STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

RON WILLIAMS & PATRICK PELONERO, Charging Parties, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS), Respondent.	Case No. LA-CE-1068-H PERB Decision No. 2140-H November 2, 2010

Appearance: Ron Williams & Patrick Pelonero, on their own behalf.

Before Dowdin Calvillo, Chair; McKeag and Wesley, Members.

DECISION

DOWDIN CALVILLO, Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Ron Williams (Williams) and Patrick Pelonero (Pelonero) (collectively Charging Parties) of a Board agent's dismissal (attached) of their unfair practice charge. The charge, as amended, alleged that the Trustees of the California State University (San Marcos) (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by: (1) promoting two bargaining unit employees to management positions and then returning those employees to their prior bargaining unit positions with no loss of seniority and without posting the vacant positions; (2) removing billable work from Charging Parties and making negative comments about Williams' work performance after this unfair practice charge was filed; (3) settling Pelonero's grievances without his consent; and (4) failing to respond to grievances in the time frame required by the collective bargaining agreement between the University and State Employees Trades Council United (SETC), the

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

exclusive representative of Charging Parties' bargaining unit. The Board agent dismissed the charge because: (1) Charging Parties lacked standing to allege that the promotions/returns and untimely grievance responses constituted unlawful unilateral changes in terms and conditions of employment; (2) it failed to state a prima facie case of retaliation against Charging Parties; and (3) the allegation regarding settlement of Pelonero's grievances was barred by collateral estoppel.

The Board has reviewed the dismissal and the record in light of Charging Parties' appeal and the relevant law. Based on this review, the Board finds the Board agent's warning, second warning, and dismissal letters to be well-reasoned, adequately supported by the record, and in accordance with applicable law. The Board therefore adopts them as the decision of the Board itself, as supplemented by the discussion below.

DISCUSSION

The second amended charge alleged that the University violated HEERA by reaching a settlement with SETC on five of Pelonero's grievances without his knowledge or participation. The Board agent found that the charge failed to allege facts showing the settlement was adverse to Pelonero or made in retaliation for Pelonero's protected activity. The Board agent also noted that this allegation appeared to be the same one dismissed in Case No. LA-CE-1038-H. Because that dismissal was not appealed to the Board, the Board agent concluded, citing *City of Porterville* (2007) PERB Decision No. 1905-M, that the allegation was barred by "the doctrines of res judicata and collateral estoppel."

After the instant charge was dismissed, the Board issued *Grossmont Union High School District* (2010) PERB Decision No. 2126, in which it overruled the collateral estoppel portion of *City of Porterville*, *supra*, and held that a Board agent's dismissal of an allegation following an investigation does not have preclusive effect in other PERB proceedings. Thus, the

collateral estoppel basis for dismissing the settlement allegation is no longer supported by PERB case law.

We nonetheless find dismissal of the allegation was proper. First, we agree with the Board agent that the charge failed to allege facts establishing the settlement was adverse to Pelonero or that it was made in retaliation for Pelonero's protected activity. Second, PERB has held that a union does not breach its duty of fair representation by settling a grievance without the grievant's consent. (*Hart District Teachers Association (Mercado and Bloch)* (2001) PERB Decision No. 1456.) We see no reason why an employer, which has no representative duty toward the employee, should be required to obtain the employee's consent to settle a grievance. Because there is no viable theory under which the alleged facts about the grievance settlement could establish a violation of HEERA, we affirm the Board agent's dismissal of the allegation.

ORDER

The unfair practice charge in Case No. LA-CE-1068-H is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members McKeag and Wesley joined in this Decision.

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

January 12, 2010

Ron Williams

Patrick Pelonero

Re: *Ron Williams & Patrick Pelonero v. Trustees of the California State University (San Marcos)*
Unfair Practice Charge No. LA-CE-1068-H
DISMISSAL LETTER

Dear Messrs. Williams and Pelonero:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 28, 2009. Ron Williams and Patrick Pelonero (Williams and Pelonero or Charging Parties)[1] allege that the Trustees of the California State University (San Marcos) (University) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[2] at sections 3560 and 3571(e) by: a) permitting two bargaining unit members—Project Supervisor Pat Simpson and Lead Locksmith Michael Treadway (Simpson and Treadway)—to voluntarily leave their Bargaining Unit 6 positions when they were promoted to the position of Management Personnel Plan (MPP); and b) subsequently, without posting the vacant positions, allowing Simpson and Treadway to retain their bargaining unit status and return to their former positions.

Charging Parties were informed by Regional Attorney Marc Hurwitz, in the attached Warning Letter dated June 11, 2009, that the above-referenced charge did not state a prima facie case. Charging Parties were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, they should amend the charge. Charging Parties were further advised that, unless they amended the charge to state a prima facie case or withdrew it prior to June 18, 2009, the charge would be dismissed. Williams and

[1] Williams and Pelonero are employed at the California State University, San Marcos (CSUSM) as Building Maintenance Mechanics. The State Employees Trades Council United (SETC) is the exclusive representative of Bargaining Unit 6, Skilled Crafts, including the classification of Building Maintenance Mechanic.

