STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

CALIFORNIA STATE UNIVERSITY EMPLOYEES UNION, Charging Party, v. TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY (SAN MARCOS), Respondent.	Case No. LA-CE-1039-H PERB Decision No. 2070-H October 15, 2009

Appearances: Brian Young, Lead Labor Relations Representative, for California State University Employees Union; Marc D. Mootchnik, University Counsel, for Trustees of the California State University (San Marcos).

Before Dowdin Calvillo, Acting Chair; McKeag and Neuwald, Members.

DECISION

DOWDIN CALVILLO, Acting Chair: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the California State University Employees Union (CSUEU) of a Board agent's partial dismissal of its unfair practice charge. Relevant to this appeal, the charge alleged that the Trustees of the California State University (San Marcos) (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by: (1) unilaterally transferring bargaining unit work to non-unit employees; and (2) retaliating against custodian Rafael Lopez (Lopez) for using CSUEU representation in a dispute over his work assignments. The Board agent dismissed both allegations for failure to state a prima facie case.

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

The Board has reviewed the partial dismissal and the record in light of CSUEU's appeal, CSU's response to the appeal, and the relevant law. Based on this review, the Board affirms the dismissal of the unilateral transfer of work allegation but remands this matter to the Office of the General Counsel for issuance of a complaint on the retaliation allegation.

BACKGROUND

The Facilities Services department at the CSU San Marcos campus employs members of systemwide bargaining Units 5 and 6. Unit 5 members perform "skilled and semi-skilled blue collar work" and are represented by CSUEU. Unit 6 members perform skilled trades and are represented by the State Employees Trades Council – United.

Employees in the Equipment Operator classifications are members of Unit 5. The job description for these classifications lists backhoes and forklifts among the equipment that incumbents may be required to operate. Among the duties listed in the job description for the Laborer classification, also part of Unit 5, is "power washing assigned areas."

The Facilities Worker and Facilities Mechanic classifications are staffed by Unit 6 members. The job descriptions for these classifications do not specifically list operating backhoes or forklifts, or power washing, among the classifications' duties. However, the job descriptions also state: "Examples of typical activities for each classification are not meant to be all inclusive or restrictive; incumbents may perform related work activities."

On April 1, 2008, Cesar Aguilar (Aguilar), a laborer, became the CSUEU Unit 5 steward at the San Marcos campus. The steward position had been vacant for several years prior to that date.

Sometime before Aguilar became steward, Steve Watters (Watters), Assistant Director of Operations in the Facilities Services department, warned Aguilar to stay away from Lopez because Lopez is a "troublemaker." After Aguilar became steward, he began to have meetings

with Lopez and Brian Young (Young), the CSUEU labor representative assigned to the San Marcos campus. At some point, a grievance was filed over Lopez's "assignments."

On May 9, 2008, Aguilar emailed Young that he had approached Watters about Unit 6 employees operating backhoe equipment. Watters responded that he was not going to spend money training Unit 5 members to operate the backhoe because he had already trained two Unit 6 members to operate it.

Young responded to Aguilar's email later that day, stating that backhoe operation is Unit 5 work and asking for the names and job classifications of the Unit 6 members trained to operate the backhoe. Aguilar responded with that information by email on May 13, 2008. In the same email, Aguilar related that Watters felt Aguilar was accusing him of wrongdoing and said that laborers would not be able to promote because of it. In the meantime, Young had learned that Unit 6 members were operating forklifts and power washers.

On May 13, 2008, Young sent a letter to Watters claiming that operation of backhoes and forklifts was work for Unit 5 Equipment Operators, not Unit 6 skilled laborers. Young requested that the department "cease and desist from the transfer of bargaining unit work from Unit 5 to Unit 6." That same day, Watters received an email from Young requesting that the department cease assigning Unit 6 members to operate power washing equipment.

On May 14, Watters approached Aguilar at his work location, approximately a quarter mile from Watters' office. Watters wanted to discuss the transfer of unit work issue and said that Aguilar was "getting under his skin." He told Aguilar "not to take the wrong path" and "that it is not a good thing to be getting involved in these kind of topic's [sic]."

