mysterious little bird spoke to HR and told them to check your file.' " Hoffman went on to state:

> While the District has not stated who or what caused them to look at your file, I acknowledged that, once they had received this information, they had no choice but to check out your credentials

[11] Sweet indicated he, too, uses a registered office for purposes of mail delivery, while working from his home.

> and put you on administrative leave while doing it. However, I said I found the way the District reacted to the situation odd – it seemed to me that, instead of acknowledging their mistake and finding a way to resolve the problem that worked for both parties, the District attacked you and "lawyered up." I said I thought the logical thing to do would be to apologize for HR's mistake, explain the accreditation problem and give you the opportunity to submit equivalency materials (without guaranteeing the equivalency would succeed).

Hoffman added that he felt that the District should allow a post-hoc equivalency review due to the "unusual situation" that involved mistake on the District's part. Hoffman then relayed information to Moberg from Hurley regarding Moberg's longstanding question about Hartnell's role in the matter. Hoffman wrote:

> Mr. Hurley stated that he has never communicated about your cases with any of the lawyers involved in them, but he is well aware of them because they are of public record in the county where he does much of his work. Ms. Welch stated that the District first became aware of the cases after you sent information about them to your Dean, who passed them on to HR. While getting more information about those cases, the District became aware of possible problems with your degree. They then asked Mr. Hurley for advice about how to proceed. He said his goal was to insure you received all due process required by the contract and the law for an adjunct without reemployment status. . . . In this case, they chose to terminate your employment because you did not meet minimum standards, as was their right. My interpretation of [Welch's refusal to disclose the source of their suspicion] was that they used the accreditation issue as a legal way to get rid of you because they viewed you as litigious.

Shingai testified that the District had never in her 13 years allowed a post-application foreign equivalency determination. Weckler testified he never responded to Moberg's request for such a determination because it was "outside the process." He did not consider a request by Moberg to teach a reading class in the spring 2013 semester because Moberg had never applied for such a position.

ISSUE

Did the District retaliate against Moberg based on protected activity by placing him on leave, withdrawing his spring 2014 teaching assignments, and terminating his employment?

CONCLUSIONS OF LAW

To establish a prima facie case of retaliation under the EERA, the charging party must show: (1) he exercised rights under EERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against him; and (4) the adverse action was imposed "because of" his exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

The charging party has the initial burden of demonstrating the "because of" element, that is, a connection or "nexus" between the adverse action and the protected conduct. (Sec. 3543.5, subd. (a); *Novato*, *supra*, PERB Decision No. 210, pp. 5-6.) "Unlawful motive is 'the specific nexus required in the establishment of a prima facie case' of retaliation." (*Cabrillo*, *supra*, PERB Decision No. 2453-E, p. 10, quoting *Novato*.) "[D]irect proof of motivation is rarely possible, since motivation is a state of mind which may be known only to the actor. Thus . . . unlawful motive can be established by circumstantial evidence and inferred from the record as a whole." (*Ibid.*; *North Sacramento School District* (1982) PERB Decision No. 264 [close temporal proximity between protected conduct and adverse action]; *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S [disparate treatment of the employee]; *Santa Clara Unified School District* (1979) PERB Decision No. 104 [departure from established procedures]; *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S) [inconsistent or contradictory justification]; *City of Torrance* (2008) PERB Decision No. 1971-M [cursory investigation of alleged misconduct]; *Oakland*

Unified School District (2003) PERB Decision No. 1529 [failure to offer justification]; *McFarland Unified School District* (1990) PERB Decision No. 786 [exaggerated, vague, or ambiguous justification]; *Jurupa Community Services District* (2007) PERB Decision No. 1920-M [animosity towards union]; *Novato, supra*, PERB Decision No. 210 [pattern of obstructionist conduct].)

