STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

TEAMSTERS LOCAL 2010, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA (IRVINE), Respondent.	Case No. SF-CE-1085-H PERB Decision No. 2593-H October 26, 2018

Appearances: John E. Varga, Legal Director, and Abenicio J. Cisneros, Staff Attorney, for Teamsters Local 2010; Patrick D. Carroll, Labor Relations Advocate, for Regents of the University of California (Irvine).

Before Banks, Winslow, and Krantz, Members.

DECISION

WINSLOW, Member: This case is before the Public Employment Relations Board (PERB or Board) on Teamsters Local 2010's (Local 2010) exceptions to a proposed decision by an administrative law judge (ALJ) dismissing the complaint. The complaint alleged that the Regents of the University of California (Irvine) (University) interfered with employee rights guaranteed by the Higher Education Employer-Employee Relations Act (HEERA)[1] by directing Dianna Sahhar (Sahhar) and Sarah Labuda (Labuda) not to discuss union matters during work time, while permitting the discussion of other non-work related subjects during work time. The ALJ concluded that although Local 2010 established a prima facie case of interference, the University established a legitimate business justification that outweighed the

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

harm to employee rights, specifically, by demonstrating that the University's restrictions were consistent with the parties' agreement.

Having reviewed the proposed decision and the entire record in light of the parties' submissions, we conclude that Local 2010 did not agree to prohibit discussion of union matters during work time. We therefore reverse the proposed decision and find that the University violated HEERA.

FINDINGS OF FACT

The University is a higher-education employer within the meaning of HEERA section 3562, subdivision (g). Local 2010 is the exclusive representative of the University's clerical bargaining unit, and is a recognized employee organization within the meaning of section 3562, subdivision (p).

Article 1 of the parties' collective bargaining agreement (CBA), effective from December 13, 2011 through November 30, 2016, contained the following relevant provisions regarding Local 2010's access rights:

> A. GENERAL PROVISIONS
>
> 1. The parties acknowledge that it is in the union's interest that it be granted access to University facilities for the purposes of ascertaining whether the terms of this Agreement are being met; engaging in the investigation, preparation, and adjustment of grievances; conducting union meetings; explaining to bargaining unit members their rights and responsibilities under the Agreement; and informing CUE[2] Teamsters employees of union activities. In the interest of facilitating these purposes, and in accordance with local campus/hospital/Laboratory procedures, the parties agree to this Article.
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> 2. The University has the right to enforce reasonable access rules and regulations as promulgated at each campus/hospital/ Laboratory.

[2] Local 2010 was formerly known as the Coalition of University Employees (CUE).

B. ACCESS BY THE UNION/UNION REPRESENTATIVES - GENERAL PROVISIONS

1. Designated union representatives who are not University employees, or who are not employed at the facility visited, may visit the facility at reasonable times and upon notice to discuss with the University or bargaining unit member's [*sic*] matters pertaining to this Agreement. In the case of visits for the purpose of conducting unscheduled meetings with bargaining unit members, the union representative shall give notice upon arrival in accordance with local campus/hospital/ Laboratory procedures.

2. CUE Teamsters will furnish the University with a written list of all CUE Teamsters representatives. . . .

3. Such internal union business as membership recruitment, campaigning for union office, handbilling or other distribution of literature, and all other union activities shall take place during non-work time. Employee rest and meal periods are non-work time for the purposes of this Article.

C. EMPLOYEE REPRESENTATIVES

1. The University shall recognize CUE Teamsters designated employee representatives who are members of the bargaining unit. The function of the CUE Teamsters designated employee representative shall be to inform employees of their rights under this Agreement, to ascertain that the terms and conditions of this Agreement are being observed, and to investigate and assist in the processing of grievances.

The University's Irvine campus (UCI) has issued "Access Regulations for Employee Organizations." Those regulations define "representative" as "any person acting in the interest of or on behalf of an employee organization, including both University and non-University personnel." The regulations state that "[r]epresentatives of employee organizations are authorized to make contact with employees only during non-working hours; i.e., immediately before and after work, and during lunch and rest periods."

