

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES')
ASSOCIATION, CHAPTER 41,)
AND MICHAEL BOGAN,)
)
Charging Parties,) Case No. SF-CE-46-H
)
v.) PERB Decision No. 534-H
)
REGENTS OF THE UNIVERSITY OF) November 4, 1985
CALIFORNIA (BERKELEY),)
)
Respondent.)
_____)

Appearances: Kevin McCurdy and Michael R. Bogan,
Representatives for California State Employees' Association,
Chapter 41 and Michael Bogan; Susan M. Thomas, Attorney for the
Regents of the University of California (Berkeley).

DECISION

This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Charging Parties, California State Employees' Association, Chapter 41 and Michael Bogan, and by Respondent, the Regents of the University of California at Berkeley (University). Charging Parties except to the attached proposed decision of an administrative law judge (ALJ) dismissing their complaint that the University discharged Michael Bogan and then banned him from certain library premises in retaliation for protected activities. The University excepts to the ALJ's determination not to give

collateral estoppel effect to an arbitrator's findings dealing with the same factual situation as the instant case.

After carefully reviewing the entire record, the Board finds the ALJ's findings of fact and conclusions of law free of prejudicial error and adopts the proposed decision as that of the Board itself.

The University's exception to the determination of the collateral estoppel issue and Charging Parties' procedural exception to the substitution of ALJs merit some brief additional comment, however.

Charging Parties except to the substitution of ALJ Ronald Blubaugh, who authored the proposed decision, for ALJ Gerald Becker, who conducted the hearing in this case. They argue that there were significant conflicts in testimony and that the decision required credibility determinations which only Becker, who saw and heard the witnesses, could make.

PERB has long since determined that such ALJ substitutions are proper and permitted by the statute, especially where the Board itself has rendered a final decision after a de novo review of the record. Fremont Unified School District (1978) PERB Order No. Ad-28. This is true even where credibility of witnesses is an issue. Regents of the University of California (UCLA) (1983) PERB Decision No. 267a-H. However, the Board finds that the decision in this case does not require

credibility determinations. We conclude from our review of the extensive record that Charging Parties simply failed to establish the requisite prima facie case of discriminatory treatment by a preponderance of the evidence, and we agree with the ALJ that, even if a prima facie case were established, the University successfully rebutted it.

With regard to the University's exception on the collateral estoppel issue, the Board affirms the ALJ's reasoning and determination. The University's reliance on People v. Sims (1982) 32 Cal.3d 468 is misplaced as that case refers to the deference given an administrative agency's findings and not an arbitrator's award.

ORDER

Upon the foregoing facts, conclusions of law, and the entire record in this matter, the Public Employment Relations Board ORDERS that the unfair practice charge in Case No. SF-CE-46-H is DISMISSED.

By the BOARD

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES')
ASSOCIATION,)
)
Charging Party,) Unfair Practice
) Case No. SF-CE-46-H
)
v.) PROPOSED DECISION
) (4/5/83)
)
REGENTS OF THE UNIVERSITY OF)
CALIFORNIA (BERKELEY),)
)
Respondent.)
_____)

Appearances: Kevin McCurdy, Steward, for the California State Employees' Association; Claudia Cate, Attorney, for the Regents of the University of California (Berkeley).

Proposed Decision by Ronald E. Blubaugh, Hearing Officer.

PROCEDURAL HISTORY

An employee organization contends here that one of its members was unlawfully dismissed in retaliation for participation in protected activity. In addition, the organization continues, the employer unlawfully interfered with employee rights to participate in protected activity when it subsequently banned the former worker from a campus library building.

The employer defends on both procedural and substantive theories, arguing first that the Public Employment Relations Board (hereafter PERB) should afford collateral estoppel to an arbitrator's earlier decision about the dismissal.

Alternatively, the employer argues that the employee

organization has failed to establish that the dismissal was motivated by the employee's participation in protected conduct and, in any event, there was ample justification for the termination and the subsequent decision to ban the employee from a library building.

The California State Employees' Association (hereafter CSEA) filed the charge at issue on April 6, 1981. The charge alleges that the Regents of the University of California (hereafter University) violated Higher Education Employer-Employee Relations Act subsections 3571(a) and (d)¹

¹Unless otherwise indicated, all references are to the Government Code. The Higher Education Employer-Employee Relations Act (hereafter HEERA) is found at section 3560 et seq. In relevant part, section 3571 provides as follows:

It shall be unlawful for the higher education employer to:

(a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

.....

(d) Dominate or interfere with the formation or administration of any employee organization, or contribute financial or other support to it, or in any way encourage employees to join any organization in preference to another; provided, however, that subject to rules and regulations adopted by the board pursuant to Section 3563, an employer shall not be prohibited

when, on December 31, 1980, it dismissed Michael R. Bogan from his job at the main library on the Berkeley campus and subsequently forbade him to enter the library for any reason.

The University answered the charge on April 28, 1982, admitting that Michael Bogan was dismissed and that he ultimately was prohibited from entering the main library and annex but denying that those actions were illegally motivated. The University raised various affirmative defenses, including the contention that the charging party had failed to exhaust the University's internal grievance procedures.

Following a PERB-ordered settlement conference, CSEA on April 30, 1981 requested that the charge be placed in abeyance indefinitely. In accord with that request the PERB suspended further processing on the case. In July of 1981, the dismissal of Mr. Bogan was submitted to an arbitrator under the University's internal grievance procedures. On November 9, 1981, the arbitrator denied the grievance and upheld the dismissal of Mr. Bogan. On November 23, 1981, CSEA moved to reactivate its unfair practice charge, asserting that the arbitrator's award was repugnant to HEERA and that Mr. Bogan was denied due process in the arbitration proceeding.

from permitting employees to engage in meeting and conferring or consulting during working hours without loss of pay or benefits.

On December 10, 1981, the University responded to the motion to reactivate the case, asserting that the matter of Mr. Bogan's dismissal had been fully litigated and that the PERB should defer to the arbitrator's findings of fact and conclusions of law. On January 15, 1982, the chief administrative law judge of the PERB issued a complaint and notice of hearing. On February 18, 1982, the University moved to amend its answer to assert that Michael Bogan had failed to mitigate his damages by seeking other employment.

A hearing was commenced on March 1, 1982 before PERB Hearing Officer Gerald Becker and conducted in Berkeley over 13 nonconsecutive days, concluding on June 29, 1982. At the start of the hearing, the hearing officer accepted the University's amended answer but reserved a ruling on a University motion that PERB should defer to the finding of the arbitrator. In the brief it ultimately filed in this case, the University withdrew its motion for deferral, relying instead upon an assertion it made during the hearing that the PERB should afford collateral estoppel to the findings of the arbitrator.

The parties' final written briefs were received on November 8, 1982. Due to the resignation of Mr. Becker, the case was transferred to the undersigned hearing officer² on

²See California Administrative Code, title 8, part III, section 32168(b).

February 24, 1982, and was submitted for decision as of that date.

FINDINGS OF FACT

The University of California is a higher education employer under HEERA. During the period relevant to this case there was no exclusive representative for employees at the Berkeley campus library although CSEA was engaged in an organizing campaign. The general library at Berkeley is comprised of the Doe Memorial Library (known colloquially as the main library) plus about 20 branch libraries. It has between 900 and 1,000 employees of whom 130 are academic employees, 250 to 300 are career staff employees and the remainder are student employees. Approximately half of the employees work in the main library and its annex and the remainder are spread through the various branches.

The complainant in this case is Michael Ralph Bogan, a former employee of the main Berkeley campus library. Mr. Bogan was hired to work in the library circulation department in 1965 when he was a student. He stopped taking classes at the University in 1968, resumed taking classes briefly in the early 1970's but then quit again. Throughout this period, whether a student or not, Mr. Bogan continued to work in the library. He was promoted to the position of student supervisory Library Assistant I in 1969, became a Library Assistant II in 1973 and attained career, rather than casual, employee status in 1975.

