*** * * JUDICIAL APPEAL PENDING * * ***

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

Manuel Saldivar & Victor Flores, Charging Parties, v. Regents of the University of California, Respondent.	Case Nos. LA-CE-1291-H LA-CE-1292-H PERB Decision No. 2704-H April 14, 2020

Appearances: Mahoney Law Group by Anna Salusky Mahoney, Attorney, for Manuel Saldivar & Victor Flores; Paul, Plevin, Sullivan & Connaughton by Sandra L. McDonough, Attorney, for Regents of the University of California.

Before Banks, Krantz, and Paulson, Members.

DECISION

PAULSON, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by Manuel Saldivar (Saldivar) and Victor Flores (Flores) (together Charging Parties) to a proposed decision of an administrative law judge (ALJ). The amended complaints in this consolidated matter alleged that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] when it terminated Charging Parties' employment.

Charging Parties, a plumber and facility worker at the University of California, Los Angeles (UCLA), argue that the University fired them for engaging in protected activities, including a lunchtime demonstration, strike, sick out, and bargaining duties.

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

The University argues it fired Charging Parties because they knowingly engaged in timecard fraud. Unlike a typical timecard fraud case, there is no dispute Charging Parties performed the work as claimed. Rather, the University argues they repeatedly pressed the "call-back" button when clocking-in for after-hours work, thereby asserting a contractual right to a four-hour incentive bonus payment for having been called back to work even though each employee allegedly knew, each time, that the facts were not sufficient to trigger the applicable contract provision.

We must determine whether Saldivar and Flores met their burden to show that when the University investigated them and proceeded to fire them without progressive discipline, it was at least partially motivated by their protected activities. If so, we must determine whether the University has met its burden to show that it would have reached exactly the same conclusion—to fire them rather than counsel them, suspend them or take any other action—even had Saldivar and Flores not engaged in protected activity.

In the proposed decision, the ALJ properly found that the lunchtime demonstration was protected activity and that Charging Parties' terminations were adverse actions. But the ALJ concluded Saldivar and Flores' supervisor, Tim Moore (Moore), was unaware of their participation in the lunchtime demonstration. The ALJ reached this conclusion even though the campus was covered in flyers with a picture depicting Saldivar and Flores at the lunchtime event, Saldivar and Flores each testified the flyer was posted and circulated in the plumbing shop, and Saldivar further testified that Moore removed the flyer from the plumbing shop and told Saldivar he could not publicize the strike in that manner. The ALJ then analyzed whether each of several other allegedly protected activities was in fact protected and ultimately

dismissed the complaint. We have reviewed the proposed decision, Charging Parties' exceptions, the University's responses thereto, and the entire record in light of applicable law. Based on this review, we reverse the proposed decision.

We depart from the ALJ early in our analysis and find the overall record demonstrates by a preponderance of the evidence that Moore knew about Charging Parties' participation in the lunchtime demonstration. We next discuss why the close proximity in time between the protected activity and the adverse action, management's departure from established procedures, the inadequate nature of the disciplinary investigation, and other factors compel our conclusion that the University terminated Charging Parties at least in part because of their protected activity. Finally, we evaluate the University's affirmative defense and conclude that both the initiation and measure of the discipline were improperly influenced by the University's unlawful motive and the University cannot meet its burden to show that it would have taken the same action absent Charging Parties' protected activity. Accordingly, we order the University to reinstate Charging Parties and award them backpay.

FACTS AND PROCEDURAL HISTORY

1. The UCLA Plumbing Shop

The skilled trades group at UCLA consists of about fifteen shops, including the plumbing shop. Plumbers work in the plumbing shop and are sometimes assisted by facility workers. Saldivar was a plumber and Flores was a facility worker. The plumbing shop handles everything from backed up sinks to floods. In addition to providing plumbing services to the UCLA campus, the plumbing shop serves off-campus housing in West Los Angeles and Culver City, and the Ronald Reagan and Santa Monica medical centers.