[2] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA is available at www.perb.ca.gov.

Pelonero filed a First Amended Charge on June 17, 2009. The First Amended Charge focused primarily on new allegations that Williams and Pelonero have been harassed and retaliated against, in violation of HEERA sections 3560, 3571(a), and 3571(e), because they filed the instant charge.

Charging Parties were subsequently informed in the attached Second Warning Letter, dated December 3, 2009, that the First Amended Charge did not state a prima facie case. Charging Parties were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, they should further amend the charge. Charging Parties were also advised that, unless they amended the charge to state a prima facie case or withdrew it prior to December 17, 2009, the charge would be dismissed. Williams and Pelonero filed a Second Amended Charge on December 16, 2009.

The Second Amended Charge

The Second Amended Charge focuses almost exclusively on events that occurred after the First Amended Charge, and does not address or cure the deficiencies discussed in the Second Warning Letter dated December 3, 2009, or the Warning Letter dated June 11, 2009. The new allegations identified in the Second Amended Charge are summarized as follows:

1. On June 23, 2009, while attending a settlement conference conducted by PERB regarding another unfair practice charge case,[3] Pelonero was presented with a copy of a Settlement Agreement and General Release that had been executed by representatives of the University and SETC. The Settlement Agreement and General Release addressed, inter alia, five earlier grievances filed by Pelonero.[4]

2. On July 28, 29 and 30, 2009, Pelonero was involved in a series of confrontations initiated by Lead Carpenter Bryan Fisher. On August 6, 2009, Williams was also involved in a confrontation initiated by Fisher.

3. Williams and Pelonero filed a grievance over the incidents involving Fisher, alleging they were being retaliated against for filing earlier grievances. The University representatives hearing the grievance at both Level I and Level II failed to provide a response within the timeframe required by the grievance procedure negotiated by SETC and the University. Charging Parties allege that the failure to provide a timely response is further evidence of harassment and retaliation, as well as evidence that the grievance procedure does not work at the University's San Marcos campus.

[3] The other case identified is Unfair Practice Charge Case No. LA-CE-1038-H.

[4] According to PERB's case files, the informal settlement conference in LA-CE-1038-H was held on December 4, 2008, rather than June 23, 2009 as alleged herein. However, a formal hearing was conducted in that case on June 23, 2009.

Discussion

As discussed more fully in the Second Warning Letter, in order to demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).)[5] In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.)

A charging party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.) Each of the new allegations raised by the Second Amended Charge will be evaluated with these standards in mind.

1. Settlement Agreement regarding Pelonero Grievances

The Second Amended Charge does not provide facts that demonstrate how the University's agreement with SETC on the resolution of various grievances adversely affects either Pelonero or Williams. Nor do Charging Parties provide any evidence of unlawful motive on the part of the University in reaching such a settlement. Thus, this allegation fails to state a prima facie retaliation violation and must be dismissed. (*Palo Verde Unified School District*, *supra*, PERB Decision No. 689; *Novato*, *supra*, PERB Decision No. 210.)

In addition, it appears that the same allegation concerning the University's settlement of various grievances by agreement with SETC was previously addressed and dismissed—on October 9, 2008—by Regional Attorney Eric J. Cu in Case No. LA-CE-1038-H. The partial dismissal of that charge was not appealed to the Board. The Board has previously ruled that, where an allegation is dismissed by a Board agent and the dismissal is not appealed to the Board, "the doctrines of res judicata and collateral estoppel bar" the same charging party from raising the allegation in a later case. (*City of Porterville* (2007) PERB Decision No. 1905-M.)

[5] As also discussed in the Second Warning Letter, Charging Parties have established that they have engaged in protected activity and that the University has knowledge of the protected activity.

2. Alleged Retaliation against Williams and Pelonero by Fisher

In the Second Warning Letter, it was noted that lead positions, such as lead carpenter, are included in the bargaining unit represented by SETC, and that such lead personnel do not have authority to exercise supervisory authority—such as the authority to hire, fire or discipline employees—on behalf of the University. Charging Parties do not provide facts to establish that Fisher—who is identified as a Lead Carpenter—was acting as a supervisor or agent of the University at the time of the alleged incidents involving Pelonero and Williams in late-July and early-August 2009. The burden of proving agency is on the party asserting its existence. (*Inglewood Unified School District* (1990) PERB Decision No. 792.) Thus, even assuming for the moment that Fisher's conduct constituted adverse action(s), the charge fails to establish a prima facie case that the University took adverse action. This allegation must also be dismissed.