Sahhar is employed by the UCI Law Library as a research services coordinator. She is also a Local 2010 steward and an assistant chapter coordinator of Local 2010's UCI chapter.

Labuda began working at the UCI Law Library as a technical services assistant in August 2014. Sahhar and Labuda are both in the clerical bargaining unit. They are supervised by Jeff Latta (Latta).

Shortly after Labuda's hiring, on August 21, 2014, Latta assigned Sahhar to "shadow" Labuda at the library's front desk for an hour. This meant Sahhar was to watch Labuda perform her duties and assist her if she was unaware of how to perform a specific task. During this hour, Labuda learned many of the front desk duties and received explicit pointers from Sahhar. Because the library was not busy, Sahhar and Labuda also engaged in casual conversation about a number of non-work topics. These topics included their respective commutes to work, the location of Sahhar's residence, Sahhar's former employment at the main library, and Sahhar's involvement in Local 2010.

Sahhar explained that she was a Local 2010 steward. Labuda asked about Local 2010 and who belonged to it. Sahhar explained what Local 2010 did, how it became the bargaining unit representative, and which classifications Local 2010 represented. Sahhar explained that being a member of Local 2010 did not cost any more than being an agency fee payer, and she encouraged Labuda to complete a membership application. Sahhar also mentioned that she was on Local 2010's political committee and told Labuda about the union's efforts to support a legislative bill concerning workplace harassment. Sahhar also asked if Labuda had received a particular Local 2010 e-mail. Labuda stated that she had not; Sahhar promised to forward the e-mail to her. Sahhar testified that she was not sharing information with Labuda as a union steward or Local 2010 representative, but rather as a fellow colleague introducing herself to a new employee.

During the hour, Sahhar and Labuda discussed non-work matters for about 15 minutes, 10 minutes of which concerned union-related matters.

Shortly afterwards, Latta sent the following e-mail to Sahhar and Labuda with the subject "union matters":

> It has come to my attention that there was some union[-]related conversation taking place between you both while you were up here at the Service Counter this past hour; according to UCI policy, union matters cannot be discussed during work time. Please restrict these conversations to outside of your working hours.

Latta testified that he had been told about Sahhar and Labuda's conversation from someone who had overheard it.

Labuda responded to Latta's e-mail by apologizing and stating that she was unaware of the policy. Latta told her not to worry about it because she was a new employee who was still learning new things.

Sahhar did not respond to Latta's e-mail. Sahhar testified that after she received Latta's e-mail, she refrained from speaking with any unit employees about union business while on work time. Sahhar believed Latta's e-mail was intimidating because it cited "UCI policy."

It was not contested that UCI Library staff were allowed to engage in non-work casual conversation while at work.[3] Some of the non-work conversation concerned watching football games, movies, and television shows; purchasing new shoes; and knitting.[4]

DISCUSSION

I. Adequacy of the Exceptions

The University argues that Local 2010's statement of exceptions does not comply with PERB Regulation 32300, subdivision (a).[5] As relevant here, that regulation states:

[3] The University's answer to the amended complaint admitted the allegation that it "tolerates incidental non-work related conversations by employees on work time." Latta also admitted that he has never advised employees to refrain from non-work related conversations, except those involving union matters.

[4] Sahhar testified that later the same day, she observed Latta at the library's front desk with another employee and overheard him discussing a football player's tattoos.

> A party may file with the Board itself . . . a statement of exceptions to a Board agent's proposed decision . . . and supporting brief . . . . The statement of exceptions or brief shall:
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> (1) State the specific issues of procedure, fact, law or rationale to which each exception is taken;
>
> (2) Identify the page or part of the decision to which each exception is taken;
>
> (3) Designate by page citation or exhibit number the portions of the record, if any, relied upon for each exception;
>
> (4) State the grounds for each exception.

(PERB Reg. 32300, subd. (a).)