Once a prima facie case that protected activity was a motivating factor for the adverse action is established, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. (*Novato, supra*, PERB Decision No. 210; *McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

There is only one instance of protected activity that occurred prior to the District's announced intention to investigate Moberg's credentials and place him on administrative leave with pay. That occurred in Moberg's November 4 email apprising Weckler that he had filed an unfair practice charge against Hartnell. (*Cabrillo, supra*, PERB Decision No. 2453-E, pp. 16-17.) That protected activity preceded the adverse action alleged in the complaint. As the District notes, however, the November 4 email occurred *after* Welch set in motion the investigation of Moberg's minimum qualifications. Therefore, while the action occurred in very close temporal proximity to the protected activity, the weight to given to this temporal factor is significantly diminished. (See *Alameda County Medical Center* (2004) PERB Decision No. 1707-M [timing absent when some related reprimands preceded adverse action]; cf. *Regents of the University of California* (2013) PERB Decision No. 2314-H, pp. 10-12 [timing established where adverse action elevated in scope by changing between original notice and later imposition of substantially more onerous consequence, after protected activity of threatening to obtain union representation at the time of notice].) The potential consequence

of termination for lack of qualifications at the time the investigation commenced was identical to the adverse action imposed after the protected activity.

Moberg's resort to union representation was additional protected activity that preceded the decision to withdraw his assignments for the spring 2013 semester. Moberg's grievance activity began prior to the later alleged adverse action of the District's determining that Moberg would no longer be entitled to employment and rejecting his request to have his credentials reconsidered after the fact. Since timing alone is insufficient to demonstrate a prima facie case, additional nexus evidence is required. (*Cabrillo, supra*, PERB Decision No. 2453-E, p. 11.)

In the appeal, PERB concluded evidence of disparate treatment and departure from standard procedures was not alleged. It did believe either cursory investigation (including merely adopting the investigation conclusion of Hartnell) or pretextual termination based on inadequate credentials. (*Cabrillo, supra*, PERB Decision No. 2453-E, p.18.) The evidence does not demonstrate cursory investigation. The investigation began even prior to the protected activity and commenced with Weckler seeming to brush the matter aside. However, when redirected by Welch to the Prescott University website, Weckler was able to reasonably conclude that the degrees offered by the organization were not legitimate degrees, even of the on-line variety, because the Google satellite image confirmed nothing that looked like a real, non-virtual academic institution (i.e., one that employs instructors and offers classes).

Moberg asserts there is evidence of cursory investigation and after-the-fact justification based on Weckler's brief internet research prior to the District's adverse action, the District's rejection of Moberg's offer to produce WASC accredited transcripts from National University (which he listed as a degree in progress at the time of his application), refusal to meet except

when the District knew he was teaching in another county, and Weckler's demand to know whether he disclosed his prior employment at the Monterey Peninsula School District by listing Monterey Adult School. Weckler's brief internet research resulted only in a demand to meet with Moberg for the opportunity to dispel Weckler's well-grounded suspicion. The formal adverse action occurred on December 13, after Moberg first agreed to meet with Weckler on Tuesday, November 13, and subsequently backed out despite Hoffman's availability at that time. Despite the District's somewhat limited flexibility thereafter in scheduling a meeting, the District offered, and Moberg accepted, the opportunity provide a written defense. Given Moberg's concession that Prescott University is a foreign school, there is little to suggest he could have offered anything at a face-to-face meeting that would demonstrate he met minimum qualifications in the absence of a satisfied and timely request for equivalency determination. Throughout the case, his union representative's argument was for the District to accept responsibility for its oversight in accepting Moberg for employment and accept a post-hoc equivalency determination (which seems to be a manifestly moot point given what was subsequently discovered about Prescott University), or to accept a master's degree from National University earned after the date of his application. But even Hoffman conceded that the District had a right to terminate based on inadequate minimum qualifications at the time of hiring. Hoffman acknowledged Hurley's statement of the District's intention to afford Moberg his full due process rights. Hoffman's uncorroborated hearsay assertion of a pretext for termination based on Moberg's litigious history proves nothing.