During his later years at the library, Mr. Bogan supervised student workers and was responsible for such tasks as reshelving books, issuing library cards and similar duties. His supervisory role with student workers was confined to giving them work assignments. He had no authority to hire or discipline student workers. During the years 1978 through 1980, Mr. Bogan worked in the library about 30 hours per week, on rotating shifts.

The annual performance evaluations of Mr. Bogan were generally favorable from 1966 until late 1978. During those years he variously was described as "accurate, fast, dependable, one of the finest workers on the staff," "a quiet, responsible worker," "courteous . . . mature, observant and effective," "capable, valuable . . . conscientious . . . relaxed . . . unusually quiet for a supervisor," "the de facto dean of the supervisors crew . . . invaluable." The student crews that worked under him were praised for getting their work done correctly and on time. The only break in the pattern of praise occurred in 1968 when Mr. Bogan was given an unsatisfactory rating because of excessive lateness. He was placed on probation briefly.

The Judey Wall Incident

Michael Bogan's relationship with his employer began to deteriorate in December of 1978. His slide from favor commenced with what the University believed to be a death

threat against his supervisor, something Mr. Bogan considered to be nothing other than a manifestation of his "gallows humor."

On December 18, 1978, a student library assistant named Deborah Callon went to Kenneth Legg, the head of the main library circulation department, and told him that she had overheard Mr. Bogan say that he would like to have his supervisor killed. The threatened individual, Judey Wall, had just been named circulation supervisor and thus became Mr. Bogan's boss.

According to a written statement Ms. Callon prepared on the date of the incident, she was working near Mr. Bogan and overheard a conversation between him and a student employee. She said that Mr. Bogan was calling Judey Wall names "and then after awhile started talking about how he would like to kill her." The other person in the conversation said that he knew of some people who, for \$150, would kidnap a person, take the person to a deserted road and then kill the person. Ms. Callon wrote that Mr. Bogan then commented that "he wouldn't want Judey drugged because he wanted her to suffer as much pain as possible and that drugs would be too expensive." Ms. Callon wrote that the incident was not the first time she had heard such comments from Mr. Bogan. She wrote:

When I came to work one morning, he told me that one of these days he was going to bring his gun to work. Then he was going to shoot Jim Nasir, Fred Develbiss, three other

people and himself. He told me that I was a strong candidate for one of the three other people he was going to kill.

Mr. Legg testified that he had not met Ms. Callon prior to when she visited his office to tell him about Mr. Bogan's statements. He said that she appeared to be truly frightened of Mr. Bogan. Mr. Legg said that he encouraged Ms. Callon to put her statements about the threat into writing so that he could take the matter up with the library administration. She complied with his request.

Mr. Legg met with Mr. Bogan shortly after the visit from Ms. Callon and told Bogan of the accusation without identifying who had made it. Mr. Legg said that Bogan responded that some people did not understand his black humor and seemed obsessed with learning the identity of the person who had reported the comment. Mr. Legg testified that Mr. Bogan approached Legg's desk, demanding to know who had told Legg about the alleged threat. Mr. Legg testified that Mr. Bogan brought his hands down hard on the desk, causing Mr. Legg's ashtray to flip up into the air and land on Legg's lap. At that point, Mr. Legg continued, he stood up and he and Bogan looked directly at each other until Bogan left the room.

On December 21, 1978, Mr. Legg wrote a "Letter of Warning" to Mr. Bogan, describing the threat purportedly made by Bogan and informing him that "such conduct on your part is inappropriate and will not be tolerated by the Library." The

letter advised Mr. Bogan that the statement attributed to Bogan had a negative effect on many library staff members who interpreted his remarks as threats against their lives and the lives of others. The letter directed Mr. Bogan to give his "immediate, full and continuing cooperation" to his new supervisor, Ms. Wall, and warned that repetition of such conduct could lead to dismissal.³

³The text of the December 21, 1978, letter of warning reads as follows:

TO: Michael Bogan, Library Assistant II,
Circulation Department
FROM: Kenneth Legg, Head, Circulation Dept.
SUBJECT: Letter of Warning

On Monday, 18 December 1978, I met with you to talk about evidence I had concerning your attitude toward Ms. Judey Wall who had been recently appointed to the position of Circulation Supervisor and who, because of this position, had become your immediate supervisor. It had been reported to me that you called her names and followed this with a statement about how you would like to kill her. During our meeting you did not deny making these statements, but rather commented at length on the fact that people who know you understood such statements.

The purpose of this letter is to inform you that such conduct on your part is inappropriate and will not be tolerated by the Library. Your statements have had a serious negative effect on many of the staff members in the Circulation Department and have been interpreted by some as threats on their lives or the lives of others. This will advise you that I expect your immediate, full and continuing cooperation with your new supervisor, Ms. Wall, and

On the last day of the PERB hearing, Ms. Callon was called as a witness by Mr. Bogan. Prior to that time, her identity as Mr. Bogan's accuser in December of 1978 had never been disclosed. At the hearing, she testified that while her fears of Mr. Bogan were real at the time she later concluded that they were overstated. She said that she had been "brainwashed" by Mr. Legg and Ms. Wall into believing that Mr. Bogan was dangerous. She testified that she later concluded that she had taken the death threat too seriously and that Mr. Bogan actually was only joking.

On cross-examination, however, Ms. Callon reaffirmed all of the statements she had made in the December 18, 1978 written statement. She specifically affirmed that Mr. Bogan had made the statements about wanting to kill Judey Wall and that one day he would bring a gun to work and shoot various employees and himself.

behavior on your part which is appropriate to your status as a student supervisor in the Circulation Department. If I receive further evidence that you continue to make statements which in any way threaten other employees the Library will take necessary corrective action which could include your dismissal from employment with the University of California.

If you wish to discuss this situation with me or others in the Library Administration, please let me know.

On January 18, 1979, Mr. Bogan requested an administrative review of the letter of warning. In a letter to the campus personnel manager, Mr. Bogan disputed the conclusions in Mr. Legg's letter of warning. Mr. Bogan tacitly acknowledged that he had engaged in a conversation about the death of Ms. Wall but denied that it was a threat. He described his comments as "black humor" and as "gallows humor." He wrote that although there have been a number of conversations in the department involving death, he has "yet to find anyone who considers such joking seriously." Mr. Bogan complained that the letter unfairly depicted him as an unstable or potentially homicidal person which is a false characterization.

Mr. Bogan's appeal went to University Librarian Joseph A. Rosenthal who delegated responsibility for investigating the situation to William E. Wenz, library personnel officer. Mr. Wenz met on a number of occasions with Mr. Bogan to discuss the accusations against him. Mr. Wenz met also with Judey Wall. Mr. Bogan was cooperative in the investigation and ultimately acknowledged that his behavior could be misinterpreted and taken seriously by others. Because Mr. Bogan was a long-time employee with a satisfactory work record, Mr. Wenz recommended that the letter of warning be made "null and void." Mr. Rosenthal agreed to this settlement and Mr. Wenz drafted a letter for Rosenthal's signature which

confirmed the resolution of the grievance.⁴ The original letter of warning, although nullified, was retained in Mr. Bogan's personnel file so that the University would have a record of the incident.

⁴Mr. Rosenthal agreed to a resolution of the grievance in a February 8, 1979 letter to Jack Webb of the Berkeley campus personnel office. The text of his letter reads as follows:

Dear Mr. Webb:

In response to your letter of January 22, 1979 concerning the administrative appeal of Michael Bogan, I have had Mr. Wenz consult with both Mr. Legg and Mr. Bogan in an effort to resolve the matter in a mutually satisfactory manner.