3. Failure of University to Provide Timely Responses to Grievances

In both the First Amended Charge and the Second Amended Charge, Williams and Pelonero frequently assert that the grievance procedure "does not work" at the San Marcos campus. Such an allegation, rather than being analyzed under a discrimination/retaliation standard, is properly considered either as a violation of, or the repudiation of, the grievance procedure negotiated by SETC and the University, or as an interference claim.

The repudiation of a collectively bargained grievance procedure is an unlawful unilateral change. (See, for example, *County of Riverside* (2006) PERB Decision No. 1825-M.) However, as Charging Parties were previously informed by the June 11, 2009 Warning Letter, as well as the December 3, 2009 Second Warning Letter, individual employees lack standing to allege unilateral change violations. (See, for example, *City of Long Beach* (2008) PERB Decision No. 1977-M; *Regents of the University of California* (2006) PERB Decision No. 1804-H.) Thus, this allegation of an unlawful unilateral change must also be dismissed.

With respect to an arguable interference claim, the test for whether a respondent has interfered with the rights of employees under the HEERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmett)* (1979) PERB Decision No. 106, the Board described the standard as follows:

> [I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if HEERA provides the claimed rights. (HEERA, § 3571.3; *California State University, Sacramento* (1982) PERB Decision

No. 211-H.) In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity. However, as also explained by Regional Attorney Cu with regard to the dismissal of a similar allegation in Case No. LA-CE-1038-H, Charging Parties must establish that the University's conduct tends to or did cause "some harm" to their right to pursue grievances in order to state a prima facie case of interference. Here, Charging Parties have not alleged any facts to establish such harm did result or would tend to result.

Conclusion

Therefore, the charge is hereby dismissed based on the facts and reasons set forth above, as well as in the June 11 and December 3, 2009 Warning Letters.

Right to Appeal

Pursuant to PERB Regulations,[6] Charging Party may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs, tit. 8, § 32635, subd. (a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs, tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs, tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090 and 32130.)

The Board's address is:

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

[6] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq. Copies may be purchased from PERB's Publications Coordinator, 1031 18th Street, Sacramento, CA 95811-4124, and the text is available at www.perb.ca.gov.

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs, tit. 8, § 32635, subd. (b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, § 32140 for the required contents.) The document will be considered properly "served" when personally delivered or deposited in the mail or deposited with a delivery service and properly addressed. A document may also be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs, tit. 8, § 32135, subd. (c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs, tit. 8, § 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

TAMI R. BOGERT
General Counsel

By _____
Les Chisholm
Division Chief

Attachments

cc: Marc D. Mootchnik

PUBLIC EMPLOYMENT RELATIONS BOARD

Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811-4124
Telephone: (916) 327-8383
Fax: (916) 327-6377

December 3, 2009

Ron Williams

Patrick Pelonero

Re: *Ron Williams & Patrick Pelonero v. Trustees of the California State University (San Marcos)*
Unfair Practice Charge No. LA-CE-1068-H
SECOND WARNING LETTER

Dear Messrs. Williams and Pelonero:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 28, 2009. Ron Williams and Patrick Pelonero (Williams and Pelonero or Charging Parties)[1] allege that the Trustees of the California State University (San Marcos) (University) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[2] at sections 3560 and 3571(e) by: a) permitting two bargaining unit members (Project Supervisor Pat Simpson and Lead Locksmith Michael Treadway (Simpson and Treadway)) to voluntarily leave their Bargaining Unit 6 positions when they were promoted to the position of Management Personnel Plan (MPP); and b) subsequently, without posting the vacant positions, allowing Simpson and Treadway to retain their bargaining unit status and return to their former positions.

Charging Parties were informed by Regional Attorney Marc Hurwitz, in a Warning Letter dated June 11, 2009, that the above-referenced charge did not state a prima facie case. Charging Parties were advised that, if there were any factual inaccuracies or additional facts that would correct the deficiencies explained in that letter, they should amend the charge. Charging Parties were further advised that, unless they amended the charge to state a prima facie case or withdrew it prior to June 18, 2009, the charge would be dismissed.

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[1] Williams and Pelonero are employed at the California State University, San Marcos (CSUSM) as Building Maintenance Mechanics. The State Employees Trades Council United (SETC) is the exclusive representative of Bargaining Unit 6, Skilled Crafts, including the classification of Building Maintenance Mechanic.

[2] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

Williams and Pelonero filed a First Amended Charge on June 17, 2009. This matter was reassigned to the undersigned on November 30, 2009.

The Warning Letter

In his June 11, 2009 letter, Regional Attorney Hurwitz explained that the allegations in the original charge were properly considered as alleged unlawful unilateral changes in violation of HEERA section 3571(c). The Warning Letter further explained that Charging Parties, as individual employees, lacked standing to allege a violation of section 3571(c).

