STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	)	Case No. SF-CE-67-H PERB Decision No. 310-H May 19, 1983

Appearances: Ernest Haberkern, Steward, for the California State Employees Association; Melvin W. Beal, Attorney for the Regents of the University of California.

Before Tovar, Jaeger and Morgenstern, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board on exceptions filed by the California State Employees Association to the administrative law judge's attached proposed decision dismissing its charge that the University violated subsection 3571(a) of the Higher Education Employer-Employee Relations Act.[1]

---

[1]HEERA is codified at Government Code section 3560 et seq. Subsection 3571(a) states:

> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

We have reviewed the administrative law judge's proposed decision in light of the Charging Party's exceptions and the entire record and, finding it free from prejudicial error, adopt it as the decision of the Board itself.

ORDER

Upon review of the entire record in this case, the Public Employment Relations Board ORDERS that the charge filed in Case No. SF-CE-67-H is DISMISSED.

Members Tovar and Morgenstern joined in this decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE EMPLOYEES ASSOCIATION, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Unfair Practice Case No. SF-CE-67-H PROPOSED DECISION (4/27/82)

Appearances: Ernest Haberkern, steward, for the charging party California State Employees Association; Melvin W. Beal, attorney, for the respondent Regents of the University of California.

Before: Barry Winograd, Administrative Law Judge.

PROCEDURAL HISTORY

On July 17, 1981 the California State Employees Association (hereafter CSEA or charging party) filed an unfair practice charge against the Regents of the University of California (hereafter University or respondent), alleging that the University violated section 3571(a) of the Higher Education Employer-Employee Relations Act (hereafter HEERA or Act).[1]

---

[1]The HEERA is codified at Government Code section 3560 et seq. Hereafter, all statutory references are to the Government Code unless stated otherwise. Charges arising under the Act are filed with the Public Employment Relations Board

The charge sets forth a course of conduct involving employee Martha LeFils, including denial of her right to union representation at meetings with her supervisor, a suspension following her requests for union assistance, and, eventually, a demotion. The charge claims that,

> Ms. LeFils was demoted in retaliation for her seeking union representation and for refusing to answer questions without her union representative present. The charge of unsatisfactory performance was a pretext.

The University filed its answer on August 12, 1981, admitting certain particulars but generally denying the allegations of unlawful conduct. The University also raised several affirmative defenses. Admissions, denials, and defenses will be considered below as relevant to this decision.

An informal conference was scheduled for August 17, 1981 but the charge was not resolved. On September 28, 1981 a complaint and notice of hearing was issued.

The formal hearing was conducted on December 2, 3 and 16, 1981 at Berkeley, California. At the start of the hearing

---

(hereafter PERB or Board). Section 3571(a) states:

> It shall be unlawful for the higher education employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

the parties agreed upon issues in dispute and several foundation facts in the chronology of case-related events. The stipulated issues referred to allegations of the denial of representation at meetings, the subsequent suspension, and the eventual demotion. Factual stipulations are recorded and incorporated, without separate identification, in the findings of facts set forth below. Post-hearing briefs were filed by each side and the matter was submitted on March 2, 1982.[2]

FINDINGS OF FACT

A. Background.

At the time of the hearing in this case, Martha LeFils had worked nearly 20 years for the University, largely doing data entry work in the employer's computer operations. The last six years had been spent as a lead key entry operator. Through July 1980 LeFils received satisfactory evaluations. LeFils' duties included assisting the shift supervisor in distributing work assignments, training and instructing new operators, key editing and verification of data on machine terminals, and processing new data in preparation for key

---

[2]After the close of the hearing, at the direction of the administrative law judge, respondent filed a documentary exhibit in response to a request for information made by the charging party during the trial. The exhibit was received to augment the record (as "Charging Party Exh. No. 7"). The charging party made no further motion or objection regarding this exhibit, and referred to the information in its final brief.

editing and entry by others. The processing function involved "batching," or grouping of materials, as well as "peeling," or separating materials from a larger store of information.

In 1979 the University undertook a comprehensive reorganization of its computer operations, including a merger of administrative and academic uses. The administrative operation, on which LeFils had worked, was moved from an off-campus location to a building that housed the academic functions on the Berkeley campus. The changeover also involved new equipment, new processing formats, a revised supervisory structure, and a substantial transition period as problems were ironed out, especially with the new machinery. According to LeFils, her duties were significantly expanded, she was retrained on the new machinery, and, she "had to learn everything from scratch."

By summer 1980 most of the difficulties associated with the merger were resolved. One of the developments included the employer's appointment of Ann Walls as the new data entry supervisor. She assumed control in late July 1980, but had had no role in formulating the content of LeFils' then-recent performance evaluation. Walls supervised day and night shift supervisors who, in turn, supervised about 20 key entry operators, including lead operators on each shift. Over the summer Walls and her supervisory staff prepared new job

descriptions and standards for these employees, as part of an overall review of the revamped computer unit.

A new job description was completed for LeFils in October 1980. Her previous duties remained intact, although described and expanded upon in much greater detail. The new job description also specified her role as a supervisory assistant for training, for coaching operators on problems, and for monitoring discipline problems. According to the job description, the lead key entry operator was to spend 20 percent time operating the key-editing equipment; that is, machine time for keypunching and verification. The lead operator was also to spend 20 percent time, respectively, on batching and assignments, on answering operator questions, and on servicing key entry users. A final 15 percent was for specialized key editing tasks.