As a result of this consultation we feel that we are able to resolve this matter in the following manner.

1. Mr. Bogan has freely admitted in his letter of January 18, 1979 to you that his conversation with another member of the Circulation Department staff which had been overheard by a third member of this staff was a joke, i.e., "gallows humor" which should not have been taken seriously.
2. Nevertheless, some individuals did not perceive this as a joke and did take Mr. Bogan's comments seriously, i.e., as threats of violence against his supervisor, Ms. Wall.
3. Mr. Bogan, therefore, has agreed to make it clear to Ms. Wall, in a personal meeting with her that his remarks were intended humorously and has further agreed to apologize to her for any emotional anguish that this misunderstanding might have caused.
4. Having agreed to this approach the Library will attach this letter to the

Profanity and Vulgarity in the Library

A key element in the University's dismissal action against Mr. Bogan was his abusive use of profanity and vulgarity against library employees and others. The record establishes that the use of profanity is not uncommon in the University library. One witness estimated that profanity is regularly used by approximately 20 of the 100 employees in the library circulation department. Profanity is frequently used, for example, when a library employee describes a rude or demanding patron in conversation with another employee outside of the patron's hearing.

Mr. Bogan's use of profanity differed from other employees in that it was more pointed and personal. Various witnesses

letter of appeal received from Mr. Bogan and the letter of warning sent to Mr. Bogan by Mr. Legg on 21 December 1978. This will document the fact that the warning letter has been made null and void on the basis of the understanding outlined in Nos. 1, 2 and 3 above.

With Mr. Bogan's agreement, I trust this will resolve the appeal.

Sincerely,

Joseph A. Rosenthal
Acting University Librarian

I have read the above and accept this arrangement as a suitable resolution of my administrative appeal.

Michael Bogan

testified that Mr. Bogan regularly said, "Kiss my ass," to employees. He also referred to individual female employees as "bitch," both directly to them and in reference to them. In particular, Mr. Bogan directed such comments to Joyce M. Ford, a Library Assistant III who was Mr. Bogan's supervisor during the several hours daily that he worked on the service desk. Mr. Bogan testified that such vulgarity as he used with Ms. Ford was in humor and that she readily went along and used profanity back at him. Ms. Ford acknowledged that she used profanity and vulgarity toward Mr. Bogan but stated that it was in response to comments he made toward her. She testified that when he said, "Kiss my ass," she responded, "Kiss your own ass." When he called her a "bitch" she called him a "shit ass." She testified that she did not regard their exchanges as good natured joking. There is no University or library rule about the use of profanity or vulgarity in the work place. However, the library administration had conducted staff meetings about the proper public service atmosphere which is to be projected by employees.

Mr. Bogan was criticized in his January 30, 1979 evaluation for writing vulgarities on walls. Mr. Bogan responded that he had commenced writing graffiti only in self defense after another person wrote things about him on the walls. He was directed to cease writing graffiti on the walls and to report incidents of graffiti about him to his supervisor.

The California Hall Meeting

In early January and February of 1980, six female library employees complained about Bogan to library circulation department head Kenneth Legg. The gist of their complaint was that Mr. Bogan had called the women, "bitch," "long-legged bitch," "slut," and "whore." Some of the women also told Mr. Legg that they were afraid of Bogan. Mr. Legg urged them individually to put their complaints into writing so he would have something to take to the library administration. Five of the women complied with his request.

In a statement dated January 30, 1980, student employee Joyce Emerson wrote that for two years she "had been subjected to numerous instances of harassment and verbal abuse" by Michael Bogan. She described Bogan as "abusive, arrogant and most unfit" to supervise student workers. She wrote that Mr. Bogan had an "extremely sexist (attitude) toward women." She stated that she had heard him downgrade women on a number of occasions by calling them "bitches," "whores," "good-for-nothing-whores," and "fat slobs." She wrote that once, when she was wearing a dress, he approached her and said, "Now who are you seducing?" Ms. Emerson accused Mr. Bogan of intimidating her and other students, of playing favorites by giving undesirable assignments to persons he disliked. She described him as filled with "hostility and frustration" and said that he looks for trouble.

In a statement dated January 31, 1980, co-worker Joyce Ford complained that Mr. Bogan had been harassing her for some time. She wrote that Mr. Bogan made comments designed to annoy her. As an example, she said that Mr. Bogan regularly said to her, "You remind me of my mother, and I hate her." Ms. Ford described Mr. Bogan as "an unfit supervisor and a total nuisance to the department."

In a statement dated January 31, 1980, Deborah Callon stated that the work environment in the library had "become increasingly intolerable" because of Michael Bogan. She described him as a disruptive and detrimental influence who treats female employees as though they were "inferior beings," calls them "bitches" and makes "vulgar remarks concerning their sexual conduct." She said that when he wants the attention of a female employee, "he snaps his fingers at her as though she were a dog." She accused Mr. Bogan of being an unfair supervisor who used his authority to give pleasant jobs to persons he liked and unpleasant jobs to those he disliked. Ms. Callon also accused Bogan of spreading "false and vicious gossip" about library employees and of writing graffiti about employees in the bathrooms and elevators. She stated that he refused to help student employees when they were rushed.

In a statement dated February 12, 1980, Diane Lazzari wrote that during the three years she worked in the main library she heard Michael Bogan make "uncountable malicious statements"

about other employees. "Comments directed at women (were) particularly glaring," she stated. Ms. Lazzari wrote that Mr. Bogan particularly vilified his one-time supervisor, Judey Wall, calling her a "bitch" and making references to her sexual character. Ms. Lazzari also criticized Mr. Bogan for interfering with students who reported to her.

Finally, in a statement dated February 12, 1980, Regina Manion (Fanelli) stated that during the four years she worked in the main library circulation department she found Michael Bogan to be an intimidating person. She wrote that he "found great pleasure in scaring, criticizing, and demeaning other employees." She stated that she had heard him refer to female employees as, "sluts," "whores," and "bitches." She stated that she had heard Mr. Bogan harangue a student employee "because she did not use cocaine." Ms. Manion stated that she had overheard Mr. Bogan make numerous derogatory remarks about Judey Wall and on one occasion, she "heard him talk about killing her." She said Mr. Bogan "boasted often of ways to mutilate animals" and said she had seen him "swinging around such dangerous things as bicycle chains while claiming that he would hit someone if they did not watch out."

Upon receipt of the written statements, Mr. Legg went to Elaine Sloan, associate University librarian who was the library's coordinator for equal rights activities. Ms. Sloan arranged a meeting between the employees and several library

and campus administrators, including herself, Mr. Wenz and Michael Smith, assistant vice chancellor for legal affairs. Because of the concerns by the women that Mr. Bogan would learn about the meeting, it was conducted in California Hall, a campus administrative building, rather than at the library.

At the outset, the female employees insisted that the meeting be conducted on a confidential basis and sought assurances that they would in no way be identified to Mr. Bogan as his accusers. Vice Chancellor Smith found the women to be visibly upset, very nervous and quite hesitant to be at the meeting. At their insistence, he promised not to take notes of their statements. He told them that if any action were to be taken against Mr. Bogan they would at some point have to come forward and be identified. They wanted assurances that if they did testify, Mr. Bogan would be dismissed, but Smith told them he could give no such assurances.

During the meeting, each of the women individually recited their grievances against Mr. Bogan, in large part through elaboration upon their written statements. They told the vice chancellor that Mr. Bogan engaged in intimidating hostile behavior, that he made personal comments of a sexual nature, made vulgar and derogatory comments about people, talked about killing people and talked about his gun.⁵ At the conclusion

⁵During the PERB hearing, Mr. Bogan denied many of the accusations which the female employees had made against him in

of the meeting, Mr. Smith told the women that if they refused to come forward the University could do nothing about Mr. Bogan. The reaction of the women was that the meeting had been a waste of time.