Further, with respect to the alleged violation of HEERA section 3571(e), the Warning Letter likewise noted that the Charging Parties lacked standing to allege that the University had failed or refused to participate in statutory impasse procedures.

The First Amended Charge

1. The Original Charge Allegations

As discussed further below, the First Amended Charge focuses almost exclusively on events and conduct that occurred after the filing of the instant charge, and alleged reprisals against Charging Parties. The only apparent references to the original allegations are as follows:

> Mr. Hurwitz in your Warning Letter dated June 11, 2009 we do not see any comment about the answer that was given by Marc Mootchnik of University Counsel [sic] letter dated May 5, 2009 relating to ULP case # LACE 1068-H.
>
> From the e-mail of James Busalacchi Friday February 27, 2009 to John Connor SETC UNITED Business Manager it was stated "Treadway and Simpson could be returned to their respective prior positions without needing to post the positions but that they would **LOSE SENIORITY.**" This reply seems to be one sided and is NOT confirmed by SETC United Business Manager John Connor by your investigation.
>
> The question still remains Did Treadway and Simpson Lose Seniority [sic]?

(Emphasis in original.) The above-quoted passage appears to concern the May 19, 2009 response to the original charge filed by the University's representative, including references to documents attached to the response.

The above-quoted passage does not cure the deficiencies in the original charge outlined in the earlier Warning Letter, and thus the alleged violations of HEERA section 3571(c) and (e) must be dismissed.

2. New Allegations

The First Amended Charge alleges that Williams and Pelonero have been harassed and retaliated against, in violation of HEERA sections 3560, 3571(a), and 3571(e), because they filed the instant charge.

The charge reads, verbatim and in relevant part, as follows:

> Within a few days of CSUSM Facility Services Management receiving [the charge,] the Retaliation and Harassment started. Both [Charging Parties] were REMOVED from a Welding Job on Campus that we had both been working on for days prior. On May 7, 2009 this job was shut down by Assistant Director of Operations Michael Chambers. This job was left Uncompleted and to this day has not been completed.
>
> Within days of Removing both [Pelonero and Williams] from the above mentioned Welding job, we started to notice that our other Assigned jobs were also being removed from us. As Building Maintenance Mechanics we are Responsible for All work that happens within our Assigned Building(s) on Campus. Jobs that we were working on were now being Re-directed to other Maintenance Mechanics that are Not assigned to the Building(s) where the job is being done.
>
> Patrick and I were informed by Lead Carpenter, Maintenance Mechanics and other Laborers in our shop that a specific group of Maintenance Staff were offered by [Chambers] All **Billable Work** on Campus. This is a Direct **Unlawful Employer Practice**, against [Pelonero and Williams]. This is a change from regular Operations that Management put against [Pelonero and Williams] after filing Unfair Labor Practice charge # LACE 1068-H. All Billable Work on Campus has Always been taken care of by the Maintenance Mechanic that is Assigned to the Building(s) were work is being done. Patrick Pelonero has been doing Billable work at California State University San Marcos for 6 years and Ron Williams has been doing Billable work at California State University for 4 ½ Years. As of Today's date June 17, 2009 Billable work that we should be doing in our Assigned Buildings on Campus is being kept away from [Charging Parties].
>
> The Assigned Building Maintenance Mechanic has always been the Primary in charge of All work within our Assigned Building(s). The Maintenance Mechanic may ask for other

Maintenance Mechanics help in completing a job if additional help is needed.

Once this New Billable Work Position was confirmed by the other Maintenance Mechanic [Charging Parties] sent an e-mail on May 19, 2009 to Facility Services Director Ed Johnson. Our e-mail indicated that we were informed about the New Billable Person Position being created by Management and that our current work Responsibilities was now going to be taken away from us.

A meeting was then scheduled that included the Associate Vice President of Facilities Development & Management Gary Cinnamon, [Johnson], [Chambers] and [Charging Parties]. During this meeting the Director and Assistant Director **DENIED** that this New Billable Person Position was being created by Management and, our Billable work **NOT** being removed from any Maintenance Mechanic.

On June 1, 2009 at 7:00-7:05am [Williams] was confronted in the Service Center office by [Chambers]. He said that [Williams] did not know what I was doing and that I should think about getting some Training. I asked Mike Chambers what he was talking about, as I had NO idea. He said something about a Faucet repair that I did in on Campus and my time charged for repair was NOT what he thought it should be, I must not know what I am doing. I told Mike Chambers that I work on Many Faucets on Campus and I still did not know what repair he was talking about. He then told me to speak with Lead Carpenter Bryan Fisher about the job he was referring to, and then he left the office. After Mike Chambers left the office I sat down to read my morning e-mails. I then saw an e-mail from [Fisher] about my Estimate for New Replacement parts for an Electronic Faucet Module for the Field House, this was the repair that Mike Chambers was confronting me about just minutes ago.