Walls was uncertain as to the original source of the figures in the job description, but testified that the 20 percent machine time figure was only intended to be a rough, minimal estimate for days when other functions diverted the lead operator. Walls told LeFils when the job description was prepared that the lead operator, as a general rule, should spend up to five hours a day on machine time. (This was later revised down to four hours, or about 50 percent time.) Regular operators worked six hours a day key editing on the machines. LeFils concurred that she was given these verbal instructions

and that in the past she had also spent 70 percent to 80 percent of her time doing key-editing work. Documentary evidence for the period after the merger showed that LeFils, on occasion, did work the required four hours or more, and, regularly exceeded the 20 percent figure in the job description.

B. December 1980.

By December 1980 Walls was beginning to have doubts about LeFils' ability to carry out her newly described job. At a meeting with LeFils on December 8 Walls presented several criticisms, which were then memorialized in a memo on December 10. The December 8 meeting was intended to be a preliminary discussion for a new evaluation which was being deferred for another month at LeFils' request. The criticisms included reference to abuse of overtime, inadequate machine time, failure to follow directions, problems with training and giving instructions, a keystroke average below other operators, and on-the-job conduct that was a poor example for unit employees. LeFils claimed that Walls threatened LeFils with possible demotion at the December 8 meeting. Walls denied the alleged threat and her notes of the meeting make no reference to the subject.[3]

On December 16, Ernest Haberkern, a CSEA on-campus steward,

---

[3]Credibility findings on disputed facts will be summarized at the end of the "Findings of Fact."

initiated a protest about the December 10 document in a meeting with Welvin Walker, manager of computer operations and Walls' supervisor, and Ella Wheaton, an analyst in the Berkeley personnel office with responsibility for advising a number of departments on employment matters. The meeting was brief, with Haberkern explaining his view that the memo was an improper warning letter and threatening to file a grievance. The dispute was left unresolved awaiting Wheaton's return from a holiday vacation and further contact in January 1981.

Meanwhile, another issue arose during the holiday period. For three days in late December Walls was on vacation and Katie Flanders, the night shift supervisor, assumed responsibility for supervising day employees, including LeFils. Because the unit was short of staff, LeFils was directed to spend most of her time key-editing and Flanders took over LeFils' lead operator duties. Twice, according to Flanders, she asked LeFils to do less talking and more machine editing. LeFils denied these complaints were made.

C. January 1981.

When Walls returned in the first week of January 1981, Flanders reported that LeFils' production time was not what it should have been for the period that LeFils had been reassigned to regular operator status. Walls did not immediately raise the issue with LeFils, but monitored her machine time for a few days during that week. Walls testified that the unit

production statistics continued to present questions about LeFils' machine time. Copies of these production statistics were routinely made available to operators in order to maintain awareness of their daily figures.

On January 8 Walls and day shift supervisor Darlene Evans requested LeFils' presence at a meeting away from her normal work station to ask LeFils to account for 32 out of 56 hours over a seven-day period in December and January, including the period under Flanders' supervision. At the meeting, Walls showed LeFils written figures detailing LeFils' work activities, including regular key-editing duties, as well as lead operator functions, such as peeling new material. LeFils was equivocal when she denied being shown statistical compilations on January 8.

It is undisputed, however, that during the meeting LeFils told Walls that she assumed she was doing her lead operator duties on the days in question, except for about two days when Flanders was supervising. LeFils also indicated that she had personal notes regarding her work assignments and, as LeFils conceded in her testimony, she promised that reference to these notes would enable her to account for the time in question. Walls stated that the meeting would be rescheduled for the next day to get LeFils' response, but denies that she instructed LeFils to produce the actual notes.

There was no threat of discipline at the January 8 meeting, nor any supervisory suggestion that LeFils was not at work at

the times in doubt. Although LeFils initially testified that she requested union representation during this meeting, on cross-examination she corrected her testimony and stated that no such request was made. Walls also denied that a request was made on this date.[4]

Separate from the meeting just described, during the day on January 8, LeFils' formal grievance was filed seeking withdrawal of the December 10 memo. On January 20, in its reply to the grievance, the University indicated the memo would be withdrawn. Wheaton and Walls testified that this decision was made because the memo carried the unintended implication that it was a formal warning letter and was therefore procedurally improper.

LeFils and Haberkern also testified that, contemporaneous with the first Walls-LeFils meeting and the grievance filing, they had a meeting of their own to discuss Walls' request that LeFils account for her time. Although Haberkern and LeFils

---

[4]Haberkern testified that this first encounter in January occurred on January 7, according to his recollection of a subsequent meeting he had with LeFils to go over the question of her personal work notes and how she should respond to Walls' inquiry. This assertion was inconsistent with a February 4 grievance claim of a first meeting on January 8. This claim was signed by LeFils and was presumably prepared by Haberkern, who was described on the document as her representative. The testimony of Walls and LeFils also contradicted Haberkern about the date of their first meeting in January and, in the charging party's briefs, there is no reference to a meeting on January 7.

contradicted each other regarding the precise date (January 7 or 8) of this meeting, they concur that Haberkern, in LeFils' presence, called Walls to remind her that he was LeFils' union representative. Walls admitted receiving a call from Haberkern, but she placed the call on January 9. Walls claimed that Haberkern merely announced his representative status and made no reference to any subject, whether the December 10 memo grievance, the January 8 accounting inquiry, or a request to be present on January 9 when the discussion with LeFils was to resume. To further complicate findings on the subject of a LeFils-Haberkern meeting, other evidence, including a LeFils' request for released time, shows that she and Haberkern met on January 9, prior to the Walls-LeFils meeting that had been reschéduled after the inconclusive January 8 meeting.