The University objects that Local 2010's statement of exceptions identifies the information required by (1) and (2), but refers to its supporting brief for the information required by (3) and (4). We find nothing improper in this practice. We have recognized that PERB Regulation 32300 permits a party to file a statement of exceptions, a brief, or both. (*El Dorado County Superior Court* (2017) PERB Decision No. 2523-C, p. 6; *Regents of the University of California (San Francisco)* (2014) PERB Decision No. 2370-H, p. 10.) Taken together, Local 2010's exceptions and supporting brief provide all of the required information and, most importantly, adequately apprise the Board and the University of the basis for its exceptions.

The University also contends that one of Local 2010's exceptions concerns a finding that does not appear in the proposed decision. Specifically, the University points out that Local 2010's third exception concerns "the ALJ's conclusion that the Respondent's directive [*sic*] unlawfully overbroad." There is an obvious typographical error in this sentence, although it is not clear whether the error is the omission of "was" or "was not." Based on our review of

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

Local 2010's supporting brief and of the proposed decision, we have no trouble discerning that Local 2010 intended to except to the ALJ's implicit conclusion that the University's directive *was not* unlawfully overbroad. The remainder of the University's response to the exceptions makes clear that the University was able to discern this, too.

We therefore reject the University's challenge to the adequacy of the exceptions and turn to the merits.

II. The Merits

The complaint in this case alleges a violation of HEERA section 3571, subdivision (a), which makes it unlawful for an employer to "[i]mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

The Board's framework for analyzing allegations of unlawful interference is well settled. A prima facie case of interference will be found when the employer has engaged in conduct that tends to or does result in at least slight harm to rights guaranteed by the statute. (*Regents of the University of California* (1997) PERB Decision No. 1188-H, p. 21.) "The employer then has the burden of demonstrating operational necessity or circumstances beyond the employer's control as justification for the conduct." (*Ibid.*) "The scrutiny with which the employer's conduct will be examined depends on the severity of the harm." (*County of San Bernardino (Office of the Public Defender)* (2015) PERB Decision No. 2423-M, p. 36.) If the harm to protected rights is slight, a violation will be found unless the employer's business justification outweighs the harm to protected rights. (*Stanislaus Consolidated Fire Protection District* (2012) PERB Decision No. 2231-M, pp. 22-23.) If the employer's conduct is, instead, inherently destructive of protected rights, it "'will be excused only on proof that it was

occasioned by circumstances beyond the employer's control and that no alternative course of action was available.'" (*Id.* at p. 23, quoting *Carlsbad Unified School District* (1979) PERB Decision No. 89.)

A. Prima Facie Case

The ALJ concluded that Local 2010 met its initial burden of establishing at least slight harm to employee rights. We agree.[6] HEERA gives employees "the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations and for the purpose of meeting and conferring." (HEERA, § 3565.) "Necessarily included in the right to 'form, join, and participate' in the activities of an employee organization is the right of employees to 'discuss[] wages, hours and working conditions at the workplace.'" (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 11.) Restrictions on the exercise of these rights during non-work time—rest breaks, meal periods, and time before and after work—are presumed invalid. (*Id.* at p. 19; *Petaluma City Elementary School District/Joint Union High School District* (2016) PERB Decision No. 2485, p. 45 (*Petaluma*).)

Latta's directive, however, imposed a restriction during work time. Because work time is for work, an employer may restrict non-business activities during work time, but it may not single out union activities for special restriction, or enforce general restrictions more strictly with respect to union activities. (*Petaluma*, *supra*, PERB Decision No. 2485, p. 50 ["Whatever the occasion or cause, if the limited intrusion into worktime and work areas is permitted, it cannot be denied for other, equally or less intrusive solicitation or concerted employee activities"]; see also *Jensen Enterprises, Inc.* (2003) 339 NLRB 877, 878 ["an employer

[6] Because we reject, below, the University's defense of contractual waiver, and the University has not asserted any other justification for its conduct, we need not decide in this case whether the harm is comparatively slight or inherently destructive.

violates the [National Labor Relations] Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work"].)

