

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



STATEWIDE UNIVERSITY POLICE  
ASSOCIATION and YOLANDA ABUNDIZ,

Charging Parties,

v.

TRUSTEES OF THE CALIFORNIA STATE  
UNIVERSITY (NORTHRIDGE),

Respondent.

Case No. LA-CE-1276-H

PERB Decision No. 2687-H

December 13, 2019

Appearances: Mastagni Holstedt by Kevin A. Flautt, Attorney, for Statewide University Police Association and Yolanda Abundiz; J. Kevin Downes, Systemwide Labor Relations Manager, for Trustees of the California State University (Northridge).

Before Shiners, Krantz, and Paulson, Members.

DECISION

KRANTZ, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Charging Parties Statewide University Police Association (SUPA) and Yolanda Abundiz (Abundiz) to the attached proposed decision of an administrative law judge (ALJ).<sup>1</sup> The complaint alleged that

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<sup>1</sup> As noted in the proposed decision, the underlying unfair practice charge listed both SUPA and Abundiz as charging parties, and it is unclear why the complaint did not include Abundiz as a charging party. In practical effect, there is often no difference in the outcome of a discrimination charge, irrespective of whether the charging parties include the alleged discriminatee, her union, or both. However, given the possibility that this technical question could impact who has the right to seek reconsideration (PERB Reg. § 32410, codified at Cal. Code Regs., tit. 8, § 32410) or judicial review of our decision (Gov. Code, § 3564, subds. (b), (c)), we clarify that

Respondent Trustees of the California State University (Northridge) (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA)<sup>2</sup> by initiating an internal affairs investigation into SUPA Vice President Abundiz's work conduct and scheduling her to appear for an investigatory interview. The complaint alleged that CSU took these actions in retaliation for Abundiz's protected activities, and that the actions interfered with her protected rights. The ALJ dismissed the complaint and underlying unfair practice charge, finding that SUPA failed to prove that CSU engaged in unlawful interference or retaliation.

Based on our review of the proposed decision, the entire record, and relevant legal authority, we conclude that the record supports the ALJ's factual findings and that his conclusions of law are consistent with applicable law. Accordingly, we adopt them as the decision of the Board itself, subject to the brief discussion below.<sup>3</sup>

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SUPA and Abundiz are both charging parties in this matter. We intend references to SUPA herein to include Abundiz, except where context indicates otherwise.

<sup>2</sup> HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

<sup>3</sup> SUPA and Abundiz have requested oral argument in this case pursuant to PERB Regulation 32315. The Board denies requests for oral argument when an adequate record has been prepared, the parties have had ample opportunity to present briefs and have availed themselves of that opportunity, and the issues before the Board are sufficiently clear to make oral argument unnecessary. (*Regents of the University of California* (2018) PERB Decision No. 2578-H, p. 2, fn. 3.) Because this case satisfies all of the above criteria, we deny charging parties' request for oral argument.

## DISCUSSION

Although the Board reviews exceptions to a proposed decision de novo, it need not address issues that the proposed decision has adequately addressed or that would not impact the outcome. (*City of San Ramon* (2018) PERB Decision No. 2571-M, p. 5; *Hartnell Community College District* (2018) PERB Decision No. 2567, p. 3.) Here, the proposed decision adequately addressed SUPA's arguments that could impact the outcome of the case. We adjust only a single sentence of the proposed decision related to assessing whether an employer's investigation into possible employee misconduct constitutes a sufficient defense to an interference claim.

A prima facie case of interference is established by evidence that an employer's conduct tends to or does result in some harm to employee rights under our statutes. (*County of Santa Clara* (2018) PERB Decision No. 2613-M, p. 8.) Once a charging party has established a prima facie case of interference, the burden shifts to the employer. (*Ibid*; *County of Orange* (2018) PERB Decision No. 2611-M, adopting proposed decision at p. 31; *Carlsbad Unified School District* (1979) PERB Decision No. 89, pp. 10-11.) The degree of harm dictates the employer's burden. (*County of Orange, supra*, PERB Decision No. 2611-M, adopting proposed decision at p. 31.) Where the employer's conduct causes or tends to cause only slight harm to protected rights, the employer may justify its actions based on "operational necessity," and PERB will then balance the employer's asserted interests against the harm to protected rights; if the harm to employee rights outweighs the asserted business justification, a violation will be found. (*County of Santa Clara, supra*, PERB Decision No. 2613-M, p. 8.) On the other hand, if the harm is "inherently destructive of

protected rights,” the employer must show that the interference was caused by circumstances beyond its control and that no alternative course of action was available.<sup>4</sup> (*Ibid.*)

The proposed decision states: “As a general rule, investigations into employee misconduct serve a legitimate business purpose.” (Proposed decision, p. 41.) Although one prior Board decision had fleetingly suggested such a “general rule,” PERB has continued to examine the facts and circumstances of each specific case in determining the extent to which the employer has demonstrated a legitimate purpose that outweighs any tendency the investigation may have to coerce employees or labor organizations in their exercise of protected rights.

Although a charging party can establish a *prima facie* case of interference without evidence of the employer’s motive, we may examine motive at the affirmative defense stage of our analysis if the charging party alleges that the employer’s purported business justification was pretextual or was not the “but for” cause of the employer’s action. (*Community Learning Center Schools, Inc.* (2017) PERB Order No. Ad-448, p. 9.)<sup>5</sup> We do not hold that motive is always at issue in assessing the respondent’s affirmative defense to an interference allegation, as in many cases there

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<sup>4</sup> In his dissent in *Contra Costa County Fire Protection District* (2019) PERB Decision No. 2632-M, Member Shiners disagreed that the concept of “inherently destructive conduct” should be part of PERB’s interference standard. Nevertheless, he recognizes that extant Board law continues to include that concept in its interference test, and thus concurs in its application here for institutional reasons.

<sup>5</sup> For the reasons set forth in footnote 29 of his dissent in *Contra Costa County Fire Protection District, supra*, PERB Decision No. 2632-M, Member Shiners believes that analysis of a respondent’s affirmative defense in an interference case should not import motive principles from PERB’s discrimination jurisprudence.

may be no dispute as to what motivated the employer's action, and in those cases PERB need only determine whether that justification outweighs any tendency to coerce protected rights. Our analysis of an employer's affirmative defense may turn on somewhat different factors where an employer asserts it had reasonable grounds for believing that an employee engaged in misconduct that was intertwined with arguably protected conduct. (See, e.g., *Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 30-31 [employer may investigate if it has a valid reason for legitimately believing employee went beyond the bounds of protected activity and engaged in misconduct, but if employer subsequently learns that the facts do not support this belief, the employer must immediately cease the investigation and notify all affected employees regarding its outcome]; *County of San Bernardino* (2018) PERB Decision No. 2556-M, pp. 22-23 [employer's surveillance unlawful, even though it was intended to document a union's potential access violation, because the underlying access policy was not lawful].)<sup>6</sup>

Here, as the ALJ correctly found, SUPA demonstrated at least slight harm to employee rights from CSU's initiation of an internal affairs investigation of Abundiz and scheduling her for an investigative interview. CSU, in turn, met its burden to prove it

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<sup>6</sup> Moreover, an employer's conduct during an investigation can be unlawful even if the employer lawfully decided to investigate potential misconduct. (See, e.g., *County of Santa Clara*, *supra*, PERB Decision No. 2613, pp. 9-14 [even where employer's investigation was appropriate, employer's gag order on investigation participants found to be unlawful interference]; *William S. Hart Union High School District* (2018) PERB Decision No. 2595, p. 8 [even where employer's investigation was appropriate, employer's coercive questions found to be unlawful interference]; *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 10-17 [employer interfered with protected rights by making coercive statements during investigation].)

had a legitimate business justification for investigating Abundiz regarding her supervisory performance, viz., ensuring compliance with departmental policies, including those relating to use of force. SUPA argues that CSU's stated reason for the investigation was pretextual. However, such a conclusion is inconsistent with the ALJ's factual findings, which we affirm.<sup>7</sup> Moreover, while SUPA asserts that CSU could have relied on Abundiz's statements in the initial investigations rather than re-interviewing her, it may in fact be more protective of employee rights to re-interview an employee after she becomes the subject of an investigation, if she was initially interviewed only as a witness.<sup>8</sup> At the very least, the record supports the ALJ's finding that re-interviewing Abundiz was reasonable in these circumstances.<sup>9</sup>

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<sup>7</sup> CSU initially investigated another employee regarding the same incidents, and this other employee was not alleged to have engaged in protected activities. These circumstances lend credence to CSU's claim that it was legitimately interested in enforcing departmental policies.

<sup>8</sup> Indeed, as the proposed decision notes at footnote 36, the Public Safety Officers Procedural Bill of Rights Act, Government Code section 3300 et seq., provides public safety officers such as Abundiz with various protections when they are under investigation that do not necessarily apply when the officer is interviewed as a witness during an investigation of another officer. (See Gov. Code, § 3303 [providing certain rights to a "public safety officer [who] is under investigation and subjected to interrogation"].)

<sup>9</sup> SUPA excepts to the proposed decision's alleged failure to analyze whether CSU established operational necessity for scheduling Abundiz's December 2, 2016 interview. SUPA argues that the initiation of the investigation and scheduling of a related investigatory interview were two distinct events, as reflected in the complaint. Yet, SUPA then concedes: "[T]he Proposed Decision correctly concludes that employee investigations reasonably tends [sic] to coerce employees, including whether it be through the initiation of an investigation, or indeed the perception that an employee is being repeatedly interrogated (scheduled for interrogation) regarding the

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1276-H are hereby DISMISSED.