After the meeting, Vice Chancellor Smith told Mr. Rosenthal, the librarian, that the University faced a serious problem with Mr. Bogan. In effect, Mr. Smith said that the library had been put on notice about the problem but, because the women refused to testify, it was powerless to act. Mr. Smith said that he found the employees to be highly credible and that he believed them. Mr. Smith told the library administrators that he was afraid that if Mr. Bogan took some

their written statements and at the California Hall meeting. He denied Ms. Emerson's contentions that he had given disfavored employees onerous assignments and that when she wore a dress one time he asked who she was seducing. He denied Deborah Callon's contention that he talked about killing employees at work. He denied Regina Manion's statement that he had swung bicycle chains in a threatening manner. He denied general accusations that he often called female employees bitches, whores and sluts.

It is unnecessary here to resolve the disputes in testimony. The issue before PERB is not whether or not the University had good cause to terminate Mr. Bogan. The issue before PERB is whether or not the University had anti-union motivation in the termination of Mr. Bogan. A determination about the University's motivation can be made by analysis of whether or not it acted on a reasonable, good faith belief that the accusations against Mr. Bogan were true. Baldwin Park Unified School District (6/30/82) PERB Decision No. 221. The underlying truthfulness of the contentions against Mr. Bogan was a matter for the arbitrator.

improper action the University might face legal liability because it had been warned.

Because of the reluctance of the female employees to be identified publicly, no action was taken against Mr. Bogan following the California Hall meeting. He was not notified of the charges against him nor were they further investigated. At that point, the matter was left unresolved.

The Joyce Ford Mother-in-Law Incident

On May 28, 1980, Joyce Ford went to Mr. Legg and told him that on the previous Saturday Michael Bogan had called her mother-in-law a "bitch." Ms. Ford, who had learned of the incident from her mother-in-law, said that from the library Mr. Bogan had telephoned the Ford home looking for her. Her mother-in-law answered and after she and Mr. Bogan had exchanged some words, he called the mother-in-law a bitch. Ms. Ford told Legg that she had confronted Bogan about the incident and that Bogan had admitted it.⁶ Ms. Ford demanded that Mr. Legg take some action against Mr. Bogan. Mr. Legg confronted Bogan about the accusation. Mr. Bogan listened and responded, "It won't fly."

⁶At the PERB hearing, Mr. Bogan denied that he used the word "bitch" in a conversation with Ms. Ford's mother-in-law. He acknowledged, however, that during his subsequent conversation with Ms. Ford he said to her in a humorous fashion, "Well, you know your mother-in-law is a bitch."

At Mr. Legg's request, Ms. Ford made a written statement about the incident. Mr. Legg consulted with Associate Librarian Sloan and library Personnel Officer Wenz and ultimately it was agreed that Mr. Wenz should write a letter of warning to Mr. Bogan. The letter, dated June 12, 1980, recites Joyce Ford's version of the incident and informs Mr. Bogan that such behavior is "totally inappropriate." The letter warns that any repetition of such vulgar and abusive language would lead to "the appropriate corrective action up to and including your dismissal."⁷

⁷The June 12, 1980, warning letter reads as follows:

TO: Michael Bogan, Circulation Department
FROM: Kenneth Legg, Head, Circulation Dept.
RE: Letter of Warning

On Friday, 30 May 1980, I met with you to discuss the matter described below:

On 28 May, Mrs. Joyce Ford spoke with me and related the following incident: At about 10:00 on the morning of 24 May, you called her home while on duty at the Library and spoke with her mother-in-law during the course of which conversation you referred to her mother-in-law as a "bitch". Further, that when Joyce spoke with you about the incident on 27 May, following her return to work after the Memorial Day holiday, you admitted to having called her mother-in-law a "bitch".

This is to inform you that such conduct on the part of any Library employee is totally inappropriate behavior. If any further instance of your use of vulgar or abusive language in your capacity as an employee of

On June 15, 1980, Mr. Bogan appealed the letter of warning. In the appeal, Mr. Bogan denied that he had called Ms. Ford's mother-in-law a bitch and denied that he had told Ms. Ford that he had done so. Mr. Bogan asked that the letter of warning be withdrawn. On June 24, 1980, University Librarian Joseph Rosenthal denied the requested rescission of the letter of warning. Mr. Rosenthal stated that based upon the information provided to him, he had concluded that Mr. Bogan had in fact called Ms. Ford's mother-in-law a bitch. Therefore, he upheld the letter and the warning that repetition of such behavior would lead to corrective action including dismissal. Mr. Rosenthal stated that he found the conduct "all the more reprehensible in view of previous occasions in which this sort of attitude and behavior" has been exhibited. Mr. Rosenthal wrote that the most recent incident indicates that prior discussions and warnings had been "insufficient to impede this sort of unacceptable behavior on your part."

Mr. Bogan asked for an administrative review of the letters he received from both Mr. Legg and Mr. Rosenthal. The administrator who conducted the factfinding review made no

the Library is reported to me, I will take the appropriate corrective action up to and including your dismissal.

You have the right to request review of this action under Staff Personnel Policy 280 and 290 as appropriate. Copies are enclosed for your information.

finding about whether or not Mr. Bogan actually called the mother-in-law a bitch while in telephone conversation with her. He did conclude, however, that Mr. Bogan had called the mother-in-law a bitch in conversation with Ms. Ford. Upon receipt of the factfinder's report and other documents, Berkeley campus Chancellor Ira Michael Heyman upheld Mr. Legg's letter of warning. Chancellor Heyman concluded that "a letter of warning against any further use of vulgar or offensive language while on the job is fully justified."

The 1980 Anonymous Telephone Calls

On June 4, 1980, Ken Legg advised Associate Librarian Elaine Sloan that he had been receiving anonymous telephone calls. The calls commenced on May 30th and he had received between three and four per day. At first, there was only silence from the person on the other end of the line. However, on June 3, a male voice hissed in a low tone, "First there was Tim, then Judey, and you're next." In another call later that night the voice said, "You're dead." Mr. Legg presumed the references were to Timothy DeWolf and Judey Wall, both of whom had worked in the main library and been Mr. Bogan's supervisors.

Mr. Legg suspected that the anonymous caller was Michael Bogan. He believed he could identify the caller by the sound of his voice. In addition, the calls commenced shortly after Mr. Legg had spoken to Mr. Bogan about the Joyce Ford mother-in-law incident and the caller's references to persons

linked up with former supervisors of Mr. Bogan. Nevertheless, it was never proven that Mr. Bogan made the calls.

The incident was reported to Mr. Rosenthal and the campus police were called upon for assistance. The campus police placed a wire tap on Mr. Legg's telephone and issued him a silent alarm which he could use to summon assistance. Mr. Legg wore the alarm for at least a year. Mr. Legg also obtained a new, unlisted telephone number.

The Profanity Complaints of October 1980

In early October of 1980, Virginia Loza approached Ken Legg and complained about Michael Bogan's continued use of abusive profanity. Ms. Loza was upset and frustrated at what she considered an unpleasant working environment caused by Mr. Bogan. Mr. Legg told her to put her complaints into writing. She did and on October 3 she gave Mr. Legg a memo complaining that Mr. Bogan had called Joyce Ford a "bitch" and that he persisted in using the obnoxious expression, "Kiss my ass," when told to do something. Ms. Loza complained that no one should have to work under the conditions caused by Mr. Bogan's use of vulgar language. She asked for some protection against him.⁸

⁸Ms. Loza's October 3, 1980 memo reads as follows:

TO: Ken Legg
FROM: Virginia Loza

On the morning of the week of September 15th

On October 17, 1980, Ms. Loza wrote another memo to Mr. Legg, again complaining about Mr. Bogan. She complained that as she passed his desk on that date he called her name. She said that she turned to see what he wanted "and then he said, 'Kiss my ass.'" Ms. Loza wrote that she could not take such abuse any longer. "I heard about a Title 9 for women who can find out about their rights and I'm going to certainly try," she concluded.

