



**PERB**  
California Public Employment  
Relations Board

Sacramento Regional Office  
1031 18th Street  
Sacramento, CA, 95811-4124  
Telephone: (916) 324-0143



December 30, 2022

Re: *Mt. San Jacinto College Faculty Association v. Mt. San Jacinto Community College District*  
Unfair Practice Case No. LA-CE-6583-E

Dear Parties:

Attached is the Public Employment Relations Board (PERB or Board) agent's Proposed Decision in the above-entitled matter.

Any party to the proceeding may file with the Board itself a statement of exceptions to the Proposed Decision. The statement of exceptions should be electronically filed using the "ePERB portal" accessible from PERB's website (<https://eperb-portal.ecourt.com/public-portal/>). (PERB Reg. 32110, subd. (a).)<sup>1</sup> Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents using the ePERB portal; however, such individuals may submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) The Board's mailing address and contact information is as follows:

**PUBLIC EMPLOYMENT RELATIONS BOARD**

**Attention: Appeals Assistant**  
**1031 18th Street, Suite 200**  
**Sacramento, CA 95811-4124**  
**Telephone: (916) 322-8231**

Pursuant to PERB Regulation 32300, the statement of exceptions must be filed with the Board itself within 20 days of service of this proposed decision. A document submitted through ePERB after 11:59 p.m. on a business day, or at any time on a non-business day, will be deemed "**filed**" the next regular PERB business day. (PERB Reg. 32110, subd. (f).) A document submitted via non-electronic means will be considered "**filed**" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a); see also PERB Reg. 32130.)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, including footnotes, but excluding the tables of contents and authorities.

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<sup>1</sup> PERB's regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

Requests to exceed the 14,000-word limit must establish good cause for exceeding the limit and be filed with the Board itself and served on all parties no later than five days before the statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. The statement of exceptions shall: (1) clearly and concisely state why the proposed decision is in error, (2) cite to the relevant exhibit or transcript page in the case record to support factual arguments, and (3) cite to relevant legal authority to support legal arguments. Exceptions shall cite only to evidence in the record of the case and of which administrative notice may properly be taken. (PERB Reg. 32300, subd. (c).) Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

Within 20 days following the date of service of a statement of exceptions, any party may file with the Board a response to the statement of exceptions. The response shall be filed with the Board itself in the same manner set forth in this letter for the statement of exceptions (see paragraphs two and three of this letter). The response may contain a statement of any cross-exceptions the responding party wishes to take to the proposed decision. The response shall comply in form with the requirements of PERB Regulation 32300 set forth above, except that a party both responding to exceptions and filing cross-exceptions shall be permitted to submit up to 28,000 words total, including footnotes, without requesting permission. A response (with or without an inclusive statement of cross-exceptions) to such exceptions may be filed within 20 days. Such response shall comply in form with the provisions of PERB Regulation 32310.

All documents authorized to be filed herein must also be “served” upon all parties to the proceeding, and a “proof of service” must accompany each copy of a document served upon a party or filed with the Board itself. (See PERB Regs. 32300, subd. (a) and 32093; see also PERB Reg. 32140 for the required contents.) Proof of service forms are available for download on PERB’s website: [www.perb.ca.gov/about/forms/](http://www.perb.ca.gov/about/forms/). Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b) and 32093.)

Any party desiring to argue orally before the Board itself regarding the exceptions to the proposed decision shall file with the statement of exceptions or the response thereto a written request stating the reasons for the request. Upon such request or its own motion the Board itself may direct oral argument. (PERB Reg. 32315.) All requests for oral argument shall be filed as a separate document.

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request

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shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)

Unless a party files a timely statement of exceptions to the proposed decision, the decision shall become final. (PERB Reg. 32305.)

Sincerely,

A handwritten signature in blue ink, appearing to read "S. P. Cloughesy", with a long horizontal flourish extending to the right.

Shawn Cloughesy  
Chief Administrative Law Judge

SPC



STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD

MT. SAN JACINTO COLLEGE FACULTY  
ASSOCIATION,

Charging Party,

v.

MT. SAN JACINTO COMMUNITY COLLEGE  
DISTRICT,

Respondent.

