



STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTORIA LEITHAM,)
)
 Charging Party,)
)
 v.)
)
 TRUSTEES OF THE CALIFORNIA STATE)
 UNIVERSITY,)
)
 Respondent.)

Case No. LA-CE-529-H

PERB Decision No. 1409-H
September 27, 2000

MICHAEL TWITTY,)
)
 Charging Party,)
)
 v.)
)
 TRUSTEES OF THE CALIFORNIA STATE)
 UNIVERSITY,)
)
 Respondent.)

Case No. LA-CE-531-H

Appearances: California State Employees Association by Hubert Lloyd, Representative, for Victoria Leitham and Michael Twitty; Janette Redd Williams, University Counsel, for Trustees of the California State University.

Before Dyer, Amador and Baker, Members.

DECISION

DYER, Member: These consolidated cases come before the Public Employment Relations Board (Board) on appeal by Victoria Leitham (Leitham) and Michael Twitty (Twitty) from an administrative law judge's (ALJ) proposed decision (attached) dismissing their unfair practice charges. The complaints allege that Leitham

and Twitty exercised rights guaranteed by the Higher Education Employer-Employee Relations Act (HEERA)¹ by initiating a grievance against the Trustees of the California State University (CSU). The complaints further allege that CSU, because of the filing of this grievance, took adverse action against Leitham and Twitty by rejecting them from probation, in violation of section 3571(a).²

The Board has reviewed the entire record in this case, including the original and amended unfair practice charges, the briefs of the parties, the ALJ's proposed decision, Leitham and Twitty's exceptions and CSU's response. The Board adopts the proposed decision, in accordance with the following discussion and modifications.

DISCUSSION

In analyzing the performance evaluation form used to evaluate Leitham and Twitty in this case, the ALJ made the following observations:

The performance evaluation form consists of rating scales of one to ten in some 18 categories such as job skills, amount of work accomplished, quality, planning and organizing work, initiative, adaptability/flexibility, working interpersonal relationships, and decision making/problem

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

²Section 3571 provides, in relevant part:

It is unlawful for the higher education employer to do any of the following:

(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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

solving. Each category contained a scale from zero to ten suggesting an average of 4.5 for each category, resulting in a rating of 450 as average for the entire evaluation. Leitham's overall rating was 666.5. (Proposed dec, p. 4.)

In footnote 4 of the proposed decision, which immediately follows the above-quoted paragraph, the ALJ additionally observed:

Sumpter reviews all evaluations in [Academic Computing Services] ACS. She testified a study she undertook (and supplemented with respondent exhibit 21) found that the average performance evaluations rating scores for all other employees in ACS for June/July 1997, were around 865.

The Board finds that the analysis of the performance evaluation form set forth below more accurately reflects the evidence received at the formal hearing in this matter, and, based upon this finding, modifies the proposed decision as follows.

The first complete paragraph on page four of the ALJ's proposed decision is modified to read:

The performance evaluation form consists of rating scales in 18 categories, which include job skills, amount of work accomplished, quality, planning and organizing work, initiative, adaptability/flexibility, working interpersonal relationships, and decision making/problem solving. Not all of the categories apply to every employee. The employee's evaluation score is based upon a four step process. In the first step, the manager conducting the evaluation assigns a weight value for each relevant category. The weights assigned in the instant case ranged from 2-10. In the next step the manager determines, on a scale of 0-10, how the employee rated in that category. The evaluation form suggests that an average rating score for each category is 4.5. In the third step, the manager multiplies the weight value by the rating score. For example, let us assume that a category was included in the evaluation, that the weight assigned to the category by the manager was 10, and that the manager believed the

employee had only an average rating score in the category. These determinations would, hypothetically, result in a category rating of 45. In the final step, all of the relevant category ratings are added together to produce the overall evaluation score. Leitham's overall score, based upon her evaluation in 13 of the 18 categories, with each category having been assigned a particular weight by Corey, was 666.5.

