**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| PATRICK PELONERO & RON WILLIAMS,<br><br>Charging Party,<br><br>v.<br><br>TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS),<br><br>Respondent. | Case No. LA-CE-1185-H<br><br>PERB Decision No. 2407-H<br><br>January 13, 2015 |

Appearances: Patrick Pelonero and Ron Williams, on their own behalf; Office of the Chancellor by J. Kevin Downes, Manager of Labor Relations, for Trustees of the California State University (San Marcos).

Before Martinez, Chair; Winslow and Banks, Members.

DECISION

MARTINEZ, Chair: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Charging Parties Patrick Pelonero (Pelonero) and Ron Williams (Williams) (collectively, Charging Parties) to a proposed decision (attached) by a PERB administrative law judge (ALJ). The complaint alleges that the Trustees of the California State University (San Marcos) (CSU-SM) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when it took adverse action against Charging Parties because of their exercise of protected rights by continuing to give overtime opportunities to favorite employees and not to qualified employees, i.e., Charging Parties. The complaint alleges that this conduct violates HEERA section 3571, subdivision (a). The ALJ issued a proposed decision dismissing the charge, concluding that Charging Parties failed to prove their case.

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

The Board has reviewed the formal hearing record in its entirety in its consideration of Charging Parties' exceptions and CSU-SM's response thereto. Based on that review, the Board finds that the record as a whole supports the proposed decision; that the proposed decision is well reasoned and consistent with applicable law; and that Charging Parties' exceptions are without merit. The Board affirms the proposed decision and hereby adopts it as the decision of the Board itself as supplemented by a brief discussion of Charging Parties' exceptions.[2]

## DISCUSSION

Charging Parties' exceptions assert that the ALJ ignored their evidence. They assert that the "evidence presented by the CSU did not include all the Hours of Overtime that should have been available to the Charging Parties." It is not CSU-SM's burden to prove Charging Parties' case. PERB Regulation 32178 states that the "charging party shall prove the complaint by the preponderance of the evidence in order to prevail." Charging Parties failed to satisfy that burden. Nothing prevented Charging Parties from putting on evidence of "all the Hours of Overtime that should have been available," but was not, as a consequence of engaging in protected activity, if such evidence exists.

Charging Parties assert that the "[o]vertime work by the favorite employees of the CSU San Marcos Facility Services Director Mr. Floyd Dudley is MUCH more than presented in

[2] On July 9, 2014, after Charging Parties' exceptions and CSU-SM's response to the exceptions had been filed, the Appeals Assistant notified the parties that the filings were complete and the matter had been placed on the Board's docket. On July 11, 2014, Charging Parties submitted a document to the Board entitled "Additional Statement by Patrick Pelonero & Ron Williams in support of Unfair Practice charge against California State University (San Marcos)" (Additional Statement). The filing of this document is not authorized by PERB's Regulations and therefore was not considered by the Board on appeal. (See PERB Regulations 32300 [Exceptions to Board Agent Decision] and 32310 [Response to Exception].) Notwithstanding the regulatory constraints on multiple filings by a single party, Charging Parties submitted the Additional Statement outside the 20-day time period for filing exceptions (PERB Reg. 32135, subd. (a)), without a showing of good cause. Under PERB Regulation 32136, a late filing may be excused in the discretion of the Board for good cause only.

[CSU-SM's] Exibit-1 [sic]." Charging Parties state that they explained this to the ALJ and that their witnesses "explained to the Judge how Management Retaliated against employees by using Overtime as a Retaliation tool." Our review of the hearing transcript confirms the ALJ's finding that neither Pelonero nor Williams identified at the formal hearing any specific overtime opportunity that had been made available to other employees and not to them, let alone demonstrated that, if such an action occurred, it was motivated by anti-union animus.[3]

Charging Parties assert that Linda Hawk (Hawk), CSU-SM Vice President, whom they subpoenaed to appear at the formal hearing, was not present on the first day of the formal hearing, as required by the subpoena. Charging Parties state that they wanted to present Hawk's testimony first, before the testimony of their other witnesses. Hawk appeared on the second day, and was questioned by Pelonero twice — on direct examination and again on redirect examination. The order in which Hawk appeared in the presentation of witnesses during Charging Parties' case-in-chief did not prejudice Charging Parties in any discernible way, nor do Charging Parties argue in their exceptions that it did.