UNFAIR PRACTICE  
CASE NO. LA-CE-6583-E

PROPOSED DECISION  
(December 30, 2022)

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

Before Jeffrey R. A. Edwards, Administrative Law Judge.

INTRODUCTION

Mt. San Jacinto College Faculty Association (“Association”) alleges that the Mt. San Jacinto Community College District (“District”) retaliated against faculty members Rosaleen Gibbons (“Gibbons”) and Farah Firtha (“Firtha”) for engaging in protected activities in violation of the Educational Employment Relations Act (EERA or the Act).<sup>1</sup> The District denies any wrongdoing.

For the reasons discussed below, I find and conclude that District violated EERA and order it cease and desist from violating the Act, make Gibbons and Firtha whole, and post notice of its violations.

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<sup>1</sup> EERA is codified at Government Code section 3540 et seq. Unless otherwise noted, all statutory references are to the Government Code.

## PROCEDURAL HISTORY

The Association filed an unfair practice charge on September 3, 2020, and the District filed a position statement on October 5. PERB's Office of the General Counsel issued a complaint against the District on July 19, 2021, and the District filed an answer on August 9. Informal conferences were held on September 30 and October 14, but the parties did not reach a resolution.

A prehearing conference was held on February 8, 2022, and a formal hearing was held on March 7-9 via PERB's Webex Platform. At the hearing, both parties had an opportunity to examine and cross examine witnesses and to present evidence and argument in support of their respective positions. The case was submitted for decision on July 14, 2022, after receipt of closing briefs.

## FINDINGS OF FACT

The District is a public school employer within the meaning of Government Code section 3540.1(k). The Association is an employee organization within the meaning of section 3540.1(d) and an exclusive representative within the meaning of section 3540.1(e). Gibbons and Firtha are employees within the meaning of section 3540.1(j).

Jeremy Brown (Brown) is the Vice President of Instruction and Marc Donnhauser (Donnhauser) is the Dean of Instruction at Mt. San Jacinto College. Beginning in 2017, Firtha and Gibbons began raising concerns to Brown and Donnhauser about safety problems in the Chemistry Department. In brief, the college had an ongoing problem recruiting and retaining instructional aides (IAs). IAs set up chemistry experiments and managing chemicals. Due to the staffing shortage, the

work was not done consistently. Gibbons and Firtha paid close attention to these problems and the potential impacts to faculty safety. Brown and Donnhauser met with Gibbons and Firtha several times and made multiple efforts to address the problem, but it remained substantially unsolved. Gibbons and Firtha grew frustrated with the problem, Brown and Donnhauser grew frustrated with the co-chairs' approach and the relationship between the co-chairs and administration soured.

In January 2020, an IA, Jose Guerrero, accepted a position at another college in the District. Gibbons and Firtha asked Brown to allow the Guerrero to continue to cover some chemistry classes at Mt. San Jacinto until there was a replacement. Brown denied the request and Gibbons pushed the issue.

In February 2020, Firtha and Gibbons raised the workplace safety issue and the Guerrero staffing part to the Academic Senate and their union. Their e-mails and the union leader's response were forwarded to Brown.

On March 5, Brown e-mailed Gibbons and Firtha. He said he was working on bringing Guerrero back to provide some IA support. He also asked them to come to a meeting for "a broader conversation" about the chemistry department on Monday, March 9 at 11:00 a.m.<sup>2</sup>

On March 8 at 6:40 p.m., Gibbons responded to the e-mail. She was critical of Brown, stating for example, "we have lost complete confidence in your [] abilities to manage chemistry department issues in a professionally thoughtful, reasoned, and timely manner," and "you have demonstrated dereliction of duty of such gravity that it

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<sup>2</sup> Though the e-mail contained the wrong date, the parties understood it to mean the ninth.

is increasingly likely that students, staff, and faculty will suffer serious injuries, including some that might even prove to be lethal in nature.” She also said that she planned to file a complaint and that she believed it was inappropriate for her to meet with him.

Brown replied late that night that he expected Gibbons to attend the meeting the next day.