Footnote four on page four of the ALJ's proposed decision is modified to read:

Sumpter reviews all evaluations in ACS. She testified that such ratings are very subjective, and that with a thousand employees and several managers, similar scores might mean different things to different managers. Sumpter testified that a study she undertook found that the average performance evaluations rating scores for all other employees in ACS for June/July 1997, were around 865. Corey testified that the scores she gave to each category was consistent in all of her ACS evaluations.

ORDER

The unfair practice charges and complaints in Case Nos. LA-CE-529-H and LA-CE-531-H are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Baker joined in this Decision.



STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

VICTORIA LEITHAM,)	
)	Unfair Practice
Charging Party,)	Case No. LA-CE-529-H
)	
v.)	
)	
TRUSTEES OF THE CALIFORNIA STATE)	
UNIVERSITY,)	
Respondent.)	
<hr/>		
MICHAEL TWITTY,)	
)	Unfair Practice
Charging Party,)	Case No. LA-CE-531-H
)	
v.)	
)	PROPOSED DECISION
TRUSTEES OF THE CALIFORNIA STATE)	(9/30/99)
UNIVERSITY,)	
)	
Respondent.)	
<hr/>		

Appearances: California State Employees Association, by Hubert Lloyd, Labor Relations Representative, for Victoria Leitham and Michael Twitty; Janette Redd Williams, University Counsel, for Trustees of the California State University.

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

Two employees were rejected during their probationary period. They contend the rejections were in retaliation for their having filed a grievance.

These cases commenced with the filing of unfair practice charges on July 31, 1998, by Victoria Leitham (Leitham) and on August 12, 1998, by Michael Twitty (Twitty). After investigation, and on November 18, 1998, the general counsel of the Public Employment Relations Board (PERB or Board) issued complaints against the Trustees of the California State

University (CSU). In Case No. LA-CE-529-H, the complaint alleges that on March 17, 1998, Leitham exercised rights guaranteed by the Higher Education Employer-Employee Relations Act (HEERA)¹ by initiating a grievance against CSU. It is alleged that CSU took adverse action against Leitham, because of her filing the grievance, by rejecting Leitham from probation on May 1, 1998, in violation of section 3571(a).²

In Case No. LA-CE-531-H, it is alleged that Twitty also exercised rights guaranteed by HEERA by filing a grievance on March 17, 1998. It is further alleged that CSU took adverse action against Twitty on May 4, 1998, by rejecting Twitty from probation.

CSU filed timely answers denying any violation of HEERA.

A settlement conference did not resolve the dispute. Formal hearing was held on June 15 and 16, 1999, in Long Beach, California. At hearing, the complaint was amended to include an allegation that CSU unlawfully rejected a Level IV grievance on the grounds the employees were engaged in protected activity.

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

²In relevant part, section 3571 provides that it is unlawful for the higher education employer to do any of the following:

- (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

With the filing of post-hearing briefs on August 16, 1999, the matter was submitted for decision.

FINDINGS OF FACT

CSU is an employer, and Leitham and Twitty were employees, within the meaning of HEERA.

At all times relevant, Michael Mahoney (Mahoney) was assistant vice president for academic information technology, including the Academic Computing Services (ACS). From December 1996, until April 30, 1998, Francoise Corey (Corey) was acting director of ACS. Kelly Sennikoff (Sennikoff) was the office manager, and Linda Sumpter (Sumpter) the administrative services officer for ACS.

Corey drafted and secured approval of the job descriptions that ultimately were provided for Leitham and Twitty. She initially selected the two for their respective positions.

Victoria Leitham

Leitham was hired by CSU in the ACS on June 11, 1997, in the Information Technology Consultant (Career Level) classification. This employment was for a probationary period of June 11, 1997, to June 11, 1998. Leitham has a doctorate in instructional psychology and has about 10 years of experience.