Finally, Charging Parties take exception to the ALJ's statement that "**Dudley testified credibly that he simply posted or caused to be posted announcements when overtime opportunities were available, and waited for interested employees to respond to the**

[3] One of the exhibits introduced into evidence at the formal hearing by CSU-SM is a summary log of overtime opportunities for skilled laborers in the Facilities Services Department from November 2011 through November 2013, along with copies of e-mail notifications of these overtime opportunities. (Respondent's Exhibit 1.) It appears that during this time period, there were 50 overtime opportunities that generated an e-mail notification, for approximately 14 to 15 skilled laborers. Pelonero and Williams are Maintenance Mechanics. Other classifications within the bargaining unit include Facility Worker, Carpenter, Auto Mechanic, Painter, and Locksmith. At the formal hearing, Williams identified eight e-mail notifications of overtime opportunities where his and Pelonero's names do not appear on the addressee line. But neither do the names of all but the two Auto Mechanics. Notification of overtime opportunities for the Auto Shop was only ever given to the two Auto Mechanics. There are three other e-mail notifications, one dated August 16, 2013, and two dated August 30, 2013, in which Pelonero and Williams' names do not *both* appear on the addressee line. Williams's name does appear; Pelonero's name does not. But neither do the names of several others.

**notice(s).**" (Bold in original.) Charging Parties ask: "Board Members are [sic] question to you is: How is it that the Testimony of Mr. Dudley is credible and the Testimony of the Charging Parties and their Witnesses Mr. Lopez and Mr. Young are Ignored and not found to be Credible?" The testimony of Charging Parties and their witnesses was neither ignored nor discredited. It was often off–point and, where it concerned Charging Parties' allegation that CSU-SM made overtime opportunities available to others and not to them in retaliation for Charging Parties' grievance-filing and other protected activities, it was simply far too conclusory. Moreover, given the ALJ's ability to observe first-hand the demeanor of the witnesses, the Board defers to ALJ credibility determinations absent evidence to support overturning such conclusions. (*Trustees of the California State University (San Marcos)* (2010) PERB Decision No. 2093-H.) The more specific testimony of Floyd Dudley II (Dudley) was not impeached by Charging Parties on cross-examination. Therefore, the ALJ's characterization of Dudley's testimony as credible will not be disturbed. (*Ibid.*; see also *Anaheim City School District* (1984) PERB Decision No. 364a ["[T]he Board has determined that it will normally afford deference to administrative law judges' findings of fact involving credibility determinations unless they are unsupported by the record as a whole."].)

"Mr. Lopez" in the above quote from Charging Parties' exceptions is Rafael Lopez (Lopez), an unskilled laborer in Bargaining Unit 5,[4] whose testimony mainly focused on alleged retaliatory conduct by CSU-SM against Lopez and other problems in Bargaining Unit 5. His testimony did not aid in proving *Charging Parties'* case involving the retaliatory

[4] Pelonero and Williams belong to Bargaining Unit 6, a unit of skilled laborers exclusively represented by the State Employees' Trades Council. Dudley, the Facilities Services Director, oversees Bargaining Unit 6 as well as Bargaining Unit 5, a unit of unskilled laborers exclusively represented by California State University Employees Union (CSUEU). Dudley is responsible for, among other things, managing the Facilities Services Department's overtime budget and making sure that overtime opportunities are equally distributed according to the standards set forth in the parties' respective collective bargaining agreements.

manner in which overtime opportunities are handled in Bargaining Unit 6, as alleged. It did not establish that Dudley had a role in the alleged retaliation against Lopez. Nor did it establish that Dudley's conduct relative to Lopez or other Bargaining Unit 5 members was motivated by anti-union animus, or that Dudley had a history or practice of responding to instances of protected activity through retaliatory adverse actions. Retaliation of employees in Bargaining Unit 5 by Dudley might be probative on the question of unlawful motivation (nexus) in Charging Parties' retaliation case (*North Sacramento School District* (1982) PERB Decision No. 264), but no such evidence exists. "Mr. Young" is Brian Young (Young), the lead labor relations representative for CSUEU, the exclusive representative of Bargaining Unit 5. The only testimony of Young's concerning retaliation primarily relates to Lopez and the problems in Unit 5.