Bryan Fisher's e-mail of 5/29/09 @ 7:58am said: Upon analyzing the situation, I've come to the conclusion that the best course of action is for me to take care of this billable work order from this point on. I do not believe we can justify any additional labor expense for this issue. Up to this point the Field House has already incurred a charge of $291.50 from your labor to investigate the problem and I cannot in good conscience ask them to pay more.

> ... [Fisher is] a Lead Carpenter without any Carpenters in Bargaining Unit 6, he is not Qualified to reprimand me or any other Maintenance Mechanic about Plumbing work done on Campus.[3]
>
> During our Facility Services Monthly Department meeting on June 4, 2009 the following was said by Michael Chambers to the entire Department.
>
> > I am not pleased when I find out that someone in this Department made a Plumbing/Faucet repair on Campus and we charged the customer more money for the repair then it would have cost the customer to have an outside Contractor come in to have the repairs done.
>
> This comment from Michael Chambers was directed to [Williams] in a Public Department meeting.
>
> On Monday June 1, 2009 another **Unlawful Employer Practice** occurred when Scott Gorsuch Lead Electrician put out an e-mail stating that the Re-lamping of [CSUSM] from that day forward was now being Contracted out to an outside Contractor. The Maintenance Mechanics job of Re-lamping light fixtures was now being taken away and an outside Contractor was now doing our work. [Pelonero] has been Re-lamping light fixtures at [CSUSM] for 6 Years and [Williams] has been Re-lamping light fixtures at [CSUSM] for 4 ½ Years.
>
> On Wednesday June 3, 2009 [Charging Parties] sent an e-mail request to [Chambers] for a Level-1 Informal review regarding the June 1, 2009 e-mail of Scott Gorsuch. Without SETC United representation it was Impossible for us to pursue this Grievance. SETC United Chief Union Stewart Tom Weir DECLINED to attend and represent [Charging Parties].
>
> **THE GRIEVANCE PROCEDURE DOES NOT WORK AT [CSUSM]**
>
> On June 16, 2009 [Williams] was scheduled and attended a meeting with [Chambers] and [Fisher]. I also brought [Weir]

[3] The First Amended Charge references and attaches an earlier e-mail message from an SETC Chief Steward stating, in part, that Leads do not have the authority to "hire, fire, promote or discipline."

> with me. I was told this meeting was to discuss my work orders. At this meeting I was put down by Michael Chambers for the work that I had been doing, I was NOT up to his standards. Michael Chambers continued to discredit my work and ability to do jobs that were done by me. In my 4 ½ years as a Maintenance Mechanic at [CSUSM] I had never received any complaint from any customer on Campus. Previous members of Management commended me for my work and ability to exceed the needs and request of my Campus customers.
>
> Michael Chamber's comments to me are a Direct Retaliation towards me Ron Williams.

Discussion

First, the allegation in the First Amended Charge that the University violated HEERA section 3571(e) must be dismissed for the reasons explained in the June 11, 2009 Warning Letter, as referenced above.[4] In addition, to the extent that the First Amended Charge alleges that the University has implemented unilateral changes in any policy, e.g., contracting out certain electrical or other work or reassigning duties, that are properly analyzed as possible unilateral changes in violation of HEERA section 3571(c), Charging Parties lack standing to allege unilateral change violations and they must be dismissed for the reasons explained in the earlier Warning Letter.

While not entirely clear from the statement of the charge, it appears the First Amended Charge alleges the University violated HEERA section 3571(a) by taking the following actions:[5]

a. Removing Charging Parties from a welding job shortly after the instant charge was filed and shutting down the job on May 7, 2009.

b. Assigning billable work formerly performed by Charging Parties to another person or persons, in or about mid-May 2009.

c. Assistant Director Chambers criticized faucet repair work by Williams in comments to Williams on June 1, 2009.

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[4] It is further noted that there are no factual allegations set forth in either the original charge or the First Amended Charge concerning the invocation of HEERA's impasse procedures by either SETC or the University.

[5] Allegations regarding SETC declining to participate in a Level 1 grievance meeting on June 3, 2009, are not addressed by this letter, as the University—and not SETC—is the respondent in this matter.

d. Informing employees on June 1, 2009 that re-lamping work was being contracted out.

e. Assistant Director Chambers made statements in a department meeting on June 4, 2009, critical of recent faucet repair work.

f. Requiring Williams to meet with Chambers on June 16, 2009, during which meeting Chambers made comments critical of Williams' recent work performance.

To demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); *Campbell Municipal Employees Assn. v. City of Campbell* (1982) 131 Cal.App.3d 416 (*Campbell*); *San Leandro Police Officers Assn. v. City of San Leandro* (1976) 55 Cal.App.3d 553 (*San Leandro*).) In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

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

(*Newark Unified School District* (1991) PERB Decision No. 864; emphasis added; footnote omitted.)