Members Shiners and Paulson joined in this Decision.

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same incident.” We find that the proposed decision appropriately analyzed the entire investigation, which necessarily included scheduling the investigatory interview.



**STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD**

STATEWIDE UNIVERSITY POLICE  
ASSOCIATION,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE  
UNIVERSITY (NORTHRIDGE),

Respondent.

UNFAIR PRACTICE  
CASE NO. LA-CE-1276-H

PROPOSED DECISION  
(April 30, 2019)

Appearances: Mastagni Holstedt, by Kevin A. Flautt, Attorney, for the Statewide University Police Association; Leslie V. Freeman, Senior Labor Relations Manager, and Joseph K. Downes, Labor Relations Manager, for the Trustees of the California State University (Northridge).

Before Shawn P. Cloughesy, Chief Administrative Law Judge.

**INTRODUCTION**

In this case, an exclusive representative of a police officers' bargaining unit alleges that a higher education employer violated the Higher Education Employer-Employee Relations Act (HEERA)<sup>1</sup> by retaliating against one of its union activists by initiating an investigation regarding her supervision of officer(s) and scheduling her for an investigative interview. The employer denies that it in any way violated HEERA.

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<sup>1</sup> HEERA is codified at Government Code section 3560, et seq. Unless otherwise specified, all statutory references herein are to the Government Code. PERB Regulations are codified at California Code of Regulations, title 8, section 31001, et seq.

## PROCEDURAL HISTORY

On November 18, 2016, the Statewide University Police Association (SUPA or Association) filed an unfair practice charge (charge) and request for injunctive relief<sup>2</sup> and expedited processing by the Office of General Counsel with the Public Employment Relations Board (PERB or Board) against the Trustees of the California State University (CSU or University).<sup>3</sup> On November 21, 2016, CSU filed its opposition to the request for injunctive relief. On November 29, 2016, the Board denied the request for injunctive relief. On December 8, 2016, the Office of the General Counsel notified SUPA that its request for expedited processing was denied, as it did not meet the criteria for expedited processing under PERB Regulation 32147.

On November 13, 2017, the PERB Office of the General Counsel issued a complaint alleging that on September 2, 2016, CSU retaliated against SUPA's activist Yolanda Abundiz (Abundiz or Sergeant Abundiz) by "initiating" a disciplinary investigation into her supervisorial oversight of officer(s) and "scheduling" her to appear at an investigative interview because of her protected activities in violation of HEERA section 3571, subdivision (a).

On November 28, 2017, CSU filed an answer to the complaint denying any violation of HEERA and asserting affirmative defenses. In CSU's answer, it admitted that in 2016, Sergeant Abundiz engaged in protected activity as a union representative for SUPA on the

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<sup>2</sup> The request for injunctive relief was assigned as Injunctive Relief Request No. 712.

<sup>3</sup> In the unfair practice charge, the charging parties were listed as both SUPA and Yolanda Abundiz. It is unclear from the hearing file why Abundiz's name was not included as a charging party in the complaint which was later issued by the Office of General Counsel.

California State University Northridge (CSUN) campus and that she filed grievances on or about April 26 and July 21, 2016.

On January 16, 2018, an informal settlement conference was held, but the matter was not resolved.

A formal hearing was held from June 11 through 13, 2018.

At the opening of the first day of hearing, June 11, 2018, SUPA moved to amend the complaint to allege that the same facts alleged in the complaint also constituted a violation that CSU interfered with employee rights in violation of HEERA section 3571, subdivision (a). Over CSU's objection, the Administrative Law Judge (ALJ) granted the amendment as allegations in an amended charge or complaint that add a new legal theory based on the same general set of facts, as were previously alleged, "relate back" for statute of limitations purposes to the date of the original pleading. (*United Teachers Los Angeles (Raines, et al.)* (2016) PERB Decision No. 2475, p. 58.)

Also on the first day of formal hearing, June 11, 2018, Sergeant Abundiz and Officer A<sup>4</sup> expressly waived any privacy interest that they had regarding the discussion and content of the investigations conducted concerning them and their rights to privacy regarding their peace officer personnel files. As a result of these waivers, a number of exhibits were offered that fall within the ambit of peace officer personnel records as defined by Penal Code sections 832.7 and 832.8: Charging Party Exhibit 6 – Sergeant Abundiz's internal affairs interview statement; Charging Party Exhibit 7 – Officer A's internal affairs interview

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<sup>4</sup> The name of the officer will not be mentioned in this proposed decision and will instead be represented by the alphabetic character "A." As a non-party, Officer A had no interest in this matter. Other officers who were involved in some of these incidents will also be identified by alphabetic character. The characters used do not necessarily correspond to any part of the officers' names.

statement; Respondent's Exhibit 16 – Internal affairs investigation file 2016-IA-03; Respondent's Exhibit 17 – Internal affairs investigation file 2016-IA-04; and Respondent's Exhibit 18 – Internal affairs Investigation file 2016-IA-06.<sup>5</sup> These statements and investigations not only involved allegations regarding Sergeant Abundiz, but also regarding allegations regarding officer(s) who were not a party or in privity with a party to these proceedings. On these formal hearing days, all of these exhibits were ordered sealed from public inspection pursuant to the peace officer privacy protections set forth in Penal Code section 832.7 and 832.8 and Government Code section 11425.20.

Post-hearing briefs were submitted on August 24, 2018, and on that date the matter was submitted for proposed decision.

### FINDINGS OF FACT

#### Jurisdiction and the Parties

SUPA is the exclusive representative of an appropriate unit of employees within the meaning of HEERA section 3562, subdivision (i). SUPA represents Unit 8, which includes police officers, corporals, and sergeants of the University's campus police departments, including CSUN Department of Police Services (DPS).<sup>6</sup> Jeffrey Solomon (Solomon) is the

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<sup>5</sup> On the third day of formal hearing, June 13, 2018, CSU sought to introduce the entire internal affairs file of three investigations in order to give context to the recorded interviews of Sergeant Abundiz and Officer A and provide justification for its initiating its investigation concerning Sergeant Abundiz. A review of these internal affairs investigation files were conducted by the ALJ on this day. These investigations are determined to be protected pursuant to Penal Code section 832.7 and 832.8, but were material in order for the ALJ to come to a determination in this proceeding. No objection was raised as to the use of these internal affairs files other than that the documents be sealed from public inspection.

<sup>6</sup> Officers, Corporals and Sergeants in this bargaining unit are considered peace officers under Penal Code 830.2. subdivision (c), and therefore are covered by the Public Safety Officers Procedural Bill of Rights (PSOPBR), Government Code section 3300, et seq. (Government Code section 3301.)

President of SUPA. Sergeant Abundiz has been the SUPA Vice-President since July 2016 and was its former Treasurer since 2006. She is also the CSUN Association Director (director).

The University is a higher-education employer within the meaning of HEERA section 3562, subdivision (g). CSUN is one of the university campuses within the CSU system.

### CSUN DPS

The CSUN DPS is structured similarly to a small police department of its size. There are twenty-six sworn officers, including a Chief of Police (Chief), two captains, a lieutenant of patrol operations, seven or eight sergeants, two corporals, and the remainder being police officers.

Anne Glavin (Chief Glavin) has been the Chief of the CSUN DPS since 2002.<sup>7</sup> She was in charge of all law enforcement operations, public safety, security, emergency management, and parking and transportation services. Captain Alfredo Fernandez (Captain Fernandez) was over the Patrol Operations Division which included all patrol officers, the dispatch center, and traffic safety.<sup>8</sup> Captain Fernandez also conducted internal affairs investigations when assigned to do so by Chief Glavin. Captain Scott VanScoy (Captain VanScoy) oversaw the investigations unit and the crime prevention unit. He was the designated Special Services Captain which gave him authority over all internal affairs investigations.<sup>9</sup> As the Special Services Captain, Captain VanScoy reviewed all internal

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<sup>7</sup> Chief Glavin became a police officer in 1975 for Massachusetts Institute of Technology (MIT) Police Department in Cambridge, Massachusetts for 27 years. At MIT, she rose from police officer to sergeant, lieutenant, captain and ultimately the Chief of Police in 1987, until the time she resigned to become the CSUN Chief in 2002.

<sup>8</sup> Captain Fernandez has been a police captain at CSUN since 2006/2007.

<sup>9</sup> Captain VanScoy has been a police captain at CSUN since approximately 2007.

affairs report when they were completed, before they were submitted to Chief Glavin. Captain VanScoy also conducted internal affairs investigations himself as well as Lieutenant Mark Benavidez (Lieutenant Benavidez) who supervised other sergeants and officers in the Patrol Operations Division.<sup>10</sup>

Sergeant Abundiz

Sergeant Abundiz began her career with CSUN DPS as a student assistant in 1996. She left for two months and returned that same year when she was hired as an administrative assistant/special assistant to the Chief. She remained in that position for five years and then went to the police academy. She graduated in 2001 and became a sworn officer. She served as a police officer until 2006, when she was promoted to her current rank of sergeant. Between January 27, 2010 and January 9, 2013, Chief Glavin had issued Sergeant Abundiz approximately seven Certificates of Excellence and one commendation.<sup>11</sup>

Sergeant Abundiz was injured in a car accident on July 29, 2014, and was off work for a year and a half. She returned to work in January 2016. Since she was off work for an extended period of time, Chief Glavin directed her to participate in five weeks of training to refresh her departmental knowledge and skills.

In addition to being SUPA's Vice-President since July 2016, Sergeant Abundiz was also a member of the Executive Board, which consisted of four people: President Solomon of Sacramento; herself as Vice-President, Treasurer Matt Kroner of Sacramento; and Secretary

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<sup>10</sup> At the time of the investigations in question, Captains VanScoy and Fernandez were the more seasoned internal affairs investigators where Lieutenant Benavidez had conducted less than three or four internal affairs investigations.