Although the collective bargaining agreement provides that the first performance evaluation of a probationary employee be provided before the end of three months, and a second before the

end of nine months, Leitham's first performance evaluation was given by Corey on January 22, 1998.³

The performance evaluation form consists of rating scales of one to ten in some 18 categories such as job skills, amount of work accomplished, quality, planning and organizing work, initiative, adaptability/flexibility, working interpersonal relationships, and decision making/problem solving. Each category contained a scale from zero to ten suggesting an average of 4.5 for each category, resulting in a rating of 450 as average for the entire evaluation. Leitham's overall rating was 666.5.⁴

Despite the above-average numerical rating given to Leitham, Corey's written comments portrayed a lower level of performance. That is borne out of Leitham's reaction, filing an eight page rebuttal, in response to the evaluation.

Under "Job Skills", Corey wrote that "At time, Victoria's lack of previous work experience in academia makes it difficult for her to grasp rationale behind procedures and work practices." The score was 58.5.

³Thus, Leitham's first evaluation should have been around September 11, 1997. Section 10.4 of the MOU provides that:

A probationary employee shall be evaluated at least twice, once before the end of the first quarter and once before the end of the third quarter of the probationary period unless the employee has earlier been rejected during probation.

⁴Sumpter reviews all evaluations in ACS. She testified a study she undertook (and supplemented with respondent exhibit 21) found that the average performance evaluations rating scores for all other employees in ACS for June/July 1997, were around 865.

Under "Amount Of Work Accomplished", Corey wrote, "Victoria does not seem to be able to handle several tasks at once which is often needed in a very busy unit such as ACS". Her "Quality of Work" was listed as very good and she rated Leitham an 80. On "Planning and Organizing Work" Corey rated her 58.5 and noted "Victoria's ability to plan and organize her work is good but is usually limited to one task at a time when often several tasks need to be handled simultaneously." Under "Initiative", Leitham was rated 65 and Corey wrote: "Victoria has not yet displayed the level of initiative expected of someone in her professional level. This may be due to her lack of familiarity with the academic world."

Corey rated Leitham a 45 in "Adaptability/Flexibility", noting, "It seems that Victoria prefers to work in a rather set environment. She will need to learn to adjust to ACS changing conditions."

Under "Working Interpersonal Relationships", Leitham was rated a 60, and Corey wrote, "Victoria needs to be willing to 'pitch in' and help with the team effort when needed.^[5] She needs also to assert herself better with the team in order to become a team member."

⁵Leitham worked with Twitty, Sue Gautsch (Gautsch) and Walter Gajewski (Gajewski), two other employees in ACS, on training projects.

Corey rated Leitham a 52 on "Decision Making/Problem Solving", with the notation, "A better understanding of the academic world should help Victoria develop this skill."

While rating Leitham only 54 on "Writing Skills", Corey commented "Victoria has produced a web design reference manual of very good quality."

Under "Skill in Oral Communication", Leitham was rated a 56 with Corey's comments, "Victoria communicates well one [sic] a one-to-one basis. Part of her responsibilities is also to conduct full-length workshops. However, such workshops have not yet been implemented by ACS."

Under "Working Without Close Supervision" Corey rated Leitham a 45.5 and commented, "A certain amount of instructions has to be provided to Victoria before she performs a task. I suspect that more familiarity with the work and the working environment will take care of this."

Corey rated Leitham a 45.5 on "Public Relations skills" noting "Victoria works a lot with faculty members and therefore must represent ACS in the best possible way."

Leitham wrote an eight-page "rebuttal" to the evaluation suggesting several of Corey's comments were "unfounded, inaccurate, and misrepresent" her performance.⁶

⁶The contents of the rebuttal are not relevant to this proceeding. The evaluation was written by Corey at a time before any protected activity by Leitham, and thus any inaccuracy could not be attributed to unlawful motive. The fact that Leitham filed an eight page rebuttal is probative to the question of whether the evaluation was "above average".

Leitham testified that there was a meeting with Mahoney a few days after January 22, 1998. She said that Mahoney said it was "not a bad evaluation". Mahoney could not recall what he said at the meeting.