1980, I was approached by Mike Bogan and asked if I knew the whereabouts of Joyce Ford. I answered that I did not know. He continued by saying that she is never around when needed. He then got angry at the fact he could not find her and proceeded to call her a "bitch". I turned around and told him that comment was uncalled for. I said I was going to tell and he told me not to because he was already being accused of using the name on someone else.

He also has the terrible habit of constantly using this obnoxious statement of "kiss my ass" when asked to do something. For example, one day I asked him if he would do an hour on the Service Desk because we were short of SD staff, and he answered by saying I will if you "kiss my ass". I looked at him and just walked away. This goes on constantly in the department with him.

My reason for writing this memo on Mike Bogan is because I feel that no one should have to work under conditions of listening to vulgar language that is being spoken by Mike Bogan.

I'm sure that something can be done, there just has to be, I feel that there has to be some type of protection against people like Mike.

Mr. Legg took the two memoranda to the administration, said that he had given Mr. Bogan a warning letter for such conduct and that it had done no good. Mr. Legg complained that Mr. Bogan continued to engage in the same types of conduct as before and that something had to be done. When he was informed of the new complaints against Mr. Bogan, Vice Chancellor Smith urged that Mr. Bogan be terminated. His recommendation to terminate was based upon the nature of Ms. Loza's complaint in light of the clarity of the previous warning letters about the same type of behavior.

On October 24, 1980, Mr. Rosenthal placed Mr. Bogan on leave "to investigate further complaints of your misconduct, similar in nature to those addressed in the letter of warning you received dated 12 June 1980." The letter informing Mr. Bogan of the action advised him that the leave would be in effect until further notice and directed him "to remain out of the library and not return to the premises until you are invited to do so as part of the investigation." The letter further informed Mr. Bogan that upon completion of the leave he might be paid for all, part or none of the leave, dependent upon the decision reached.

Mr. Rosenthal testified that he was motivated to place Mr. Bogan on investigatory leave because of the complaints of Ms. Loza and the other female employees. He concluded that there had been a pattern of conduct and that the complaints of

the women appeared valid. Mr. Rosenthal testified that he concluded that Ms. Loza's complaints were serious and that Mr. Bogan's presence in the library was having a serious negative effect upon the library's female employees.

During the investigation which followed Mr. Rosenthal met personally with some of the principals, assigned various subordinates to gather information and report back to him and examined all documents and statements which previously had been collected about Mr. Bogan. Mr. Rosenthal asked that a notice to employees be posted in the library, soliciting any information they might have about Mr. Bogan and he also asked Mr. Legg to contact the women who had made written statements prior to the California Hall meeting and seek permission for those statements to be used in any subsequent proceeding.

On November 17, Mr. Rosenthal met with both Ms. Loza and Ms. Ford and questioned them about the various complaints they had made against Mr. Bogan. After the one-hour meeting, Mr. Rosenthal concluded that the women were telling the truth in their accusations. He also called Joyce Emerson who described her dealings with Mr. Bogan and orally affirmed the comments she had made in her January 30, 1980, written statement.

On November 20, Mr. Rosenthal met with Mr. Bogan and his CSEA representative, Kevin McCurdy. By the date of the meeting it had been nearly a month from when Mr. Bogan first was placed

on investigatory leave and Mr. Bogan already had filed a grievance about the length of the investigatory leave. Mr. McCurdy also had complained to Mr. Rosenthal about the length of the investigation and the November 20 meeting was held against a backdrop of CSEA agitation about the delay. Present at the meeting in addition to Bogan, McCurdy and Rosenthal was library Personnel Officer Wenz.

From Mr. Rosenthal's perspective, the purpose of the meeting was to afford Mr. Bogan the opportunity to respond to the derogatory information which had been developed against him. Mr. Rosenthal summarized the information against Mr. Bogan and read the two memoranda from Ms. Loza. He asked Bogan if he had any response to the accusations. Throughout most of the meeting, Mr. McCurdy responded on behalf of Mr. Bogan. Toward the end of the session, Mr. Bogan himself responded by denying the accusations. He gave very little explanation. Rosenthal wanted to engage in a discussion about the charges and he sought to elicit further explanation from Bogan. Bogan, however, stood by his summary denial. Mr. Bogan's response struck Mr. Rosenthal as being evasive and as a result Mr. Rosenthal concluded that Ms. Loza was more credible than Mr. Bogan.

On December 1, 1980, the Berkeley campus personnel office denied Mr. Bogan's grievance about his placement on investigatory leave. The University took the position that

Mr. Bogan had not been deprived of any grievable right under the University staff personnel policy. The University advised Mr. Bogan that if he incurred an adverse effect upon completion of the investigation he could file a grievance at that time.

The Dismissal of Michael Bogan

On December 5, 1980, University Librarian Joseph Rosenthal notified Michael Bogan that he would be dismissed from the library staff. The letter of intent to dismiss afforded Mr. Bogan five days for response and promised that any response would be carefully considered before final action was taken.

The letter offered as specific grounds for dismissal the two October memoranda from Joyce Loza. Mr. Rosenthal acknowledged that Mr. Bogan had denied the assertions in Ms. Loza's memoranda but credited Ms. Loza's statements, nonetheless. Mr. Rosenthal wrote:

On the basis of her statements and the record of your behavior in the past I find her assertions to be credible and persuasive. I am deeply concerned with the fact that this behavior followed the attached (June 12, 1980) letter of warning regarding the same kind of behavior on your part. . . . The letter expressly informed you that your behavior had been unacceptable and that 'any further instance of your use of vulgar or abusive language' might lead to dismissal.

The December 5 notice of intent to dismiss also cited the 1978 threat against Judey Wall and corrective action which followed. In light of these various incidents, Mr. Rosenthal concluded, the continued pattern of misconduct was

"unacceptable and inexcusable." Mr. Rosenthal concluded that Mr. Bogan's behavior not only constituted serious misconduct "but also has had damaging effects on the working conditions and morale of other employees of the Library." In his letter of intent to dismiss, Mr. Rosenthal made no reference to the California Hall meeting or the written statements of female employees which preceded the meeting.

On December 11, CSEA Steward Kevin McCurdy and Mr. Bogan met with Mr. Rosenthal a final time and gave him a letter challenging most of the assertions in the December 5 notice of intent. Mr. McCurdy discounted the significance of the incidents discussed in Mr. Rosenthal's letter and questioned whether they occurred in the way the University believed they did. Moreover, Mr. McCurdy asked, under what University policy or rule is the use of profanity prohibited. Mr. McCurdy asserted that Mr. Bogan had been singled out for unfair treatment. At the meeting, Mr. Bogan was again asked whether he had made the abusive statements to Ms. Loza. He denied it.

On December 18, Mr. Rosenthal notified Mr. Bogan that his dismissal would occur effective December 31, 1980 and that he would be paid from the date he was placed on investigatory leave through December 31. In his letter, Mr. Rosenthal stated that he had considered Mr. McCurdy's December 11 letter and all other available information and had concluded that the allegations were true. Because of the repetitive nature of the

action, Mr. Rosenthal concluded that dismissal was the appropriate course of action

At the PERB hearing Mr. Rosenthal testified that he considered other, lesser actions against Mr. Bogan but rejected other responses as inappropriate. He said he discounted the idea of doing nothing because he did not doubt the validity of the complaints and he believed it imperative to protect the health and well being of library employees and to try to maintain effective work performance. He rejected the idea of another letter of warning because the repetitive nature of Mr. Bogan's conduct showed that letters of warning were not effective. He did not favor a suspension because that would return Mr. Bogan to the work place after completion of the suspension, something the employees in the library feared and opposed. Finally, he rejected the idea of a transfer because that would simply move the problem to another location. Mr. Rosenthal concluded that because Mr. Bogan had evidenced threatening behavior, his dismissal was the most reasonable alternative.