Gibbons responded on March 9 at 12:12 a.m. to which Brown responded at 7:54 a.m. in a point-by-point response by using inline text. In short, Gibbons repeated her criticism of Brown, and he took issue with her characterizations. Gibbons also wrote, “we will not be accepting your invitation for the 3/9/2020 meeting.” Brown responded, “[y]our refusal to attend this meeting is a clear demonstration of insubordination . . .”

Brown concluded, writing:

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

On March 10, Brown informed the chemistry faculty that Gibbons and Firtha were no longer the department chairs. On March 18, he appointed Professor Josh

Hartman chair. The faculty did not elect Hartman. The parties disagree about how exceptional it was for a chair to be appointed without a faculty election, but it was at least unusual and had not happened recently.

In early April, the chemistry faculty reelected Gibbons and Firtha as co-chairs of the department. Brown acknowledged the election, but said, "I will not be approving your assignment[s] as [co-]chairs, for the reasons expressed earlier this semester. My decision on this still stands."

In early May, Brown put out the Fall 2020 teaching schedule. The schedule showed Gibbons and Firtha assigned to teach Introductory Chemistry, an entry level class, instead of the higher-level chemistry classes they typically taught. Gibbons responded with an e-mail to Brown on May 5 which she copied to several people including Firtha and Donnhauser. The e-mail reads in pertinent part, "I'm not sure what the logic is for changing the 2 most senior faculty members to schedules to Introductory Chemistry, allowing other scheduling alterations but refusing any for Farah and I for the upcoming Fall schedule, but once again, this feels like harassment."

On May 6, 2020, the college's Academic Senate met. Firtha addressed the senate and said that Brown removed her and Gibbons as co-chairs in retaliation for advocating for workplace safety.

On May 6, 2020, at 7:56 p.m., Brown e-mailed Gibbons a counseling memo. The memo said in pertinent part:

"This memo serves as a counseling memo regarding your disrespectful communication on Tuesday, May 5, 2020. . . Your message is a clear example of disrespectful behavior. . . I respectfully requested that you accept the change in assignment . . . I offered to meet with you, should you have other questions[.] In



response, you continued to make your argument and escalated your tone to one that is clearly disrespectful. This is insubordinate behavior. A copy of this memo will not be placed in your personnel file at this time. However, in the event that this issue recurs in the future and if you do not comply with this directive, this memo will be placed in your personnel file and further corrective action will be taken.”

On May 6, 2020, at 8:06 p.m., Brown e-mailed Firtha. His e-mail said in

pertinent part:

“The purpose of this email is to inform you that a statement you made in the Academic Senate meeting on 5/6/2020 was inaccurate, and may have caused misunderstanding among participants in the discussion as they made decisions. On the item "Department Chairs," you explained that "we have been advocating for our program's integrity and the safety of our program, and that has resulted in the chairs being removed by admin ... I guess we are kind of asking that you use your powers and perhaps maybe not approve this list .... " "There kind of needs to be a way to protect faculty when they are advocating for their program and their program's integrity and especially for chemistry we're advocating for the safety of our program." It appears that you perceive the reason for your removal of chair was due to your advocacy for chemical safety.

In my email to you on Sunday, March 8, I made clear that the reason for your removal was because you and Rosaleen refused to meet with us, and that your insubordination results in a breakdown in communication and a dysfunctional supervisory relationship.

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In the future, it is important in public meetings to accurately represent these matters. The District is committed to your continuing success. To that end, the District wants to ensure that you have access to AP 7360 and BP 7360.<sup>3</sup>”

### ISSUE

Did the District retaliate against Gibbons and/or Firtha because of protected activities, and if so, what are the appropriate remedies?

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<sup>3</sup> Administrative Procedure (AP) and Board Procedure (BP) sections 7360 are about employee discipline and dismissal.