Leitham acknowledged at the hearing that ACS was changing its focus from one-on-one help to faculty to group help, from individual projects to group assistance. This included the faculty integrating technology (FIT) workshops that were put on by ACS.

In addition to the pilot workshop there were three put on that year. Leitham, Gautsch, Twitty, Corey and Gajewski participated.

Leitham's next evaluation, again by Corey, covered the period of February 1998 to May 30, 1998. This resulted in an overall rating of 666. Several of the comments by Corey reflect continued concern about Leitham's performance. Under general comments, Corey wrote that Leitham:

still does not quite understand what it takes to work as a team member in a fast-paced situation (Example FIT); that she cannot expect other staff members to provide her with all the pieces of a projects [sic] assigned to her . . . that she may have to pitch in or perform more than one task at a time.

Under "Job Skills", Corey wrote that "Victoria still needs to better understand the role of service and support personnel in an academic setting." Corey ranked Leitham a 32.5 in amount of work accomplished. Under "Planning and Organizing" work, while giving Leitham a rating of 58.5, Corey wrote:

Victoria is not always willing to take on the more mundane activities associated with her job responsibilities. For example: she waited for someone else to write simple descriptions for the faculty workshops flyer, as a result, the flyers were sent late and attendance was low.

Under "Adaptability/Flexibility", Corey rated Leitham a 49.5, commenting:

While she is able to learn new skills such as software applications, Victoria has not yet displayed the ability to adapt to fast paced and changing working conditions. This was shown once again before and on the first day of Spring FIT when many tasks needed to be done and everybody had to take on additional duties. At the request of her colleagues, I had to remind her to take an active role in the training program. This issue was already brought up in Victoria's previous evaluation.^[7]

Under "Working Interpersonal Relationships", while rating Leitham 60, Corey wrote:

Victoria works effectively on a one-to-one basis with faculty. However, by her colleagues, she is seen as a rather cold and distant person who does not work very well as a team member and who is unable to change her work routine to accommodate the needs of the team. On occasions, she works with another staff member.

Under "Working Without Close Supervision", Corey rated Leitham a 45.5 with the comment, "In general, Victoria needs

⁷Gajewski testified that he did not think Leitham's technical skills were commensurate with her position. She could not do tasks, such as capture images on the screen, that were considered routine. Gautsch did not find Leitham competent for the position she held and not able to work in the fast-paced environment of ACS. Leitham told her she was uncomfortable with public speaking.

very specific instructions before taking on a particular project. . . ."

Under "Record Keeping Skills", Leitham was rated a 14, with the comment by Corey, "Victoria keeps good records but is also very protective of them. I had to ask her several times for records I needed related to faulty workshops."

Finally, under "Public Relations Skills", Corey rated Leitham a 46.5 with the comment, "Victoria can be very tactful and helpful, especially working on a one-to-one basis. She can also be very abrupt with people not sharing her point of view."

Leitham filed a six page rebuttal to the evaluation.⁸

On May 1, 1998, Mahoney invited Leitham into Corey's office to discuss the performance evaluation. He told her it was a bad evaluation. He then handed her the letter of rejection.

Michael Twitty

Twitty was hired on June 27, 1997, as an analyst/programmer.

Early on, a disregard for work hours and protocol for notifying the office of his absence emerged in Twitty's work performance.⁹ On July 28, 1997, Twitty electronically mailed (e-mail) to Corey an apology for arriving at 9:30 a.m. for the past few weeks.

⁸No summary of the rebuttal is provided. (See fn. 6.) No evidence was tendered to prove Corey knew of any protected activity at the time she wrote the second evaluation.

⁹Gajewski, a co-worker in ACS, once thought Twitty was falling into disfavor with Corey for his tardiness. He warned Twitty along those lines. Gajewski did not see improvement in Twitty's conduct.

On November 24, 1997, Twitty wrote to Corey and other members of ACS requesting that he would "like to move the Monday morning meeting to 10:00am. 9:30 breaks the 9-10 hour in half, moving it later will make sure we never run over two hours, and it will coincide with my office hours." Corey responded that she asked ACS staff to work between 7:00 and 8:30 a.m. She requested he describe his work hours.