The following day, Ed Johnson (Johnson), Director of Facilities Services, called Aguilar to a meeting about work-related issues. After discussing Aguilar's assignment and career objectives, Johnson began to discuss the transfer of unit work issue. Aguilar said he

was uncomfortable discussing the issue without Young present. Johnson replied, "We don't want Young around here."

On May 15, 2008, Watters responded to Young by letter. Watters claimed that both units had been using backhoes and forklifts "since the campus was opened 15 years ago." He admitted that Unit 6 members had been trained to use the equipment but said this did not preclude Unit 5 members from receiving the same training. Watters also noted that power washing "is an approved industry method for the preparation of paintable surfaces." He stated that Unit 6 members would continue to operate backhoes, forklifts and power washers because those duties are part of their job descriptions. The letter closed with an offer to discuss the matter with Young or Aguilar to attempt to reach "a reasonable compromise or understanding."

On June 19, 2008, Aguilar complained to Johnson that Lopez "was being swamped with work orders and denied any assistance." On the morning of June 24, 2008, Young emailed Ellen Cardoso, CSU Human Resources Director, that Aguilar was being harassed by Watters, who had approached Aguilar the previous day to discuss his union activity. Following his shift later that day, Lopez was prevented from leaving his parking space by a campus police vehicle. Campus Chief of Police Ronald Hackenberg (Hackenberg) demanded to search Lopez's car without explanation. During the search, Hackenberg spoke with Watters "out of earshot of Lopez." After consulting with Watters, Hackenberg allowed Lopez to leave. The charge alleged that Watters initiated the search by filing a "false complaint that Lopez had stolen state equipment."[2]

[2] The charge referenced an attached statement by Lopez regarding the vehicle search. However, the statement is absent from the PERB case file in this matter.

Partial Dismissal, Appeal and Response

The Board agent dismissed the allegations that CSU unilaterally transferred bargaining unit work and retaliated against Lopez. The unilateral transfer allegation was dismissed because the charge failed to allege facts showing that Unit 5 work had actually been transferred to Unit 6 members or that such a transfer had any negotiable effect on the terms and conditions of employment of Unit 5 members. The Board agent dismissed the retaliation allegation because the charge failed to establish a connection or "nexus" between Lopez's protected activity and the search of his personal vehicle by campus police.

On appeal, CSUEU argues that a nexus between Lopez's protected activity and the search of his vehicle is shown by CSU's departure from established procedures, cursory investigation of Lopez's alleged misconduct, and failure to give Lopez justification for the search at the time it occurred. Regarding the transfer of bargaining unit work, CSUEU asserts that PERB should look to the occupational distinctions between Unit 5 and Unit 6 throughout the entire CSU system, not just at the San Marcos campus. CSUEU further contends that the transfer of Unit 5 work denies Unit 5 employees promotional opportunities and makes them more vulnerable to layoff.

CSU counters that the charge failed to establish any of the nexus factors identified by CSUEU in its appeal, and further contends that the search was an "innocuous police stop" based on a legitimate belief that Lopez had stolen state property. CSU asserts that Unit 5 employees never exclusively operated backhoes or forklifts, or performed power washing duties, but that members of both units had performed these duties for years. CSU also claims that the negotiable effects identified by CSUEU are speculative.

DISCUSSION

1. Transfer of Bargaining Unit Work

In determining whether a higher education employer has violated HEERA section 3571, subdivision (c) by refusing or failing to meet and confer in good faith with an exclusive representative, PERB utilizes either the "per se" or "totality of the conduct" test, depending on the specific conduct involved and the effect of such conduct on the negotiating process. (*Stockton Unified School District* (1980) PERB Decision No. 143.) A unilateral change in terms and conditions of employment is considered a "per se" violation if: (1) the employer breached or altered the parties' written agreement or its own established past practice; (2) such action was taken without giving the other party notice or an opportunity to bargain over the change; (3) the change was not merely an isolated breach of the contract, but amounts to a change in policy (i.e., it has a generalized effect or continuing impact upon bargaining unit members' terms and conditions of employment); and (4) the change in policy concerns a matter within the scope of representation. (*Walnut Valley Unified School District* (1981) PERB Decision No. 160; *Grant Joint Union High School District* (1982) PERB Decision No. 196.)