<sup>11</sup> Some Certificates of Excellence were issued to Sergeant Abundiz after this date also, but these were dates which came after Chief Glavin's August 11, 2016 decision to investigate Sergeant Abundiz.

Justin Celano of Fresno. The Executive Board was responsible for contract negotiations for all SUPA Unit 8 members, in addition to all legal matters that involve members.

Sergeant Abundiz oversaw SUPA representation in the southern California area and has been involved in representing SUPA unit employees in disciplinary matters since 2006.<sup>12</sup>

Sergeant Abundiz was also a SUPA director at CSUN, as were all other SUPA officers from their respective campuses. There are SUPA directors and alternate directors at all campuses. The alternate directors serve in the capacity as directors if the director is not available for a meeting or grievance or to represent an employee.<sup>13</sup> Sergeant Abundiz had difficulty getting bargaining unit employees to volunteer to assume the duties of the SUPA alternate director at the CSUN campus. When Sergeant Abundiz attempted to solicit a member to become an alternate director, he responded that he saw that she was being investigated and he did not want to experience the same treatment. She asked other employees whether they wanted to be an alternate director and they declined.<sup>14</sup>

Chief Glavin, Captain Fernandez, Captain VanScoy and Lieutenant Benavidez were aware of Sergeant Abundiz status as a SUPA representative.

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<sup>12</sup> Sergeant Abundiz testified to being aware of CSUN disciplining unit members without conducting an internal affairs investigation on a “handful” of occasions.

<sup>13</sup> Directors perform a representational function. Bargaining unit employees bring grievances to directors or their alternates, who then review the grievances and determine whether there is a violation of the bargaining agreement. The directors also handle disciplinary actions or coordinate legal representation for all the university campuses, especially for cases coming before an administrative law judge of the State Personnel Board, as well as coordinating legal representation for a unit employee’s internal affairs investigations.

<sup>14</sup> The officers who made statements to Sergeant Abundiz did not testify and therefore Sergeant Abundiz’s testimony of what they said is uncorroborated hearsay, which cannot be used to base a finding of fact upon. (PERB Regulation 32176.)

### Protected Activity

In April of 2016, Sergeant Abundiz filed a grievance regarding the partial denial of a union release request for her to attend a SUPA meeting. The grievance was pending at the time of hearing and may be appealed.

SUPA also filed a lawsuit on or about April 21, 2016 against the University's Board of Trustees, asserting that the CSUN DPS instituted illegal parking citation quotas and disciplined SUPA members for not complying with these illegal quotas. Specifically, SUPA alleged that officers were required to submit a minimum of ten parking citations every month.

Sergeant Abundiz provided assistance, support and information for the union's lawsuit. The complaint most likely alleges that Captain Fernandez gave the directive which instituted parking citation quotas at a supervisory meeting which allegedly occurred on February 6, 2014.<sup>15</sup> The complaint most likely states that three officers, other than Sergeant Abundiz, were issued "written adverse comments" and a formal written reprimand on February 2, 2015, March 12, 2015, June 1, 2015 and September 5, 2015 for not meeting these quotas. During the time period that these written adverse comments and formal written reprimand were issued, Sergeant Abundiz was off duty due to an injury.

On July 29, 2016, Sergeant Abundiz attended, on behalf of SUPA, a meet and confer over a notice to increase the parking rate for CSUN Unit 8 members.

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<sup>15</sup> The April 21, 2016 complaint was not made an exhibit of the record, but rather the amended complaint filed on November 14, 2016, was admitted which added Sergeant Abundiz as a named plaintiff to the complaint as well as allegations similar to the instant proceeding. The adding of Sergeant Abundiz and the accompanying allegations related to her in the amended complaint took place after Chief Glavin's August 11, 2016 decision to initiate an investigation into her supervisory involvement into the April 30, 2016 fire alarm and the June 18, 2016 burglar alarm incidents.

On August 29, 2016, SUPA conducted a leafletting protest at CSUN, in which information was distributed regarding SUPA’s lawsuit challenging the parking citation quota. Sergeant Abundiz assisted SUPA President Solomon by downloading the forms required to obtain a permit for the protest and providing the forms to him.<sup>16</sup> Sergeant Abundiz told bargaining unit employees about the leafletting protest, but she did not tell Chief Glavin, Captain Fernandez, or Captain VanScoy. She did, however, tell Lieutenant Benavidez, who was her direct supervisor, about a week or two in advance of the protest.<sup>17</sup> Chief Glavin admits that she was notified by an August 28, 2019 e-mail from SUPA President Solomon that he would be at CSUN between August 29 and September 2, 2018, but that e-mail only stated that Solomon and other SUPA members would be present “conducting union business” and that they would “be visiting various areas of the campus.”<sup>18</sup> No mention was made of a leafletting protest. Sergeant Abundiz was not copied on the e-mail and the e-mail made no reference to Sergeant Abundiz’s involvement in preparing for the leafletting protest. Captain Fernandez was not aware of the SUPA leafletting before it occurred. Captain Fernandez testified that after the leafletting occurred, Chief Glavin was annoyed, but largely indifferent.

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<sup>16</sup> The Associated Students at the University Student Union (USU) satellite, not the DPS, handles the issuance of permits.

<sup>17</sup> Lieutenant Benavidez did not recall such notification.

<sup>18</sup> Chief Glavin forwarded the e-mail to CSUN Associate Vice-President of Human Resources Kristina de la Vega (de la Vega) without any comment of an upcoming leafletting. It stands to reason, that if Chief Glavin would have known of the upcoming leafletting, she would have disclosed it de la Vega.

Sergeant Abundiz also filed a grievance in August of 2016 that claimed Chief Glavin did not follow seniority in her shift assignments. The grievance was pending at the time of hearing and may have been appealed.

Sergeant Abundiz believed Chief Glavin's August 11, 2016 initiation of an investigation against her constituted retaliation for her union activities. She was questioned three times regarding two incidents (fire alarm incident and burglar alarm incident) and felt uneasy and afraid of the results from the interviews because she believed anything could be used against her to prevent her from continuing to be employed as a peace officer.

#### April 30, 2016 Fire Alarm Incident<sup>19</sup>

On April 30, 2016, at 0055 hours, the CSUN dispatch center received a fire alarm activation at the University Park Apartment building 12 (UPA 12) on the east side of the second floor. Officers A and B were assigned to investigate the fire alarm, while Officer C was assigned to meet the Los Angeles Fire Department (LAFD) in order to direct the LAFD through the complex to UPA 12. While en route to the call, Officer A instructed the dispatch center to advise LAFD to stand by on the fire call until he and Officer B arrived on the scene.<sup>20</sup> The dispatcher acknowledged the instruction and did not call LAFD to dispatch them to the scene.

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<sup>19</sup> Only facts pertinent to this proceeding will be discussed and are taken largely from the internal affairs files which were reviewed by Captain VanScoy and motivated him to write one memo and instruct Lieutenant Benavidez to write another memo. At the time of the fire alarm incident, Sergeant Abundiz had been back to work in patrol operations for approximately ten days.

<sup>20</sup> Officer A explained that he told LAFD to stand by as CSUN had multiple false alarm activations immediately before this and suspected that this was another one.

Officer A and B parked their patrol vehicle on the north side of UPA 12 and entered the building through the main lobby.<sup>21</sup> They did not see any signs of smoke or fire and a large group of building residents had already left the building. Officer A proceeded to the second floor fire alarm pull station and saw no signs of smoke or fire and determined that the alarm was a false activation.

Officer B encountered a male and a female resident who were heavily intoxicated and sitting on the floor. Officer B then separated the two residents by having them sit down with their backs to the walls on opposite sides of the lobby. Officer A returned to the first floor at Officer B's request. Officer A spoke to the female resident and Officer B spoke to the male resident. The female resident was trying to calm down the male resident because he was becoming belligerent. At one point, the female resident began to stand up in order to gain the male resident's attention to calm him down. As she attempted to walk over to the male resident, Officer A directed the female resident to sit down multiple times and then kicked the female resident's foot/ankle (foot sweep) in an attempt to get her to sit back down on the ground. The female resident eventually buckled as a result and Officer A held on to the female resident as he guided her to the ground.

Sergeant Abundiz was working as the shift supervisor for the night watch patrol when the fire alarm call came into the police station. At approximately 0111 hours, a request was made by one of the officers that she respond to the scene. Sergeant Abundiz responded to the

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<sup>21</sup> While Officers A and B stated that they established an incident command center and that Officer B remained on the first floor as the incident commander, the internal affairs investigation concluded that no such command center was established as required by department policy. Since no incident command center was established, there was not a notification to the dispatch center of the location of the incident command center and was not a notification to dispatch as to who was the incident commander, as required by departmental policy as set forth in Department Policy/Procedure #05-S.O.-005 (Fire and Fire Alarm Response Procedures), Section IV.

scene and asked the resident director where her officers were located. The resident director advised that the officers were on the south side of the building and they both walked to that location. Once she located the officers, she asked Officer B what they were investigating. Officer B told her to ask Officer A.

Officer A explained to Sergeant Abundiz that they arrived and thought it was a false alarm, similar to those that they investigated previously. Officer A informed Sergeant Abundiz that the female resident was not cooperating and was not listening to him. Officer A explained that as Officer A was speaking to another person, the female resident attempted to stand up and he told her to sit back down. When she did not listen, he used a foot sweep to get her to sit and helped her back down to a sitting position. Officer A also advised he checked the female resident for injuries and there were none. Officer A then offered the female resident medical assistance, if she wanted it. Sergeant Abundiz questioned the female resident regarding the use of force and the female resident replied that nothing happened.