On November 26, 1997, Corey wrote to Twitty that he had missed the presentation on November 25. She observed that he should try to schedule his doctor appointments other than at staff meeting times. Further, she requested that he tell Sennikoff that he was leaving the office, when he needed to do so.

On November 26, 1997, there had been scheduled interviews from 2:30 p.m. to 4:30 p.m. for a position of equipment specialist. Twitty was scheduled to be one of three panelists, but he did not appear for the interviews. Corey wrote to him that afternoon complaining that he did not show up for the interviews or notify her of his absence. He responded that he had called Sennikoff at 1:15 p.m. to advise her of a family emergency and that he might miss part of the interviews. He suggested another employee take his place. Twitty did not know why Corey did not get the message and apologized.

On December 13, 1997, Corey wrote to Twitty about his absence from a staff meeting on December 12, 1997.

On January 22, 1998, Corey gave Twitty his first evaluation covering June 1997 to January 1998. Twitty's overall score was 662. General comments were that several criteria were difficult to evaluate because, until then, Twitty had helped ACS with tasks weighted as a low percentage of his responsibilities. Starting immediately, he was to focus on his main responsibilities, programming instructional applications, working with faculty and participating actively in training programs. She further stated that starting immediately, he was to come to work at least by 8:30 a.m. and attend all meetings. Several comments within the evaluation suggest needed improvement. She wrote that documentation is an essential part of his responsibilities and there was nothing to judge his skills; he needed to take a more active role in the training programs. He needed to work more with faculty.

Twitty wrote a rebuttal to this evaluation and met with Mahoney to get the "inaccuracies" out.¹⁰ He said Mahoney told him 662 was not a bad score. Mahoney did tell him that to pass probation Twitty would have to improve his attendance.

The problems with his lateness, tendency to miss meetings, or informing the office of his lateness or absence persisted after this evaluation.

¹⁰Twitty testified he took exception to the comments because "it might indicate my performance was below where it actually was."

On January 27, 1998 (appears to be at 1:21 a.m.), Twitty e-mailed Sennikoff that he was going to be half an hour late for a meeting on Tuesday because of medication he needed to take. He stated that he would take his medicine at 9:00 a.m. "and will leave shortly thereafter."

On that day, Corey wrote to Twitty reminding him that at their mid-probationary meeting the previous Thursday she told him to report to work between 7:00 and 8:30 a.m. and be ready for work by 9:00 a.m. She noted that she had mentioned that staff meetings for the semester were on Tuesday at 9:00 to 11:00 a.m. On January 27, he arrived at 10:45 a.m. She asserted that last semester he had missed most staff meetings and that he continued to come in around 10:00 a.m. or later. This was not acceptable, she said, and he must come in between 7:00 and 8:30 a.m.

The next day he responded that he had been advised by his doctor to stay at home until his bronchitis was under control. Regarding the last semester, he contended he missed no more than two staff meetings because of illness and four because she had rescheduled the meeting times. Initially, he came in at 9:30 a.m. to allow him to finish up on private projects and then came in at 9:00 a.m. until she moved the time to 8:30 a.m. Until his recent illness, he said, he had been coming in at 8:30 a.m.

On February 2, 1998, at 12:28 p.m., Twitty e-mailed Sennikoff that he was sick and was going to stay home.

On February 17, 1998, Twitty wrote Corey at 2:30 p.m. that he was going to be at his home office from 3:00 p.m. onward.

On February 23, 1998, Twitty wrote Sennikoff at 11:17 a.m. that he was late that morning. He stated he had tried to call but got that "annoying fast-busy signal that I frequently get".

On Monday March 9, 1998, Twitty e-mailed Sennikoff that he was working on the payroll system that morning and "since my entire day Tuesday is going to be wasted in meetings, I'd like to get as much done on it as possible. So I plan to just keep working on it here where it's quiet."