PERB has held that the transfer of work from bargaining unit employees to those in a different or no bargaining unit is a subject within the scope of representation. (*Rialto Unified School District* (1982) PERB Decision No. 209.) "[I]n order to prevail on a unilateral transfer of work theory, the charging party must establish, as a threshold matter, that duties were, in fact, transferred out of the unit; that is, that unit employees ceased to perform work which they had previously performed or that nonunit employees began to perform duties previously performed exclusively by unit employees." (*Eureka City School District* (1985) PERB Decision No. 481; emphasis in original.)

CSUEU has not established that CSU transferred Unit 5 work out of the bargaining unit. The charge did not allege that backhoe or forklift operations, or power washing duties, were removed from Unit 5 members and transferred to Unit 6 members. (*Calistoga Joint Unified School District* (1989) PERB Decision No. 744; *State of California (Department of Developmental Services)* (1985) PERB Decision No. 484-S.) Nor did the charge allege that the parties' collective bargaining agreement or past practice established Unit 5 members as the exclusive performers of such duties. (*California Community Colleges* (1987) PERB Decision No. 636-S.)

However, even if a transfer of work did not occur, a bargaining obligation may still exist if the change in allocation of bargaining unit work has a negotiable effect on unit members' terms and conditions of employment, such as a reduction of work hours. (*Eureka City School District*, *supra*.) In order for an effects bargaining obligation to arise, the impact on terms and conditions of employment must be "reasonably certain to occur and causally related to the nonnegotiable decision." (*Fremont Union High School District* (1987) PERB Decision No. 651.) PERB will not find an unlawful unilateral change when the alleged effect is "indirect and speculative." (*Lake Elsinore School District* (1987) PERB Decision No. 646.)

CSUEU asserts on appeal that the alleged transfer of bargaining unit work to Unit 6 members denies Unit 5 members promotional opportunities and makes them more vulnerable to layoff. However, the charge alleged no facts to support these assertions and we find no good cause to consider these new allegations on appeal. (PERB Reg. 32635(b).)[3]

In sum, we find the charge failed to establish that CSU transferred Unit 5 work to Unit 6 members or that any reallocation of bargaining unit work had a negotiable effect on the

[3] PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq. PERB Regulation 32635(b) states in full: "Unless good cause is shown, a charging party may not present on appeal new charge allegations or new supporting evidence."

terms and conditions of employment of Unit 5 members. Accordingly, we affirm the Board agent's dismissal of the allegation that CSU unilaterally transferred bargaining unit work.

2. Retaliation

To demonstrate that an employer discriminated or retaliated against an employee in violation of HEERA section 3571, subdivision (a) the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the adverse action *because of* the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210.)

According to the charge, Lopez engaged in two activities protected by HEERA: (1) filing a grievance (*Regents of the University of California* (1999) PERB Decision No. 1314-H); and (2) utilizing CSUEU representation in a dispute with CSU, specifically Aguilar's June 19, 2008 complaint to Johnson about Lopez's work assignments (*The Regents of the University of California* (1995) PERB Decision No. 1087-H). It is undisputed that CSU knew of these activities.

In determining whether evidence of adverse action is established, the Board uses an objective test and will not rely upon the subjective reactions of the employee. (*Palo Verde Unified School District* (1988) PERB Decision No. 689.) In a later decision, the Board further explained that:

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

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

PERB has held that the filing of a citizen's complaint against an employee with the knowledge that it would lead to an investigation by the employer is an adverse action. (*California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S.) In particular, the Board stated:

> Such an action could cause a reasonable person to be concerned about the potential adverse effect of the complaint and ensuing investigation on his employment relationship. The fact that the complaint and investigation did not result in action being taken against Coelho by his employer does not eliminate the adverse nature of CAUSE's conduct.

