STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFREY ESTES, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. LA-CE-1120-H PERB Decision No. 2302-H December 21, 2012

Appearances: Jeffrey Estes, on his own behalf; Carl D. Smith, Labor and Employment Relations Consultant, for Regents of the University of California.

Before Martinez, Chair; Dowdin Calvillo and Huguenin, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Jeffrey Estes (Estes) to the proposed decision (attached) of a PERB administrative law judge (ALJ). The complaint and charge alleged that the Regents of the University of California (University) violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[1] by suspending and terminating Estes's employment in retaliation for having engaged in protected activities. The ALJ determined that the evidence failed to establish a violation of HEERA and dismissed the complaint and underlying charge. Estes excepts to that determination.

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

The Board has reviewed the proposed decision and the record in light of Estes's exceptions, the University's response,[2] and the relevant law. Based on this review, we find the ALJ's proposed decision to be well-reasoned, adequately supported by the record, and in accordance with applicable law. Accordingly, the Board adopts the ALJ's proposed decision as the decision of the Board itself, supplemented by the discussion below.

DISCUSSION

In nineteen separate exceptions to the ALJ's proposed decision, Estes asserts that the ALJ erred in dismissing the complaint. In response, the University asserts that the statement of exceptions fails to comply with the filing requirements set forth in PERB's regulations governing the filing of exceptions (see PERB Reg. 32300[3]) and that the ALJ correctly determined that the discipline would have occurred even in the absence of any protected activity. Having reviewed the record, we conclude that the ALJ considered and addressed all of the issues raised in the exceptions appropriately, and adopt the ALJ's factual findings and conclusions of law.

Estes's exceptions focus primarily on his claim that the University improperly assigned him work and his denial of any inappropriate behavior in the workplace. Where, as here, the charging party establishes a prima facie case of retaliation, the burden shifts to the employer to prove that it would have taken the adverse action even if the employee had not engaged in protected activity. (*Novato Unified School District* (1982) PERB Decision No. 210; *Martori Borthers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730 (*Martori Brothers*); *Wright Line* (1980) 251 NLRB 1083.) When it appears that the

[2] In *Regents of the University of California (Estes)* (2012) PERB Order No. Ad-396-H, we determined that the University established good cause for the late filing of its response to the exceptions.

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

employer's adverse action was motivated by both lawful and unlawful reasons, "the question becomes whether the [adverse action] would not have occurred 'but for' the protected activity." (*Martori Brothers.*) The "but for" test is "an affirmative defense which the employer must establish by a preponderance of the evidence." (*McPherson v. Public Employment Relations Bd.* (1987) 189 Cal.App.3d 293, 304.)

In assessing the evidence, PERB's task is to determine whether the employer's true motivation for taking the adverse action was the employee's protected activity. (*Regents of the University of California* (1993) PERB Decision No. 1028-H (*Regents*); *McFarland Unified School District* (1990) PERB Decision No. 786, aff'd *McFarland Unified School Dist. v. Public Employment Relations Bd.* (1991) 228 Cal.App.3d 166.) (*City of Santa Monica* (2011) PERB Decision No. 2211-M (*Santa Monica*); *Baker Valley Unified School District* (2008) PERB Decision No. 1993 (*Baker Valley*); *Moreland Elementary School District* (1982) PERB Decision No. 227 ["Disciplinary action may be without just cause where it is based on any of a host of improper or unlawful considerations which bear no relation to matters contemplated by [the Educational Employment Relations Act (EERA)[4]] and which this Board is therefore without power to remedy."]; *San Bernardino City Unified School District* (2004) PERB Decision No. 1602.) Rather, "PERB weighs the employer's justifications for the adverse action against the evidence of the employer's retaliatory motive." (*Baker Valley.*) "Once PERB determines that the employer did not take action for an unlawful reason, its inquiry is at an end; PERB has no authority to determine whether adverse action not motivated by protected activity was just or proper." (*Santa Monica.*) Our authority to remedy adverse actions extends only to that action which is unlawful under our statutes. (*Regents*; *San Ysidro School District* (1980) PERB Decision No. 134.) We do not determine whether the employer had just cause to

[4] EERA is codified at section 3540 et seq.

take adverse action, nor whether it was correct in its determination that the employee engaged in misconduct. (*Santa Monica.*)

In conclusion, having reviewed the record thoroughly, we agree with the ALJ that, although there was direct evidence that the University was motivated in part by Estes's protected activity in deciding to take adverse action, the University established that it would have taken the same action even if Estes had not engaged in the protected activity. We further agree that the evidence failed to establish that the University's true motivation in deciding to suspend and terminate Estes was based upon his protected activity rather than on its expressed concerns over his behavior in the workplace.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1120-H are hereby DISMISSED.

Chair Martinez and Member Huguenin joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JEFFREY ESTES, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (IRVINE), Respondent.	UNFAIR PRACTICE CASE NO. LA-CE-1120-H PROPOSED DECISION (July 31, 2012)

Appearances: Jeffrey Estes on his own behalf; Samuel A. Strafaci, Senior Labor Relations Consultant, for Regents of the University of California (Irvine).

Before Eric J. Cu, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, a former higher education employee alleges that a higher education employer suspended and then terminated his employment in retaliation for engaging in protected activities. The employer denies any wrongdoing.

On September 29, 2010, Jeffrey Estes filed an unfair practice charge with the Public Employment Relations Board (PERB or Board), alleging that the Regents of the University of California at Irvine (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] based upon multiple theories. Estes amended his charge first on March 21, 2011, and again on May 6, 2011. On June 1, 2011, the PERB Office of the General Counsel dismissed all allegations in the charge except the claims that the University suspended and terminated Estes's employment in retaliation for filing a grievance, discussing contractual

[1] HEERA is codified at Government Code section 3560 et sequentes.

rights, and/or filing the instant unfair practice charge in September 2010.[2] On those allegations, PERB issued a complaint. On June 17, 2011, the University filed an answer to the PERB complaint admitting all allegations except that there was any causal connection between Estes's protected activities and his suspension and termination. The University also asserted multiple affirmative defenses.

An informal settlement conference was held on July 13, 2011, but the matter was not resolved. PERB held a formal hearing on six non-consecutive days between November 17, 2011 and April 23, 2012. On July 16, 2012, the parties filed simultaneous closing briefs. At that point, the record was closed and the matter was submitted to PERB for decision.

FINDINGS OF FACT

The Parties

The University is an employer within the meaning of HEERA section 3562(g). Prior to January 20, 2011, Estes was an employee of the University within the meaning of HEERA section 3562(e).