## CONCLUSIONS OF LAW

The complaint alleges that the District violated EERA section 3543.5(a) by retaliating against Gibbons and Firtha for protected activity. To demonstrate a violation of EERA section 3543.5(a), a charging party must show that: (1) the public employee exercised rights protected by EERA; (2) the public agency had knowledge of the employee's exercise of those rights; (3) the agency/employer took adverse action (imposed/threatened reprisals, discriminated/threatened to discriminate, or otherwise interfered with/restrained/coerced the employee); and (4) the employer took adverse action because of his/her exercise of those statutorily guaranteed rights. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 555; *Novato Unified School District* (1982) PERB Decision No. 210, pp. 4-5; *City of Sacramento* (2019) PERB Decision No. 2642-M, p. 19.) If the charging party satisfies all the elements of the prima facie case, the burden shifts to the respondent to put on an affirmative defense and prove by a preponderance of the evidence that it would have taken the same course of action even if the charging party did not engage in protected activity. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 12.)

### 1. Protected Activity and Employer Knowledge

Under EERA, "an individual employee's criticism of management or working conditions is protected when its purpose is to advance other employees' interests or when it is a logical extension of group activity." (*Trustees of the California State University* (2017) PERB Decision No. 2522-H, p. 16.) Gibbons and Firtha repeatedly raised workplace safety issues with management. These efforts were protected because they were concerted and, when independent, the logical extension of group

activity. They also raised their concerns to their union, which is protected activity. Gibbons and Firtha’s activities were far from meeting the opprobrious standard for losing protection. (See *Rancho Santiago Community College District* (1986) PERB Decision No. 602-E, pp. 12-13.) Management was aware of Gibbons and Firtha’s activities.

2. Adverse Action

PERB uses an objective test to decide whether a respondent’s action was adverse to employment conditions. (*Palo Verde Unified School District* (1988) PERB Decision No. 689, p. 12 (*Palo Verde*.) Under *Palo Verde*, the proper analysis is not whether the charging party found the respondent's action adverse to employment conditions, but whether a reasonable person under the same circumstances would regard it as adverse. (*San Diego Unified School District* (2019) PERB Decision No. 2634, p. 14.)

The complaint alleges five adverse actions which are discussed below.

Allegation	Analysis
“a) On March 9, 2020, VP Brown removed them from chemistry department chair positions.”	Removing Gibbons and Firtha from their chemistry department chair positions was adverse because a reasonable person would find the loss of workplace status and responsibility adverse.
“b) On April 3, 2020, VP Brown refused to recognize their re-election and assignment as chemistry department chairs.”	Refusing to recognize their re-election as chemistry department chairs is adverse for the same reasons.
“c) On April 22, 2020, their teaching assignment for the 2020-2021 school year changed from “upper-level chemistry” to “remedial chemistry,” which is typically taught by part-time	Teaching remedial chemistry classes may not be adverse for other faculty or other circumstances but assigning them lower levels classes is adverse under the circumstances because it denotes a

employees and faculty with the least seniority.”	lowering of status and power in their workplace.
“d) On May 6, 2020, VP Brown issued Ms. Gibbons a ‘Counseling Memo.’”	The May 6 counseling memo is adverse because it threatens discipline.
“e) On June 29, 2020, VP Brown placed in Ms. Firtha’s personnel file, a May 6, 2020, e-mail message admonishing her to speak more accurately in public comments (e.g., during Senate meetings), while also referencing Respondent’s Discipline and Dismissal protocols.”	The June 29 admonishment is adverse for the same reason.

### 3. Nexus

The “because of” element is a causal connection or “nexus” between the adverse action and the protected conduct. (*Novato, supra*, PERB Decision No. 210, pp. 5-6.) “Because ‘retaliatory conduct is inherently volitional in nature,’ where it is alleged that the employer has acted in reprisal against employees for participation in protected activity, evidence of unlawful motive is the specific nexus required to establish a prima facie case.” (*City of Sacramento, supra*, PERB Decision No. 2642-M, p. 20 quoting *Novato, supra*, at p. 6.) A charging party may prove unlawful motive, intent, or purpose through direct or circumstantial evidence. (*Novato, supra*, PERB Decision No. 210, p. 6.)

A charging party may prove unlawful motive, intent, or purpose through direct or circumstantial evidence. (*Novato, supra*, PERB Decision No. 210, p. 6.) Circumstantial evidence supports nexus as to Gibbons and Firtha’s removal as co-chairs, the refusal

to recognize their reelection, and the change to their teaching assignments. Direct evidence supports nexus as to the counseling memo and admonishment.