On December 31, 1980, Mr. Bogan appealed the dismissal. In his appeal, he argued that the library acted "unfairly and excessively by dismissing" him without just cause. He denied that he had engaged in abusive behavior during the 15 years in the library and challenged the contention that the use of profanity "is serious misconduct . . . that . . . has negative

effects on the working conditions of the department." He said he had been singled out for punishment under "unclear and un-established codes of behavior." He argued that his dismissal was in reprisal for participation in University grievance procedures.

Mr. Bogan's grievance went through the University's grievance procedures resulting ultimately in a November 9, 1981 arbitrator's decision in favor of the University. In her decision, the arbitrator concluded that the dismissal of Mr. Bogan was reasonable under the circumstances. The arbitrator wrote that Mr. Bogan,

. . . was on notice concerning the unacceptable and inappropriate nature of his behavior . . . ; that he was apprised of the fact that such conduct disturbed and upset co-workers but nonetheless persisted in it . . . ; that no apparent remedial purpose would be served by continuing a pattern of progressive discipline . . .

The arbitrator concluded that Mr. Bogan's continued presence in the library, given his pattern of behavior, "was likely to cause further disruptions and problems in the department." Accordingly, the arbitrator concluded, the University's decision to terminate him was "not unreasonable under the circumstances."

The arbitrator also rejected the assertion that the dismissal was in retaliation for the filing of grievances. She wrote that Mr. Bogan carried the burden of showing "a

connection between his activities related to the grievance procedure . . . and his discharge." She concluded that he failed to make the required showing.

Removal of Mr. Bogan from the Library

On December 5, 1980, the same day as he was given notice of intent to dismiss, Mr. Bogan returned to the main library. It was his first visit since he was placed on investigatory leave. The purpose of his return visit, Mr. Bogan testified, was to sign up new members for CSEA. After January 1, 1981, when he no longer was a library employee, Mr. Bogan began to visit the library two or three times each week. He would enter the library loan hall and sit at a table within 20 feet of the service desk. Several witnesses testified that he occupied his time by staring at the person who worked at the desk, in particular, Ms. Loza and Ms. Ford.

Ms. Loza's reaction to the return of Michael Bogan was highly negative. She was afraid of him and his presence during her two to three hour shift on the service desk made her nervous and upset. She went to Mr. Rosenthal and told him that she was "at the end of her rope" because of Bogan's presence in the library. On February 4, 1981, Ms. Loza wrote to Mr. Legg, advising him that the situation with Mr. Bogan had put a great deal of strain on her and that it was causing a recurrence of a chronic eye condition. Ultimately, she took time off in an attempt to control an eye disease from which she suffers. The

University was given a letter from Ms. Loza's physician describing her condition and its relationship to work-related pressures.

Ms. Ford was similarly upset about Mr. Bogan's daily presence in the library. She said she would sit on the desk, knowing Mr. Bogan was staring at her, and think about how he said she reminded him of his mother and how much he hated his mother. She would recall the Bogan remarks about the bullet with no name on it and worry that it had her name on it. Invariably, she said, Mr. Bogan would make eye contact with her. Ultimately, she went to a doctor for treatment of high blood pressure. After that she resolved that she would not sit at the service desk under the gaze of Mr. Bogan.

During this period, both Ms. Loza and Ms. Ford began to receive anonymous telephone calls. On February 4, 1981, Ms. Loza wrote to Mr. Legg and complained about the calls. She said that from the sound of the voice she believed the caller to be Mr. Bogan. After Ms. Ford began to receive telephone calls she went to the library card application file and discovered that the applications were missing for herself, Ms. Loza and Ken Legg. The application cards contain home telephone numbers and because Ms. Ford had an unlisted telephone number, she believed that the person who made the calls obtained her number from the library records. Ultimately, Ms. Ford joined Ms. Loza in stating that she would

not work on the circulation desk if Mr. Bogan was seated in the loan hall.

Even though the anonymous telephone calls were never conclusively linked to Mr. Bogan, Mr. Rosenthal shared the belief of Ms. Loza and Ms. Ford that Mr. Bogan was a prime suspect.

Mr. Rosenthal's first response was to personally advise Mr. Bogan that he could not be in the circulation work areas of the library. Not long after that, however, Mr. Rosenthal concluded that Mr. Bogan had to be banned from the library, altogether. The information he received from Ms. Loza and Ms. Ford convinced him that Michael Bogan's presence in the library was detrimental to the health and job performance of library staff members.

Mr. Rosenthal met with various campus and library administrators including the campus police chief to consider whether Mr. Bogan could be banned from the library. Vice Chancellor Smith was consulted on whether or not Bogan's role with CSEA would preclude banning him from the library. Mr. Smith advised Rosenthal that Mr. Bogan could be banned if there were justification such as fear of intimidation or threat. Mr. Smith concluded that the information in Rosenthal's possession was sufficient to meet that requirement.

There was some discussion about whether Mr. Bogan should be banned from the campus in its entirety but Mr. Smith opposed

that idea on the ground that the campus was open to the public and there was no justification for excluding Bogan from it. Mr. Smith said that the ban would have to be as narrow as possible and still achieve the desired result. Ultimately, it was concluded that the ban should cover only the main library and its annex because those were the work areas of the female employees who felt intimidated by Mr. Bogan.

On February 25, 1981, Mr. Rosenthal notified Mr. Bogan that effective immediately he was no longer permitted in the main library or its annex. Mr. Rosenthal advised Mr. Bogan that his presence and behavior in the library since early January 1981 has been perceived by employees "as intimidating and threatening." Mr. Bogan also was advised that the campus police department would assist if enforcement of the ban were to become necessary. Mr. Bogan was not banned from any library facility other than the main library and its annex nor did the ban pertain to any other CSEA representative or organizer. Indeed, Philip Encinio, the Berkeley campus manager for employee relations, wrote to CSEA Chapter President Ed Caine to assure him that the ban against Mr. Bogan was not designed to hinder CSEA organizing. He invited the CSEA officer to discuss with him ways of insuring library access for organizational activities.

Although Mr. Bogan was banned from the main library and its annex, University access policies afford organizers the right

to solicit among employees during breaks, lunch periods and other nonworking periods. Other than Mr. Bogan, no CSEA organizer ever sought admission to the working areas in the circulation department. However, these areas are closed to the general public because the University stores records there including library card applications which contain personal information about patrons.

In February of 1982, Mr. Bogan reentered the library to inspect the personnel records of an employee he was representing on behalf of CSEA. Mr. Bogan went to the office of library Personnel Officer Wenz. After consultation with Mr. Rosenthal, Mr. Wenz ushered Mr. Bogan out of the library but made copies of the documents Mr. Bogan sought and gave them to him. Mr. Rosenthal testified that he continued the ban because of Mr. Bogan's past conduct in the library and not because of his new role as a CSEA organizer.

Mr. Bogan's Participation in Protected Conduct

During his time as a University employee, Mr. Bogan filed grievances on behalf of himself and participated with others in the filing of grievances. He also held membership for two years in the American Federation of State, County and Municipal Employees and, beginning in October of 1980, membership in CSEA. Beginning in April of 1981, Mr. Bogan became a CSEA job steward.

Mr. Bogan filed three grievances on behalf of himself, each of which has been discussed above. In addition to those,

Mr. Bogan has participated with others in the filing of a grievance about a purported 1979 reduction in employee work hours. Later in 1979, and again in concert with others, Mr. Bogan requested that the number of working hours be increased for student supervisors on the circulation desk. Finally, he and three other employees filed a summer of 1980 complaint about reductions in their summer work hours.