The plumbing shop is located on the second floor of the Facilities Management Building, near the center of campus. The Trouble Desk is just down the hallway. There is a parking structure immediately north of the building. In between, there is an alley with enough room for parking. The alley is readily accessible from the plumbing shop and it takes about three minutes to get from one to the other. There are security cameras in the alley that capture images of people coming and going from the Facilities Management Building.

The plumbing shop receives funding for shop operations but also charges other departments hourly for work such as Trouble Calls. Trouble Calls are when someone notices a problem and calls into the Trouble Desk to report it. The Trouble Desk then notifies the plumbing shop, which generates a work order number that begins the process of charging for that work. On-call plumbers are available to respond to Trouble Calls after hours. Plumbers can volunteer to cover on-call periods, and if there are not enough volunteers, on-call assignments are made using a rotating seniority list based on hire dates. Only plumbers are on call, but if facility workers are called in for non-scheduled time, they also can receive call-back pay for coming in.

The Plumbing Shop Call Back Procedure (Call Back Procedure) tells plumbers how to handle Trouble Calls when they are on call. The Call Back Procedure is a one-page document with ten numbered paragraphs. It starts with instructions on answering pages and evaluating calls, and ends with steps to take after completing the work. It is posted on a corkboard in the plumbing shop. Paragraph two is central to the dispute here. It reads, “Once you arrive on campus swipe in. Call Trouble Desk @ 68352 or go by the trouble desk, let them know you are here and get the work order number. Use the call back mode on the wand or wall clock when you swipe in on the

work order number." The Call Back Procedure does not address what to do if an on-call plumber gets a second call shortly after clocking out from the first one—the circumstances at issue in a majority of the times that Saldivar and Flores are alleged to have improperly pressed the call-back button on their wands. Nor do shop managers train employees on this critical question.

The collective bargaining agreement (contract) covering plumbers and facility workers provides a minimum of four hours' pay when an employee is called back to work. It defines a "call-back" as "those instances when an employee is ordered back to work without prior notice after completing a shift and leaving the premises or those instances when prior notice is given but the work begins at least three hours after the completion of the regular work schedule." Other than the Call Back Procedure, there is no policy or procedure about call-back pay. In practice, the process is more fluid than either the contract or the Call Back Procedure state, because plumbers normally use their cell phones to communicate with each other and learn about call-back opportunities that way. For example, even though the contract talks about being ordered back to work without prior notice, managers have authorized plumbers to get call-back pay even if they are not ordered back, but return to the shop on their own, i.e., irrespective of the three-hour gap mentioned in the contract, as long as they left and had a work reason to come back.

Moreover, Saldivar testified that he sincerely believed that, once called back, he was required to press the call-back button for the any successive job performed, irrespective of whether he had left the premises since completing the last call-back job. Although Flores was not asked about his belief on this question, as discussed below, he pressed the call-back button only because Saldivar told him to do so.

Indeed, because Flores was not a plumber, he simply followed the plumbers' instructions as to which jobs were call-backs.

Plumbers and facility workers record their time using an electronic Kronos product. Initiating a time record takes two steps. First, employees need to swipe their badge so that the system recognizes that they are on campus. Then, after at least two minutes, they need to punch in a work order number and swipe in their badge again for the system to put them on that job. If they try to punch in before the waiting period, the system will reject the punch. Accordingly, the time records read as though employees clock in for brief periods of time and then clock out and clock back in simultaneously before longer periods that represent actual working time. Employees can select "call-back" during the second step.

Saldivar is a licensed and certified plumber. In 2006, he started working for UCLA. Saldivar has been an on-call plumber since he started working at UCLA, including about 20 times in 2016 and 15-20 times in 2015. Saldivar's supervisor, Moore, testified that Saldivar always acted professionally and reliably took care of Trouble Calls. He had never been disciplined before being terminated for alleged timecard fraud. His supervisors never counseled or reprimanded him about his timekeeping as an on-call plumber prior to November 2016.

Flores started working at UCLA on August 2007 as a facility worker. He worked with plumbers and mechanics. He assisted plumbers by, for example, handing them tools and cutting tape. He was never reprimanded over any timekeeping issues.