At LeFils' second meeting with Walls and Evans on January 9, the supervisors again asked LeFils to account for her time on the days in question. LeFils gave no explanation and stated that she had given her notes to Haberkern, who had advised her that the notes were personal property and that production could not be compelled by Walls. Walls denied that she requested the notes themselves, and stated she sought only the information that LeFils said was in the notes. LeFils testified that she asked to phone her union representative during this conference, which Walls would not permit, but that Walls agreed to reschedule the sessions. Walls denied a

request for representation was made either in the morning before the meeting, when LeFils was given advance notice of the rescheduled time, or, during the meeting, when the questions were posed.[5]

Regardless of whether a specific request for assistance was made, both Walls and LeFils agree that once LeFils indicated her inability to respond, Walls ceased all questioning and stated the meeting would be rescheduled so that LeFils could provide an accounting. LeFils also concurred with Walls' testimony that there was no discussion of the December grievance issue at this meeting.[6]

---

[5]Inconsistent with Walls' testimony was the University's reply to an eventual grievance over these January meetings, indicating that a LeFils request for representation was made on January 9. The author of the response, Joseph Yeaton, the director of computer facilities and operations and the supervisor of Walker and Walls, was not called as a witness. The source of his information, although presumably Walls, was never identified, and the charging party did not otherwise lay a foundation to impeach Walls' testimony on the basis of Yeaton's statement. For reasons noted hereafter, even if Walls' testimony was not credited on this point, the disposition of the case would not be affected.

[6]During the hearing there was a testimonial dispute between LeFils and Haberkern, on the one hand, and Walls and Wheaton, on the other, about whether an earlier morning meeting took place on January 9 in connection with the grievance filed on January 8. Haberkern stated that such a meeting took place and that he was rebuffed in an attempt to raise a protest over the January 8 meeting. LeFils also testified, but with noticeable doubt, that this morning meeting occurred. The claim about a January 9 morning meeting was not discussed further when the case was briefed and no finding is therefore made that this alleged encounter actually took place.

On January 13 Walls wrote a memo to LeFils directing that she account for the time in question at a meeting on January 20. In the memo Walls also disclaimed any desire to actually review LeFils' personal notes.

Haberkern, on January 16, wrote a letter to Wheaton that, in part, appeared responsive to the January 13 memo. In brief, Haberkern stated that he could not attend a meeting on January 20 and he protested the attempts by Walls to meet with LeFils without the presence of her union representative.[7] Haberkern did not send a copy of this letter to Walls, Evans or Walker, whose names were all on the January 13 memo.

Wheaton, who had not been sent a copy of the Walls January 13 memo, did not respond to the Haberkern letter because, as she explained, she was not involved in scheduling any meetings with LeFils and thus didn't believe she had a role to play. Wheaton did not send a copy of Haberkern's letter to either Walls or Walker, but simply placed it in the folder for the then-pending grievance over the December 10 memo.

---

[7]Haberkern's letter, however, also referred to a Walls-LeFils meeting on January 7, and to the alleged morning meeting on January 9 between Haberkern and employer agents. These disputed references, no longer advanced by CSEA in its briefs, cast doubt on the accuracy of another claim in the letter that Walls had been attempting to meet with LeFils about the December memo grievance. Even LeFils did not contend in her testimony that Walls had intermingled the events during their January meetings.

Just before the January 20 meeting, LeFils, knowing that Haberkern would be unable to attend, called in sick. The meeting was cancelled and re-set for January 22. Walls testified, contrary to LeFils, that advance notice was given during the afternoon of January 21 of the meeting time and place the next day. According to Walls, LeFils did not request the presence of a union representative.

When the January 22 meeting got under way, LeFils, without a union representative, indicated she could not answer Walls' inquiry because Haberkern still had her personal notes. LeFils testified that Walls asked her to leave the office in order to contact Haberkern for the information. Walls maintained that it was LeFils who asked to leave to reach Haberkern. Regardless, when LeFils could not find Haberkern at his nearby work site, and could not reach him by phone, she spoke with another CSEA steward who advised LeFils to decline to answer questions without the presence of her representative. Walls stated that LeFils then returned to the meeting and requested representation.

Walls claimed that the January 22 meeting was the first time a specific request was made in the three meetings to that date on the accounting issue. In any event, according to both principal witnesses, once LeFils made it clear that Haberkern's presence was necessary to pursue the inquiry, Walls again stopped the meeting and stated that it would be rescheduled.

D. February 1981.

Two events occurred on February 3 related to the case. First, Walls wrote a memo to LeFils informing her that another meeting would take place on February 10 regarding the accounting matter. Walls said that continued refusal by LeFils to account for her time would constitute insubordination. Walls warned that if LeFils failed to account for the time on February 10 "further disciplinary action will be taken; i.e., suspension."

Second, on February 3 LeFils also received a performance evaluation, as discussed and deferred in December, covering the period from the preceding September through January. The overall rating given LeFils was "improvement needed." The criticisms made in the evaluation were similar in nature to issues raised in the December 10 memo that had been withdrawn on January 20. Specific problem areas identified included: ineffective training and poor guidance to operators; inefficient batching and organization of materials; lack of responsiveness leading to disruption of workflow; insufficient familiarity with certain formats; inadequate machine time; and, inability to limit distractions caused by work interruptions. Comments attached to the evaluation characterized LeFils' deficiencies as a problem of accommodation to more complex duties and to new standards following the computer operation merger. A cover letter for the evaluation informed LeFils that

it was designed to help improve her performance and that a follow-up evaluation would be given in mid-April in accord with University policy regarding less-than-satisfactory evaluations.[8]

The next day, February 4, a grievance was filed challenging the warning letter, the performance evaluation, and the lack of representation at the January meetings. This grievance was eventually denied on February 19. The denial, signed by Yeaton, rejected any claim that the disputed actions were in reprisal for LeFils' involvement with a union, or that LeFils had been improperly deprived of union representation at the January meetings.