### 3.1 Circumstantial Evidence

While PERB considers all relevant facts and circumstances in assessing an employer's motivation, the following factors are the most common types of circumstantial evidence establishing a discriminatory motive, intent, or purpose: (1) timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor; (2) disparate treatment of the employee; (3) departure from established procedures and standards when dealing with the employee; (4) failure to offer a contemporaneous justification, or offering exaggerated, questionable, inconsistent, contradictory, or ambiguous justifications for the employer's actions; (5) a cursory or inadequate investigation of the employee's alleged misconduct; (6) a punishment that is disproportionate based on the relevant circumstances; (7) employer animosity toward protected activity; and (8) any other facts that might demonstrate the employer's unlawful motive. (*City of Santa Monica* (2020) PERB Decision No. 2635a-M, p. 42; *County of Santa Clara* (2019) PERB Decision No. 2629-M, pp. 9-10; *County of Yolo* (2009) PERB Decision No. 2020-M, pp. 12-13; *Novato, supra*, PERB Decision No. 210, pp. 6-7.) Here, timing, departure from procedures and standards, and cursory investigation support an inference of unlawful motive.

#### 3.1.1 Timing

The timing between protected activity and an adverse action can be a strong indicium of unlawful motive. (*County of Riverside* (2009) PERB Decision No. 2090-M,

pp. 30-31, 33, 35.) “Typically, the closeness in time (or lack thereof) between the protected activity and the adverse action goes to the strength of the inference of unlawful motive to be drawn and is not determinative in itself.” (*Metropolitan Water District of Southern California* (2009) PERB Decision No. 2066-M, p. 12.)

### 3.1.2 Departure from Procedure and Standards

Departure from established procedures is when an employer takes an adverse action in a way that is inconsistent with the way it normally goes about doing so. (Lake Elsinore Unified School District (2019) PERB Decision No. 2671-E, p. 7.) This can indicate unlawful motive because it suggests a reason other than the stated reasons are the motivation for the adverse action. Here, Brown departed from established procedures by appointing a replacement department chair and by refusing to recognize Gibbons and Firtha when they after faculty reelected them to their positions. These actions tend to indicate unlawful motive because they appear designed to ensure Brown would have a chair that did not engage in protected activities.

### 3.1.3 Cursory Investigation

“An inadequate or cursory investigation supports an inference of unlawful motive because it reveals an employer’s disinterest in whether misconduct truly occurred and thus that the stated reasons for the adverse action are not the actual motivating reasons.” (*Regents of the University of California* (2020) PERB Decision No. 2704-H, p. 24.) Though the term “cursory” is often used to describe this indicium, “it is not merely hasty or perfunctory investigations that indicate unlawful motive.” (*Regents of the University of California, supra*, p. 25.)

Here, Brown's failure to investigate Firtha's involvement in Gibbons' refusal to attend the March 9 meeting indicates unlawful motive. On March 5, Brown e-mailed the meeting date and time to Gibbons and Firtha. On March 8, *Gibbons* refused to attend. Though Gibbons wrote on behalf of her and Firtha, the e-mail did not express Firtha's concurrence. But Brown responded by removing both Gibbons and Firtha from their positions without investigating Firtha's level of involvement. This indicates that Gibbons' insubordination was pretext and Brown's true reason for removing them from their positions was their protected activity.

### 3.2 Direct Evidence

#### 3.2.1 May 6 Counseling Memo to Gibbons

Brown directly references protected activity as among the bases for the counseling memo. The counseling memo is about Gibbons' May 5 e-mail to him. He characterized the e-mail as "disrespectful" and complained that Gibbons failed to "accept the change in assignment." He admonished Gibbons for "contin[ui]ng to make your argument and escalat[ing] your tone to one that is clearly disrespectful. This is insubordinate behavior. He threatened discipline "in the event that this issue recurs[.] Since Gibbons e-mail was a continuation of her protest of Brown's decisions affecting her and Firtha's working conditions, the e-mail was protected activity and threatening her with discipline for doing so is direct evidence of unlawful motive.