LEGAL ISSUES

1. Did the University dismiss Michael Bogan in retaliation for participation in protected activities and thereby violate subsection 3571(a) and/or (d)?

2. Did the University unlawfully ban Michael Bogan from access to the main library and annex and thereby violate subsection 3571(a) and/or (d)?

CONCLUSIONS OF LAW

The Dismissal of Michael Bogan

Higher education employees have the protected "right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring."⁹ Under

⁹HEERA section 3565 provides as follows:

Higher education employees shall have the right to form, join and participate in the activities of employee organizations of

section 3571, it is unlawful for a higher education employer to "impose reprisals on employees, to discriminate . . . or otherwise to interfere with, restrain, or coerce employees because of their exercise of (protected) rights."

CSEA contends here that Michael Bogan was dismissed because he filed grievances on behalf of himself and other circulation department employees. CSEA asserts that the filing of the grievances was protected concerted conduct, that the library management knew that he had filed the grievances, that the dismissal occurred shortly after Mr. Bogan had requested CSEA representation and that the University's explanations for the dismissal are pretextual.

The University argues that the filing of grievances under the employer-adopted grievance procedure was not protected conduct, that CSEA has failed utterly to demonstrate any relationship between the dismissal and the filing of the grievances, and that in any event the University acted with justification and only after prior warnings.

their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring. Higher education employees shall also have the right to refuse to join employee organizations or to participate in the activities of these organizations subject to the organizational security provision permissible under this chapter.

As noted by both parties, the analytical method for resolving charges of discrimination and retaliation was set out by the Board in Novato Unified School District (4/30/82) PERB Decision No. 210, adopted for HEERA in California State University, Sacramento (4/30/82) PERB Decision No. 211-H. Under Novato and California State University, a party alleging discrimination within the meaning of subsection 3571 must make a prima facie showing that the employer's action against the employee was motivated by the employee's participation in protected conduct. Because direct proof of motivation is rarely possible, the Board concluded that unlawful motive could be established by circumstantial evidence and inferred from the record as a whole, citing Republic Aviation Corp. v. NLRB (1945) 324 U.S. 793 [16 LRRM 620].

Proof that the employer had actual or imputed knowledge of an employee's participation in protected activity is a key element in establishing unlawful motivation by circumstantial evidence. Novato, supra, PERB Decision No. 210; Moreland Elementary School District (7/27/82) PERB Decision No. 227. An employer cannot retaliate against an employee for engaging in protected conduct if the employer does not even know of the existence of that conduct.

Once it is shown that the employer knew of the protected conduct, the charging party then must produce evidence linking that knowledge to the harm which befell the employee. Among

the factors which have provided that link are, "the timing of the employer's conduct in relation to the employee's performance of protected activity, the employer's disparate treatment of employees engaged in such activity, its departure from established procedures and standards . . . , the employer's inconsistent or contradictory justification for its actions," Novato, supra, or the cursory nature of the investigation which preceded the discipline of the employee. Baldwin Park Unified School District (6/30/82) PERB Decision No. 221. Respondent's knowledge of protected conduct together with some indicia of unlawful intent will establish a prima facie case.

After the charging party has made a prima facie showing sufficient to support an inference of unlawful motive, the burden shifts to the employer to prove that its action would have been the same despite the protected activity. If the employer then fails to show that it was motivated by "a legitimate operational purpose" and the charging party has met its overall burden of proof, a violation of subsection 3571 will be found. Baldwin Park, supra, PERB Decision No. 221.

As a first line of defense, the University asserts that participation in its grievance and administrative review procedures is not protected conduct. Comparing the wording of National Labor Relations Act section 7 to that of HEERA section 3565, the University argues that under HEERA there is no right

"to engage in . . . concerted activities" but only a right to "participate in the activities of employee organizations."¹⁰ Relying upon an Oregon case,¹¹ the University contends that because the grievances were not filed as part of the activities of an employee organization, Mr. Bogan did not engage in protected conduct.¹²

It is unnecessary to resolve here the question of whether the filing of grievances by Mr. Bogan was a protected act.¹³

¹⁰The distinction between "concerted activity" and the "right to participate in the activities of employee organizations" may be more illusory than real. See, for example, Modesto City Schools (3/8/83) PERB Decision No. 291 where the Board wrote:

The only difference we find between the right to engage in concerted action for mutual aid and protection and the right to form, join and participate in the activities of an employee organization is that EERA uses plainer and more universally understood language to clearly and directly authorize employee participation in collective actions traditionally related to the bargaining process.

¹¹Carolyn White v. Oakland School District No. 1 (5/30/80) Oregon Employment Relations Board Case No. C-128-78.

¹²There is no question that the filing of grievances under a contractually negotiated grievance procedure is a protected act. North Sacramento School District (12/20/82) PERB Decision No. 264. However, the PERB has yet to consider a fact pattern similar to the present case where the grievances were filed under an employer-instituted grievance procedure.

¹³It is unnecessary to resolve a legal issue where a factual determination is dispositive of the case. See State of California (Franchise Tax Board) (7/29/82) PERB Decision No. 229-S.

Assuming arguendo that the filing of grievances was protected, CSEA has failed to establish another vital element in its case, i.e., that the filing of grievances was a motivating factor in the decision to dismiss Mr. Bogan.

CSEA has not even made a prima facie showing that the University's dismissal of Mr. Bogan was motivated by retaliatory intent. The best CSEA has done is to show that the dismissal occurred after Mr. Bogan had sought administrative review of three managerial decisions and filed three grievances. However, the timing of the dismissal is not suggestive of retaliation. Two of the three administrative actions Mr. Bogan commenced in concert with other employees and one of the grievances were all filed in 1979. The third administrative action and another of the grievances were commenced in the summer of 1980. Mr. Bogan was not dismissed until December of 1980 and so five of the actions upon which he relies were not proximate to the dismissal. The final grievance was filed by Mr. Bogan after he already was on the investigatory leave which led to his dismissal. While that grievance was close in time to the dismissal, there is nothing in the record to indicate that it affected the decision to dismiss one way or the other.

Indeed, CSEA has shown none of the ordinary indicia of unlawful motivation. There is no significant indication of disparate treatment, no significant evidence that the

University departed from its established procedures, no indication of inconsistent explanations for the dismissal, no significant evidence that the pre-disciplinary investigation was cursory. The record establishes instead that the University first challenged Mr. Bogan's conduct two years prior to his dismissal, gave him ample opportunity to modify his behavior and then dismissed him only after it received substantial evidence that Mr. Bogan was continuing his old ways. The investigation the University made prior to the dismissal was thorough and, from persuasive evidence, even-handed.

The burden of establishing an unlawful motivation by a preponderance of the evidence was that of CSEA. The evidence introduced by CSEA falls far short of meeting that burden. It is concluded that CSEA has failed to establish a prima facie case that Mr. Bogan's dismissal was unlawfully motivated¹⁴ and the charge therefore should be dismissed.