(*Ibid.*)

Here, Watters filed a complaint with campus security alleging that Lopez had stolen state property. The complaint led campus police chief Hackenberg to search Lopez's personal vehicle. A reasonable person would be concerned about the effect of the search on his or her employment because it could lead to discipline, criminal charges, or both. Thus, despite the fact that Lopez was never disciplined or charged based on the search, we find the vehicle search was an adverse action.[4]

Although the timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor (*North Sacramento School District* (1982) PERB Decision No. 264), it does not, without more, demonstrate the necessary connection or "nexus" between the adverse action and the protected conduct. (*Moreland Elementary School District* (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (*State of California (Department of Transportation)* (1984) PERB Decision No. 459-S); (2) the

[4] CSU contends that the search "was a police matter; not an employment investigation." Though Hackenberg conducted the search under his authority as campus police chief, he nevertheless acted as an agent of CSU, Lopez's employer. Thus, just as in *California Union of Safety Employees (Coelho)*, *supra*, the investigation was conducted by the employer.

employer's departure from established procedures and standards when dealing with the employee (*Santa Clara Unified School District* (1979) PERB Decision No. 104); (3) the employer's inconsistent or contradictory justifications for its actions (*State of California (Department of Parks and Recreation)* (1983) PERB Decision No. 328-S); (4) the employer's cursory investigation of the employee's misconduct (*City of Torrance* (2008) PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated, vague, or ambiguous reasons (*County of San Joaquin (Health Care Service)* (2001) PERB Order No. IR-55-M); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that might demonstrate the employer's unlawful motive. (*North Sacramento School District*, *supra*; *Novato Unified School District*, *supra*.)

CSU argues CSUEU failed to establish the timing factor because the charge did not allege when Lopez filed his grievance. It is true that the charge merely stated "Lopez has a pending grievance on assignments" and did not allege a date on which the grievance was filed. However, the charge also alleged that Aguilar complained to Johnson about Lopez's assignments on June 19, 2008, five days before the search of Lopez's vehicle. In addition, the charge alleged that Watters initiated the search on the same day that Young complained to CSU Human Resources about Watters' harassment of Aguilar. Consequently, the charge established that CSU took adverse action against Lopez close in time to his protected activity.

CSUEU contends that a nexus was established because CSU departed from established procedures in searching Lopez's vehicle, conducted a cursory investigation of his alleged misconduct, and failed to give him a reason for the search at the time it occurred. The charge

failed to set forth CSU's established procedures for investigating alleged employee theft. As a result, there is insufficient evidence to show that CSU departed from those procedures (*Trustees of the California State University (Sacramento)* (2005) PERB Decision No. 1740-H) or that its investigation was cursory (*State of California (Department of Health Services)* (1999) PERB Decision No. 1357-S). It is undisputed, however, that neither Hackenberg nor any other agent of CSU gave Lopez a reason for the search at the time it occurred. Such conduct supports an inference of retaliation. (*County of San Joaquin (Health Care Services)* (2004) PERB Decision No. 1649-M; *Oakland Unified School District* (2003) PERB Decision No. 1529.)

Further, the charge alleged facts showing that CSU management harbored animus toward CSUEU's efforts on behalf of Unit 5 members. Watters told Aguilar that he took the transfer of work complaint as a personal accusation and implied that the complaint would prevent laborers from being promoted. Watters also told Aguilar "not to take the wrong path" and "that it is not a good thing to be getting involved in these kind of topic's [sic]." When Aguilar told Johnson that he would not discuss the transfer of work complaint unless Young was present, Johnson responded, "We don't want Young around here." PERB has held that statements by management discouraging the pursuit of a grievance constitute an expression of union animus. (*Jurupa Community Services District*, *supra*.) Therefore, we find the above statements by Watters and Johnson support an inference of retaliation.

In sum, we find the charge established a nexus between Lopez's grievance and use of CSUEU representation, and the search of his personal vehicle by showing a closeness in time between the protected activity and the adverse action, failure to give a reason for the adverse action at the time it was taken, and anti-union statements by CSU management. We therefore conclude CSUEU has established a prima facie case of retaliation against Lopez. Accordingly, we remand this allegation to the Office of the General Counsel for issuance of a complaint.

ORDER

The Board AFFIRMS the dismissal of the allegation that CSU unilaterally transferred Unit 5 work out of the bargaining unit. The Board REVERSES the dismissal of the allegation that CSU retaliated against Rafael Lopez and REMANDS that allegation to the Office of the General Counsel for issuance of a complaint consistent with this Decision.

Members McKeag and Neuwald joined in this Decision.