#### 3.2.2 May 6 Admonishment to Firtha

Brown directly references protected activity as among the bases for the admonishment. He quoted Firtha's complaints to the Academic Senate about workplace safety and her perception that Brown retaliated against her and Gibbons.

These were protected activities. Brown directed Firtha to “accurately represent these matters,” apparently by not contradicting him, and threatened her with discipline if she did not. This shows unlawful motive. While Brown may have been frustrated with Firtha and Gibbons’ repeated complaints about his behavior, he was not allowed to threaten discipline or retaliate against them.

#### 4. Affirmative Defense

When a charging party has proven that discrimination or retaliation contributed to the employer’s decision, but the employer asserts that one or more other nondiscriminatory reasons also exist, the burden shifts to the employer to show as an affirmative defense that it would have taken the same action(s) even absent any protected activity. (*NLRB v. Transportation Management Corp.* (1983) 29 U.S. 393 at pp. 395-402; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d at pp. 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) Merely presenting a legitimate reason for acting is not enough to meet the burden. To prevail on its affirmative defense, the employer must show, by preponderance of the evidence, that it had a legitimate, nondiscriminatory reason for taking the adverse action and that the reason proffered was, in fact, the employer’s reason for taking the adverse action. (*Cabrillo Community College District, supra*, PERB Decision No. 2453, p. 12; *McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304.) Even direct evidence of unlawful motivation does not bar a respondent from proving that an employee’s protected activity was not the true motivation for its action. (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 4.)



#### 4.1 Removal as co-chairs/refusal to recognize reelection

The District argues that it would have taken the same actions even if Gibbons and Firtha had not engaged in protected activity. It argues their removal as chairs was solely based on their refusal to meet with Brown and Brown issued the memorandum to Gibbons because of her “disrespectful and insubordinate behavior” and the admonition to Firtha because of her “untruthful statements.” The District’s arguments are not persuasive. As discussed ante, Gibbons’ refusal to attend the meeting was more likely a convenient pretext than the motivating reason for the adverse actions. And Firtha, notably, did not refuse to attend the meeting. Gibbons and Firtha’s complaints, though repetitive, were protected, and their word choice, though sometimes hyperbolic, was not offensive. Brown’s habit of sending early morning and late evening e-mails also cuts against the affirmative defense because it tends to show a manager who is reacting impulsively, rather than in a considerate way dictated by the circumstances.

#### 4.2 Reassignment to Introductory Chemistry

The District also argues that assigning Gibbons and Firtha to Introductory Chemistry for Fall 2020 was not retaliatory, but instead part of a restructuring of chemistry department assignments to improve student pass rates. But that explanation is at odds with Brown’s statement that “Fall 2020 schedules will be developed in direct conversation between deans and faculty,” instead of by Gibbons and Firtha which he included in his hasty March 9 early morning e-mail removing them as co-chairs. Notably, even if losing scheduling authority was a natural product of losing chair positions, it does not follow that the replacement chair would also lose that role as the

e-mail states. On balance, the preponderance of the evidence shows it was Brown's intemperate reactions to protected activity that was critical of his behavior, not tone, professionalism or student achievement, that motivated the adverse actions.

#### 4.3 Counseling memorandum and admonishment

The District attempts to defend these actions by arguing that Gibbons and Firtha's statements were untrue and their tone was unprofessional. The first argument misses the point; true or not, they were protected. The second argument is unpersuasive because the word choice was at most strident and did not lose protection.

Thus, the District retaliated against Gibbons and Firtha, in violation of section 3543.5(a). The District also derivatively interfered with the rights of bargaining unit employees to be represented by Charging Party in violation of section 3543.5(a) and derivatively denied Charging Party its right to represent bargaining unit employees in violation of Government Code section 3543.5(b).

#### REMEDY

When a violation occurs, PERB typically aims to restore the status quo. (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 16.) EERA

section 3541.5, subdivision (c) states:

"The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter."