The Instructional Technology Department

The University operates a Continuing Education program that offers fee-based courses to the public. Oftentimes, Continuing Education courses have a technology component, including "online" classes, where students can view and participate in instructor lectures via the Internet. The Instructional Technology (ITECH) Department supports the technology operations of the Continuing Education program. At all times relevant to this case, Wayne Swift was the Director of ITECH and was Estes's direct supervisor. Jill James, the Director of

[2] The PERB complaint erroneously alleged that some of these activities occurred in 2011. During the formal hearing, the parties agreed to amend the PERB complaint to reflect that the listed protected activities occurred in 2010, not 2011.

Information Services, supervises Swift. Robert Rude, the Assistant Dean of University Extension has overall responsibility for Continuing Education operations, including ITECH.

One of the positions at ITECH is the Computer Resource Specialist II (CRS). The job duties of this position include providing technical assistance to both instructors and students, updating calendars, testing, repairing, configuring, and cleaning the Extension computer laboratory (computer lab) computers, and coordinating the work of student employees. The CRS position is expected to be familiar with various software applications such as WebEx, used for creating online classroom environments, PowerCampus, used to create and maintain calendars, and Voice-Over Power-Point (VoPP), used by instructors to overlay lecture or other narration into synchronous audio-video presentations. The CRS position is part of a bargaining unit that is represented by the University Professional and Technical Employees Union (UPTE).

The ITECH Department also employs Program Analyst (PA) II and III positions that have more technical expertise than the CRS position. Generally speaking, only the PA positions perform complex functions involving the Extension's computer networks and servers. It is unclear whether the PA position is represented by UPTE.

Estes's Work Performance From October 2007 Through June 2009

On October 5, 2007, Estes was hired as a part-time CRS. Initially, his job duties included using various software programs to monitor, test, or troubleshoot different University Extension operations. For example, Estes monitored online classes and other Extension events using the WebEx software.

The University rated Estes as "Exceeds Expectations" during his first performance evaluation (2007-2008). Among other comments, Swift praised Estes for his familiarity with different computer operating systems and his ability to assist students and instructors using

ITECH equipment and software. In the next evaluation (2008-2009), the University again rated Estes as "Exceeds Expectations." Swift again commended Estes for his contributions to the ITECH department, but also commented that he "sometimes challenge[d] established policies and procedures in an inappropriate manner by e-mail and during meetings." Swift also commented that there "were a few times when [Estes] perceived policies and procedures as being unfair or inefficient and [he] spent too much time debating these instead of directly addressing support issues."

Changes at ITECH in 2009

Starting in 2009, the University Extension experienced a noticeable swell in distance learning activity, such as increases in WebEx based meetings and a concomitant need for additional VoPP production. As a result, Estes was assigned additional work including creating new WebEx meetings and posting them onto the University Extension web page. Regarding VoPP, Estes was assigned to convert the presentations into video files, rather than merely testing those files during the conversion process. Estes complained that these new job duties were previously performed by PA positions, not the CRS.

On July 13, 2009, Swift met with Estes and raised some concerns about Estes's recent workplace interactions. Swift commented that other staff felt that Estes was uncooperative and argumentative during meetings, that he inappropriately challenged department policy, and that he avoided doing his job by deferring to other staff or challenging the assignment policy. Swift directed Estes to change his communication with others and to focus on his job duties. Swift also commented about the cleanliness of the computer labs. Swift memorialized his concerns in an e-mail message dated July 16, 2009. Estes responded to this e-mail message, stating that more often than not, computer labs are clean and noting that, during the past year, the ITECH Department assumed more functions and began using new software.

Estes's Request for UPTE Representation

In September 2009, Estes approached UPTE representative Michael Moore about his belief that Swift had been assigning him job duties outside scope of the CRS job description. On September 17, 2009, Estes requested a meeting with Swift and Moore to discuss the matter. Estes also explained to Swift that he wished to either be reclassified as a PA or that he no longer be assigned more advanced job duties. Swift agreed to meet but scheduling discussions continued until November 2009. No meeting was held due to Moore's unavailability and because another project came up that needed attention.

Around that time, Estes participated in a one-day demonstration on behalf of UPTE to protest the University's conduct during ongoing contract negotiations. Estes described the demonstration as a "strike." No further detail was provided about the demonstration and no evidence was presented that Swift or any other ITECH representative was aware of Estes's participation in the demonstration.

The University's Counseling, Investigation, and Issuance of Written Warning #1

In February 2010, some ITECH laptop computers became infected with a virus. Swift assigned Steven Gilmer, an ITECH PA III to address the issue, which he did. However, after learning that the matter had been resolved, Estes sent an e-mail message to all ITECH staff explaining that he was uncomfortable with Gilmer's conduct. Swift informed Estes that the communication was inappropriate.

On February 25, 2010, Swift met with Estes to discuss Estes's attitude at work. Swift described Estes as "argumentative and disruptive," citing incidents where he observed Estes having an "angry outburst" or arguing with Swift in front of other staff. Swift later testified that he observed at least two other similar incidents around that time including a "violent emotional outburst" where Estes used profanity. Swift also noted that Estes disobeyed his

order to stop sending argumentative e-mail messages to all staff concerning his personnel complaints. Estes later informed Swift in an e-mail message of his "preference to have [his] union rep[resentative] present in any meeting that might have even the merest whiff of being of a disciplinary nature so [the February 25, 2010] meeting was purely informational."

On March 2, 2010, Swift attempted to give Estes a "Confirming Memo" describing the meeting. Estes refused to accept the document because he did not have UPTE representation. Swift issued the memorandum to Estes on March 4, 2010.

On March 9, 2010, Gilmer sent a letter to University Extension Human Resources Director, Harriet Whitmyer, complaining about Estes's treatment of both him and Swift. Gilmer also complained the Estes showed students videos "about some political subjects most often centering around the definition of a family and sexual preferences."

On March 10, 2010, Whitmyer requested Estes's presence at an investigatory meeting to discuss Gilmer's complaints and other issues. Whitmyer invited Estes to bring an UPTE representative to the meeting. The parties agreed to meet on April 6, 2010.

On March 18, 2010, Swift issued Estes a document entitled "Written Warning-Continued Argumentative and Insubordinate Behavior" (Written Warning #1). The basis for the written warning was Estes's conduct during the February 25, 2010 meeting, his refusal to accept the March 2, 2010 confirming memorandum, and his continued effort to argue with Swift over the issues covered in the February 25, 2010 meeting. On March 26, 2010, Estes filed a grievance over the issuance of Written Warning #1. There was no showing that any ITECH representative was aware of this grievance. The outcome of the grievance was not established in the record.

Around the same time, Estes requested that the parties participate in the University's Campus Mediation Program run by the Ombudsman's Office along with an UPTE

representative. The University declined Estes's request because Whitmyer and Rude felt that mediation would not be productive.

On April 6, 2010, the parties participated in the previously scheduled meeting. Estes was present, along with UPTE representative Sue Cross, Rude, Swift and Whitmyer. Whitmyer questioned Estes regarding multiple subjects, including student Estes's interactions with Gilmer and Swift. Estes was also asked about his use of University computers to display sexual or political material. Estes denied any wrongdoing. The University decided that no further action was necessary after the meeting.