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S; *Campbell*, *supra*, 131 Cal.App.3d 416); (2) the employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104; *San Leandro*, *supra*, 55 Cal.App.3d 553); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S; *San Leandro*, *supra*, 55 Cal.App.3d 553); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification

at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*, PERB Decision No. 264; *Novato*, *supra*, PERB Decision No. 210.)

Protected Activity and Employer Knowledge

Charging Parties have established they engaged in conduct protected by HEERA. First, Charging Parties filed the instant charge, and the Board has long held that filing unfair practice charges with PERB constitutes protected activity. (*Trustees of the California State University* (2008) PERB Decision No. 1970-H; *Riverside Unified School District* (1987) PERB Decision No. 639.) In addition, Charging Parties filed a grievance on or about June 3, 2009 and sought assistance from SETC with regard to the grievance. This activity is also protected. (*Trustees of the California State University*, *supra*, PERB Decision No. 1970-H; *Los Angeles Unified School District* (2005) PERB Decision No. 1787.) The University, in its response to the First Amended Charge, acknowledges that Charging Parties engaged in protected activity of which the University had knowledge.

Adverse Action

However, as presently written, the First Amended Charge does not contain sufficient facts to establish that any of the alleged retaliatory actions constitute adverse action under the objective standard described above.

The allegations with respect to the welding job terminated in early May 2009; the alleged reassignment of billable work to other, unnamed staff or entities; and the decision to contract out re-lamping work all fail to describe any "adverse impact on [Charging Parties'] employment," as required by *Newark Unified School District*, *supra*, PERB Decision No. 864. There is not, for example, any suggestion that Williams or Pelonero worked fewer hours or suffered a loss in pay or overtime opportunities as a result of this alleged conduct. Thus, the allegations identified above in paragraphs a, b, and d must be dismissed. (*Ibid.*)

The allegation described in paragraph e, concerning Chambers' comments at a department meeting on June 4, 2009, also fails to establish any adverse action with respect to Williams or Pelonero. While the First Amended Charge alleges these comments were "directed to" Williams, there are no specific facts alleged to support that conclusion. PERB Regulation 32615(a)(5)[6] requires, inter alia, that an unfair practice charge include a "clear and concise statement of the facts and conduct alleged to constitute an unfair practice." The charging

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

party's burden includes alleging the "who, what, when, where and how" of an unfair practice. (*State of California (Department of Food and Agriculture)* (1994) PERB Decision No. 1071-S, citing *United Teachers-Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions are not sufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB Decision No. 873.)

Finally, the two allegations (described above in paragraphs d and f) concerning critical comments by Chambers that were addressed specifically to and about Williams, on June 1 and 16, 2009, fall short of establishing that adverse action was taken against Williams.[7] The Board has held that a verbal reprimand can constitute adverse action. (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S.) However, not all verbal expression of concern about an employee's conduct or performance rise to the level of a verbal reprimand and thus establish that adverse action was taken. (*Woodland Joint Unified School District* (1987) PERB Decision No. 628.) In the present case, there is no information in the First Amended Charge that shows that any further action was taken, in the form of discipline, written documentation, or a formal performance evaluation, regarding Chambers' concerns about Williams' job performance. Thus, the First Amended Charge fails to show that Chambers' comments on June 1 and/or 16, 2009 constitute adverse action. (*Ibid.*)

Nexus

If amended to establish that any adverse action was taken, most of the allegations discussed herein would still fail to demonstrate a prima facie discrimination violation due to insufficient evidence of unlawful motive. That said, Charging Parties have established timing as an element supporting such an inference, as the original charge was filed on April 28, 2009, and the alleged adverse actions occurred within the two months following. (*Calaveras County Water District* (2009) PERB Decision No. 2039-M.) Temporal proximity with respect to the allegations concerning conduct occurring on June 4 and 16, 2009 is further established by the June 3, 2009 filing of the Level 1 grievance.

Additional evidence of animus, with regard to the expression of concerns regarding Williams' work performance on June 1 and 16, 2009, is not supported by the conclusory allegations that Williams had previously received no complaints regarding his work and in fact had only received expressions of approval of his work performance. The First Amended Charge does not demonstrate, for example, that the concerns expressed to Williams were exaggerated (*McFarland Unified School District*, *supra*, PERB Decision No. 786), or that Chambers failed to offer an explanation or justification for the concerns at the time (*Oakland Unified School District*, *supra*, PERB Decision No. 1529), or that the concerns were expressed following a cursory investigation (*City of Torrance*, *supra*, PERB Decision No. 1971-M).

[7] It should be noted that the First Amended Charge does not allege any instances where Pelonero was on the receiving end of critical comments about his work performance.