As for his impressions of Dudley, Young testified that he participated in a labor-management committee that included Dudley when Dudley was Associate Director of Facilities Services. Young testified:

> At the conclusion of that training, we informed Human Resources that we thought, of the three physical plant directors that had shown up, Mr. Floyd was the – Mr. Dudley was the only person that seemed to take the process seriously and to not – to not act like an ass. And that we thought that he was going to be a more effective partner in terms of dealing with union issues than Mr. Johnson would be. Shortly after that, Mr. Johnson was reassigned.

Reiterating their testimony, Charging Parties argue on appeal that the overtime notification system does not work because "we don't look at the iPad every day. We are Skilled Trades workers, we do not work at a desk therefore email notification of Available Overtime may not be seen by us for Days/Weeks." In addition, they assert that "Dudley gave Overtime to his Favorite employees without using any email notification to us the Charging Parties." The hearing record confirms the ALJ's conclusion that Charging Parties had the same access to overtime opportunities as other Unit 6 employees, through their personal iPad

devices. The conclusory nature of Charging Parties' entire case is apparent throughout the formal hearing. On cross-examination of Williams, the following exchange took place:

> Q Are you aware of any facts on which we could – someone could conclude that you're entitled to approximately 507.75 hours of overtime as relief in this case?
>
> A As I recall, we reached that number by a numerical equation of half the time that was done on all the jobs that we weren't notified about, but we could have been.
>
> Q Okay. And when you say half the time on all the jobs you were not notified on that you could have, could you tell us what those jobs were?
>
> A Without specific jobs in front of me, no.

Even if we were to credit the conclusory testimony made by Charging Parties about favoritism, favoritism can exist in a workplace in the absence of retaliation.[5] If favoritism is in fact at play, Charging Parties failed to prove that it is evidence of retaliation. What is clear is that Charging Parties do not like the e-mail system used to notify Unit 6 employees of overtime opportunities. Pelonero, on cross examination conceded:

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[5] On this point, we note that the total number of overtime hours made available in 2012 (94 hours) and 2013 (448), as quantified in Respondent's Exhibit 1, does not match the total number of overtime hours worked, as broken down by employee in Respondent's Exhibits 5 (2012) and 6 (2013). This discrepancy is unexplained. We are not, however, persuaded by Charging Parties' presentation of evidence that this discrepancy alone creates an inference of unlawful motive. As the ALJ concluded, "[t]he lack of a nexus in this case is due, in large part, to the fact that Dudley's method for notifying employees of overtime is the same now as it was before the Charging Parties filed grievances about it." (Proposed decision, p. 12.) Where the subject of a grievance is the very adverse action complained of in the unfair practice proceeding, as here, it cannot be said that the adverse action was *a product of* retaliation for having filed the grievance. As the ALJ found, Charging Parties "only filed the present unfair practice charge when the grievance process did not produce the desired change in overtime notification procedures." (Proposed decision, p. 8.) The final step in a grievance procedure is not the filing of an unfair practice charge. Unfair practice proceedings and grievance procedures serve different purposes. The latter serves to resolve contract violations. The former serves to resolve statutory violations. The decision herein should not be seen as resolving the parties' contract dispute in CSU-SM's favor. At the same time, a violation of the parties' collective bargaining agreement, even if proven, does not establish retaliation in an unfair practice proceeding. The central problem in Charging Parties' case is attributable to a blurring of these principles.

> Q Well, okay. You've just spent a lot of time telling us that you don't check your emails at various times for various reasons. And then you also testified that there have been times when you've come in after a weekend and you found out that other people in your classification got overtime that you didn't know about. And all I'm asking you is could those be situations where you haven't checked your email prior to leaving for the weekend?
>
> A I will say, yes, I don't check my email often, and that's why the email notification don't work for overtime.

In the exceptions, Charging Parties characterize Dudley as "not qualified" for the position of Facilities Services Director, a micro-manager and someone who demands "100% agreement with him all the time." Not only is their characterization contradicted by the CSUEU representative's testimony, or at least inconsistent with Young's impression that Dudley does not act "like an ass," even if true, it does nothing to support Charging Parties' allegation that Dudley retaliated against them for filing grievances and meeting with Hawk.

Accordingly, we conclude that Charging Parties' exceptions are without merit, affirm the ALJ's proposed decision and dismiss the charge.