Corey responded on March 10, 1998, noting that if he was not coming to work because he was sick he was to call Sennikoff. Working at home was not an option unless approved ahead of time. She noted the ACS staff meeting that day started at 9:00 a.m. and he arrived at 10:10. He responded the next day on the later point that he knew when the meeting started, but was delayed by traffic and from 9:15 a.m. until 10:05 he was in the parking lot in his car waiting for a vacant parking place.

On March 11, 1998, at 10:21 a.m., Twitty wrote to Sennikoff telling her he was not feeling well.

On March 17, 1998, Corey wrote to Twitty that it was then 10:12 a.m. and they had just ended their weekly staff meeting without him and he had not called Sennikoff to let her know he was going to be absent. Twitty responded that he had called Sennikoff shortly after 9:00 a.m. when he realized he was not going to make it to work. He was not sure why Corey wouldn't have gotten the message.

On March 19, 1998, Twitty e-mailed Corey apologizing for not contacting her immediately about not coming to work the prior day. He stated he had attempted to call Sennikoff but got the busy signal, made a second attempt, and then "went to bed."

On that same day he responded to Corey's March 18 memo suggesting that they wait until after Easter vacation to conduct his follow-up evaluation. She noted they had a number of workshops coming up and the delay would give him more time for his projects. He agreed.

On March 19, 1998, at 7:58 a.m Twitty wrote to Corey that he was not at the staff meeting, but he had called Sennikoff at 9:00 a.m. when he realized that he was not going to work. He wasn't sure why she did not get the message.

Twitty got a second evaluation in the Spring. Although it was not introduced into evidence, Twitty said the second one had almost the same comments as the first.

The Grievance

A grievance was filed on March 17, 1998, on behalf of four employees, including Twitty and Leitham.² The grievance was predicated upon Corey's directive that employees commence their workday between 7:00 and 8:30 a.m. This, the grievance contended, required them to work overtime for which they were entitled to overtime compensation.

²The four were Teresa Morrow, Stafford Cox, Leitham and Twitty, all employees in ACS. Only Leitham and Twitty were probationary employees.

On March 24, 1998, a Level II grievance meeting was held. Present at this meeting were three of the grievants, but not Leitham. CSEA representative Hubert Lloyd (Lloyd), Mahoney and Sumpter were also present.

Leitham could not testify with any certainty, that Corey was aware of the grievance. Leitham testified on direct-examination, that Corey became cool and distant after the grievance was filed. Yet, on cross-examination, she testified Corey's coolness surfaced in January during one of the FIT workshops and well before any grievance was filed.

Corey denied that she was aware of this particular grievance. It is concluded that charging parties failed to establish that Corey was aware of the grievance filed by either Leitham or Twitty when she wrote the second evaluation for each of the two employees.

CSU's response to the grievance, issued on April 8, 1998, over Mahoney and Sumpter's signature, denied the grievance on the ground that Article 18.2 of the MOU provided that the appropriate administrator would determine the work schedule for employees. Article 18 provides that employees assigned a five day workweek, a day shall normally consist of eight (8) hours. It further contended that exempt employees do not earn overtime, either as case or compensatory overtime.

Both Leitham and Twitty were notified on May 1, 1998, that effective May 15, 1998, they were rejected during their probationary period. The notice came from Mahoney.

Mahoney testified that the decision to reject the two employees was his alone. Based upon the evaluations, input from others, and his own observations, he did not feel the employees fit into ACS. A new director was coming to ACS a few weeks following May 1, 1998, and Mahoney did not think the remaining time for probationary status for the two employees would be enough for the new director to make a decision on their retention.

On May 6, 1998, Twitty applied for a position at CSU, Long Beach, in another department for which he was hired.³ At the time of the hearing he was still employed in that department.

The Grievance Rejection

On February 16, 1999, Lloyd filed an amended unfair practice charge on behalf of both Twitty and Leitham. The amendment set forth allegations of CSU's Level IV rejection of their grievances on rejection from probation. The gist of the amendment was that the grievance was rejected because they had filed unfair practice charges against CSU. As noted, at the commencement of hearing, the complaint was amended to include an alleged violation of HEERA by CSU's response to the grievance.