Moore reports to Todd Conover (Conover). At the time of the hearing, Moore had worked at UCLA for 21 years. He was a journeyman plumber for 16 years and became the plumbing shop day shift supervisor in 2013. As the supervisor, he

reviewed his subordinates' time keeping entries. When he found reporting anomalies, his normal practice was to discuss the anomalies with the employees to clear them up, and to review procedures with them, if necessary.

Conover is the manager of the plumbing shop. The plumbing supervisors report directly to him and he oversees the lead plumbers and the overall operation of the plumbing shop. Conover had worked for UCLA for two and a half years at the time of the hearing, having come over from a non-union construction company.

At the time of the hearing, Doug Grode (Grode) had worked at UCLA Facilities Management for 28 years. During the relevant period, Grode was assistant director for the maintenance and alterations group and oversaw the skilled trades groups.

2. Saldivar and Flores' Union Activities

Saldivar and Flores were active members of their union, International Brotherhood of Teamsters, Local 2010 (Teamsters Local 2010). Saldivar participated in 2016 contract negotiations, meeting with UCLA's bargaining team to negotiate wages and other changes sought by one party or the other. In the same timeframe, he served as the "liaison" between the bargaining team and members in the plumbing shop for the last four years he worked at UCLA. Whenever Saldivar took time off for union business, either he or the union would inform Moore so his time could be coded appropriately. In fall 2016, Saldivar encouraged his co-workers to decline voluntary overtime, which he characterized as "work-to-rule", he participated in demonstrations, and he passed out flyers.

On November 4, 2016, Saldivar and Flores joined a union demonstration during their lunch hour where they gathered in front of the Wilshire building and picketed. Teamsters Local 2010 used a picture of this demonstration to promote a

November 16 24-Hour Strike at UCLA's medical facilities. The flyer prominently features a picture of Saldivar, Flores, and two other picketers. In the photo, Saldivar is holding a sign. The sign bears the Teamsters' logo next to the word "Teamsters" and above a message reading, "FAIR WAGES NOW!." The word "HONK!" is handwritten at the bottom of the sign.

In the week or two before the November 16 strike, the flyer was posted all over campus. Moreover, Saldivar specifically placed copies on tables in the plumbing shop and posted it on the plumbing shop corkboard, located by the entrance to Moore's office. He also passed out flyers in a tool room, near where management sits, and elsewhere throughout campus.

Saldivar testified that the flyer he posted on the plumbing shop corkboard was ultimately posted for only one day, because he saw his supervisor, Moore, take it down. Saldivar further testified Moore told him that the union could not post anything advertising the strike in the shop. Flores did not personally see who took down the flyer, but he heard it was Moore, and he personally saw that the flyer depicting himself and Saldivar was posted in the shop when he started his shift in the morning, but later that day it was gone. As we address below, Moore claims that he took down a different flyer. He cannot recall specifically what was on flyer he took down, but he asserts it was not the one depicting Saldivar and Flores.

The union went forward with the planned November 16 strike. Saldivar and Flores, along with all of the plumbers, participated. The day after the strike, Saldivar, Flores, and others in the shop called in sick. Moore and Conover called each employee and requested a doctor's note for their sick day.

3. The Disputed Call-Back Entries

The November 2016 Call-Backs

November 25 was the Friday after Thanksgiving. It was a busy weekend in the plumbing shop. That morning, Flores worked a scheduled overtime shift with Tony Luckett (Luckett), a mechanic, at the Ronald Reagan Medical Center. Flores clocked in for the day around 4:00 a.m. and then swiped into the work order. After Luckett told him the work was complete, he went back to the shop, filled out paperwork, took off his facilities shirt and work boots, clocked out at 12:30 p.m., and walked downstairs to leave. As he was leaving the building, Saldivar was coming in and asked him if he could help out with a flood. Flores agreed, walked back upstairs, and clocked in at 12:33 p.m. Saldivar told him to press the call-back button, and he did. He put his shirt and boots back on and went out on the job with Saldivar.