## ORDER

The unfair practice charge and complaint in Case No. LA-CE-1185-H are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Winslow and Banks joined in this Decision.

**STATE OF CALIFORNIA**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| PATRICK PELONERO & RON WILLIAMS,<br><br>Charging Party,<br><br>v.<br><br>TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS),<br><br>Respondent. | UNFAIR PRACTICE<br>CASE NO. LA-CE-1185-H<br><br>PROPOSED DECISION<br>(5/13/2013) |

Appearances: Patrick Pelonero and Ron Williams, on their own behalf; Kevin Downes, Manager of Labor Relations for the Trustees of the California State University, Office of the Chancellor.

Before Alicia Clement, Administrative Law Judge.

## PROCEDURAL HISTORY

This case alleges that the California State University, San Marcos retaliated against two employees by denying and/or preventing them from working overtime in retaliation for their protected activities. The employer denies any unfair practice.

Patrick Pelonero (Pelonero) and Ron Williams (Williams) (referred to jointly as "Charging Parties"), filed Unfair Practice Charge Number LA-CE-1185-H on March 11, 2013. On September 11, 2013, the Office of the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that the Trustees of the California State University (San Marcos) (CSUSM) took adverse action against Pelonero and Williams because of their exercise of protected rights in September 2011, April 2012, July 2012, September 2012 by filing and pursuing grievances, and January 2013 by meeting with the Vice President of Finance and Administrative Services to discuss those grievances, in violation of Higher Education Employer-Employee Relations Act (HEERA)[1] section 3571(a).

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

On October 7, 2013, CSUSM filed an answer to the complaint. An informal settlement conference was held on November 15, 2013, but the matter was not resolved.

A formal hearing was held on February 5 and 6, 2014. The matter was submitted for decision following the March 31, 2014 submission of post-hearing briefs. On April 4, 2014, Charging Parties contacted ALJ Clement to request that PERB reject CSUSM's closing brief because it had been postmarked one day after the agreed-upon March 31, 2014 deadline for filing briefs, and Charging Parties had thereby been prejudiced. An investigation of the allegations was conducted and CSUSM was permitted to respond to the allegations. On April 7, 2014, Charging Parties' request was denied based on a finding that CSUSM's brief had been filed with PERB electronically on March 28, 2014 and Charging Parties had not been prejudiced by any delay in receipt of their copy of CSUSM's closing brief.

## FINDINGS OF FACT

Charging Parties are Maintenance Mechanics in the Facilities Department at CSUSM. Maintenance Mechanics are in Bargaining Unit 6 (Unit 6), which includes skilled laborers and is exclusively represented by the State Employees' Trades Council (SETC). Charging Parties report to Floyd Dudley II (Dudley), the Director of Facilities Services at CSUSM. Dudley is responsible for overseeing all skilled laborers in Unit 6 as well as the unskilled laborers in Bargaining Unit 5, who are exclusively represented by the California State University Employees Union (CSUEU). Ultimately, Dudley is responsible for managing the Department's overtime budget and ensuring that overtime opportunities are equally distributed according to the standards set forth in the collective bargaining agreements.

Maintenance Mechanics perform a variety of tasks including plumbing, electrical work, painting, as well as, occasionally, custodial work. Since before Dudley began working as the Director of Facilities Services, e-mail was used to give Facilities Services staff their work orders and staff submitted their time cards by e-mail. Sometime after he became the Director

of Facilities, Dudley issued a "Standard Operating Procedure," (SOP) regarding overtime procedures. Under this new SOP, any employees interested in working overtime were required to submit specified paperwork to the "appropriate Administrator" and the Payroll Department. Overtime opportunities would be e-mailed to the staff who had submitted the required paperwork informing the appropriate Administrator that they were interested in overtime work.

Facilities Department employees did not always have ready access to e-mail, however. For some time, the Unit 6 employees were forced to share access to a limited number of desktop computers that had been made available for them to use. This was especially problematic, as Unit 6 employees are dispatched to perform work at various locations across the campus and were often unable to check their e-mail for days at a time. Over the course of the last two years, CSUSM has successively issued to Unit 6 employees both iPods and iPads in order to ensure that each Unit 6 employee has the ability to send and receive e-mails throughout the work day. Neither party provided the specific dates when either iPods or iPads were issued to employees. The iPods proved problematic because they would often malfunction, necessitating the up-grade to iPads, which have been in use since approximately February 2013. Currently, both Charging Parties have CSUSM-issued iPads upon which they receive their work orders, submit time cards, and send and receive work-related e-mails.