The Decision to Convert the CRS Position

In or around April 2010, James, Rude, Swift, and Whitmyer discussed how to address the increased workload and evolving technological needs of the University Extension. The group felt that ITECH needed a full-time PA-level position rather than the part-time CRS position filled by Estes. The group considered eliminating the CRS position and laying Estes off, but felt that Estes should have the opportunity to qualify for the position as he had requested. The group then decided that it would convert Estes's CRS position to full-time and then train him to become a PA. When the University informed Estes of this decision, he said he preferred to remain part-time. The University did not reverse its decision. Estes's conversion from part- to full-time was effective on or around July 6, 2010.

The Issuance of Written Warning #2

On July 7, 2010, Swift informed Estes that he was placing Estes in charge of all WebEx recordings, including downloading classes and posting them onto the Extension website. Estes again complained that those WebEx duties were typically performed by Swift or other positions with more technical expertise than the CRS position. On July 9, 2010, Rude sent

Estes an e-mail message stating that he considered Estes's disregard for directions from his supervisor to be argumentative and unacceptable.

On July 26, 2010, Gilmer informed Estes via e-mail that Swift wanted him (Estes) to install new computers in one of the computer labs. Estes asked whether the assignment was mandatory or merely a training exercise and Gilmer responded that Swift expected the assignment to be completed that week.

Estes replied on July 27, 2010, stating in part "I am puzzled – you seemed to suggest that I'm unwilling to install new computers in our classrooms, despite two different emails from me to the contrary. . . . Your interpretation has no foundation, certainly not based on what I wrote." Estes then said "I'd ask that you review what I wrote [in prior e-mail correspondence] and re-evaluate this misperception. I'd also hope that other recollections you have regarding me are not similarly colored by unfounded reasoning."

Gilmer responded to Estes's e-mail later that day, stating that he was "disturbed" by Estes's response because he felt that nothing in his earlier messages suggested that he thought Estes was unwilling to perform the assigned task. Gilmer sent a copy of his reply to Swift.

On August 11, 2010, Rude issued Estes a document entitled "Second Written Warning – Continued Argumentative and Disruptive Behavior" (Written Warning #2), accusing Estes of disrespectful behavior exhibited towards Gilmer. Rude stated his opinion that Estes's response to Gilmer's July 26, 2010 e-mail messages was "argumentative and counter-productive" and that he felt Estes was intentionally trying to "provoke and antagonize Mr. Gilmer." Rude also cited previous attempts to correct Estes's behavior, including counseling on October 29, 2009, December 10, 2009, and February 25, 2010, through Written Warning #1, and through Rude's July 9, 2010 e-mail message about following supervisorial instruction. Rude later met with Gilmer to counsel him about his role in the e-mail exchange with Estes.

Estes requested time to draft a written response to Written Warning #2 during work hours. Swift replied that Estes could respond during work-time so long as it did not interfere with his work performance. On September 7, 2010, Estes filed a grievance over the issuance of Written Warning #2. The grievance was denied on September 24, 2010.

The September 2010 Sick Leave Incident

On September 8 and 9, 2010, Wednesday and Thursday, Estes took two consecutive sick days. On September 9, 2010, Swift informed Estes via e-mail that "HR policy requires [Estes] to provide a doctor's note upon return to work for an absence of three or more consecutive sick leave days." According to Section 39(D)(3) of the University/UPTE contract, the University may require documentation for sick leave absences less than three days only when it appears to be justified and the University gives the employee advance written notice that documentation would be required.

That day, Estes replied to Swift's e-mail message stating that he believed that the UPTE-University Collective Bargaining Agreement states "that if three days are EXCEEDED then a note MAY be required. This has never been an issue before. Where is this coming from and where is it justified?" Estes was, in fact, absent for a third consecutive day on Friday, September 10, 2010.

On or around September 10, 2010, Swift consulted with Whitmyer. The two discussed what Swift perceived to be a pattern by Estes to take sick leave around weekends at least once per month over the past four months. They did not examine any other employee's use of sick leave at that time. However, the record does include evidence that other ITECH employees who took multiple sick days provided a doctor's note or other verification. The two decided that it would be appropriate to require Estes to provide a doctor's note because the September 8-10, 2010 absence was again adjacent to the weekend.

Later that day, Swift informed Estes via e-mail that the Extension policy and the UPTE contract allow the University to require a doctor's note. Swift did not mention either his discussion with Whitmyer or his consideration of Estes's prior absences in this e-mail message.

Estes replied, asking what section of the UPTE contract allowed for Swift to request a doctor's note. Swift replied that he did not have the UPTE contract on hand, but that his "expectation is that [Estes would] provide a doctor's note upon [his] return per [Swift's] previous message." Over the weekend, UPTE representative Cross e-mailed the University/UPTE contract to Swift. Estes again asserted his belief that a note should not be required for absences of three days or less.

On Monday, September 13, 2010, Swift informed Estes via e-mail that section 39(D)(3) of the UPTE contract allowed the University to require a doctor's verification for absences less than three days when it appears to be justified and if prior notice is given to the employee that verification was necessary. Swift stated his belief that both criteria were met in this case. Estes replied to Swift's message, but the contents of his reply were not included in the record.

Swift met with Estes around noon that day and requested that Estes produce a doctor's note. Estes asked a series of questions about whether he would be paid for that day if he did not have a note and Swift stated that he would check with Human Resources and get back to Estes. Swift recalled asking Estes to produce a doctor's note four or five times. Estes recalled asking Swift whether he wanted to see the note but Swift replied "yes, no, would you like me to get back to you on that?" Estes did not produce a doctor's note at that time.

At around 5:00 p.m., that day, Swift and Rude spoke to Estes about the doctor's note issue. Rude asked Estes whether he had a doctor's note. Estes again asked questions about whether he would be paid if he did not produce a note. Rude stated that it was not the

appropriate time to address those questions and demanded to know whether Estes had a doctor's note. Rude requested the note three or four additional times before Estes handed the note to Swift. On September 23, 2010, Estes filed a grievance over this incident. The University denied the grievance on October 14, 2010.

Estes's 2009-2010 Performance Evaluation and Suspension

On September 21, 2010, Estes received his third performance evaluation from the University. Estes's overall performance was rated as "Improvement Needed." Swift included multiple comments that Estes was "disrespectful" and "confrontational" in his interactions with other ITECH staff and also that he inappropriately objected to performing tasks that were included as part of his job description.