On February 10, while the grievance was pending, the meeting announced in the February 3 warning letter took place to discuss the accounting matter. Haberkern, LeFils, Wheaton

---

[8]There was testimony that LeFils also requested union assistance on or about January 29, at a pre-evaluation conference with Walls that was intended to review a tentative draft, but that this request was denied. The issue of representation at the January 29 meeting was not one of the matters raised by CSEA either in its charge, or as an amendment at the time of the hearing or in its briefs. Nonetheless, Walls testified, as Wheaton confirmed, that University personnel practice precluded the involvement of an outside representative at the evaluation preparation and issuance stage (in contrast to representation at grievance steps after an evaluation). No contrary evidence about this practice was introduced by the charging party. LeFils did not participate in a substantive talk with Walls about the contents of the proposed evaluation, and no action was taken against her for this position.

and Walls were present. Haberkern spoke for LeFils, without management objection, and claimed, as had LeFils on January 8, that LeFils' best recollection was that she did her normal assigned work on the days in question, except for a brief period when Flanders was supervising in December. During the meeting, according to Wheaton, following Haberkern's request for the employer's supporting data, he showed some surprise when Walls pointed out, and LeFils conceded, that daily production figures were regularly provided and that LeFils had been shown her relevant statistics. After Haberkern and LeFils caucused, at which time he examined her personal notes of the days at issue, they returned to the room and restated the previous response that LeFils had worked as assigned. Walls expressed dissatisfaction with this response, in light of the earlier promises by LeFils that details could be provided, and the meeting ended. Both Haberkern and LeFils deny that management expressed dissatisfaction with the answer given.

A week later, on February 17, a formal suspension notice was issued, effective February 23, 24 and 25. The ground stated was insubordination. LeFils was also warned that continued insubordination could result in disciplinary action, including demotion and dismissal. The accounting issue was not pursued further by the University, however, and the matter was dropped.

E. Events related to the LeFils demotion.

The follow-up evaluation described in the February evaluation cover letter was issued April 27. The evaluation observed that there had been a slight improvement in LeFils' keystroke average during the interim, but noted that the variety of problems identified previously were continuing. The rating given LeFils was "unsatisfactory," since there had been minimal improvement.[9]

According to Walls, her evaluation critique was based on employee complaints about LeFils, in addition to personal observation. These complaints included claims that LeFils was loud and disruptive, that she gave inadequate training or confusing instructions, and that she sifted through the assignment basket to take easier jobs herself (thereby boosting her keystroke average). Specific employees were identified by Walls as the sources of her information. Neither side called these employees as witnesses. Flanders' testimony also provided corroboration for Walls' analysis. On rebuttal, LeFils disputed the allegation that she sifted through the assignment basket for self-serving purposes, claiming it was

---

[9]Neither the February nor the April evaluation included any reference to the January-February time accounting and insubordination dispute. Walls testified that she perceived that matter as a one-of-a-kind problem, unrelated to the general employment concerns usually reserved for overall evaluations.

part of her assignment distribution task, but offered no denial of the other criticisms leveled against her.

The evaluation also repeated the previous criticisms that LeFils' machine time production was inadequate. Documentary evidence reflecting several months performance was offered in support of this point, effectively demonstrating machine time that was usually far below the announced standard. As a means of impeaching the value of this evidence, CSEA relied not only upon the job description standard of 20 percent time, discussed above, but also argued that documentary evidence based on the statistical performance of another lead key operator, Aurora Fernandez, revealed disparate treatment by Walls. This documentary evidence, however, submitted after the hearing, does not provide conclusive support for CSEA.

The University introduced explanatory evidence, through Walls' testimony, that Fernandez' actual duties were rarely comparable to those of LeFils. In fact, the sample comparison prepared after the close of the hearing, for a limited period when some comparability could be valid, showed that Fernandez performed at least as well as, and perhaps better than LeFils, in terms of machine time and peeling duties. The sample comparison also shed no light on the performance of other lead operator tasks. In the last analysis, the issues of comparability and disparate treatment were only one element in CSEA's attempt to challenge the accuracy of the April

evaluation. As explained elsewhere in this decision, a substantial body of other criticisms and complaints set forth in the April 27 evaluation were supported by the evidence.

A day later, April 28, Walls officially notified LeFils of management's intent to demote her to regular entry operator status. The demotion decision had been reached that month as the re-evaluation was prepared. Walls testified that a decision was made to demote, rather than to fire LeFils because,

> . . . [she had] been with the University for 18 years and I felt, if she had been a key entry operator she probably would have been fired, but I felt that it was only fair to give her the opportunity to perform at a satisfactory level in the key entry operator position. I just didn't feel it was fair to fire her.