On April 5, 2012, Charging Parties filed a grievance alleging a violation of the contractual overtime provisions. Essentially, Charging Parties alleged that two other employees had received more overtime than they had, which they believe violated the requirement that overtime opportunities be equalized among Unit 6 employees.[2] On July 11, 2012, Charging Parties filed a second grievance alleging continuing and additional violations of the contractual overtime provisions. Both the April 5 and July 11, 2012 grievances were

[2] Neither party provided a copy of the collective bargaining agreement between SETC and CSUSM. Characterizations of the collective bargaining agreement are taken from the parties' testimony.

pursued to Step IV of the grievance procedures. After Step IV, the grievances are elevated to the Chancellor's Office and are no longer handled by local campus supervisors.

At the lower levels, the grievance procedures include meetings between grievants and their supervisors. Charging Parties assert that at each stage of these procedures and during several meetings with various supervisors, they proposed that CSUSM adopt, as an alternative to e-mail notifications, a bulletin-board system where overtime opportunities could be manually posted on a daily basis. In that manner, employees would all have access to the information when they entered or exited the Facilities Services Department building. Overtime opportunities for Unit 5 employees are apparently posted in a similar fashion to that being proposed by Charging Parties. It is not clear if Unit 5 employees have also been issued iPods or iPads for their personal use.

Over the course of the 2012 and 2013 calendar years, Pelonero engaged in a written campaign to pursue approximately eleven grievances that had been elevated to level IV, but had seemingly stalled at the Chancellor's Office. Included among this list were the grievances Charging Parties had filed regarding overtime opportunities as well as grievances about motorcycle parking and contracting out.[3] Also during this period, Pelonero was in frequent contact with CSUSM Vice President, Linda Hawk, both through e-mail communications as well as several in-person meetings.

Pelonero's recollection of the grievance meetings was that he repeatedly requested that the department adopt an overtime notification system similar to that used by Unit 5 employees, utilizing a bulletin board and paper notifications. Hawk's recollection of these meetings was that she and Pelonero discussed his concerns about the cost of motorcycle parking, but she did not recall discussing his concerns about the distribution of overtime opportunities in general or

[3] Charging Parties also argued that CSUSM's policy of subcontracting certain work to outside entities has reduced the overall volume of overtime opportunities for Unit 6 employees.

his desire for a bulletin board posting of overtime opportunities. Dudley recalled discussions with Pelonero during this period in which Pelonero raised concerns about the distribution of overtime opportunities generally, but could not recall Pelonero proposing the use of a bulletin board in lieu of e-mail notifications of overtime opportunities.

Upon consideration of the idea at the hearing, Dudley stated that he preferred e-mail notifications of overtime opportunities to the proposed use of a bulletin board. Dudley's rationale was that some of the overtime opportunities require a great deal of detail to explain the nature of the jobs and job skills needed to complete the tasks. This kind of information could easily be transmitted by e-mail. E-mail was more likely to reach all eligible employees at the same time. An employee who responded by e-mail to a notification of overtime opportunities could complete any necessary paperwork electronically, streamlining the payroll process. Finally, the use of electronic forms of notification reduced the campus's use of paper, which was a greener way to conduct business.

According to Charging Parties, notification of overtime opportunities was often sent after the end of the work day and with insufficient advance notice for Charging Parties to respond and take advantage of the opportunities. At the hearing, CSUSM presented copies of e-mail messages allegedly sent to Pelonero, Williams, and other employees in the Facilities Services Department during the period from November 2011 through November 2013, notifying employees of overtime opportunities. In all, CSUSM produced 50 notices of overtime opportunities during the period from November 2011 through November 2013. Among this sampling, some of the e-mail notifications were sent after the end of the working day or with less than 24 hours' notice of the scheduled work time. Short notice appeared to occur more frequently on Fridays for Saturday overtime opportunities.

When presented with copies of the e-mail notifications from this time period, Williams identified 8 notifications where his name did not appear on the addressee line, two notifications

that appeared to be duplicates, and several notifications where he had been included among the addressees, but the type of work being offered was not appropriate for some reason or other, such that he would not have taken advantage of the offer if he had seen it. For example, Williams testified that he would not have responded to an e-mail notifying him of overtime work for "fence removal" on January 31, 2013, because the work was laborer's work rather than skilled labor. He would not have been included in overtime opportunities for the Auto Shop that were sent to Nicolas Magana and Manuel Flores. He would not have responded to the notification on November 19, 2013 for carpentry work.