With respect to the four other alleged adverse actions, there is simply no evidence submitted, aside from timing, to support an inference of unlawful motive. For all the above reasons, the discrimination allegations contained in the First Amended Charge must be dismissed.

Conclusion

For these reasons the charge, as amended by the First Amended Charge, does not state a prima facie case.[8] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Party may amend the charge.[9] The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled Second Amended Charge, contain all the facts and allegations Charging Parties wish to make, and be signed under penalty of perjury by an authorized agent of Charging Parties. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before December 17, 2009,[10] PERB will dismiss the charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Les Chisholm
Division Chief

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[8] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

[9] This opportunity to further amend the charge is limited to those allegations first raised in the First Amended Charge. The time in which the original charge allegations could be amended has passed.

[10] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)

PUBLIC EMPLOYMENT RELATIONS BOARD

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June 11, 2009

Ron Williams

Patrick Pelonero

Re: *Ron Williams & Patrick Pelonero v. Trustees of the California State University (San Marcos)*
Unfair Practice Charge No. LA-CE-1068-H
WARNING LETTER

Dear Mr. Williams and Mr. Pelonero:

The above-referenced unfair practice charge was filed with the Public Employment Relations Board (PERB or Board) on April 28, 2009. Ron Williams and Patrick Pelonero (Williams and Pelonero or Charging Parties) allege that the Trustees of the California State University (San Marcos) (University) violated the Higher Education Employer-Employee Relations Act (HEERA or Act)[1] by: a) permitting bargaining unit members, Project Supervisor Pat Simpson and Lead Locksmith Michael Treadway (Simpson and Treadway), to voluntarily leave their Bargaining Unit 6 positions when they were promoted to the position of Management Personnel Plan (MPP); and b) subsequently, without posting the vacant positions, allowing Simpson and Treadway to retain their bargaining unit status and return to their former positions.

Background

Williams and Pelonero are employed at the University as Maintenance Mechanics. The State Employees Trades Council (SETC) is the exclusive representative of Bargaining Unit 6, Skilled Crafts, including the classification of Maintenance Mechanic. The University and SETC are parties to a Collective Bargaining Agreement (CBA).

In early September 2008, Simpson and Treadway were promoted, which resulted in their filling management/MPP positions. On September 4, 2008, Facilities Services Director Ed Johnson (Johnson) notified Bargaining Unit 6 members attending the University's monthly Facility Services Department meeting of Simpson's and Treadway's promotions.

[1] HEERA is codified at Government Code section 3560 et seq. The text of the HEERA and the Board's Regulations may be found on the Internet at www.perb.ca.gov.

On September 5, 2008, SETC Chief Steward Thomas J. Weir (Weir) sent an e-mail to all Bargaining Unit 6 members and to Director of Human Resources, Ellen Cardoso, stating the following:

> To dispel rumors about Retreat Rights for SETC-U positions vacated by Mr. Treadway and Mr. Simpson who were promoted to MPP positions, under Article 30.13 [sic] these employees cannot exercise the provisions of this Article because there was no mutual agreement between the Union and management as such relates to the Collective Bargaining Agreement. Also, be aware that neither Mr. Treadway nor Mr. Simpson can perform any Unit 6 work or portion of work thereof, as outlined within the negotiated Classification Standards. Any such violation will result in an Unfair Labor Practice filed on behalf of all SETC-U employees against CSU San Marcos.

Article 30, Layoff, Section 30.13 of the parties' CBA states:

> Effective July 1, 1996, the parties may mutually agree that an employee may be temporarily assigned to a position in another classification at a salary rate appropriate for the temporarily assigned duties and responsibilities. Such temporary assignment shall not exceed six months (180 days), except by mutual agreement of the parties. A temporary assignment implemented under this provision shall not be considered as a break in service for computation of seniority points, and an employee on such temporary assignment shall retain bargaining unit status.

At the monthly Facility Services Department meeting on December 11, 2008, Director Johnson advised the attending bargaining unit members that on or about January 1, 2009, Simpson and Treadway were returning to the bargaining unit and would fill their former positions. On December 12, 2008, Williams sent, in part, the following e-mail to management:

> Mr. Michael Treadway, Per the Comments that were made to the Department at the Department meeting on 12/11/08. [sic] We, Ron Williams, Patrick Pelonero, George Delgado, Calvin Kidd make the following Request. Level-1 Informal Review 9.6 A For the Following Articles of SETC-United:
>
> 30.13 [parties may mutually agree that an employee be temporarily assigned to a position in another classification.]
>
> 32.5 [amendments to CBA only by mutual agreement signed by both parties.]

> 20.2 [notice of temporary reassignment to a higher classification shall be posted prior to effective date, except in cases of emergencies.]
>
> 10.1 [all positions to be filled, except those of 90 days or less, shall be posted.]