Walls stated in the notice and in her testimony that the demotion was tied to the prior evaluations and that the primary factors were LeFils' unprofessional disruptive conduct, poor batching, instruction and training problems, and insufficient machine time. Walls testified that no warning letter preceded the demotion because, under University policy, LeFils had reason to know about potential corrective action if her conduct did not improve after the February evaluation. (See University Staff Personnel Manual (1980) sec. 270.6.) The charging party failed to offer contrary evidence about established practice at the University. The formal demotion notice was issued May 5 and took effect on May 13. A protest letter submitted by

Haberkern on May 5 apparently was either not received, or had no influence on the decision.

F. Credibility determinations.

The quality of testimony offered by the charging party was generally not persuasive on the many factual discrepancies related to a disposition of the case. LeFils, for example, who gave only limited direct testimony in the case-in-chief, was often vague and uncertain about specific events and about who said what in meetings. In other instances, her representative at the hearing asked leading questions about crucial elements of the charge, further damaging the believability of LeFils' presentation. Her demeanor showed evident nervousness, especially during her explanation of the procrastinating interactions with Walls over the accounting issue. The weight to be given LeFils' testimony was also affected by the contradiction within her account on whether she requested representation on January 8, as well as by the conflict between her recollection and Haberkern's regarding the date of their private interchange in early January.

Finally, the rebuttal testimony offered by LeFils, failing almost completely to come to grips with the many damaging aspects of the University's defense, cast further doubt on the credibility of her account of her performance. Indeed, as to some matters, LeFils made significant concessions during both her initial and rebuttal testimony, including: the major

changes after the computer merger, the low keystroke average up to the February evaluation, and the reports that she gave confusing training or instructions to other key entry operators.

LeFils' testimony was not enhanced by Haberkern as a witness. Haberkern was more assured and to-the-point than LeFils, but his own testimony was weakened by its conflicts with that of other witnesses. For example, his insistent claim that a meeting between LeFils and Walls took place on January 7 was supported by no other witness and was at odds with the February 4 grievance claim that bore Haberkern's name as LeFils' representative. Haberkern's reference to a January 9 morning meeting about the December 10 memo grievance was supported, with visible hesitancy, by LeFils, and was convincingly denied by Walls and by Wheaton, the latter having testified to another event taking place the entire day in question. In the end, these matters alluded to in the hearing were simply dropped from the charging party's case in its briefs.

Last, Haberkern's testimony as a whole was marred by his improbable explanation of his role in the January-February accounting dispute, in relation to which he guided LeFils through a series of meetings while remaining largely behind-the-scenes. But for his brief phone call to Walls on January 8 or 9, and his misdirected January 13 letter to Wheaton, Haberkern barely resembled the diligent steward who,

in the space of six days from December 10 through 16, had arranged a multi-party meeting with a personnel department representative to consider a potential grievance over a memo.

In comparison, the testimony of both Walls and Flanders, central to respondent's case, was of superior quality. Walls was both careful and prompt in her responses, and her recollection was largely in accord with the voluminous documentary record she maintained about the day-to-day events as the disputes developed. Her conscientious approach toward her job--and to testimonial recitals--was evident not only on direct examination but on cross-examination as well, when efforts were made to test her precision and motivation. As a whole, Walls' testimony had a ring-of-truth and her account of events, particularly in January, held together.

Key aspects of Wall's testimony were corroborated by Flanders, who testified not only about the holiday season machine time issue involving LeFils, but also about her extensive working history with LeFils and her familiarity with complaints made by other employees. Flanders is deaf and testified by reading the lips of her examiners. Perhaps in part for this reason, her account assumed an air of exceptional concern and attentiveness to the truth. At the same time, she also managed to convey a personal liking for LeFils that was the product of years of comraderie on the job. Thus, from Flanders' point of view, LeFils's somewhat loud and disruptive

nature may well have interfered with her job performance, but also, on an interpersonal level, these attributes made LeFils a livelier, friendlier person to be around. There was no evidence in the record to suggest, as the charging party claimed in its brief, that Flanders' testimony could be discounted as back-biting by a disgruntled co-worker.

For the reasons set forth above, respondent's view of the facts is credited, to the extent a material dispute has been identified. Specifically, it is found that: (1) no demotion threat was made on December 8; (2) Flanders did comment to LeFils about excessive talking and insufficient machine time in December; (3) Walls showed production and machine time statistics to LeFils on January 8; (4) Haberkern, in a phone call on January 8 or 9, made no request to be present at the accounting discussion set for January 9; (5) no request for union representation was made by LeFils on January 9; (6) LeFils had advance notice of the times of the meetings requested by Walls on January 9 and January 22; (7) Walls never asked LeFils to produce her personal work notes for supervisory inspection; (8) Walls expressed dissatisfaction with the adequacy of LeFils' explanation (via Haberkern) of the accounting issue on February 10; and, (9) in addition to Walls' personal observation of performance deficiencies, employee complaints about LeFils had been conveyed to Walls.

ISSUES

1. Did the University interfere with and deny LeFils' right to union representation on January 8, 9 and 22, 1981?

2. Did the University suspend LeFils in February 1981 in retaliation for the exercise of protected representation rights?