Pelonero and Williams stated that they could not confirm that they had received any of these notifications, despite the appearance of their names on the addressee lines of many of the e-mails. Neither Pelonero nor Williams identified any specific overtime opportunity that had been made to other employees but denied to Charging Parties and that they would have taken advantage of if they had received timely notification, whether from CSUSM's sampling of e-mails or any other source. Nevertheless, they acknowledged that the e-mail notifications presented at the hearing were the same format as e-mail notifications of overtime opportunities that they had received in the past. Further, they both acknowledged that they had received e-mail notifications of overtime opportunities in the past, but could not remember whether any of the e-mail notices they had received were among those presented by CSUSM at the hearing.

Charging Parties admitted that on September 24, 2012, Dudley sent an e-mail message to Williams, Pelonero and two others, stating:

> Gentlemen,
> If you are receiving this e-mail I have you on my OT list as having little to no overtime hours for the year. Please read thru [*sic*] the following opportunities, and let me know which ones you would be interested in helping to complete. Please send me a response as soon as possible and include a tentative schedule when you would be available for OT thru [*sic*] the end of this year, please let me know if you do not intend on working

> overtime this year and I will take you off my list to notify for these opportunities. Thank you!
> Bryan Fisher will be the point of contact for the first three and Scott Gorsuch will be the point of contact for the last one.
>
> 1. Painting hand rails and railing campus wide
> 2. Painting gas pipe in the tunnel
> 3. Painting fire hydrants campus wide
> 4. Luis Polson lamp lens gasket installation campus wide

On September 25, Dudley sent a second e-mail message to the same four employees, stating:

> Gentlemen,
> Please respond by Friday the 28th with your tentative schedule of availability or if you do not intend on volunteering to work the overtime, I want to get these projects started and need to know if I will need to open up the opportunity to other qualified employees?
> Thank you!

On September 28, Williams responded that he would be interested in working overtime on projects numbered 3 and 4 of the September 24 e-mail, but not with regard to the first two projects. At hearing, Williams and Pelonero objected that the September offer of overtime work from Dudley was all work that would need to be performed outside, and there was a heat wave during September 2012. According to Charging Parties, there was plenty of work to be done inside during this time, but Dudley only offered the least desirable work. Dudley testified that because these projects could be scheduled at the employees' convenience, they could easily be performed during early morning hours, or even overnight, when outdoor temperatures were cool.

Dudley testified that the September 24 e-mail was sent specifically to make overtime available to those employees who had indicated their desire to work overtime, but had not actually worked any overtime at any point earlier in the year. Dudley stated that he has never denied overtime to any employee. However, if there were ever multiple employees responding

to the same overtime opportunity, he would give it to the employee who had worked the least overtime for the current year.

Charging Parties testified that they only filed the present unfair practice charge when the grievance process did not produce the desired change in overtime notification procedures.

## ISSUE

Whether CSUSM denied Charging Parties overtime opportunities in retaliation for their protected conduct?

## CONCLUSIONS OF LAW

The complaint that PERB issued on September 11, 2013 alleges that since engaging in protected activity, Dudley has taken adverse action against Charging Parties by "continu[ing] to give [o]vertime opportunities to his [f]avorite [e]mployees and not to 'qualified' employees."

CSUSM argues that it kept Charging Parties informed of overtime opportunities in the same manner in which all employees were informed of overtime opportunities—e-mail notices. Additionally, all employees in Unit 6 were given equal access to the tools necessary to retrieve their e-mail messages: first through a shared computer, and later through personal devices that were issued to all employees. Whether the Charging Parties checked their e-mail and availed themselves of the overtime opportunities to the same extent as other employees does not establish disparate treatment by CSUSM.

Charging Parties do not dispute that Dudley implemented an e-mail notification system for overtime opportunities. Nor do they dispute that they were given the same access to the shared computer, iPods, and iPads that other Unit 6 employees were afforded. Rather, Charging Parties argue that e-mail notifications for blue collar employees who do not perform their work at a desk and are often engaged in tasks which preclude the use of an iPad, either because those tasks are dirty or dangerous, is wholly inappropriate. Instead, Charging Parties

would have CSUSM adopt a policy similar to the one utilized for unskilled laborers in Unit 5, in which employees receive notice of overtime opportunities by way of a printed list, posted daily in a central location.