Moberg's related claims of exaggerated and/or vague justification are unsupported by the record, for the same reasons. Prescott University is not simply a "New Age" institution of higher learning granting legitimate advanced degrees, as claimed by Moberg in his post-

hearing brief. Even if Weckler initially indicated the National University degree might have been legitimate, the District was obligated not to ignore the fact that Moberg had received doctoral level compensation based on his Prescott University degree, which could have constituted a gift of public funds.

Moberg contends there is evidence of disparate treatment because the District had never before rescinded approval of a "similarly situated" instructor, or required a meeting with a District attorney for the same, or refused to accept WASC accredited transcripts for the same. By his use of the term "similarly situated," Moberg appears to assert that a faculty member with similar foreign transcripts would not have been terminated. Moberg presented no evidence of such favorable treatment given other such faculty members.

Moberg contends there is evidence of departure from standard procedures because the District's practice is to evaluate foreign transcripts prior to hiring and not rescind approval thereafter. The application form and accompanying materials provides that the burden is on the applicant to request equivalency determination for foreign transcripts, that Moberg made no such request, and that the District would not necessarily have known Prescott University was located outside of the United States, given the fact that Prescott College is located in the United States and Moberg failed to provide a location for either "Prescott" listed on the application form, or "Prescott University" (which appeared in his accompanying resume).

Moberg's defense during the grievance process was that the District should have allowed itself to overlook the alleged deficiencies because Moberg had proven to be a valued lecturer elsewhere and could substitute more recent credentials, if the District only allowed him to go through a credentialing process after the fact. There is little in the record to suggest this additional adverse action was motivated by any protected activity. The District's

procedures, when followed to the letter, require that an equivalency determination be made at the time of application. Moberg never filed a new application for employment by which to reassess his credentials.

In the PERB appeal, Moberg alleged that McCawley admitted to CCFT Representative Maya Bemdotoff that the District was motivated by objections to his litigious nature. (*Cabrillo, supra*, PERB Decision No. 2453-E, p. 4, fn. 3.) This could arguably have been a reference to his PERB unfair practice case. At the hearing, Moberg called McCawley as his first witness but never directly asked her if she had spoken with Bendotoff. While it appears Hoffman got the same impression from his contacts with the District, Hoffman was not presented as a witness either. McCawley delegated the investigation to Shingai, who further delegated the limited task of obtaining degree verification from Prescott University to Barnett. There is no evidence McCawley had significant involvement in the decision to terminate. Welch's contemporaneous statement of needing to "do this carefully" was legitimately based on a desire to avoid unnecessary exposure to potential litigation from Moberg.

As PERB explained in the appeal in regard to the assertion of an affirmative defense, "[t]o prevail on its affirmative defense, the employer must establish both that a legitimate, non-discriminatory reason existed for taking the adverse action, and that the reason proffered was, in fact, the employer's reason for taking adverse action." (*Cabrillo, supra*, PERB Decision No. 2453-E, p. 12.) The District has satisfied these requirements, even assuming a prima facie case has been made out. Moberg's protected activity was not shown to have played any role in the District's decisions regarding his employment status. Moreover, the initial protected activity here was not the assertion of rights vis-à-vis the District, but only the giving of notice of protected activity as to another employer that had taken place in the past. This case illustrates

an employee who engages in protected activity as a tactical ploy to establish a legal shield to anticipated disciplinary action by the employer. There was no evidence of prior anti-union animus on the District's part so as to justify a reasonable fear on Moberg's part that the District would collude with another employer to suppress EERA protected activity in relation to the District, or any other employers. Thus, such putative protected activity was not a bona fide attempt to assert rights under the EERA.

For all the foregoing reasons, the District did not unlawfully terminate Moberg because of his protected activity.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint and underlying unfair practice charge in Case No. SF-CE-2994-E, *Eric Moberg v. Cabrillo Community College District* are hereby DISMISSED.

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 Board itself within 20 days of service of this Decision. The Board's address is:

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

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.) A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and

32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)