Here, the evidence shows that the University's restriction on work-time union-related discussion was discriminatory; the University permits incidental non-work related conversations by employees on work time. Therefore, we agree with the ALJ that the University's directive caused harm to employee rights by prohibiting work-time discussion of union-related matters, but not other non-work matters.[7]

B. The University's Defense

Turning to the University's affirmative defense, the ALJ concluded that the University had a legitimate business justification for its actions, because the CBA restricted Local 2010's rights to engage in membership recruitment. This is where we part ways with the ALJ.

Although largely analyzed in the proposed decision as a business justification defense, the University's defense is one of waiver. Waiver of a statutory right is an affirmative defense (*City of Palo Alto* (2017) PERB Decision No. 2388a-M, p. 37), and may be established only by: (1) clear and unmistakable agreement; or (2) bargaining history showing that the issue was fully discussed and consciously explored, and that the waiving party intentionally yielded its interest in the matter (*City & County of San Francisco* (2017) PERB Decision No. 2536-M, p. 34).

The parties' CBA contains no clear and unmistakable waiver of rights applicable to Latta's e-mail directive. The CBA provides, in section 1.B.3, that "[s]uch internal union

[7] Latta's directive could also be deemed overbroad in that it did not specifically define the ambiguous terms "work time" and "working hours." (See *State of California (Employment Development Department)* (2001) PERB Decision No. 1365a-S, p. 10.) However, the e-mail otherwise concerned Sahhar and Labuda's conversation at the front desk, which was indisputably during work time, and Local 2010's exceptions focus only on the overbreadth of the terms "union[-]related conversation" and "union matters," not of the terms "work time" and "working hours." The potential overbreadth of the latter terms is therefore not before us. (PERB Regulation 32300, subd. (c).)

business as membership recruitment, campaigning for union office, handbilling or other distribution of literature, and all other union activities shall take place during non-work time." Finding that Sahhar was "obviously recruiting Labuda to become a member of Local 2010," the ALJ concluded that the CBA's prohibition on membership recruitment applied. If this was Latta's concern, his directive to refrain from discussing "union matters" was quite overbroad. (Cf. *Los Angeles Community College District* (2014) PERB Decision No. 2404, p. 6.) But Latta's e-mail did not contend that Sahhar was engaged in membership recruitment for Local 2010, nor was his directive confined to membership recruitment. Section 1.B.3 did not clearly and unmistakably waive the right of employees to discuss "union matters" during work time.[8]

In its response to Local 2010's exceptions, the University suggests that the CBA's prohibition of "all other union activities" constitutes a waiver. It does not. An expansive interpretation of such an imprecise phrase is inherently at odds with the requirement of a clear and unmistakable waiver. To take one example, the Board has consistently declined to read a general no-strike clause as a clear and unmistakable waiver of the right to engage in a sympathy strike. (*City & County of San Francisco, supra*, PERB Decision No. 2536-M, pp. 32-33; *Regents of the University of California* (2004) PERB Decision No. 1638-H, p. 5.)

Additionally, the context of the phrase "all other union activities" suggests a much narrower interpretation than the one advanced by the University. The phrase appears after "[s]uch internal union business as membership recruitment, campaigning for union office, handbilling or other distribution of literature." According to the maxim that "a word takes its meaning from the company it keeps" (noscitur a sociis), it is appropriate to "adopt a restrictive

[8] Local 2010 argues that the restrictions in section 1.B.3 only apply to union representatives who are not University employees or who are not employed at the facility they are visiting. In other words, because Sahhar was an employee of the UCI Law Library, the CBA did not prohibit her from engaging in campaigning for union office, membership recruitment, or literature distribution during her work time. Given the broad scope of Latta's e-mail directive, we need not resolve this issue.