Retaliation/Discrimination

In order to demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571(a), the charging party must establish by a preponderance of the evidence 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. (See *Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*); and PERB Regulation 32178[4].)

Exercise of Rights and Employer Knowledge

In its October 7, 2013 Answer to the Complaint, CSUSM admits that Charging Parties filed grievances and pursued those grievances to Level IV. CSUSM also admits that Charging Parties met with Hawk on or about January 9, 2013, though it disputes Charging Parties' assertion of what was discussed at that meeting. In any case, CSUSM does not dispute that Charging Parties engaged in protected activity and that it was aware of that fact.

Adverse Action

The adverse action alleged in the complaint is Dudley's *continued* assignment of overtime opportunities to favored employees rather than qualified employees. What Charging Parties seem to have argued at the hearing is essentially that Dudley deliberately prevented Charging Parties from learning of overtime opportunities, with the logical result that other, less

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

senior employees, worked significantly more overtime during the preceding year than did the Charging Parties.

CSUSM acknowledges that other, less senior employees may have worked more overtime than Charging Parties, but attributes that fact to Charging Parties' failure to avail themselves of overtime opportunities. CSUSM also points out that Dudley created overtime opportunities for the express purpose of equalizing overtime work among the Unit 6 employees, and Charging Parties still failed to take advantage of the opportunity. Finally, CSUSM argues that it never refused overtime to any employee who responded to an e-mail notification.

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 other words, when establishing the elements of a discrimination claim,

> 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.) Additionally, the adverse action in a discrimination case cannot be speculative, but must be actual harm. (*Palo Verde Unified School District, supra*, PERB Decision No. 689.)

The facts presented at the hearing did not establish that Dudley assigned overtime to employees at all, let alone that he continued to do so in a discriminatory manner after the Charging Parties had filed grievances. Rather, Dudley testified credibly that he simply posted or caused to be posted announcements when overtime opportunities were available, and waited for interested employees to respond to the notice(s). Indeed, the only evidence of any limited or targeted notice to particular individuals of a particular overtime opportunity was when

Dudley specifically solicited Charging Parties for overtime work, an action that can hardly be considered adverse to Charging Parties' employment.

Nor did the facts presented at hearing establish that Dudley took some other deliberate act to prevent Charging Parties from learning about overtime opportunities at the same time and in the same manner as other Unit 6 employees. For example, Charging Parties admit that they each have an iPad assigned to them for their use, a circumstance shared by other Unit 6 employees; they each have an e-mail account and have ready access to that e-mail account; and Charging Parties acknowledge that the copies of emails presented by CSUSM at the hearing are the same type of emails that they have received in the past, though they were unable confirm that they had received those specific emails. In other words, Charging Parties failed to provide any evidence of any conduct by Dudley or any other CSUSM representative that had the effect or intention of depriving them of notice of overtime opportunities.

Nexus

Even assuming Charging Parties had established the factual allegations that CSUSM officials prevented them from learning of overtime opportunities or assigned overtime to other employees, Charging Parties have not established that Dudley or any other CSUSM agent was motivated by anti-union animus to deprive Charging Parties of overtime opportunities. The lack of a nexus in this case is due, in large part, to the fact that Dudley's method for notifying employees of overtime is the same now as it was before the Charging Parties filed grievances about it. Accordingly, whether the adverse action is the alleged deliberate prevention of Charging Parties learning of overtime opportunities in a timely manner or the continued assignment of overtime opportunities to favored employees, Charging Parties failed to establish that this action occurred, and that it was motivated by an unlawful desire to retaliate against Charging Parties for their protected conduct.

Because Charging Parties failed to establish two of the four indispensable elements of a prima facie case of discrimination—in this case, that they suffered an adverse act by the employer and that the employer's adverse act was motivated by anti-union animus—the charge must be dismissed.

## PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-1185-H, Patrick Pelonero & Ron Williams v. Trustees of the California State University (San Marcos), are hereby DISMISSED.

### Right to Appeal

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

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, 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, 32091 and 32130.)

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