3. Did the University demote LeFils in May 1981 in retaliation for the exercise of protected representation rights?

CONCLUSIONS OF LAW

A. Introduction.

There is no real dispute between the parties about the legal principles and tests relevant to a disposition of this case. For example, the University concedes that under section 3565 of the Act,

> . . . filing a grievance and requesting representation are protected and any act aimed against an employee for undertaking such activities would be in violation of HEERA. (Respondent's Brief at p. 16.)[10]

The University also concedes that an employee has a correlative right to request union assistance at investigatory interviews which the employee reasonably believes could result in

---

[10]Section 3565 states, in relevant part:

> Higher education employees shall have 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. . . .

discipline. Both parties cite Weingarten v. U.S. (1975) 420 U.S. 251 to support their respective applications of this fundamental representational principle.[11] Additionally, as amply demonstrated by the testimony of Wheaton and Walls, established University policy allows for union representation at such investigatory encounters even if there is no certified exclusive representative. (Also see University Staff Personnel Manual (1980) sec. 280.31; accord Anchortank, Inc. v. NLRB (5th Cir. 1980) 615 F.2d 1153 [104 LRRM 2689].)

The University and CSEA concur as well that in resolving the claim of retaliatory discrimination against LeFils, for her suspension and demotion, the trier of fact is obliged to weigh both direct and circumstantial evidence, to determine whether an action would not have been taken against an employee but for the exercise of protected rights. See, e.g., Carlsbad Unified School District (1/30/79) PERB Decision No. 89; Belridge School District (12/31/80) PERB Decision No. 157 at. p. 5; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 729-730; Wright Line, Inc. (1980) 251 NLRB 150 [105 LRRM 1169] enf. (1st Cir. 1981) ___F.2d___ [108 LRRM 2513].

---

[11]The construction of similar or identical provisions of the National Labor Relations Act (hereafter NLRA), as amended, 29 U.S.C. 151 et seq., may be used to guide interpretation of the HEERA. See, e.g., San Diego Teachers Assn. v. Superior Court (1979) 24 Cal.3d 1, 12-13; Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608, 616.

Assuming a prima facie case is presented, an employer carries the burden of producing evidence that the action "would have occurred in any event." Martori Brothers Distributors v. Agricultural Labor Relations Bd., supra, 29 Cal.3d at 730. Thus, once employee misconduct is demonstrated, the employer's action,

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

Although the parties generally agree about the appropriate legal standards to be utilized, they are sharply at odds over the application of these principles to the facts of this case.

B. The union representation issue.

At the outset, it should be observed that the charging party's claim on this issue, based on the evidence ultimately argued in its briefs, goes to the meetings of January 8, 9 and 22, 1981. At these meetings, according to CSEA, the University denied LeFils an adequate opportunity to secure representation, and, when a request was made, it should have been granted. Under Weingarten and related cases, several questions must be resolved to determine whether LeFils' representation rights were interfered with or denied.[12] First, were the meetings for an investigatory purpose which the employee objectively

---

[12]The Weingarten rule has been adopted in California.

perceived as a possible pre-disciplinary inquiry? Second, did the employee request union assistance prior to or during the meeting? And, third, if such a request was made, did the employer persist in conducting the meeting without representation, or otherwise infringe on the employee's right to representation? Applying this analytical approach, it is concluded that there was no violation of LeFils' right under the HEERA.[13]

See, e.g., Social Workers' Union, Local 535 v. Alameda County Welfare Dept. (1974) 11 Cal.3d 382; Robinson v. State Personnel Bd. (1979) 97 Cal.App.3d 994; Marin Community College District (11/19/80) PERB Decision No. 145.

[13]Alternatively, two of the meetings, on January 8 and 9, took place more than six months prior to the filing of the instant charge on July 17, 1981 and are therefore subject to a limitations bar under section 3563.2(a) of the Act:

> . . . the board shall not issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.

Although this defense was not argued by the respondent at the hearing or in its brief, the employer did set it forth as affirmative defense in its answer. Aside from the question of possible employer waiver or abandonment of the claim, the fact that an internal University grievance was filed and pursued raises the issue that the six-month limitations bar was equitably tolled, at least until the grievance about these meetings was denied on February 19. See State of California (Dept. of Water Resources) (12/29/81) PERB Order No. Ad-122-S; San Dieguito Union High School District (2/25/82) PERB Decision No. 194. Regardless, it was still necessary to receive evidence about these meetings in order to shed light on the timely-raised disputes over the January 22 meeting and the subsequent suspension and demotion.

1. The January 8 meeting.

It is undisputed that the Weingarten principle does not attach to "run-of-the-mill shop floor conversations." Weingarten v. U.S., supra, 420 U.S. at 257-258, citing Quality Mfg. Co. (1972) 195 NLRB 197, 199 [79 LRRM 1269], enf. Garment Workers v. Quality Mfg. Co. (1975) 420 U.S. 276. Although the January 8 meeting was not foreshadowed by any supervisory interaction indicating displeasure other than Flanders' comments in December to LeFils, or by any warning at the outset of the meeting, the interchange cannot be easily dismissed as a passing "shop floor" exchange. LeFils was summoned from her usual work site and was questioned in the presence of two supervisors. The subject matter of the inquiry--unaccounted work time--was inherently and potentially serious, even if no threat against her was formally made. Given these circumstances, the benefit of doubt should yield to the possible benefit of assistance:

> A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated or too ignorant to raise extenuating factors. (Id., 420 U.S. at 262-263; also see U.S. Postal Service (1981) 256 NLRB No. 12 [107 LRRM 1172].)

Irrespective of the possibility of discipline, it is conceded by LeFils that she made no request for union assistance, the second prerequisite for invocation of the

Weingarten right. As CSEA itself observed, in its opening brief (at p. 5), citing that seminal decision,

> . . . the right [to a representative] arises only in situations where the employee requests union representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative. (Id., 420 U.S. at 257.)