On September 22, 2010, the University issued Estes a document entitled "Notice of Intent to Suspend." This document, authored by Rude, informed Estes that the University intended to suspend his employment for three days without pay due to what Rude described as "continued argumentative, insolent, and insubordinate behavior." Rude referenced prior counseling and discipline administered to Estes. Rude also described Estes's recent conduct regarding the doctor's note request. Rude also cited another incident where Estes continued sending e-mail messages about an issue with one of the laptop computers after Swift informed Estes that the matter was resolved.

On September 28, 2010, Estes requested the opportunity to respond to the Notice of Intent to Suspend during work time. Swift denied the request. During the hearing, Swift testified that he denied the request because of concerns that Estes was spending too much work time drafting argumentative communications.

On October 4, 2010, the University issued Estes an "Amended Notice to Suspend" providing Estes with additional time to write a response. Estes filed a response on October 4,

2010. On October 7, 2010, the University suspended Estes's employment for three days without pay.

On November 5, 2010, Swift briefly demonstrated how to update calendars using the PowerCampus software and assigned Estes to perform a similar task. Estes complained that he was unfamiliar with the software and that a PA III used to perform that task.

On November 22, 2010, Estes attended another meeting with Rude, Swift, and James. Estes was issued a document entitled "ITECH - CRS to PA Transition: Training Goals & Timeline." The goal of the meeting and the timeline was to develop a training schedule to transition Estes to become a PA. Estes complained that the training goals amounted to a "300 percent" increase in assigned tasks. Rude informed Estes that he would not be assigned new tasks without proper training.

On December 13, 2010, Swift assigned Estes to inspect and update computers in the computer lab while students were on winter recess. Estes complained that the updates were typically performed by the PA III position. After Estes also complained that there was insufficient time to complete the task, Swift instructed Estes to do whatever he could during one hour per day. Estes sent multiple e-mail messages to all ITECH staff regarding the progress and complications in completing this assignment. In one message, Estes questioned whether Swift's update schedule was "realistic."

Estes's Termination From Employment

On January 4, 2011, the University issued Estes a document entitled "Intent to Dismiss-Continued Argumentative and Insubordinate-Like Behavior" (Notice of Intent to Dismiss), authored by Rude. In the document, Rude broadly described the University's attempts to address what it perceived to be Estes's "argumentative, disrespectful and . . . inappropriate" behavior without success. Rude distinguished an employee's asking questions and raising

concerns with management from arguing and continuously reiterating those concerns after management provides an answer. The document attached multiple counseling and disciplinary documents as well as an eight-page summary of the conduct after the October 2010 suspension. The majority of the incidents described in the summary were not independently described in the record. Estes requested a meeting to discuss the matter and one was scheduled for January 19, 2011. Estes later sought to postpone the meeting so that he could find an attorney to represent him, but Rude denied the request because Estes had already arranged to have UPTE representation.

On January 19, 2011, Estes attended the meeting along with Rude, Swift, Whitmyer, and UPTE representative, Cross. Rude informed Estes that this was his opportunity to respond to the Notice of Intent to Dismiss. Estes read a short statement explaining his opinion that he performed his job duties well and that he is popular among most Extension employees. Estes also expressed that he felt it was unfair to be required to participate in the meeting without an attorney. Cross expressed her disappointment that the University had declined their requests for mediation. Rude said he would consider what was said and the University would make its final determination regarding termination the next day. On January 20, 2011, the University issued Estes a "Written Notice of Final Dismissal" stating that his employment with the University was terminated effective that day.

ISSUES

1. Did the University suspend Estes's employment without pay for a three days in retaliation for engaging in protected activity?

2. Did the University terminate Estes's employment in retaliation for engaging in protected activity?

CONCLUSIONS OF LAW

To demonstrate a prima facie case that an employer discriminated or retaliated against an employee in violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action *because of* the exercise of those rights. (*Regents of the University of California (Los Angeles)* (2008) PERB Decision No. 1995-H, citing *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*).)

1. Estes's Protected Activity

To establish first element of a prima facie case for retaliation the charging party must demonstrate participation in specific acts protected by HEERA. (*Regents of the University of California* (2006) PERB Decision No. 1843-H.) Here, the PERB complaint lists three separate activities that are alleged to be protected under HEERA. Estes also presented evidence of other protected activities during the hearing.

a. The Protected Activities in the PERB Complaint

The PERB complaint enumerates three protected acts by Estes:

> (3) On or about September 8, 201[0] and continuing until about September 13, 201[0], [Estes] exercised rights guaranteed by [HEERA] by attempting to assert his rights under the collective bargaining agreement pertaining to whether a doctor's note is required by the sick leave provision in Article 39[;]
>
> (4) On or about September 23, 2010, [Estes] exercised rights guaranteed by HEERA by filing a grievance against [the University][;]
>
> (5) On or about September 29, 2010, [Estes] exercised rights guaranteed by HEERA by filing an unfair practice charge against [the University]."

In its answer to the PERB complaint, the University admitted the allegations in all three paragraphs. The admission of facts in a pleading "is a conclusive concession of the truth of a matter which has the effect of removing it from the issues." (*Pinewood Investors v. City of Oxnard* (1982) 133 Cal.App.3d 1030, 1035, citing *Walker v. Dorn* (1966) 240 Cal.App.2d 118, 120; see also *Blankman v. Vallejo et al.* (1860) 15 Cal.638, 644.) Accordingly, the University's admission is sufficient to establish that these three activities took place and that each constitute protected activity under HEERA.

b. Estes's Other Alleged Protected Activities

During the hearing, Estes presented evidence of other allegedly protected acts. Consideration of protected acts not described in the PERB complaint is appropriate where those activities are related to the claims in the complaint and where the parties have had the full opportunity to litigate all issues. (*Lake Elsinore Unified School District* (2012) PERB Decision No. 2241.) These conditions are met in this case and it is therefore appropriate to consider Estes's other allegations of protected activity.

i. Requesting and/or Bringing UPTE Representation to Meetings

An employee's request for union representation during meetings with management is protected activity. (*Los Angeles Unified School District* (1991) PERB Decision No. 874, citing *California State University, Long Beach* (1987) PERB Decision No. 641-H (*CSU Long Beach*); *California State University, Sacramento* (1982) PERB Decision No. 211-H.) In this case, Estes requested UPTE representation for multiple meetings with University management. For example, in September through November 2009, Estes requested a meeting with his supervisor (Swift), and UPTE to discuss a possible reclassification. In March 2010, Estes requested that the University participate in mediation along with an UPTE representative. In

addition, Estes brought UPTE representative Cross to meetings April 6, 2010, and again on January 19, 2011. These activities are protected under HEERA.

ii. Participation in a September 2009 UPTE Demonstration

Estes also participated in an UPTE demonstration in September 2009 protesting ongoing negotiations with the University. PERB has held that non-disruptive informational picketing is protected under the collective bargaining statutes it enforces. (*San Marcos Unified School District* (2003) PERB Decision No. 1508.) However, picketing for the purpose of causing significant disruptions to an employer's operations may not be protected. (*City of San Jose* (2010) PERB Decision No. 2141-M.) In this case, Estes did not provide sufficient evidence to conclude whether the 2009 UPTE demonstration constituted lawful, non-disruptive picketing. Accordingly, Estes has not met his burden of establishing that his participation in the demonstration was protected.

iii. Estes's Other Grievance Activity

Estes filed two grievances in addition to the grievance identified in the PERB complaint. Specifically, on March 26, 2010, Estes filed a grievance regarding the issuance of Written Warning #1. On September 7, 2010, Estes filed another grievance regarding the issuance of Written Warning #2. Both grievances alleged that the warnings violated the University/UPTE contract. Filing and pursuing grievances to enforce contractual rights is protected activity. (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2140-H (*CSU San Marcos*).)