³On the application, Twitty explained his discharge from ACS as follows, "I was rejected during probation with ACS following two strenuously contested and unsubstantiated bad performance reviews from the departing acting director in whose removal I played a part."

ISSUES

The issue in this case is whether CSU rejected either Leitham or Twitty from probation in retaliation for having participated in a grievance, and thus violated HEERA?

CONCLUSIONS OF LAW

In order to prevail on a retaliatory adverse action charge, the charging party must establish that the employee was engaged in protected activity, the activities were known to the employer, and that the employer took adverse action because of such activity. (Novato Unified School District (1982) PERB Decision No. 210 (Novato)). Unlawful motivation is essential to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. (Carlsbad Unified School District (1979) PERB Decision No. 89.) From Novato and a number of cases following it, any of a host of circumstances may justify an inference of unlawful motivation on the part of the employer. Such circumstances include: the timing of the adverse action in relation to the exercise of the protected activity (North Sacramento School District (1982) PERB Decision No. 264); the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); departure from established procedures or standards (Santa Clara Unified School District (1979) PERB Decision No. 104); inconsistent or contradictory justification for its actions (State of California (Department of Parks and Recreation) (1983)

PERB Decision No. 328-S); or employer animosity towards union activists (Cupertino Union Elementary School District (1986) PERB Decision No. 572).

Once an inference is made, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employee's protected activities.

(Novato; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626].) Once employee misconduct is demonstrated, the employer's action,

. . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance to other protected activities. [Ibid.]

CSEA contends an inference of unlawful motivation may be drawn from the timing of the adverse action in relation to the protected activity, the failure of CSU to follow timelines in the contract, and the failure to recognize the purpose of evaluations as set forth in the contract.

Mahoney took the action to terminate the employees on May 1, 1998, just weeks after Leitham and Twitty had filed the grievance on March 18, 1998. Mahoney presided over the Level II grievance on March 24, 1998. Thus, he knew of the grievance, and just five weeks after presiding over the grievance, he rejected the two employees from probationary status. Timing points to unlawful motive.

In addition, the contract requires CSU to render performance evaluations at the end of the third month and the ninth month of

probationary status. CSU failed to provide either Leitham or Twitty with timely evaluations. Leitham's was due around September 11, 1997, and Twitty's was due around September 27, 1997. Yet neither was given an evaluation until January 21, 1998, four months after they were due. Failure to follow the provisions of the contract points to unlawful motivation.

CSEA further argues that CSU's conduct was inconsistent with the contractual purpose of evaluations. Article 10.1 of the contract provides that the purpose of the evaluation is to "recognize acceptable performance and to improve inadequate performance." Here, the second evaluation was rendered at the same time the employees were rejected from probation. Thus, no helpful change could have been undertaken by the employees to improve their performance. Again, failure to follow the terms of the contract points to unlawful motivation.

CSEA further argues that at the meetings following the first evaluation, there was no indication performance was sub par.

CSEA argues that Twitty's evaluation was above average in every category, suggesting there would be no problem with making probation. Mahoney told Leitham her evaluation was not a bad evaluation, but later, after her rejection, he told her it was because of the bad evaluation. In fact, the second evaluation was not much different from the first evaluation. Further, CSEA argues that the ratings for both employees were numerically above average, and that management's perception that these were in

reality average evaluations could not have been understood by the probationary employees.

Mahoney labeled evaluations in the 660 range as "not bad", while discussing the first evaluations with the employees. Yet, based upon similar ratings in the second evaluation, Mahoney rejected the employees from probation. These are rather inconsistent statements on a key issue. Mahoney's inconsistent statement regarding similar evaluations give rise to an inference of unlawful motivation.

The burden now shifts to CSU to establish that it would have rejected both Leitham and Twitty, despite the filing of the grievance.