The male resident, who had been handcuffed, walked towards the female resident, and since he was heavily intoxicated, lost his balance and fell. Sergeant Abundiz took control of the situation and separated the male resident from the female resident. The female resident was released to the care of her roommate and the male was taken to jail. Sergeant Abundiz then returned to the station and briefed Lieutenant Benavidez about the incident.

Internal Affairs Investigation #2016-I.A.-03<sup>22</sup>

On May 2, 2016, Chief Glavin assigned Captain VanScoy to conduct an internal affairs investigation as to the use of force resulting from the April 30, 2016 incident. This request was based upon the Use of Force report filed by Lieutenant Benevidez and reviewed by Captain Fernandez. In her brief memo, Chief Glavin stated that the use of force utilized was “concerning.” Captain VanScoy began his investigation on May 3, 2016.

On May 9, 2016, Captain VanScoy issued the Internal Affairs investigation notice to Officer A, advising him of the fact that an investigation has been opened into his handling of the fire alarm incident and his use of force. Since Captain VanScoy had to interview nine individuals, including Officer A, he had to ask Chief Glavin for an extension of time of thirty days to complete his investigation.

Captain VanScoy interviewed the residents and the resident director on May 9, 10 and 12, 2016. He interviewed Officers B and C on May 11, 2016 and Officer A on May 25, 2016. Sergeant Abundiz was interviewed on June 17, 2016 and Lieutenant Benavidez was interviewed on June 21, 2016.

As stated earlier, on May 25, 2016, Captain VanScoy interviewed Officer A about what occurred on April 30, 2016. Officer A was represented by an attorney and was provided the Computer-Aided Dispatch (CAD) incident report which listed all of the officers’ calls into the dispatch center during that incident as well as the three supporting documents and the Use of

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<sup>22</sup> Department Policy/Procedure #07-P.A.-010 (Internal Affairs), Section IV, paragraph G, subparagraph 9, subparagraph (a) provides that all complaints, investigative reports, writings and other associated files shall be maintained in a separate and secure file in the Chief’s office. Subparagraph (b) provides that every sustained case that results in a letter of reprimand, suspension, loss of pay, demotion in rank, or termination shall require a summary of the complaint and disciplinary action taken which will become a permanent part of the employee’s personnel file.

Force report. Captain VanScoy began the investigation by asking open-ended questions of what occurred and then followed those questions up with more specific questions as to what occurred during the incident. The interview lasted 50 minutes long.

On June 17, 2016, Captain VanScoy interviewed Sergeant Abundiz as a witness, who related what she saw and her actions.<sup>23</sup> During the course of her interview, she was shown Officer A's completed Use of Force report that was reviewed and approved by her and Lieutenant Benavidez. When asked why she did not indicate an answer in the box to the question, "Do the actions of the officer involved in the incident indicate a need for additional training?" she was not sure why it was not completed. She said she usually placed a check in one of the two boxes ("yes" or "no") and believed it was an "oversight." She would have checked the "no" box because she did not feel additional training was needed and the use of force was justified.<sup>24</sup>

On June 21, 2016, Captain VanScoy completed his investigation and sent it to Chief Glavin. On June 24, 2016, Chief Glavin sent a memo to Officer A regarding the completion of the internal affairs investigation and its findings.

#### June 18, 2016 Burglar Alarm Incident

On or about June 18, 2016 at approximately 0532 hours, the Metropolitan Security operator called the dispatch center at approximately 0536 hours and reported burglar alarm activations at the USU Pub (pub). The operator told the dispatch center that there were two

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<sup>23</sup> Captain VanScoy asked open-ended questions to Sergeant Abundiz and she answered the questions in a narrative. Captain VanScoy specifically asked Sergeant Abundiz about her failure to check the box regarding whether the officer using force needed additional training.

<sup>24</sup> After Lieutenant Benavidez reviewed the same report, he checked a box "assigned for follow-up Internal Investigation."

burglar alarm activations – apparently one when the suspect entered the pub and another one when the suspect exited the pub.

The dispatch center sent Officers A and C to the burglar alarm activation at the pub at approximately 0538 hours. Officer C arrived first at 0539 hours and conducted an exterior search and found all exterior doors locked. Officer C looked inside the pub from the glass entry doors and did not see anyone inside. Officer C did not see any pry marks or broken glass indicating forced entry. While Officer C waited for Officer A to arrive, he realized he forgot his flashlight and returned to his patrol vehicle to retrieve it.

Officer A then arrived at approximately 0543 hours. Officer C advised Officer A of his initial check of the premises. Officer A walked to the northwest main entrance to the pub without Officer C and used his department-issued key to unlock the door and enter the building at approximately 0544 hours. Officer A scanned the open area of the restaurant near the manager's office door and the cashier counter during his search. He shined his flashlight beam onto the damaged louvered vents of the office manager's door<sup>25</sup> and pushed the door open. Officer A entered the office and looked around. He directed his flashlight to the bank bag on the floor, the safe, the desk, and the ladder that led to a roof access hatch. He then surveyed the storage space under the surveillance equipment cabinet, and again observed the bank bag left on the floor, the safe, and the desk. Officer A then left the office and ensured that the door was completely closed. The search took about 20 minutes and Officer A did not check the roof access hatch to see if there was evidence of a forced entry. He then surveyed the cashier and counter areas.

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<sup>25</sup> Officer A had seen these vents damaged before and assumed they just had not been fixed. In reality, the vents had been fixed and were damaged as a result of the forced entry.

Officer C entered the pub at approximately 0547 hours and met up with Officer A at the northwest entry door. The officers then began a methodical search of the bathrooms, and the dining and kitchen areas. After completing their search, Officer A advised the dispatch center, “Code 4,”<sup>26</sup> or no sign of trouble and no sign of “459.”<sup>27</sup>

Neither Officer A nor Officer C completed the Records Information Management System (RIMS) log entry into the database system after the disposition of the call prior to the end of their shift.<sup>28</sup> Officer A thought Officer C was going to complete the RIMS log entry and Officer C thought Officer A was going to complete the RIMS log entry, since he took over the call as the primary officer.

On June 18, 2016, the night shift briefing commenced at 1800 hours. Lieutenant Benavidez conducted the briefing since Sergeant Abundiz had called in sick. Officers A and C were present when Lieutenant Benavidez pulled up the burglary crime report and began reviewing the narrative with both officers. Officer A asked if a RIMS entry had to be made when there was no sign of a burglary and, after a brief discussion, Lieutenant Benavidez directed Officer A that a RIMS log entry be completed for the incident.

On June 20, 2016, RIMS Incident #1606180004 showed that a log entry was completed later in the evening of June 18, 2016 at 1944 hours by Officer A.

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<sup>26</sup> “Code 4” means there was no evidence of a crime and no problem, which is documented by the dispatcher via the RIMS database system as an entry and which demonstrates that the officer is clear. USU surveillance footage and radio logs revealed, however, that a burglar had in fact entered the pub and entered into the manager’s office and attempted to open the safe, but was unsuccessful. The officers here dismissed apparent evidence that a crime already had been committed.

<sup>27</sup> California Penal Code section 459 defines the crime of burglary.

<sup>28</sup> Department Policy/Procedure 307-O.A.-007 (Field Reporting and Management) required that officers who were dispatched to a burglary scene make an entry into the RIMS database system.

Internal Affairs Investigation #2016-I.A.-04

As a result of his briefing on June 18, 2016 with Officers A and C, Lieutenant Benavidez discussed his concerns with Captain VanScoy over the incident. Captain VanScoy sent a memorandum or memo to Chief Glavin on June 23, 2016 and recommended that an investigation be conducted. Chief Glavin concurred and on June 24, 2016, she assigned the investigation to be conducted by Lieutenant Benavidez.

On June 30 2016, Lieutenant Benavidez issued an Internal Affairs investigation notice to Officer A advising him that he was the subject of the investigation regarding his conduct relating to the June 18, 2016 burglary investigation. He also issued Internal Affairs investigation notices to Officer C and Sergeant Abundiz, advising them that they were witnesses to the burglar alarm incident of June 18, 2016.

During Lieutenant Benavidez investigation, he interviewed Sergeant Abundiz on July 6, 2018; Officer C on July 8, 2018; and Officer A on July 19, 2016.

As stated earlier, on July 19, 2016, Lieutenant Benavidez interviewed Officer A about what occurred on June 18, 2016. Officer A was represented by an attorney and was provided the CAD incident report and both were allowed to review the reports before the interview began. Similar to Captain VanScoy, Lieutenant Benavidez began the investigation by asking open-ended questions as to what occurred and then followed those questions up with more specific questions. The interview lasted 26 minutes long.

Lieutenant Benavidez interviewed Sergeant Abundiz on July 6, 2016 as a witness, before any other witnesses and the employee who was the subject of the investigation was interviewed. Sergeant Abundiz was the patrol supervisor at 0538 hours on June 18, 2016. She had a vague recollection of the incident. Sergeant Abundiz heard a call dispatched, but was

not monitoring the radio closely and did not know the nature of the call because at the time, she was in the jail checking the doors as the doors were malfunctioning earlier in her shift.

Sergeant Abundiz did not see Officers A or C before the officers went “end of watch,”<sup>29</sup> but she was not sure. Neither Officer A nor C advised her that they responded to a burglar alarm at the pub or briefed her on how they handled the call. She had no other information regarding how they handled the call.