The union requests that PERB order the District to cease and desist from violating EERA, post notice of its violations, return Gibbons and Firtha to their chair positions, award them backpay, and ensure the counseling memo and admonishment

are not in their personnel files. PERB has broad remedial powers to effectuate the purposes of EERA. A cease-and-desist order, notice posting, backpay, and removal of the documents are appropriate remedies. Backpay shall be payment for monetary value of the hours of release time Gibbons and Firtha lost by being removed and not recognized upon reelection as chairs plus seven percent interest per annum.

Returning Gibbons and Firtha to their co-chair positions requires a remedy more tailored than requested by the union. In failure-to-promote cases, PERB often prefers not to remove an innocent incumbent over a discriminatee. (*State of California (Correctional Health Care Services)* (2021) PERB Case No. 2760-S, p. 42.) The chair positions are analogous to promotions and failure-to-promote principles are instructive here. Though Hartman was innocent, Brown appointing him – rather than him being elected by the faculty – was not. Thus, if Hartman is still chair, his appointment is void and Gibbons and Firtha shall be returned to their positions. But if the faculty has since elected a chair, that chair will remain to finish their term at which point Gibbons and Firtha may compete to be elected chairs. The District must recognize Gibbons and Firtha as chair/co-chairs if either or both are elected by the faculty.

#### PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that MT. SAN JACINTO COMMUNITY COLLEGE DISTRICT violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq. by retaliating against Rosaleen Gibbons and Farah Firtha for engaging in protected activity.

Pursuant to EERA sections 3541.3, subdivisions (i) and (n), and 3541.5, subdivision (c) of the Government Code, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activities.
2. Interfering with the rights of bargaining unit employees to be represented by the Mt. San Jacinto College Faculty Association.
3. Denying the Mt. San Jacinto College Faculty Association its right to represent bargaining unit employees.

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

1. Remove from Gibbons' personnel file and destroy the May 6, 2020, Counseling Memorandum.
2. Remove from Firtha's personnel file and destroy the May 6, 2020 admonishment.
3. Pay Gibbons and Firtha backpay.
4. Return Gibbons and Firtha to their positions as co-chairs unless the faculty has since elected a chair, in which case that chair may finish their term at which point Gibbons and Firtha may compete to be elected chairs and the District must recognize Gibbons and Firtha as chair/co-chairs if either or both are elected by the faculty.
5. Within 10 workdays of the service of a final decision in this matter, post at all work locations where notices to faculty customarily are posted, copies of the

Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. The Notice shall also be posted by electronic message, intranet, internet site, and other electronic means customarily used by the District to communicate with faculty. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

6. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on counsel for Charging Party.

#### RIGHT OF APPEAL

A party may appeal this proposed decision by filing with the Board itself a statement of exceptions within 20 days after the proposed decision is served. (PERB Reg. 32300.) If a timely statement of exceptions is not filed, the proposed decision will become final. (PERB Reg. 32305, subd. (a).)

The statement of exceptions must be a single, integrated document that may be in the form of a brief and may contain tables of contents and authorities, but may not exceed 14,000 words, excluding tables of contents and authorities. Requests to exceed the 14,000-word limit must establish good cause for exceeding the limit and be filed with the Board itself and served on all parties no later than five days before the

statement of exceptions is due. PERB Regulation 32300, subdivision (a), is specific as to what the statement of exceptions must contain. Non-compliance with the requirements of PERB Regulation 32300 will result in the Board not considering such filing, absent good cause. (PERB Reg. 32300, subd. (d).)

The text of PERB's regulations may be found at PERB's website:

[www.perb.ca.gov/laws-and-regulations/](http://www.perb.ca.gov/laws-and-regulations/).

A. Electronic Filing Requirements

Unless otherwise specified, electronic filings are mandatory when filing appeal documents with PERB. (PERB Reg. 32110, subd. (a).) Appeal documents may be electronically filed by registering with and uploading documents to the "ePERB Portal" that is found on PERB's website: <https://eperb-portal.ecourt.com/public-portal/>. To the extent possible, all documents that are electronically filed must be in a PDF format and text searchable. (PERB Reg. 32110, subd. (d).) A filing party must adhere to electronic service requirements described below.