Finally, even if LeFils' direct testimony that a request was made had not been retracted during cross-examination, it is still plain that Walls did not pursue the meeting but told LeFils that it would be rescheduled the next day to allow LeFils to refer to her notes. In this regard, Walls' conduct was also consistent with the Weingarten option of discontinuing the meeting. (Id., 420 U.S. at 258-259.)

2. The January 9 meeting.

The factual pattern relevant to this meeting is similar to events of January 8. Granted, the January 9 meeting may have carried a more serious implication of potential discipline because Walls was sufficiently concerned about the subject matter to reschedule the conference. Nevertheless, Walls' testimony has been credited that no request for union assistance was made, either before the meeting, when LeFils was told of the time, or, during the meeting. Further, even if the request was made, Walls stopped the meeting once she understood that LeFils could not answer the questions posed because Haberkern possessed the personal notes containing the information LeFils needed.

3. The January 22 meeting.

Although LeFils (and Haberkern) were aware well in advance of Walls' intention to have this meeting, first, on January 20, and then, after LeFils' cancellation, on January 22, no union effort was made to arrange for the presence of a representative. And, once the meeting started, Le Fils, by her own account, made no request for representation until after Walls had asked LeFils to contact Haberkern to secure the information necessary for a full response. Then, when LeFils later stated she did not want to continue without her union representative, Walls stopped the meeting and indicated, for a third time, that her inquiry would be deferred and rescheduled. Under these facts, no interference with LeFils' rights can be found since Walls' postponement was more than she was legally obligated to accord. Compare Coca-Cola Bottling Co. (1977) 227 NLRB 1276 [94 LRRM 1200].

Regarding all of these meetings, CSEA makes an underlying argument that no meetings should have been called because LeFils was deprived of an adequate opportunity to arrange in advance to have her union representative present, and that the desire for representation was already known to the University in regard, at least, to the December 10 grievance. This argument is unpersuasive. Walls' testimony has been credited that advance notice was given for the January 9 and January 22 meetings. Since the balance of the testimony about the

January 8 meeting indicates that LeFils made no request for representation during that conference, and there is no evidence of intimidation or coercion inhibiting LeFils, it is unclear how advance notice would have guarded a right never asserted at the meeting by the employee who was the holder of the right. Appalachian Power Co. (1980) 253 NLRB 135 [106 LRRM 1041]. What CSEA appears to be arguing for, in effect, is a type of labor relations analogue to the Miranda warning principle in constitutional law governing police investigatory procedures. (See Miranda v. State of Arizona (1966) 384 U.S. 436.) No authority is cited for this argument and, on its face, it is beyond the mandate of Weingarten.

Indeed, upon examination of the series of meetings, it can hardly be suggested that Walls disregarded LeFils' representational rights. All three meetings were rescheduled, providing sufficient opportunity for representation. No express or even implied threat is placed at Walls' door regarding LeFils' reliance upon union representation. In fact, on January 22, Walls was so solicitous of LeFils' position, according to the charging party, that Walls asked LeFils to leave the meeting in order to contact Haberkern so that the merry-go-round of meetings might be brought to a conclusion. If anything can be inferred from this chain of events, it is that Haberkern and LeFils's purported utilization of the principle of union assistance did not improve communication and

workplace stability, as intended under Weingarten (id., 420 U.S. at 262-263), but, perhaps unintentionally, thwarted a legitimate management inquiry.

C. The suspension issue.

The charging party asserts that the February suspension was given in retaliation for LeFils' grievance filings and her requests for union representation. CSEA argues that there is a temporal nexus between these events and the subsequent disciplinary action taken by the employer. It is also contended that the University's claim of insubordination was unfounded and therefore it could not be the basis for the suspension decision.

There are, however, inherent limitations in the charging party's case. First, CSEA presented little if any challenge to the propriety of the employer's underlying inquiry about the December-January work hours that was the subject of the later meetings. Without this challenge, it cannot be argued that the employer's actions were pretextual. Second, not only was there an absence of evidence of anti-union statements, express or implied, in the context of the meetings that occurred, but CSEA's case-in-chief showed a deliberate, cautious approach by Walls in her communications to LeFils that avoided an implication of anti-union hostility.

Additionally, the University's defense provided sufficient evidence of business justification for the suspension. The

warning letter on February 3 followed three unsuccessful meetings to secure from LeFils what she had promised to provide--an accurate accounting of her time. The employer's concern was corroborated by Walls' supervisory review of production material, available to and examined by LeFils, as well as by the initial complaints that Flanders confirmed. The facile response given by LeFils (via Haberkern) on February 10, when a meeting with her union representative finally occurred, gave Walls no more information than she had received from LeFils on January 8, despite LeFils' assurance that more precise information was obtainable and would be forthcoming. Under these circumstances, the LeFils suspension was an appropriate response.

D. The demotion issue.

The charging party's theory regarding this allegation is that LeFils' eventual May 1981 demotion to regular operator status was the final outgrowth of the retaliatory and discriminatory course of employer conduct going back to LeFils' earlier grievances, and her request for union assistance. Again, there was no evidence, express or implied, of hostile anti-union statements in the context of the demotion. However, the CSEA claim draws inferential, circumstantial support from several other factors.

Thus, for years, LeFils had received satisfactory evaluations even though other testimony by Flanders indicated

many complaints had long existed. No warning letter preceded the demotion, only an evaluation. Le Fils was penalized for, among other complaints, insufficient machine time, while her official job description stated that 20 percent time was in order. Walls and other employer agents conceded that no disciplinary action was contemplated before April 1981, thereby raising doubt about the seriousness of the alleged premises for the adverse action.