On July 27, 2016, Lieutenant Benavidez completed his investigation and sent his report to Chief Glavin and on August 4, 2016, Chief Glavin issued a memo to Officer A.

#### Internal Affairs Investigation #2016-I.A.-06

Captain VanScoy was responsible for reviewing all internal affairs investigations conducted by other DPS investigators. After reviewing his own internal affairs report regarding the fire alarm incident, on August 8, 2016, Captain VanScoy sent a memo to Chief Glavin regarding Sergeant Abundiz’s “Shift Supervisor Performance Deficiencies.” Specifically, Captain VanScoy had the following concerns about the manner in which Sergeant Abundiz supervised Officers A’s and B’s response and handling of the April 30, 2016 fire alarm activation: that Sergeant Abundiz arrived on scene and had to ask a resident director where her patrol officers were located; that no incident command post was established; the fire department’s response was cancelled over the radio by one of the field officers prior to their arrival on scene violating departmental policies and procedures; that she did not ask about the establishment of an incident command post; and she did not override the officer’s cancellation of the fire department’s response. Captain VanScoy believed Sergeant Abundiz’s inaction

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<sup>29</sup> “End of watch” means that the officer has finished the shift.

placed an undue safety risk upon the campus community and exposed the university and department to liability.<sup>30</sup>

Captain VanScoy also expressed his concern that Sergeant Abundiz seemed to be only focusing on the potential of a citizen complaint filed by the resident director<sup>31</sup> instead of assessing the incident as to whether the Officer A's use of force was in compliance with DPS policy. Captain VanScoy explained that his assertion was supported by: Sergeant Abundiz not performing a preliminary investigation into the use of force when she was informed that an officer exercised physical force against a resident; that Sergeant Abundiz "accidentally" missed checking the box as to whether further training was needed; and Sergeant Abundiz stated that an incident command post had been established, when it had not. In addition, Sergeant Abundiz approved her own supplemental report, rather than have it reviewed by another supervisor or the patrol operations commander, according to departmental policy. Captain VanScoy recommended to the Chief that further investigation was necessary.

Regarding the burglar alarm investigation, Captain VanScoy also had concerns regarding Sergeant Abundiz after reviewing Lieutenant Benavidez investigation report and discussing the matter with him.<sup>32</sup> However, instead of writing his own memo to Chief Glavin

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<sup>30</sup> Captain VanScoy estimated that he had conducted approximately five investigations of CSUN police supervisors. He admitted that he did not make it a practice of starting a second investigation after a first investigation had been completed.

<sup>31</sup> The resident director expressed concerns as to how his residents were treated by the officer(s) that night.

<sup>32</sup> Lieutenant Benavidez's stated that his focus during the conduct of his internal affairs investigation was on the conduct of the officers (Officers A and C). While there may be facts calling attention to some other types of violations, he was taught that the other violations should be noted, but the focus of the investigation should remain on the scope of the investigation (the conduct of the officer(s) who were the subject of the investigation). Initially, Lieutenant Benavidez did not understand the premise for Captain VanScoy's concern, but then understood afterwards that the concern needed to be noted.

about his concerns, Captain VanScoy directed Lieutenant Benavidez to prepare a memo for Chief Glavin outlining his concerns as Lieutenant Benavidez was the investigator assigned to the case. Lieutenant Benavidez had not been directed to prepare such a memo in the past, but he had only prepared less than three or four investigations at the time of this directive. On August 11, 2016, Lieutenant Benavidez sent a memo to Chief Glavin regarding Sergeant Abundiz entitled, “Employee Performance Matter.” Specifically, Lieutenant Benavidez raised concerns about Sergeant Abundiz’s supervision of Officers A and C with respect to their handling of the burglary of the pub on June 18, 2016. He noted that the RIMS incident log demonstrated that neither officer entered a RIMS log entry documenting their actions on the call as required by department policy and that it also required the supervisor to review all reports submitted prior to the end of their watch to ensure that the specific procedures outlined in the policy were followed. Lieutenant Benavidez noted that Sergeant Abundiz had a shift log dated June 17, 2016, in the “Shift Synopsis” section, that documented that the officers responded to a burglar alarm call indicating she was aware of the call. Sergeant Abundiz should have checked the RIMS incident log to ensure that the primary officer entered a RIMS log entry. Lieutenant Benavidez likewise recommended that Sergeant Abundiz’s performance be investigated.

On August 11, 2016, Chief Glavin assigned Captain Fernandez to conduct an “IA” or an internal affairs investigation in light of Captain VanScoy’s and Lieutenant Benavidez’s memos.<sup>33</sup> Chief Glavin further stated that “[t]here appears to be a total breakdown of

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<sup>33</sup> Pursuant to Department Policy 07-P.A.-010 (Internal Affairs), upon the completion of an internal affairs investigation, the Chief has the authority to order further investigation, if necessary.

supervisory oversight in these cases.”<sup>34</sup> Chief Glavin assigned Captain Fernandez as her other two investigators (Captain VanScoy and Lieutenant Benavidez) had already made recommendations for a further investigation into these matters and she wanted to assign an investigator that was not involved as her usual practice was to separate issues.

Since Sergeant Abundiz was out of the office from August 7, 2016 through August 24, 2016 and from August 28, 2016 through August 30, 2016, Captain Fernandez served Sergeant Abundiz with an Internal Affairs investigation notice on September 2, 2016, regarding allegations that she failed to properly discharge her duties as a supervisor. The notice also notified her of her right to the presence of a representative and that she was not to contact any witnesses in the case. Captain Fernandez suggested September 8, 15, and 16, 2016, as potential dates for an interview.

Captain Fernandez did not hear back from Sergeant Abundiz, so he contacted her on September 9, 2016 to confirm the date of her interview. Sergeant Abundiz advised that she was waiting for her attorney and proposed September 30, 2016 as a possible date for the interview. They also discussed October 13 or 14 as possible dates.

On September 22, 2016, Sergeant Abundiz sent Captain Fernandez an e-mail advising him that her attorney was available on October 13, 2016. Captain Fernandez had cancelled his vacation to accept her proposed date of September 30, 2016, and preferred that date. Sergeant Abundiz replied that September 30, 2016, was no longer good and she and her counsel preferred to meet on October 13 or 14, 2016.

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<sup>34</sup> Chief Glavin explained at the hearing departmental policies are created to guide supervisors and officers to ensure that they properly respond to the incident at hand. She stated that an internal affairs investigation has to be conducted if there was a failure of a supervisor to apply the proper policy so that the DPS can take corrective action and DPS employees can follow the proper policies in future incidents, thereby maintaining that professional standards are upheld.

On September 26, 2016, a SUPA attorney sent a letter to the CSUN President demanding, inter alia, that CSUN rescind its order to interview Sergeant Abundiz. The letter requested a response within 24 hours so that SUPA could file an injunctive relief request with PERB as well as a complaint for damages before Los Angeles Superior Court. On September 28, 2016, CSUN responded by stating that it would be proceeding with its investigation.

On November 14, 2016, SUPA amended its April 21, 2016 lawsuit adding Sergeant Abundiz as a named plaintiff and included allegations that the investigation was meritless, harassment and retaliatory. The amended complaint requested as a remedy that CSUN cease from retaliating against Sergeant Abundiz.

On November 16, 2016, an Amended Notice of Internal Affairs Investigation was issued to Sergeant Abundiz, scheduling her interview for December 2, 2016.

On or about November 18, 2016, SUPA filed its charge and request for injunctive relief. The request for injunctive relief requested that PERB order CSUN to cease and desist from its investigation of Sergeant Abundiz. The request for injunctive relief was denied on November 29, 2016.

On November 30, 2016, SUPA sent a letter to Captain Fernandez asking him to recuse himself as the assigned investigator as he was a named as a “wrongdoer” in SUPA’s lawsuit along with Chief Glavin, Captain VanScoy and Lieutenant Benavidez as imposing illegal parking citation quotas. SUPA alleged in the letter that Captain Fernandez ordered Sergeant Abundiz to attend an investigative interview in retaliation for her union activities. SUPA requested that CSUN retain an outside investigator or law firm to conduct the investigation. Captain Fernandez forwarded the letter to Chief Glavin who forwarded it to

CSUN Associate Vice-President of Human Resources de la Vega. After Chief Glavin consulted with de la Vega, they agreed that no conflict of interest existed for Captain Fernandez.<sup>35</sup> On December 1, 2016, de la Vega responded to SUPA's letter stating that it was denying the request that CSUN hire an outside investigator, and the interview would proceed as scheduled on December 2, 2016.

On December 2, 2016, Captain Fernandez interviewed Sergeant Abundiz in the presence of her attorney representative and the interview was recorded.<sup>36</sup> Captain Fernandez read from a standard admonishment that Sergeant Abundiz had the right to a representative, the right to record the interview, a description of allegations to be investigated and that she must answer all questions truthfully. Sergeant Abundiz's attorney placed some preliminary objections as to CSUN DPS's investigation of her as they should have noticed her as a subject the first time around and they had sufficient notice to do so and that the investigation was potentially in retaliation for SUPA's leafletting on August 29, 2016.<sup>37</sup> Sergeant Abundiz's attorney made sure that SUPA's November 30, 2016 letter and de la Vega's December 1, 2016

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<sup>35</sup> Chief Glavin testified that she had only hired an outside investigator three times in the last 16 years as Chief and a decision to hire an outside investigator was usually contingent on the workload of her investigators.