meaning of a listed item if acceptance of a broader meaning would make other items in the list unnecessary or redundant, or would otherwise make the item markedly dissimilar to the other items in the list." (*Blue Shield of California Life & Health Ins. Co. v. Superior Court* (2011) 192 Cal.App.4th 727, 740.) Interpreting "all other union activities" broadly to include all employee discussion of "union matters" would make the other activities specified in CBA section 1.B.3 redundant. Therefore, we infer that the ban on "all other union activities" applies to those activities similar to membership recruitment, campaigning for office, and handbilling, but not broader activities such as employee discussion of union matters.[9]

The University also submits that any ambiguity regarding CBA section 1.B.3 is resolved by reference to UCI's access policy and CBA section 1.A.2. There is no evidence that Local 2010 agreed to the content of the access policy, meaning that it sheds little light on any purported contractual waiver by Local 2010, and in any event the access policy covers conduct by employee organization representatives, not conduct by employees. As for CBA section 1.A.2, this provision allows the University "to enforce reasonable access rules and regulations as promulgated at each campus/hospital/Laboratory." Such a provision does little more than acknowledge the University's ability under HEERA section 3568 to place "reasonable" limits on the access rights of employee organizations.[10] (*Regents of the University of California* (2012) PERB Decision No. 2300-H, pp. 12, 27-28 [by agreeing to "abide by the reasonable access rules and regulations promulgated at each campus/

[9] It also bears noting that if we were to conclude that section 1.B.3 prohibits all employee discussion of union matters during work time, we may well have to find that that provision unlawfully waives individual employee rights. (See *NLRB v. Magnavox Co. of Tennessee* (1974) 415 U.S. 322, 325.)

[10] Section 3568 provides: "Subject to reasonable regulations, employee organizations shall have the right of access at reasonable times to areas in which employees work, the right to use institutional bulletin boards, mailboxes and other means of communication, and the right to use institutional facilities at reasonable times for the purpose of meetings concerned with the exercise of the rights guaranteed by this act."

Laboratory," as well as to refrain from "*any* Union activity or Union business on University premises . . . unless . . . conducted in accordance and conformance with campus procedures," union did not waive right to challenge reasonableness of the rules and regulations (emphasis in original)]; see also *Regents of the University of California* (2004) PERB Decision No. 1700-H, adopting proposed decision at p. 55 [to determine whether a new access rule was authorized by MOU provision allowing reasonable rules and regulations, PERB would determine whether the rule was reasonable under HEERA].) Thus, section 1.A.2 does not suggest that Local 2010 has agreed to a discriminatory policy concerning employee discussions of union matters, because a discriminatory policy is per se unreasonable. (See *Regents of the University of California, Lawrence Livermore National Laboratory* (1982) PERB Decision No. 212-H, p. 16.)

Because we reject the University's waiver argument, and the University has presented no other justification for Latta's e-mail directive, we conclude that the University's conduct violated section 3571, subdivision (a).

ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this case, it is found that the Regents of the University of California (Irvine) (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571, subdivision (a). Therefore, pursuant to Government Code section 3563.3, it is hereby ORDERED that the University, its administrators, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Interfering with employee rights by prohibiting union-related discussions during work time while permitting other non-work related discussions.

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

1. Rescind Jeff Latta's August 21, 2015 e-mail directive prohibiting the discussion of union matters.

2. Within ten (10) workdays following the date this decision is no longer subject to appeal, post at all locations where notices to clerical bargaining unit employees are customarily posted, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used to communicate with clerical bargaining unit employees. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on Teamsters Local 2010.

Members Banks and Krantz joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case No. SF-CE-1085-H, *Teamsters Local 2010 v. Regents of the University of California (Irvine),* in which all parties had the right to participate, it has been found that the Regents of the University of California (Irvine) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq.

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

A. CEASE AND DESIST FROM:

Interfering with employee rights by prohibiting union-related discussions during work time while permitting other non-work related discussions.

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

Rescind Jeff Latta's August 21, 2015 e-mail directive prohibiting the discussion of union matters.

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA (IRVINE)

By: _____
Authorized Agent

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