2. The University's Knowledge of Estes's Protected Activity

The second element of a prima facie case is establishing that the respondent was aware of the protected activities. To establish this element, at least one of the individuals responsible for taking the adverse action must be aware of the protected conduct. (*Oakland Unified School*

District (2009) PERB Decision No. 2061 (*Oakland USD*); *California State University (San Francisco)* (1986) PERB Decision No. 559-H.)

a. Knowledge of Activities Enumerated in the PERB Complaint

There was ample evidence that both of Estes's supervisors were aware of the protected activity described in the PERB complaint. Assistant Dean Rude and Swift were party to Estes's communications to "assert his rights under the collective bargaining agreement" as described in paragraph three of the PERB complaint. Likewise, both were aware of Estes's September 2010 grievance described in paragraph four of the PERB complaint. Finally, both received a copy of the University's position statement filed in response to the unfair practice charge described in paragraph five of the PERB complaint. These facts are sufficient to demonstrate knowledge of the three protected activities described in the PERB complaint.

b. Knowledge of Estes's Other Protected Activities

There is also sufficient evidence to establish that Rude and Swift were aware of some of Estes's other protected activities. Estes's requests for UPTE representation at meetings were made directly to either Swift or Rude. In addition, both were present in the April 6, 2010 and January 19, 2011 meetings with Estes and his UPTE representative. In addition, both acknowledged their awareness of Estes's September 7, 2010 grievance concerning Written Warning #2. This is sufficient to demonstrate University knowledge of these incidents.

Estes has not shown, however, that the appropriate University representatives were aware of Estes's March 26, 2010 grievance concerning Written Warning #1. Rude, Swift, and Whitmyer were the employees involved in drafting the Notice of Intent to Suspend and Notice of Intent to Dismiss. All three testified that they first learned of this grievance at the beginning of the formal hearing in this case. No documentary evidence demonstrates that they received any information regarding this grievance beforehand. Estes only testified that he delivered the

grievance to Cross and later received a copy of a letter from University Human Resources representative Alice Martinez, who was not involved in issuing either the Notice of Intent to Suspend or the Notice of Intent to Dismiss. Estes has not met this burden of establishing that individuals involved in his suspension or termination knew of the March 26, 2010 grievance. (*Oakland USD*, *supra*, PERB Decision No. 2061.)[3]

3. Adverse Actions

The third element of a prima facie case is whether the respondent took adverse actions against the charging party. In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*CSU San Marcos*, *supra*, PERB Decision No. 2140-H.) The Board further explained that:

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

(*Id.*, citing *Newark Unified School District* (1991) PERB Decision No. 864; emphasis supplied; footnote omitted.) In this case, the University admitted that Estes's suspension and termination from employment constitute adverse employment actions. Thus, this element of the retaliation analysis is satisfied. (See also *City of Santa Monica* (2011) PERB Decision No. 2211-M; *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C (*LA Superior Court*).)

[3] The letter states that David Cortez also received a copy of this letter. Rude, Swift, and Whitmyer may have consulted with Cortez in drafting either the Notice to Suspend or the Notice of Intent to Dismiss. However, the contents of the letter are hearsay and are insufficient to establish a factual finding without independent corroboration. (PERB Reg. 32176 [Cal. Code Regs., tit. 8, sec. 31001, et seq.]; *County of Riverside* (2009) PERB Decision No. 2090-M.) This matter is distinguishable from *Fallbrook Public Utility District* (2012) PERB Decision No. 2229-M, where the Board held that a letter correctly addressed and properly mailed is presumed to have been received. Here, no address was provided for Cortez and no evidence was presented regarding how this letter was sent. This is not sufficient to establish that Cortez received the letter.

4. Nexus Between Protected Acts and Adverse Actions

The final element of a prima facie case is demonstrating a causal connection, or nexus, between Estes's protected activities and the University's decision to suspend and terminate his employment. Because direct evidence of an employer's discriminatory intent is uncommon, nexus is typically established circumstantially. However, where there is direct evidence that the employer took adverse actions because of protected activities, no further evidence of nexus is necessary to establish a prima facie case. (*Regents of the University of California (Davis)* (2004) PERB Decision No. 1590-H (*UC Davis*).)

a. Direct Evidence of Nexus

In *UC Davis*, *supra*, PERB Decision No. 1590-H, the Board found direct evidence of nexus where the employer admitted to laying off employees due to employees' complaints that were found to be protected under HEERA. In this case, the Notice of Intent to Suspend lists Estes's discussions about the doctor's note issue from September 8 through 13, 2010 as part of the justification. As stated above, the University admits that those same discussions were protected under HEERA. This constitutes direct evidence that Estes's September 8-13, 2010 protected activity was at least one of the causes of the University's decision to suspend him. The Notice of Intent to Suspend was incorporated into the Notice of Intent to Dismiss. Thus, it is also true that Estes's termination was at least partially motivated by the same protected activity. (*Escondido Union Elementary School District* (2009) PERB Decision No. 2019 (*Escondido UESD*).)

b. Circumstantial Evidence of Nexus

Any causal connection between the adverse actions and Estes's other protected activities is less straightforward. Nexus connecting adverse actions to one protected act does not necessary connote a similar connection to other protected acts. (See *San Diego Community*

College District (1983) PERB Decision No. 368.) Here, there is no direct evidence that the adverse actions in this case were motivated by Estes's other protected activity. Accordingly, it is appropriate to consider circumstantial evidence.

i. Timing as Circumstantial Evidence of Nexus

The timing between adverse actions and protected conduct is an important circumstantial factor when establishing the presence or absence of nexus. (*The Regents of the University of California* (1998) PERB Decision No. 1255-H, citing *North Sacramento School District* (1982) PERB Decision No. 264 (*North Sacramento SD*).) PERB has found that the passage of around three and half months between protected activity and adverse actions to support an inference of nexus. (*Escondido UESD, supra*, PERB Decision No. 2019.) However, the passage of six months was more remote and less likely to support such an inference. (*Los Angeles Unified School District* (1998) PERB Decision No. 1300.)