<sup>36</sup> Captain Fernandez was questioned at the hearing why he scheduled Sergeant Abundiz for an internal affairs interview rather than just glean from her existing statements given in her prior witness interviews. Captain Fernandez responded that he always reinterviews the employee when they gave a statement as a witness so that they can have access to a representative in compliance with the PSOPBR. (See Gov. Code, § 3303, subd. (i).) Failure to adhere to PSOPBR rights can lead to the exclusion of a statement at an administrative hearing. (*City of Los Angeles v. Superior Court* (1997) 57 Cal.App.4th 1506, 1517.)

<sup>37</sup> Specifically, Sergeant Abundiz's attorney mentioned that Sergeant Abundiz was the SUPA Vice-President. Captain Fernandez informally congratulated Sergeant Abundiz and stated that he did not know she was now the SUPA Vice-President.

response were part of the investigation file. Captain Fernandez acknowledged that they were part of the file.

Captain Fernandez then gave Sergeant Abundiz and her attorney the CAD Incident Reports and the supporting documentation to the June 18, 2016 report. Sergeant Abundiz admitted that she had reviewed the CAD Incident Reports, but was unsure if she reviewed the other reports. Captain Fernandez then allowed Sergeant Abundiz and her attorney additional time to review the reports.

Captain Fernandez initially stated that he was going to ask open-ended questions and then follow up with clarifying questions. Sergeant Abundiz's attorney objected that she had already given a long narrative answer to Captain VanScoy and asked Captain Fernandez if he would allow her to answer the narrative question in smaller increments. Captain Fernandez agreed that she could answer the questions based upon the CAD Incident Report chronology to the best of her recollection. While Captain Fernandez did ask some narrative questions as to what happened at a period of time and what happened next after she described a portion of the incident, most of Captain Fernandez's questions were specific and directed.

Sergeant Abundiz's attorney inserted himself throughout the investigative interview in an attempt to assist his client. Sergeant Abundiz's attorney was also allowed to advocate certain points on his client's behalf at the end of the interview. The interview lasted less than 45 minutes. Captain Fernandez did not repeatedly ask the same questions over and over again covering the same ground he had already covered.

When asked about the fire alarm incident and whether she observed if an incident command post was set up at the scene, Sergeant Abundiz answered that she did not recall. Sergeant Abundiz advised that she reviewed and approved the officer's reports for the incident,

but inadvertently failed to check a box on the Use of Force report, but did so during her interview with Captain VanScoy. Captain VanScoy also advised Sergeant Abundiz that Lieutenant Benavidez had already approved the report.

With regard to the June 18, 2016 burglar alarm incident, Sergeant Abundiz's interview revealed that she did not recall hearing anything about the burglar alarm. She only became aware of it because of the interview with Lieutenant Benavidez during a related internal affairs investigation, as she was in the jail conducting a check and having radio problems. The call for service went out about 0538 hours prior to her end of watch and she stayed over and was out in the field when the officers returned from the station to conclude their end of watch. She did not recall if these officers made a RIMS entry. If she had heard the call for service or if the officers made her aware of it, the time was too close to the proximity of the officers' end of watch and she did not see them. Sergeant Abundiz explained these reasons as why she did not speak with the officers on the day of the incident. She did not believe it was her responsibility to review with the officers what transpired before the end of her shift. She explained that the next supervisor coming on shift usually assumed responsibility for the officers finalizing whatever is pending. If the matter was still pending, Sergeant Abundiz said that she would have stayed if there was a report pending so she could review and approve it. She did not recall anything further about the incident.

On December 8, 2016, Captain Fernandez interviewed Captain VanScoy. He asked Captain VanScoy why he wrote the memo relating to the April 30, 2016 incident. Captain VanScoy advised that often, issues come up during an investigation that become apparent after the report had been compiled and this was such a case. This case involved a use of force incident, which triggered supervisorial responsibilities. He had other concerns such as

the lack of establishment of an incident command post. He believed that these concerns needed to be answered and brought them to the attention of Chief Glavin. He did not opine whether violations of policy occurred, but that these questions needed to be investigated.

Captain VanScoy stated that he reviewed the internal affairs investigative report regarding the burglar alarm incident and recalled a discussion with either Chief Glavin or Lieutenant Benavidez regarding the issue of performance and was advised that the proper way to handle questions was to write a memo, but he did not recall if he asked Lieutenant Benavidez to write a memo.

On January 9, 2017, Captain Fernandez completed his investigation and sent his report to Chief Glavin. He initially recommended the two lowest level possibilities of discipline, which was either a performance comment card<sup>38</sup> or a memorandum of counseling.

Pursuant to Department Policy 07-P.A.-010 (Internal Affairs), Section IV, subparagraph G, Section 8, subsection 8 (c), upon receipt of a completed investigation, Chief Glavin has the discretion to determine the appropriate disciplinary proceeding,<sup>39</sup> remedial training, and/or other disposition based upon the findings and the employee's record of service. She was not bound by the investigation's findings.

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<sup>38</sup> A performance comment card is a half sheet of paper which documented an employee's performance issue. A performance comment card is not kept in the employee's personnel file and, other than a "verbal counseling," is considered to be the lowest level of discipline on the progressive discipline continuum.

<sup>39</sup> Pursuant to Department Policy/Procedure 08-P.A.-013 (Discipline Procedures), Sec. II, subpara. E, disciplinary proceedings include verbal counseling, memorandum of counseling, oral reprimand, written reprimand, suspension, demotion or dismissal. Remedial training may also be included in addition to one of the above actions or in lieu of a memorandum of counseling, if approved by the Chief.

Captain Fernandez then discussed the investigation with Chief Glavin. Eventually, they both agreed training was appropriate and agreed that Sergeant Abundiz did not deserve any disciplinary action.

On January 25, 2017, Chief Glavin issued a memo regarding Internal Affairs Investigation 2016-I.A.-06 to Sergeant Abundiz, finding that she violated Department Policy/Procedure #08-L.E.-011 (Use of Force), Section V, paragraph C, which requires, in pertinent part, that the supervisor ensure that the Use of Force report form is completed by all officers using force, as defined within the policy and approve said report(s) prior to the end of watch on the date of occurrence. Chief Glavin also advised Sergeant Abundiz that she violated Department Policy/Procedure #07-O.A.-007 (Field Reporting and Management), Section IV, paragraph F, subparagraph 1, which provides “Supervisors shall review all reports submitted prior to the end of their watch to ensure that the specific procedures outlined in this policy and the Criminal Investigation Policy (Policy/Procedure Number 07-C.I.-005) are being followed. Other allegations were not sustained. As a result of these findings, Chief Glavin determined that the policy violations were best addressed through remedial training.<sup>40</sup> Sergeant Abundiz completed her remedial training by reviewing the appropriate policies with Captain VanScoy.

### ISSUES

1. Did CSU retaliate against Sergeant Abundiz because of her protected activities by initiating an investigation and scheduling her for an investigative interview in violation of HEERA section 3571, subdivision (a)?

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<sup>40</sup> Department Policy/Procedure #04-T.C.-001 (Training and Career Development) contains the general policy provisions with respect to Training and Career Development for all employees. Section IV, paragraph I, provides the policy regarding remedial training, which can be provided by, among others, department supervisors.

2. Did CSU interfere with employee rights by initiating an investigation of Sergeant Abundiz and scheduling her for an investigative interview in violation of HEERA section 3571, subdivision (a)?

### CONCLUSIONS OF LAW

Higher education employees have the right to “form, join and participate in the activities of employee organizations of their own choosing.” (HEERA, § 3565.) A higher education employer violates this right when it either interferes with employees’ exercise of their rights or imposes reprisals on employees because of their participation in protected activities. (HEERA, § 3571, subd. (a).)

#### Retaliation because of Participation in Protected Activities

To establish a prima facie case of retaliation in violation of HEERA section 3571, subdivision (a), a charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; (3) the employer took adverse action against the employee; and (4) the employer took the action because of the exercise of those rights. (*Novato Unified School District* (1982) PERB Decision No. 210, pp 6-8.)

Once the charging party has established a prima facie case, the burden shifts to the respondent to demonstrate that it had and was motivated by alternative, non-discriminatory reasons in taking adverse action. (*Palo Verde Unified School District* (2013) PERB Decision No. 2337, p. 12.)

#### 1. Protected Activity

The filing and pursuit of grievances is a protected activity. (*Sacramento City Unified School District* (2010) PERB Decision No. 2129, p. 6.) The Board has also found that the

exercise of representational activities in the capacity as a union steward or other official role is also protected. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2282-S, pp. 9-11; see also *State of California (Department of Corrections)* (2001) PERB Decision No. 1435-S, adopted proposed decision, p. 26, citing *Los Angeles Unified School District* (1992) PERB Decision No. 957.) Additionally, PERB has consistently described leafleting to advertise a labor dispute as presumptively protected activity. (*Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 16.)

It was largely undisputed by the University that Sergeant Abundiz in her role as a SUPA representative in 2016 exercised protected activity by filing grievances and representing SUPA at a meet and confer with Chief Glavin regarding the proposed increase of parking rates. She also assisted in the preparations of the leafletting at the campus. SUPA has therefore demonstrated by a preponderance of the evidence that Sergeant Abundiz engaged in protected activity and satisfied this element of proving a prima facie case of retaliation.

## 2. Knowledge of Protected Activity

The ultimate decision maker of the individual who issued the alleged adverse action must have actual or imputed knowledge of Sergeant Abundiz's protected activities. (*Sacramento City Unified School District* (1985) PERB Decision No. 492, adopted proposed decision, pp. 33-34.) Except for the August 29, 2016 leafletting protest, the University does not dispute its knowledge of Sergeant Abundiz's protected activity. Chief Glavin, and Captains Fernandez and VanScoy were all unaware of Sergeant Abundiz's involvement in the leafletting protest. Sergeant Abundiz stated that she informed Lieutenant Benavidez as her supervisor of the upcoming leafletting a week or two in advance. However, other than Lieutenant Benavidez's rank, SUPA did not provide any evidence to support that the

notification of Lieutenant Benavidez was tantamount to notifying Chief Glavin or even Captain Fernandez or Captain VanScoy. Therefore, such notification will not be imputed to Chief Glavin and the captains.