Three members of the Bargaining Unit and Chief Steward Weir participated in the Level-I Informal Review with management on January 14, 2009. On January 30, 2009 Weir notified bargaining unit members Williams, Delgado and Pelonero that he had not received a response to the Level-1 Informal Review. The same day, Weir sent an e-mail to SETC Business Manager John Conner on behalf of bargaining unit members Pelonero, Williams and Delgado requesting that SETC file an unfair practice charge alleging violations of several articles of the CBA.

Williams and Pelonero now assert in part that management employees "are not entitled to the contractual rights of [b]argaining unit employees." As a consequence, they contend that when a unit member leaves the bargaining unit to take a management position, that person;

> loses his/her permanency and seniority credit upon entering management. Promotion to management constitutes a break in service and a permanent separation from a Bargaining unit position, disqualifying the employee from rights under the contract including retreat rights.

It is also alleged that by the aforementioned conduct, management has also violated HEERA section 3571(e) by refusing to participate in good faith in the impasse procedure.

Discussion

1. Standing to Allege Bargaining Violations

Williams and Pelonero argue that the University committed an unlawful unilateral change by violating various provisions of the CBA.[2] Before an employer may make a change in policy on a matter affecting hours, wages and working conditions, which has a generalized effect or continuing impact upon terms and conditions of employment, it must first provide the exclusive representative with notice and an opportunity to bargain the change. (*Grant Joint Union High School District* (1982) PERB Decision No. 196.) The duty to meet and confer arises between an employer and an exclusive representative, and therefore, an individual employee lacks standing to allege a breach of that duty. (*Alum Rock Union Elementary School District* (2005) PERB Decision No. 1748.)

[2] As to alleged violations of the CBA, PERB does not have jurisdiction to enforce agreements between the parties. (Gov. Code, § 3563.2(b).)

Under HEERA, the duty to meet and confer on matters within the scope of bargaining runs between the University and the exclusive representative, SETC. (See Gov. Code, §§ 3570 and 3562(m).) The Board has held that an individual employee does not have standing to pursue violations of the collective bargaining rights of employee organizations. (*Regents of the University of California* (2006) PERB Decision No. 1804-H; *State of California (Department of Corrections)* (1993) PERB Decision No. 972-S.) Thus, in this case, Williams and Pelonero do not have standing to pursue possible violations of SETC's rights.

Individual employees also lack standing to allege unilateral change violations or that an employer has failed or refused to bargain in good faith. (*City of Long Beach* (2008) PERB Decision No. 1977-M; *Bay Area Air Quality Management District* (2006) PERB Decision No. 1807-M; *Oxnard School District* (*Gorcey and Tripp*) (1988) PERB Decision No. 667.) To the extent the Charging Parties are alleging a violation of HEERA section 3571(c),[3] this allegation must be dismissed.

2. University's Refusal to Participate in Good Faith in the Impasse Procedure

Williams and Pelonero also allege that the University failed to participate in good faith in the impasse procedure in violation of HEERA section 3571(e). This section provides that it shall be unlawful for the employer to "Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3590)."

HEERA section 3571(e) is clear and unambiguous; the duty to participate in good faith in impasse arises between the employer and the exclusive representative. As noted above, an individual employee does not have standing to pursue violations of the collective bargaining rights of employee organizations. (*State of California (Department of Corrections)*, *supra*, PERB Decision No. 972-S.) Accordingly, Williams and Pelonero do not have standing to allege that the University failed to participate in good faith in the impasse procedure. Therefore, this allegation shall be dismissed.

For these reasons the charge, as presently written, does not state a prima facie case.[4] If there are any factual inaccuracies in this letter or additional facts that would correct the deficiencies explained above, Charging Parties may amend the charge. The amended charge should be

[3] HEERA Section 3571(c) provides that it shall be unlawful for the employer to "Refuse or fail to engage in meeting and conferring with the exclusive representative."

[4] In *Eastside Union School District* (1984) PERB Decision No. 466, the Board explained that a prima facie case is established where the Board agent is able to make "a determination that the facts as alleged in the charge state a legal cause of action and that the charging party is capable of providing admissible evidence in support of the allegations. Consequently, where the investigation results in receipt of conflicting allegations of fact or contrary theories of law, fair proceedings, if not due process, demand that a complaint be issued and the matter be sent to formal hearing." (*Ibid.*)

prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by an authorized agent of the Charging Parties. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the Respondent's representative and the original proof of service must be filed with PERB. If an amended charge or withdrawal is not filed on or before June 18, 2009,[5] PERB will dismiss your charge. If you have any questions, please call me at the above telephone number.

Sincerely,

Marc S. Hurwitz
Regional Attorney

MSH

[5] A document is "filed" on the date the document is **actually received** by PERB, including if transmitted via facsimile. (PERB Regulation 32135.)