Here, all of Estes's protected activities occurred close in time to either the Notice of Intent to Suspend, the Notice of Intent to Dismiss, or to the written warnings or counseling memoranda.[4] Such timing supports finding a causal connection.

ii. Other Circumstantial Evidence of Nexus

Timing alone, however, is insufficient to demonstrate the necessary nexus. (*Regents of the University of California* (1990) PERB Decision No. 858-H, citing *Moreland Elementary School District* (1982) PERB Decision No. 227.) Further circumstantial evidence of a causal connection is necessary. (*CSU San Marcos, supra*, PERB Decision No. 2140-H.)

[4] Although the written warnings and counseling memoranda were not included as adverse actions in the PERB complaint and it would be untimely to add them as additional causes of action now (*County of Riverside* (2010) PERB Decision No. 2097-M), evidence of an employer's actions from outside the statute of limitations period may be considered as background evidence of the employer's motives. (*Trustees of the California State University* (2008) PERB Decision No. 1970-H.)

Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*CSU San Marcos*, *supra*, PERB Decision No. 2140-H, citing *State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (*Id.*, citing *Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*Id.*, citing *State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*Id.*, citing *City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Id.*, citing *Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*Id.*, citing *McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Id.*, citing *Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*Id.*, citing *North Sacramento SD*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

(a) Unfair Assignments and Training Schedule

Estes's primary theory to establish an unlawful motive in this case is that the University assigned him job duties and training goals that no employee of his experience level could accomplish. Essentially, Estes claims they set him up to fail. PERB has previously found similar conduct to be evidence of unlawful motive. In *Trustees of the California State University*, *supra*, PERB Decision No. 1970-H, PERB held that an employer's manipulation of

a job description did not have a legitimate purpose but was instead designed to disqualify an individual who had filed grievances and unfair practice charges.

While Estes claims that the University assigned him new duties in response to his protected activities, it appears that the converse is closer to the truth; it was the University's assignment of new duties that caused Estes to seek assistance from UPTE. Both Rude and Swift testified that there was a large increase in ITECH work starting in early 2009, prior to any of Estes's protected activity. This testimony was corroborated by documentary evidence in the record, including comments in Estes's performance evaluations during the relevant time-frame. It was these assignments that prompted Estes to speak with UPTE and Swift about getting reclassified. Assignment changes that predate the protected activity normally do not establish a nexus between that activity and adverse actions. (*Trustees of the California State University* (2004) PERB Decision No. 1697-H.) Thus, there is insufficient evidence in the record to show that the decision to assign Estes additional duties was due to his protected activity.

Moreover, as to the type of job duties assigned, PERB has found that an employer's direction of employee workload is generally a management prerogative. (*Desert Sands Unified School District* (2010) PERB Decision No. 2092.) Accordingly, in *Mammoth Unified School District* (1983) PERB Decision No. 371, PERB held that an employee did not engage in protected activity by refusing to perform tasks assigned by his employer, even if the employee believed the assignment was improper.[5] PERB has consistently found no retaliation where employees are disciplined for refusing to comply with a direct order. (*San Bernardino County Public Defender* (2009) PERB Decision No. 2058-M; *Los Angeles Unified School District*

[5] The Board was careful to distinguish this case from lawful union-organized work stoppage or a refusal to perform duties that jeopardized the safety of the employee. No evidence of either circumstance is present in this case.

(2005) PERB Decision No. 1791, citing *The Regents of the University of California* (1996) PERB Decision No. 1158-H.)

Here, the record indicates that the vast majority of the additional assignments given to Estes were consistent with the CRS job description as well as the University's expectations of his performance as demonstrated through performance evaluations. For instance, the CRS job description expressly lists among the "essential functions," updating calendars using the PowerCampus software and testing both software and hardware in the computer lab. When Swift gave Estes a calendaring assignment on November 5, 2010, in two separate e-mail responses, Estes stated that he was unable to complete the task and complained that the task was traditionally the job of the PA III position. In December 2010, Swift directed Estes to update software in the computer lab. Estes again complained that the task was traditionally done by someone in a PA position.

Likewise, the CRS job description states that the position assists with using online meeting software, including downloading and posting course materials on the Internet. When Swift assigned Estes to download recorded sessions from the WebEx meeting software and post them on the Extension webpage, Estes complained multiple times that those duties were previously performed by the PA II, PA III, or by Swift himself.

Estes appears to claim that it was improper for the University to assign him any new duties that were not assigned to him when he was hired in 2007. But it is unclear how the assignment of duties consistent with his job description is evidence of unlawful motive. Estes also argues that the CRS job description in the record is out of date, but Swift credibly testified that the job description was not updated because the duties remained essentially the same. Estes has not established that these assignments support his retaliation claim.

For similar reasons, the University's attempt to convert Estes's position from a part-time CRS to a full-time PA II or III also does not indicate nexus. Rude and Swift felt that ITECH needed a position with higher technical expertise and that they wanted Estes to have the opportunity to fill that position. Both also testified that the University would not assign Estes new job duties until he received adequate training. This testimony is supported elsewhere in the record. In each of Estes's performance evaluations, Swift indicated that Estes should continue to train and develop more expertise in the software applications used in ITECH. In addition, after Estes left the University in January 2011, the University hired a PA II at ITECH. Estes himself informed Swift that reclassification to a PA position was one of his goals.[6] Based on these circumstances, Estes does not show that the University's decision to reclassify the CRS position demonstrates any unlawful motive.

Regarding the actual training program outlined by the University, Estes testified that it represented a "300 percent" increase in tasks assigned to him. Without commenting on the accuracy of Estes's calculation, it is unsurprising that the process for reclassifying the CRS position to a PA position would involve learning to perform new tasks. There was conflicting evidence in the record regarding whether the University's training regimen was feasible. Swift testified that the training goals seemed achievable but Estes testified that the training program was unrealistic. There is not enough evidence in the record to corroborate or discount either witnesses's account. However, because it is Estes that carries the burden of establishing the elements of a prima facie case, this evidence is not sufficient to support his retaliation claim.

[6] It is worth noting that Estes's individual attempts to seek a reclassification of his position is not protected activity. (*Fairfield-Suisun Unified School District* (2005) PERB Decision No. 1734.)

(b) Departure From Established Procedures

To establish that an employer departed from existing procedures, the charging party must show what the procedure was and how the employer deviated from that process. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086.)

On August 13, 2010, Swift permitted Estes to draft his response to Written Warning #2 during work hours. When Estes made the same request to respond to the September 22, 2010 Notice of Intent to Suspend, Swift denied the request. Estes has not shown that this difference represents a deviation from existing policy because he has not shown that the University had a consistent practice concerning responses to disciplinary notices. Swift testified that he was unaware of any policy. He further testified that both sets of instructions could be consistent with what he would normally do in that situation. Thus, PERB is unable to conclude that Swift deviated from an established policy.