However, regardless of whether such notification to Lieutenant Benavidez can be imputed to Chief Glavin, knowledge of Sergeant Abundiz's participation in this event is inconsequential. Chief Glavin's decision to investigate Sergeant Abundiz was issued on August 11, 2016, which was before Sergeant Abundiz stated that she informed Lieutenant Benavidez of the upcoming leafletting. Therefore, the August 29, 2016 leafletting could not have impacted Chief Glavin's August 11, 2016 to initiate the investigation and eventually have Captain Fernandez schedule the interview.<sup>41</sup>

Other than the August 29, 2016 leafletting, SUPA has established that Chief Glavin had knowledge of Sergeant Abundiz's exercise of protected activity under HEERA.

### 3. Adverse Action

In determining whether an employer's action is adverse, the Board uses an objective test and will not rely upon subjective reactions of the employee. (*Chula Vista Elementary School District* (2018) PERB Decision No. 2586, pp. 24-25.) "The test which must be satisfied is not whether the employee found the employer's action to be adverse, but whether a reasonable person under the same circumstances would consider the action to have an adverse

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<sup>41</sup> The decision to initiate an internal affairs investigation of an employee and schedule that employee for an investigative interview are all part of one singular decision to initiate an investigation of the employee, especially when the decision is to investigate the employee in the format of an internal affairs investigation as was done in this case. The two actions (initiating an investigation and scheduling an interview) are inseparable as the scheduling of the interview will eventually occur when the decision to initiate the internal affairs investigation is made.

impact of the employee's employment." (*Id.* at p. 25, quoting *Newark Unified School District* (1991) PERB Decision No. 864, pp. 11-12.)

The initiation of an investigation into allegations which could lead to disciplinary action by the employer may be considered to be an adverse action against the investigated employee, regardless of whether disciplinary action actually results. (*City of Torrance* (2008) PERB Decision No. 1971-M, pp. 16-17; *State of California (Department of Youth Authority)* (2000) PERB Decision No. 1403-S, p. 32 (*Dept. of Youth Authority*); *California Union of Safety Employees (Coelho)* (1994) PERB Decision No. 1032-S, p. 12 (*CAUSE-Coelho*).) This is true for investigations initiated at the behest of management (*City of Torrance, supra*, PERB Decision No. 1971, p. 16), and those that were undertaken as a result of complaints against the employee made by another employee or third parties, including by representatives of the union. (*Dept. of Youth Authority, supra*, PERB Decision No. 1403-S, adopted proposed decision, p. 16; *CAUSE-Coelho, supra*, PERB Decision No. 1032-S, p. 5.)

The determination of whether an employer's investigation rises to the level of an adverse action is made on a case-by-case basis on the facts presented. (*Service Employees International Union, Local 221 (Gutierrez)* (2012) PERB Decision No. 2277-M, p. 9 (*SEIU-Gutierrez*).) In *SEIU-Gutierrez*, the union's request to management to investigate an employee's alleged on-duty, anti-union activities did not result in a finding of adverse action, because the investigation consisted entirely of one phone call by management to the investigated employee, after which the matter was completely dropped on the same day. (*Id.* at p. 7.) The Board concluded that no employee would reasonably fear disciplinary action based on the very limited response of the employer to the union's allegations against him. (*Id.* at pp. 7-9.)

In contrast, in *City of Torrance*, the investigation was found to be adverse because the employee was threatened that sustained allegations could lead to discipline. (*City of Torrance, supra*, PERB Decision No. 1971-M, p. 16.) Similarly, in *Dept. of Youth Authority*, the adverse investigation consisted of formal witness interviews over a long period and the allegations involved misconduct against students. (*Dept. of Youth Authority, supra*, PERB Decision No. 1403-S, p. 37.)

In *CAUSE-Coelho*, a union's attorney filed a written complaint against a safety officer employed by the state's department of fish and game. In that case, after the employee had sued the union in small claim's court, a heated verbal altercation ensued outside of the court house between the union's attorney and the employee. The union alleged that the employee potentially represented a threat to the safety of the union's staff members because of the way the employee had behaved toward the union's attorney. The employer's investigation consisted of formal interviews and a lengthy written report, but the charges were not sustained against the employee. The Board found that such action by the union was adverse to the employee, because "a reasonable person [would] 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." (*CAUSE-Coelho, supra*, PERB Decision No. 1032-S, p. 12.)

Thus, where the investigation into alleged misconduct by the employee is conducted in a formal and serious manner by the employer, the more likely it is to be found to be adverse to the investigated employee's interests.

In this case, the investigation into the conduct of Sergeant Abundiz was formal and serious because (1) it was an internal affairs investigation where she had the right to the presence of a representative and record the interview; (2) Sergeant Abundiz was compelled to attend the recorded interview and answer all questions, and (3) Sergeant Abundiz was directed not to contact any witnesses. Thus, the investigation process here was very different from the insubstantial one in *SEIU-Gutierrez*, and very similar to those in the other cases cited above, where formal investigations were adverse to an employee's employment interests despite them not culminating in disciplinary action against the investigated employees. A reasonable employee in these circumstances would find the investigation to be adverse to one's employment. SUPA has demonstrated that the University subjected Sergeant Abundiz to an adverse action under HEERA.

#### 4. Unlawful Motivation

A charging party must also show that the employee's protected activity was a motivating factor in the employer's decision to impose adverse action. (*Carlsbad Unified School District* (1979) PERB Decision No. 89; *Omnitrans* (2010) PERB Decision No. 2121-M.) In the absence of direct evidence, an inference of unlawful motivation may be drawn from circumstantial evidence in the record. (*Palo Verde Unified School District, supra*, PERB Decision No. 2337, pp. 10-12.)

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 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, supra*, PERB Decision No. 1971-M; *Coast Community College District* (2003) PERB Decision No. 1560); (5) the employer's failure to offer the employee justification at the time it took action (*Oakland Unified School District* (2003) PERB Decision No. 1529) or the offering of exaggerated, vague, or ambiguous reasons (*McFarland Unified School District* (1990) PERB Decision No. 786); (6) employer animosity towards union activists (*Jurupa Community Services District* (2007) PERB Decision No. 1920-M; *Cupertino Union Elementary School District* (1986) PERB Decision No. 572); or (7) any other facts that demonstrate the employer's unlawful motive (*North Sacramento School District, supra*, PERB Decision No. 264; *Novato Unified School District, supra*, PERB Decision No. 210).

a. Timing

The timing factor has been established. Sergeant Abundiz engaged in protected activity throughout 2016 and specifically in filing grievances in April 26, 2016 and July 21, 2016 and participating in a meet and confer on July 29, 2016. Within a few weeks to a couple months of Sergeant Abundiz's protected activity, adverse action in the form of initiating a formal internal affairs investigation was taken. Thus, Sergeant Abundiz's protected activity was in close temporal proximity to the adverse action.

b. Disparate Treatment of the Employee and Inconsistent or Contradictory Justifications for its Actions

SUPA contends that Sergeant Abundiz was treated disparately from other employees in that Lieutenant Benavidez had been directed by Captain VanScoy to write the August 11, 2016 memo and he had not been directed to do so in the past and that Lieutenant Benavidez did not initially think Sergeant Abundiz needed to be investigated further when he completed his interview. However, Lieutenant Benavidez explained that he had conducted less than three or four internal affairs investigation before he investigated the burglar alarm incident and he was trained to focus on investigating the subject employee of the investigation, not on other aspects related to other employees, other than to note them. When Captain VanScoy and he discussed other aspects brought forward as a result of the investigation, he was directed to submit his August 11, 2016 memo to the Chief. Captain VanScoy directed Lieutenant Benavidez to prepare the memo as he was the investigative officer of the case. Overall, and based on Lieutenant Benavidez prior inexperience and training, SUPA has not established that Sergeant Abundiz was treated disparately. Additionally, based upon Captain VanScoy's and Lieutenant Benavidez's explanations, it does not appear that Lieutenant Benavidez provided an inconsistent or contradictory explanation for Lieutenant Benavidez initial decision not to recommend a subsequent investigation against Sergeant Abundiz, and then later recommend a subsequent investigation to Chief Glavin on August 11, 2016.

c. Departure from Established Procedures and Standards

An employer may be found to have engaged in retaliation where it alters its investigation practices or related employment decision in response to any intervening protected activity. (*County of Lassen* (2018) PERB Decision No. 2612-M, pp. 5-7 (*Lassen*)).

SUPA contends that CSUN DPS should have given an investigatory interview notice to Sergeant Abundiz during the fire alarm incident and burglar alarm incident investigations as it knew while those investigations progressed of Sergeant Abundiz's alleged inactions during these incidents. While the investigators may have had notice on the fire alarm incident of Sergeant Abundiz's inactions as she was interviewed after the officers,<sup>42</sup> the practice of the DPS was to focus its investigation on the subject of the investigation and make other notations once the investigation was concluded. SUPA was not able to establish that DPS had a practice of interrupting its ongoing investigation of a subject, once they found another violation, and renotice the newly suspected employee as a new subject of the investigation.