B. Filing Requirements for Unrepresented Individuals

Individuals not represented by an attorney or union representative, are encouraged to electronically file their documents as specified above; however, such individuals may also submit their documents to PERB for filing via in-person delivery, US Mail, or other delivery service. (PERB Reg. 32110, subds. (a) and (b).) All paper documents are considered "filed" when the originals, including proof of service (see below), are actually received by PERB's Headquarters during a regular PERB business day. (PERB Reg. 32135, subd. (a).) Documents may be double-sided, but must not be stapled or otherwise bound. (PERB Reg. 32135, subd. (b).)

The Board's mailing address and contact information is as follows:

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street, Suite 200  
Sacramento, CA 95811-4124  
Telephone: (916) 322-8231

C. Service and Proof of Service

Concurrent service of documents on the other party and proof of service are required. (PERB Regs. 32300, subd. (a), 32140, subd. (c), and 32093.) A proof of service form is located on PERB's website: [www.perb.ca.gov/about/forms/](http://www.perb.ca.gov/about/forms/). Electronic service of documents through ePERB or e-mail is authorized only when the party being served has agreed to accept electronic service in this matter. (See PERB Regs. 32140, subd. (b), and 32093.)

D. Extension of Time

An extension of time to file a statement of exceptions can be requested only in some cases. (PERB Reg. 32305, subds. (b) and (c).) A request for an extension of time in which to file a statement of exceptions with the Board itself must be in writing and filed with the Board at least three calendar days before the expiration of the time required to file the statement of exceptions. The request must indicate good cause and, if known, the position of each of the other parties regarding the request. The request shall be accompanied by proof of service of the request upon each party. (PERB Reg. 32132.)



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

After a hearing in Unfair Practice Case No. LA-CE-6583-E, *Mt. San Jacinto College Faculty Association v. Mt. San Jacinto Community College District*, in which all parties had the right to participate, it has been found that the Mt. San Jacinto Community College District violated the Educational Employment Relations Act (EERA), Government Code section 3540 et seq.

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

**A. CEASE AND DESIST FROM:**

1. Retaliating against employees for engaging in protected activities.
2. Interfering with the rights of bargaining unit employees to be represented by the Mt. San Jacinto College Faculty Association.
3. Denying the Mt. San Jacinto College Faculty Association its right to represent bargaining unit employees.

**B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE ACT:**

1. Remove from Gibbons' personnel file and destroy the May 6, 2020 Counseling Memorandum.
2. Remove from Firtha's personnel file and destroy the May 6, 2020 admonishment.
3. Pay Gibbons and Firtha backpay.
4. Return Gibbons and Firtha to their positions as co-chairs unless the faculty has since elected a chair, in which case that chair will remain to finish their term at which point Gibbons and Firtha may compete to be elected chairs and the District must recognize Gibbons and Firtha as chair/co-chairs if either or both of them are elected by the faculty.

Dated: \_\_\_\_\_

Mt. San Jacinto Community College District

By: \_\_\_\_\_

Authorized Agent

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



## PROOF OF SERVICE

I declare that I am a resident of or employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, Sacramento Regional Office, 1031 18th Street, Sacramento, CA, 95811-4124.

On December 30, 2022, I served the Cover Letter and Proposed Decision regarding Case No. LA-CE-6583-E on the parties listed below by

I am personally and readily familiar with the business practice of the Public Employment Relations Board for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Sacramento, California.

Personal delivery.

Electronic service (e-mail).

York Chang, Staff Attorney  
California Teachers Association  
11745 E. Telegraph Road  
Santa Fe Springs, CA 90670  
Email: ychang@cta.org

Paul Z. McGlocklin, Attorney  
Atkinson, Andelson, Loya, Ruud &  
Romo  
201 S. Lake Avenue Suite 300  
Pasadena, CA 91101  
Email: pmcglocklin@aalrr.com

John W. Dietrich, Attorney  
Atkinson, Andelson, Loya, Ruud & Romo  
2151 River Plaza Dr., Ste. 300  
Sacramento, CA 95833  
Email: jdietrich@aalrr.com

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 30, 2022, at Sacramento, California.

Maryna Maltseva  
\_\_\_\_\_  
(Type or print name)

*Maltseva M.*  
\_\_\_\_\_  
(Signature)