I believe that CSU has met its burden.

In both instances, the evaluation reflected concerns Corey had with their performances. Leitham's evaluation reflected a passive nature and reluctance to lead. Twitty's evaluation reflected a preference for technical work and not presentation, plus a care-free approach to his arrival time at work and meetings. These factors were expressed by CSU to the employees before either Leitham or Twitty participated in the grievance. As evidenced by their rebuttal statements, they were aware of their deficiencies in performance as seen by Corey.

In addition, although the numerical rating of the performance evaluations suggested above average ratings, both Leitham and Twitty took strong umbrage at the comments and responded with rebuttals and protested to Corey's supervisor,

Mahoney. Their actions in submitting the rebuttals were inconsistent with, and undercut their contentions that the evaluations reflected above average performance.

Significantly, the second evaluations, by Corey, showed no improvement, the scores were generally the same as the scores achieved prior to the filing of the grievance. It was not established that Corey had any knowledge of the March 17 grievance, or that Lithium and Twitty were participants in that grievance.

The department scores on performance evaluations for other employees were on the average significantly higher.⁴ The ACS evaluations were otherwise at an average of 865, considerably higher than the 665 the two employees received. In addition, as Corey testified, a probationary employee should reflect higher than average scores to demonstrate ability to perform the job tasks.

Most importantly, the performance evaluations rendered by Corey could not have been based upon protected activity. The first evaluations Leitham and Twitty received were well before they participated in filing the grievance. They did not

⁴It is not certain that those scores would be relevant to Leitham and Twitty to the extent that other evaluations might include permanent employees. However, Gautsch was a probationary employee and her evaluations were in the high 700 to 800. CSEA takes exception to Gautsch's recall on her own rating in an effort to place her score closer to Leitham's and Twitty's. I reject that approach and find that her testimony corroborates Sumpter's findings that other employees evaluation ratings in the department were significantly higher than theirs.

establish that she knew of the grievance when she rendered the second set of evaluations.

In addition, the observations of Mahoney and Corey that both Leitham and Twitty were less than team players and seemingly ill-suited for the academic expectations of staff support for CSU faculty was corroborated by Gajewski and Gautsch, both employees of ACS and with no interest in the outcome of this case.

Well before the filing of the grievance, both employees were notified of improvements that were needed. Twitty was specifically told that his attendance was a problem and that he needed to improve the issue to make probation. The evidence shows that he continued to have such a problem.

The concerns that Corey had before the grievance was filed continued after the filing of the grievance. As noted, these concerns were reiterated without establishing that Corey even knew of the grievance.

In addition, Mahoney credibly testified that these employees did not seem appropriate for the unit. Given ACS's efforts to provide group training, which necessitated overt presentation abilities, it was his decision not to delay the rejection and place such responsibility in the new director's hands.

For these reasons, it is concluded that CSU would have rejected both Leitham and Twitty from probation even if they had not filed the grievance. Thus, their rejections from probation were not in retaliation for the grievance filing, and were not in violation of HEERA.

The Amendment to the Complaint

The complaint was amended on the first day of the hearing to include an allegation that the CSU unlawfully rejected the Level IV grievance. No evidence regarding the circumstances of that Level IV grievance was presented at the hearing, however. Therefore, no findings can be made to ascertain the events surrounding the allegation. That portion of the complaint must be dismissed. Based upon the conclusions reached herein, the complaints and underlying charges should be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact, conclusions of law and the entire record in this matter, it is ordered that the complaints in Case No. LA-CE-529-H, Victoria Leitham v. Trustees of the California State University, and Case No. LA-CE-531-H, Michael Twitty v. Trustees of the California State University, and the underlying unfair practice charges are hereby Dismissed.

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the

portions of the record, if any, relied upon for such exceptions.
(Cal. Code Regs., tit. 8, sec. 32300.)

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing.
(Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit.8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, secs. 32300, 32305, 32140, and 32135(0)*)

Gary M. Gallery
Administrative Law Judge