But, despite the implications of these several factors, it is concluded that sufficient evidence of business justification supports the employer's demotion decision.

First, the University's evidence about the impact of the computer operation merger on unit work, altering LeFils' work-setting and standards of many years duration, provded a reasonable explanation discounting weight that might otherwise be given to LeFils' earlier satisfactory evaluation ratings. LeFils herself admitted that the change was significant and that she had to learn her job from "scratch." These admissions lend credence to Walls' perspective that LeFils' problem was accommodating herself to the new operation.

Second, the failure to provide a warning letter about a possible demotion was adequately explained by the employer's evidence that LeFils had been told when the February evaluation was given that another evaluation would be forthcoming in about three months. The February evaluation stated that her

performance needed improvement. It was reasonable to conclude that a continuation of that performance, if assumed to be true, could be considered unsatisfactory, as the April evaluation declared. Since LeFils had ample notice of the deficiencies relied upon, and her poor rating, she can hardly claim that she was denied a fair opportunity to correct the problem. Even if CSEA had shown, which it did not, that customary University practice was to provide a warning letter before similar corrective action, regardless of successive adverse evaluations, it would unduly elevate form over substance to argue that the failure to do so in this case conclusively proved anti-union animus.

Third, the apparent contradiction between the claim that LeFils had insufficient machine time, one of the bases for her demotion, and the job description requirement of 20 percent for that duty, was explained by Walls' testimony that the 20 percent figure was a rough estimate for minimal time on days when other duties were more pressing. Le Fils conceded that under the old system she worked 70 percent to 80 percent machine time, and that Walls gave clear verbal directions that four to five hours of machine time was still the normal requirement when the computer operation was revised. CSEA's contention that this was too much time to require was not supported by documentary evidence. Instead, the evidence showed that LeFils was able to produce, on occasion, that amount of machine time.

Further, the argument that LeFils suffered disparate treatment on machine time measurement was not clearly supported by the documentary evidence elicited by CSEA and produced after the close of the hearing. Those figures, reflecting the work activity of another lead key entry operator in a comparable period of time, show that the other operator performed at least at LeFils' level, if not better. In any event, the University's evidence effectively arguing against the clear comparability of the work of these two employees was not undermined by any CSEA rebuttal.

Fourth, the absence of disciplinary intent prior to preparation of the April evaluation does not support the theory of discriminatory motive. Rather, the evidence can be viewed as demonstrating that Walls kept an open mind about LeFils' performance after the adverse February evaluation, and had not predetermined an ultimate outcome.

Finally, there was substantial, largely unrebutted evidence supporting the criteria used to arrive at the demotion decision. Those criteria were explained at the hearing, consistent with the notice given to LeFils, to include insufficient machine time, unprofessional disruptive behavior, problems communicating work information and training operators, difficulty with user contacts, and improper sorting and assignment of work. In addition to the machine time issue already discussed, Walls credibly testified on the basis of

personal observation about several of these factors. Walls also reported corroborating hearsay comments of LeFils' co-workers. Flanders, too, provided persuasive substantiating evidence. CSEA, for its part, made a minimal effort to challenge the accusations. It failed to call other employee witnesses, and it conceded some of the claims made (for example, the earlier complaint about a low keystroke average and employee confusion over LeFils' instructions). Also, when LeFils was called on rebuttal, CSEA neglected to adduce crucial testimony relevant to the business justification defense the University had just concluded.

E. Conclusion.

Through the course of the formal hearing, and in its brief, CSEA wove a claim that the University's actions against LeFils were not discrete, separate instances, but were part of a larger chain of events reaching back to the December 1980 dispute and designed to fire her or, at least, to remove her from the lead operator position. In accord with this view is Haberkern's January 13 letter which mixes the January accounting issue with the previous December memo dispute. CSEA also suggests that LeFils' January grievance challenging the December memo was successful because the University was trying to clear up its case in preparation for later retaliation. Similarly, CSEA claims that the February 3 warning letter was actually intended to be a warning for the evential demotion

but, for reasons unexplained, that use was abandoned. Although this approach has a convenient neatness, it is that in appearance only. Little evidence supported the inferences drawn by CSEA in this regard other than Haberkern's assertions as a witness that the University was advancing a factual construction of separate incidents that was inconsistent with positions previously taken. Set against this claim are several points.

Neither LeFils nor Haberkern provided any credible evidence that University officials were blending the events at issue. Other evidence, testimonial as well as documentary, supported the contrary view that University agents carefully and scrupulously avoided the cross-fertilization inferred by CSEA. Thus, the January meetings were expressly separated from the pending December memo grievance. The subsequent warning letter and suspension for insubordination were divorced from the contemporaneous evaluation overview of LeFils' performance. The demotion also made no reference to or reliance upon the events leading up to the suspension.

Indeed, had the University been less careful in taking steps that could have been misinterpreted--for example, by tying the January accounting exchanges into the later evaluations and demotion--it is reasonable to assume that CSEA would reverse field and argue that retaliatory intent was evident because the University had intertwined the earlier

representation issue with those subsequent occurances. In any event, each of the University's actions were fully examined on the merits and, in that respect, CSEA was unable to prevail on any one issue, much less on the type of conspiracy theory described above.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, the complaint against the Regents of the University of California is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on May 17, 1982, unless a party files a timely statement of exceptions. See California Administrative Code title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on May 17, 1982, in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305 as amended.

Dated: April 27, 1982

Barry Winograd

BARRY WINOGRAD
Administrative Law Judge