In addition, not all departures from existing practices are evidence of unlawful motive. (*Regents of the University of California* (1987) PERB Decision No. 615-H.) In this case, Swift testified that the University decided against allowing Estes to respond to the Notice of Intent to Suspend during work hours because the University had become increasingly concerned with the amount of time Estes spent drafting argumentative communications. In fact, those very concerns were raised in the Notice of Intent to Suspend. After Swift denied Estes's request, the University amended the Notice of Intent to Suspend, affording Estes additional time to respond. Under these circumstances, Estes has not established that this conduct supports his retaliation claim.[7]

[7] Although not addressed by either party, there was additional evidence of a departure from the University's policy concerning self-evaluations. However, it appears from the evidence that this was merely a record-keeping error and did not affect the issuance of the adverse actions in this case or Estes's ability to respond to those actions. Deviations that are

(c) Shifting and/or Exaggerated Justifications

Estes alleges that the University provided differing or exaggerated reasons for its actions. An employer's shifting justifications for taking adverse action against an employee may be evidence of nexus. (*Trustees of the California State University (San Marcos)* (2009) PERB Decision No. 2070-H.) In contrast, PERB found no evidence of retaliation where the employer gave consistent justifications for its disciplinary actions and treated the employee at issue in that case the same as it had other employees who did not engage in any protected activities. (*Alameda County Medical Center* (2004) PERB Decision No. 1707-M.) Similarly, PERB found no evidence of nexus where the employee failed to correct her behavior after being given several opportunities to do so. (*San Diego Unified School District* (1991) PERB Decision No. 885 (*San Diego USD*).)

In this case, the University consistently stated its concerns with Estes in multiple counseling and disciplinary documents. On July 13, 2009, the University counseled Estes due to conduct it believed was argumentative and disruptive to other ITECH staff. The University also indicated that Estes challenged directives from his supervisor in inappropriate ways. These same concerns were raised with Estes in subsequent documents culminating in the January 4, 2011 Notice of Intent to Dismiss. In the University's assessment, Estes never corrected his behavior. Under these circumstances, there is no evidence of shifting justifications. (*San Diego USD*, *supra*, PERB Decision No. 885.)

Estes also claims evidence of nexus based on the University's failure to explain why its request for doctor's verification during his September 2010 absences was "justified" as defined in the University/UPTE contract. However, while the contract requires the University to *have* a justification for requiring a doctor's note, nothing in the sections of the contract provided for

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unrelated to the adverse actions do not provide evidence of nexus. (*Trustees of the California State University* (2009) PERB Decision No. 2038-H (*Sonoma State Univ.*).)

the record requires the University to *explain* its justification to the employee at the time of the request. An employer's failure to provide an explanation for its conduct is only evidence of nexus in cases where the employer was required by law, policy, or past practice to do so. (*City of Santa Monica, supra*, PERB Decision No. 2211-M.) In addition, the University did eventually explain that it felt verification was "justified" based on its observations of Estes's recent sick leave usage. Other ITECH employees that had similar absence records provided verification for their absences. An employer's strict application of the contract is not evidence of retaliation. (*State of California (Department of Personnel Administration)* (1999) PERB Decision No. 1313-S.)

(d) Cursory Investigation

Estes contends that the University's investigation prior to issuing Written Warning #2 was cursory. The failure to conduct a reasonable investigation prior to issuing discipline may be evidence of nexus. (*The Regents of the University of California, supra*, PERB Decision No. 1255-H.)

Estes first alleges that it was improper for Rude to rely primarily on Gilmer's complaints as the basis for issuing Written Warning #2. This claim is factually untrue. Rude referenced multiple issues including his belief that Estes refused to take direction from his supervisor. Regarding Gilmer, Written Warning #2 focused not on Gilmer's complaints, but on Estes's own communications. In other words, regardless of the content of Gilmer's statements, Rude felt that Estes's e-mail messages were improper and warranted discipline.

Estes also contends that it was improper for Rude to exclude Gilmer's e-mail messages from the warning issued to Estes. This also does not demonstrate that the University engaged in a cursory investigation because Written Warning #2 was clearly designed to address Estes's conduct, not Gilmer's. Rude testified that he separately met with Gilmer to discuss his own

role in provoking the situation. Based on these facts, Estes does not demonstrate that the University engaged in a cursory investigation.

(e) Animosity Towards Union Activists

Estes also alleges that the University's refusal to give Estes time to secure an attorney representative for the January 19, 2011 meeting as well as its denial of his request to have UPTE representation at "any meeting that might even have the merest whiff of being disciplinary in nature" was evidence of animus towards unions.[8]

Employees may have a protected right to meetings with their employers where: (a) the employee requested representation, (b) for an investigatory meeting, (c) which the employee reasonably believed might result in disciplinary action; and (d) the employer denied the request. (*Trustees of the California State University* (2006) PERB Decision No. 1853-H, citations omitted.)[9] However, employees are not entitled to representation at meetings whose sole purpose is to either correct work technique or present already-drafted discipline. (*Ibid.*) There is also no protected right to have an attorney present during investigatory meetings with their employer. (*County of Riverside*, *supra*, PERB Decision No. 2090-M.)

In this case, Estes's request far exceeds the bounds of employees' right to representation and it would not have been unlawful for the University to deny such a request. Moreover, Estes did not establish that the University ever actually denied Estes's request for representation at any specific meeting. The record shows other instances where the University apparently had no issue with Estes bringing UPTE representation to meetings. Under these

[8] It would be untimely to add these issues as additional causes of action at this time. (*County of Riverside*, *supra*, PERB Decision No. 2097-M.)

[9] An employee may have an additional right to representation under meetings arising out of "highly unusual circumstances" which are not present here and will therefore not be discussed in this proposed decision.

circumstances, there is simply insufficient evidence to conclude whether the University's actions were evidence of animus.

Likewise, because HEERA does not protect Estes's right to have an attorney represent him in meetings with his supervisor, denial of this request does not demonstrate animus towards unions or individuals that request union representation. Even if there were such a right, it is unclear how Estes's request for private counsel in lieu of UPTE representation demonstrates animus towards union activists.

(f) Disparate Treatment

Estes also alleges that he was treated more harshly than other ITECH employees. Evidence that an employee was treated differently from similarly situated employees may be evidence of nexus. (*Sonoma State Univ.*, *supra*, PERB Decision No. 2038-H.)

In this case, the record does not demonstrate disparate treatment. When Swift was asked whether he disciplined other employees for using profanity or other inappropriate communication in the workplace, he responded "absolutely." Rude also testified that he counseled Gilmer for communications the University felt were inappropriate and that he found counseling to be effective in Gilmer's case. Likewise, the University has formally disciplined other employees for misconduct or behavioral issues regardless of union affiliation. In addition, other ITECH employees who were absent as frequently as Estes were asked and did provide verification for time off. As explained above, discipline consistently applied to similarly situated employees does not provide evidence of nexus. (*Alameda County Medical Center*, *supra*, PERB Decision No. 1707-M.)