¹⁴This conclusion, while closely parallel to that of the arbitrator, was not reached on the basis of collateral estoppel. The hearing officer reached his conclusion on the basis of the evidence in the record. The University has asked that collateral estoppel effect be given to the decision of the arbitrator. That request is denied. As noted in footnote 5, supra, the issue before PERB, while similar, is nonetheless different from that which was before the arbitrator. It was the arbitrator's duty to determine whether the University had good cause to dismiss Mr. Bogan. The issue before PERB is whether the University acted with unlawful, retaliatory motivation. The two questions are not synonymous. See, e.g. Moreland Elementary School District (7/27/82) PERB Decision

As a further and separate grounds for dismissal of the charge, it must be observed that even had a prima facie showing been made, the University has demonstrated conclusively that Mr. Bogan would have been terminated despite his participation in the filing of grievances. Beginning in 1978, the University received information from co-workers and subordinates of Mr. Bogan that he: stated that he would bring his gun to work and kill several others and then himself; stated that he would like to kill or have killed his supervisor, Judey Wall; called female employees "bitch," "long-legged bitch," "slut," "whore," and made generally sexist remarks to them; treated female employees as inferiors, snapping his fingers at them as if they were dogs; made pejorative comments about his perception of the sexual habits of female employees; boasted of ways to mutilate and kill animals; swung bicycle chains in the library and warned that he would hit anyone who got too close; engaged in a graffiti war with a student which resulted in the defacing of walls in the University library; called the mother-in-law of a co-worker a "bitch" during a telephone conversation; told a co-worker to "Kiss my ass" and was otherwise rude to her.

No. 227. Moreover, the forum from which the University seeks collateral estoppel effect was not court or a constitutional tribunal or an administrative agency acting in judicial capacity. The University has cited no persuasive authority that PERB is obligated to give collateral estoppel effect to a decision by an arbitrator.

Against this litany of allegations from what the University believed to be credible sources were only Mr. Bogan's tacit admissions and unconvincing denials. Moreover, there developed what the University concluded was a pattern of conduct despite repeated warnings that Mr. Bogan should change his ways or face discipline up to and including dismissal. In its brief, CSEA dismisses the accusations against Mr. Bogan as being exaggerated, unspecific, solicited by management, uninvestigated, unsubstantiated and otherwise pretextual. The record the University compiled against Mr. Bogan is simply too extensive to be so lightly dismissed. The condemnations of Mr. Bogan were made consistently, by too many persons, over too long a period for the University to ignore. Indeed, as the University argues, it may well have had an independent legal obligation under anti-discrimination laws to stop the sex-based harassment in which Mr. Bogan participated. In any event, the University has clearly established that Mr. Bogan would have been dismissed had he never filed a single grievance.

For these reasons, the allegation that the University violated subsection 3571(a) by the dismissal of Michael Bogan is hereby dismissed. In the absence of any independent evidence establishing a violation of subsection 3571(d), that charge is dismissed also.

The Removal of Michael Bogan from the Library

CSEA's final contention is that the University interfered with protected rights when it banned Mr. Bogan from the

University library and its annex.¹⁵ CSEA argues that Mr. Bogan was active in organizing and recruiting members and in representation of employees in grievances. Banning Mr. Bogan from the library, CSEA continues, interfered with "the rights of the employees in the department to engage in protective activities."¹⁶

The University argues that banning Mr. Bogan from the library did not significantly interfere with the rights of library employees because other CSEA representatives were permitted access to the library. The University contends that, in any event, it had justifiable business reasons to keep Mr. Bogan out of the main library under both PERB and National Labor Relations Board precedent.

It is a violation of subsection 3571(a) for a higher education employer to interfere with the protected right of employees to "form, join and participate in the activities of employee organizations." In Carlsbad Unified School District

¹⁵It should be noted that in its charge CSEA has alleged violations of subsections 3571(a) and (d). It does not contend that the ban of Mr. Bogan from the library violated subsection 3571(b). The proposed decision does not consider, therefore, whether the ban interfered with any of CSEA's protected rights as an organization.

¹⁶CSEA does not contend that banning Mr. Bogan from the library was an interference in his personal right to engage in protected activities. The only interference CSEA alleges is with the protected right of other employees. Mr. Bogan, of course, was no longer a University employee as of the date he was banned from the library.

(1/30/79) PERB Decision No. 89, the Board held that where an employer's act causes some harm to protected rights, an unfair practice charge against that employer will be resolved through a balancing of the employer's operational needs against the degree of harm to employee rights.¹⁷

CSEA introduced evidence that the removal of Mr. Bogan from the main library and its annex was, at least, inconvenient. Assuming, for discussion, that CSEA demonstrated slight harm to

¹⁷The Carlsbad rule was adopted for cases under HEERA in Regents of the University of California (4/30/82) PERB Decision No. 212. In relevant part, the Carlsbad rule provides as follows:

2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;

3. Where the harm to the employees' rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;

4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;

5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.

protected rights, a balancing of the equities tilts, once again, in favor of the University.

The evidence is overwhelming that the female co-workers of Mr. Bogan were frightened of him. In the case of Ms. Loza, it probably is not too strong to state that she was terrified of Mr. Bogan. His return to the library to sit and stare seems to have been designed to aggravate employee fears. If that was his goal, he achieved it. Ms Loza suffered a return of a chronic eye condition. Ms. Ford suffered an attack of high blood pressure. Both of them ultimately told the library administration that they would no longer work on the circulation desk if it required them to be under the stare of Mr. Bogan.

One of the University's primary motivations in the dismissal of Mr. Bogan was to remove the threatening atmosphere from the library and to eliminate further disruptions. Yet, by sitting in the library reading room and staring at employees, Mr. Bogan had nullified what the University believed it had achieved by his dismissal. Given the pressure that Mr. Bogan's presence put on his co-workers, the University had legitimate business reasons to ban him from the building.¹⁸

¹⁸A similar conclusion was reached in General Electric Co. v. NLRB (6th Cir. 1968) 388 F.2d 213 [67 LRRM 2401], a case cited by the University.

Against these reasons must be weighed the inconvenience that the ban of Mr. Bogan posed to the exercise by other employees of their right to engage in protected conduct. Plainly, they were not cut off from CSEA. Only Mr. Bogan was banned and, in an effort to insure continued access by CSEA, the University administrators sought a meeting with the CSEA chapter president to discuss ways to alleviate the problem. The ban was limited in scope and kept Mr. Bogan only from the main library and its annex. He otherwise had free movement on the campus and in the various departmental branches of the library. The equities in this situation balance in favor of the University. It is concluded, therefore, that banning Mr. Bogan from the main library and its annex was not an unlawful interference within the prohibition of subsection 3571 (a). Accordingly, that charge must be dismissed. In the absence of any independent evidence establishing a violation of subsection 3571 (d), that charge must be dismissed, also.

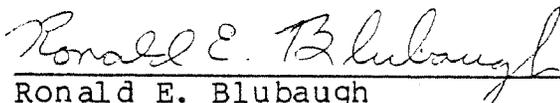
PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, unfair practice charge SF-CE-46-H filed by the California State Employees' Association against the Regents of the University of California and the companion PERB complaint are hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall

become final on April 25, 1983, unless a party files a timely statement of exceptions. In accordance with the rules, the statement of exceptions should identify by page citation or exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on April 25, 1983, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: April 5, 1983



Ronald E. Blubaugh
Hearing Officer

PROOF OF SERVICE BY MAIL
C.C.P. 1013a

I declare that I am employed in the County of Sacramento, California. I am over the age of eighteen years and not a party to the within entitled cause; my business address is 1031 18th Street, Suite 200 Sacramento, California 95814.

On November 4, 1985, I served the attached PERB Decision No. 534-H in Regents of the University of California, Case No. SF-CE-46-H

on the parties listed below by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, CA addressed as follows:

Regents of the Univ. of Ca.
Attn: James Odle
Office of the General Counsel
590 University Hall
Berkeley, CA 94720

California State Employees Assoc.
General Counsel
Attn: Jeffrey Fine
1108 O Street
Sacramento, CA 95814

Michael R. Bogan
c/o Dave Weldon
P.O. Box 802
El Cerrito, CA 94530

Edward M. Opton, Jr.
Susan M. Thomas
Claudia Cate
Office of the General Counsel
590 University Hall
Berkeley, CA 94720

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on November 4, 1985 at Sacramento, California.

Noel F. Lawrence
(Type or print name)

Noel F. Lawrence
(Signature)