SUPA also contends that Sergeant Abundiz was the subject to open-ended questions which would lead to a narrative answer. After reviewing the interviews of Officer A, it appears that the DPS investigator had a practice of beginning their questioning with open-ended questions and then following up those questions with more narrowly focused questions. Sergeant Abundiz's interviews with Captain VanScoy and Lieutenant Benavidez were not meaningfully different from the format employed with Officer A. While Captain Fernandez asked open-ended questions of Sergeant Abundiz which called for a narrative response, Sergeant Abundiz was provided CAD incident reports and other report(s) prior to the questioning beginning.<sup>43</sup> Captain Fernandez allowed Sergeant Abundiz to give her answers

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<sup>42</sup> Sergeant Abundiz was the first witness interviewed during the burglar alarm incident and did not provide any information other than that she was not cognizant of the radio call as she was in the jail and did not speak with the officers before they concluded their shift.

<sup>43</sup> SUPA asserts that the practice of asking multiple narrative questions was an attempt to trip up Sergeant Abundiz. However, DPS practice was to provide the interviewed employee with the CAD incident report and other reports to go over with their representatives prior to any questions being asked. Such a practice would lend toward more consistency in answers rather than inconsistency. Additionally, Sergeant Abundiz' representative was aware before Sergeant Abundiz answered any questions about the incidents that Sergeant Abundiz had

while following along the chronology set forth on the CAD incident report if it assisted her in her narrative response. All in all, Captain Fernandez's narrative questions were not repetitive and more focused on a period of time within the incident as the incident progressed. He did not continue to ask the same questions about the same portion of the incident. Sergeant Abundiz's representative was able to insert himself to assist her on many occasions during the interview. The length of the investigatory interview was consistent with that taken of the prior subject of the investigation, Officer A. Captain Fernandez's interview of Sergeant Abundiz did not depart from DPS established procedures or standards.

SUPA contends that DPS had a practice of disciplining employees without an investigation. In support of this, SUPA offered Sergeant Abundiz's testimony of being aware of a "handful" of occasions where Unit 8 members were disciplined without an investigation. Sergeant Abundiz has been representing the CSUN Unit 8 employee since 2006. A handful of occasions where employees were disciplined over a period of ten years, does not establish a past practice. This contention is also rejected.

d. Employer Animosity toward Union Activist(s)

SUPA contends that Chief Glavin's August 11, 2016 authorization for Captain Fernandez to conduct an internal affairs investigation regarding Sergeant Abundiz where she characterizes Captain VanScoy's and Lieutenant Benavidez memos as demonstrating that Sergeant Abundiz's inaction as an apparent "total breakdown of supervisor oversight in these cases" as indicia of Chief Glavin's union animus, especially when compared to her statement regarding the fire alarm incident that Officer A's use of force was

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already given a long narrative answer in Captain VanScoy's investigation of the fire alarm incident. PSOPBR provides the subject of an investigation the right to access recordings of prior interviews. (Government Code section 3303, subd. (g).)

“concerning.” Chief Glavin’s statement authorizing the memo made no mention of Sergeant Abundiz union office or union activities, but only her supervisorial responsibilities. Based upon the memos submitted to Chief Glavin, especially Captain VanScoy’s August 8, 2016 memo, Sergeant Abundiz allegedly failed to take a number of actions dictated by policy. Chief Glavin did qualify her statement in the investigation authorization by stating that it “*appears* to be a total breakdown” (emphasis added). In its totality, Chief Glavin’s statement will not be considered as one that expresses animus toward union activists, but rather centers on Sergeant Abundiz’s supervisorial responsibilities.

SUPA was only able to establish timing as a nexus factor. However, timing alone does not demonstrate the necessary connection or “nexus” between the adverse action and the protected conduct. (*Moreland Elementary School District, supra*, PERB Decision No. 227.) Therefore, SUPA has not been able to establish a prima facie case of retaliation and that allegation must be dismissed.

##### 5. University’s Defense

Where there is evidence that the respondent’s adverse action was motivated by both lawful and unlawful reasons, “the question becomes whether the [adverse action] would not have occurred ‘but for’ the protected activity.” (*Martori Brothers Distributors v. ALRB* (1981) 29 Cal.3d 721, 729-730.) The “but for” test is “an affirmative defense which the respondent must establish by a preponderance of the evidence.” (*McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304.)

In assessing the evidence, PERB’s task is to determine whether the respondent’s “true motivation for taking the adverse action was the employee’s protected activity.” (*Regents of the University of California* (2012) PERB Decision No. 2302-H, p. 3, citations omitted (UC

*Regents*); see also *Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 23.) Further, PERB “weighs the respondent’s justifications for the adverse action against the evidence of the respondent’s retaliatory motive.” (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 14.) If PERB determines that a respondent’s action was not taken for an unlawful reason, it has no authority to also determine whether the action was otherwise justified or proper. (*City of Santa Monica* (2011) PERB Decision No. 2211-M, p. 17.)

Although, SUPA has not established a *prima facie* case of retaliation, even if it did, the University would be able to demonstrate that it would have taken the same action even if Sergeant Abundiz had not engaged in protected activity. Both Lieutenant Benavidez and Captain VanScoy provided memos to Chief Glavin as to Sergeant Abundiz’s inactions in following policies during the fire alarm and burglar alarm incidents. A law enforcement agency must be able to ensure that its supervisors are enforcing its policies so that its officers follow those policies. Some of the incidents brought to light in this case regarding use of force reporting, establishment of an incident command post, and cancelling of a responding fire department’s response must be able to be investigated by a law enforcement agency to ensure that policies are followed and that the public’s safety is respected. Investigating Sergeant Abundiz actions or inactions regarding the use of force incident alone adequately establishes an alternate, non-discriminatory reason for investigating her. Chief Glavin credibly explained that these concerns motivated her decision to conduct the investigation into Sergeant Abundiz’s supervisory responsibilities.

CSU has established by a preponderance of the evidence that its actions were motivated by alternative, non-discriminatory reasons for investigating Sergeant Abundiz.

## Unlawful Interference

PERB's interference test does not require evidence of unlawful motive, only that at least "slight harm" to employee rights results. (*Simi Valley Unified School District* (2004) PERB Decision No. 1714, p. 17 (*Simi Valley USD*).) The Board described the prima facie standard as follows:

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

(*Ibid.*, quoting *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S; *Carlsbad USD, supra*, PERB Decision No. 89, p. 10.) PERB examines whether the respondent's actions "reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." (*Clovis Unified School District* (1984) PERB Decision No. 389 (*Clovis USD*), pp. 14-15, quoting *NLRB v. Triangle Publications* (3d Cir. 1974) 500 F.2d 597, p. 598.) That "no one was in fact coerced or intimidated is of no relevance." (*Ibid.*) PERB considers the totality of the circumstances when making these determinations. (*Los Angeles Community College District* (1989) PERB Decision No. 748, proposed dec., p. 16.)

If a prima facie case is established, then PERB balances the degree of harm to protected rights against the employer's asserted interests. (*Hilmar Unified School District* (2004) PERB Decision No. 1725, pp. 16, citing *Carlsbad USD, supra*, PERB Decision No. 89 at pp. 10-11.) "Where the harm is slight, the Board will entertain a defense of operational necessity and then balance the competing interests." (*Ibid.*) On the other hand, "[w]here the harm is inherently destructive [of protected rights], the employer must show the interference was caused by circumstances beyond its control." (*Ibid.*) The employer bears the burden of proving the

necessity of its actions. (*Simi Valley USD, supra*, PERB Decision No. 1714, pp. 17-18, citing *Carlsbad USD.*)

It is clear that an employee representative under investigation would be less likely to be effective in representing its membership while that employee representative is under the cloud of an investigation. Not only would the employee representative be in fear that they will not be able to continue their employment, but other employees may not want to use an employee representative who is under such a cloud. Such an investigatory cloud would reasonably tend to coerce or intimidate employees in the exercise of their protected activities and cause a chilling effect on representational activities because they are closer to feeling the results of the disciplinary process as compared to when they are not under investigation. This investigatory cloud would therefore cause at least “slight harm” to employee rights. SUPA has satisfied its’ burden of demonstrating a *prima facie* case of interference.

The burden then shifts to the University to show its need for an operation necessity. As a general rule, investigations into employee misconduct serve a legitimate business purpose. (*State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, p. 14.) In this case, the only issue is whether the “initiating” of the investigation is an interference with employee rights under HEERA. Especially in a law enforcement setting, a law enforcement employer must be able conduct an investigation to be able to ensure that its supervisors not only follow and enforce its policies, but make sure its officers follow its policies. This need for policy compliance is heightened when the use of physical force is exerted on a member of the public. In such a situation, such issues of force must come to the attention of the DPS and analyzed for compliance as compliance can ensure the proper treatment of the public in a specific circumstance and in future situations. The supervisor’s

role in such analysis is critical in bringing the issue forward and making sure all of the proper reports and information required by the DPS are produced in order that a complete review of the use of force can be accomplished. Clearly, this need outweighs the interests of SUPA preventing its representational activities from being chilled while the investigation is ongoing.

Therefore, the University has met its' burden in demonstrating its operational necessity in justifying the initiating of the investigation and that, in balance, its interest outweighed that of SUPA's interest regarding the chilling of protected activity. The allegation of interference with employee rights under HEERA therefore must also be dismissed.

#### PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No. LA-CE-1276-H, *Statewide University Police Association v. Trustees of the California State University (Northridge)*, are hereby DISMISSED.

#### Right to Appeal

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

Public Employment Relations Board  
Attention: Appeals Assistant  
1031 18th Street  
Sacramento, CA 95811-4124  
(916) 322-8231  
FAX: (916) 327-9425  
E-FILE: PERBe-file.Appeals@perb.ca.gov

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

A document is considered “filed” when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered “filed” when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

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