For all these reasons, there is insufficient circumstantial evidence connecting the adverse actions in this case to any of Estes's protected activities. Therefore, only Estes's

protected September 8-13, 2010 conduct, which had direct evidence of nexus, will be discussed further in this proposed decision.

5. The University's Justifications

If the charging party can establish all the elements of a prima facie case, then the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in any protected activity. (*Trustees of the California State University* (2000) PERB Decision No. 1409-H, citing *Novato*, *supra*, PERB Decision No. 210, *Martori Bros. Dist. v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721.) In other words, the issue is whether the adverse action would have occurred "but for" the protected acts. (*County of Riverside*, *supra*, PERB Decision No. 2090-M.) However, the focus of this analysis "is not whether the employer had a lawful reason for the action but whether it took the action for an unlawful reason." (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, citing *McFarland Unified School Dist. v. PERB* (1991) 228 Cal.App.3d 166, 169.)

In *LA Superior* Court, *supra*, PERB Decision No. 1979-C, an employer issued a written notice of suspension because of the employee's unauthorized use of a room for a union meeting and because she sent multiple e-mail messages broadcast to hundreds of employees. The Board found that the employee's use of the room was protected activity, but that her e-mail usage was not. The Board concluded that the protected conduct was not the "true motivation" for the suspension, given that the employee had been disciplined multiple times for her e-mail usage and that witnesses credibly testified that that the discipline was due to the employee's disregard for the e-mail policy. (*Ibid.*)

In *City of Santa Monica*, *supra*, PERB Decision No. 2211-M, the Board held an employee's long record of unacceptable performance was sufficient to demonstrate that he was

not terminated for his grievance activity. (See also *Martori Bros.*, *supra*, 29 Cal.3d at p. 730-731 [notwithstanding employee's protected activity, there was "ample evidence" justifying termination, such as threatening, obscene, and insubordinate statements].) In *CSU Long Beach*, *supra*, PERB Decision No. 641-H, PERB found that an employee's deteriorating relationship with his supervisor was justification for adverse actions.

In *County of Riverside*, *supra*, PERB Decision No. 2090-M, PERB found that the disciplinary memoranda and notice of termination were hearsay and not sufficient in-and-of-themselves to meet its burden to rebut a prima facie case for retaliation. The employer's other evidence that the discipline was justified was discredited and therefore not persuasive. (*Ibid.*; see also *Escondido UESD*, *supra*, PERB Decision No. 2019.) In *Chula Vista Elementary School District* (2011) PERB Decision No. 2221, an employer's claimed justification for adverse actions was found to be pretext where witnesses as well as performance evaluations consistently indicated that the employee interacted well with others. (*Ibid*; see also *Jurupa Community Services District* (2007) PERB Decision No. 1920-M.)

As stated above, the University admitted that its Notice of Intent to Suspend was at least partially motivated by Estes's September 8-13, 2010, protected activity. However, it is clear that the University had concerns with Estes's work performance long before the protected activity and that those same concerns persisted long afterwards.

For example, in July 2009, Swift observed that the manner in which Estes challenged his supervisor about following directives was inappropriate. These concerns were reiterated in comments made by Swift in Estes's 2008-2009 performance evaluation issued on September 15, 2009. On December 20, 2010, Estes sent an e-mail message to all ITECH staff questioning whether Swift's directive about updating software was "realistic." The failure to

correct behavior after multiple warnings has been found to be adequate justification for discipline. (*LA Superior Court*, *supra*, PERB Decision No. 1979-C.)

Unlike in *County of Riverside*, *supra*, PERB Decision No. 2090-M, the University's characterization of Estes's behavior was supported by personal accounts. For example, Swift testified that he observed Estes engage in a "violent, emotional outburst" where he raised his voice and used profanity. Swift observed at least two other "angry outbursts" from Estes. These concerns were raised with Estes on February 25, 2010.

Around the same time, in February 2010, Estes continued sending e-mail messages about a computer virus issue even after Swift told him that the issue was resolved and that no further discussion was necessary. Swift informed Estes that it was inappropriate to e-mail his personal complaints with other employees to all ITECH staff. Those issues were raised with Estes in Written Warning #1, dated March 18, 2010.

Another issue that the University had was Estes's continued insistence that his job assignments were outside the scope of his job description. Swift and Rude unambiguously communicated their belief that the assigned tasks were reasonable for a CRS. This issue first arose in 2009, when Extension began seeing more WebEx production. The University informed Estes that it considered his challenges to supervisorial authority to be unacceptable on July 9, 2010, and August 11, 2010. Swift testified that he had many other discussions with Estes over this issue. In November and December 2010, Estes was still making the same complaints. The University's concerns were raised again in the January 2011 Notice of Intent to Dismiss.

Estes acknowledges making these complaints but contends that he never actually refused to perform any assigned tasks. However, the record does not demonstrate that Estes performed the more advanced duties assigned satisfactorily. Moreover, this argument does not

address the manner in which Estes conducted himself with this supervisors, which appears to be the primary basis for the University's concerns. An employer's persistent dissatisfaction with an employee's conduct may rebut the prima facie case for retaliation. (*City of Santa Monica*, *supra*, PERB Decision No. 2211-M; *CSU Long Beach*, *supra*, PERB Decision No. 641-H.)

Estes's September 8-13, 2010 protected activity was one of two events described in the September 22, 2010 Notice of Intent to Suspend. The document also discussed an incident on September 7, 2010, where Estes continued to send e-mail about a laptop computer issue after Swift informed him that the matter required no further attention. This was similar to a complaint Swift raised with Estes in February 2010.

Based on the totality of this evidence, the record does not show that Estes's September 8-13, 2010, protected activity was the "true motivation" for either his suspension or termination. (*LA Superior Court*, *supra*, PERB Decision No. 1979-C.) The record shows that the University had many concerns about Estes's ability to follow direct orders as well as the manner in which he challenged his supervisors about assigned tasks. Those concerns were present independent from Estes's efforts to enforce his contractual rights.

It is important to note that the issue before PERB is not whether the University's concerns were justified or whether Estes's suspension or termination were for "good cause." (*City of Santa Monica*, *supra*, PERB Decision No. 2211-M.) The sole issue in this case is whether the University retaliated against Estes for engaging in protected activities. On that issue, it is concluded Estes's protected activity was not the actual cause behind the University's decision to suspend or terminate his employment.

PROPOSED ORDER

Jeffrey Estes has not established that the Regents of the University of California (Irvine) retaliated against him for engaging in protected activities. Therefore, the Public Employment Relations Board complaint and underlying unfair practice charge in LA-CE-1120-H are hereby DISMISSED.

Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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 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 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).)