On Saturday, November 26, there was confusion about who was handling which projects because the shop was inundated with calls. The plumbers were calling each other, and Moore, trying to get them all covered. Flores clocked in around 4:00 a.m. Then, when he got the work order for his first job, he clocked into the Kronos kiosk at 4:28 a.m., went over to the Ronald Reagan Medical Center, and worked the day with Tony Luckett again. Flores came back to the shop and called Moore at about 12:20 p.m. Flores testified that he left the plumbing shop around 12:30 p.m.

Saldivar was on call that day and received a call from the Trouble Desk around noon for no hot water at the Weyburn Terrace Apartments. Then, around 12:40 p.m. or 12:45 p.m., Saldivar called Flores and asked him to help on the Trouble Call. Flores agreed, turned around, came back, parked, and walked upstairs to the plumbing shop. When he got there, Saldivar was already present and they both

clocked in at 12:59 p.m. and again at 1:05 p.m. Like the previous day, Flores pressed the call-back button because Saldivar asked him to do so. There is no dispute it was appropriate for Saldivar to select call-back on this call.

While they were at the Weyburn job, Saldivar received a call from the Trouble Desk. They advised him that there were two additional calls pending. One was about a leaking ceiling at the Mentone Apartments and the other was a call from Sepulveda University Apartments about a stoppage. Saldivar asked them to contact the other on-call plumber to see if he could assist. When Saldivar and Flores finished the Weyburn job, Saldivar called the Trouble Desk again and they told him that Marc Thompson (Thompson) had just swiped into the Mentone Apartments and that the University Sepulveda Apartments was still pending.

When Saldivar arrived on campus, he parked in the Facilities Management building alleyway. He saw Thompson pulling equipment out of a nearby tool room. Saldivar approached him and asked him if he would handle both calls. Thompson told Saldivar he would, because he was with Craig Barrett (Barrett). Saldivar and Flores then went up to the plumbing shop and swiped out. Right after he swiped out, Saldivar got a call from Thompson asking him if he could take one of the calls. Saldivar agreed to take the call from University Apartments at Sepulveda. Saldivar asked Flores to go on the University Apartments call with him and to swipe into that job as a call-back. Saldivar and Flores punched out when they finished that job.

The December 2015 Call-Back

As discussed below, when Moore noted and disagreed with the call-back designations Saldivar and Flores made in November 2016, Moore initiated a review covering a year's worth of records to see if Saldivar and Flores had other questionable

call-backs. The University found one such event in Saldivar's past work, relating to a call-back beginning on the night of Saturday, December 5, 2015. We conclude below that in conducting a full year look-back, instead of first attempting to address inconsistencies or policy violations with the employees, the University deviated from its past practices and evidenced an unlawful motive. Because the look-back was unlawfully-motivated, the University may not rely on the December 2015 events, as we explain below. As an alternate basis for our decision, however, we consider the December 2015 events and determine that they do not change the outcome as to Saldivar, much less as to Flores (who was not involved in the December 2015 events).

Saldivar was on call and at home on December 5 when he received a call or a page to respond to the University Apartments about a stoppage. He talked to the Trouble Desk dispatcher at 10:28 p.m. and then drove to UCLA and clocked in at the wall clock in the plumbing shop at 11:02 p.m. Then he responded to the location as directed but realized he had been given the wrong address and wrong contact number. He tried to find the correct location, but his efforts were complicated by an active police pursuit and, after an hour and a half, he headed back to the plumbing shop to clock out. He called the Trouble Desk dispatcher, who told him he'd made contact with the reporting party and told them Saldivar had been dispatched home and it was agreed Saldivar would take care of the call the next morning. He clocked out at 12:39 a.m. on Sunday, December 6.

Saldivar left the plumbing shop and began driving home, but quickly realized the call was about a clog in a first-floor apartment, a problem that could escalate and impact other units if not handled promptly. Recognizing that he should notify the

dispatcher and go back, Saldivar called the Trouble Desk at 12:50 a.m. The transcript of that call reads as follows:

> "Trouble Call Dispatcher ("TC"): Facilities.
>
> "Manual Saldivar: Hey, you know what? Can you just give me their number? And I, I'm gonna go over there and, and swipe back into the number and take care of it right now man.
>
> "TC: That is as a matter of fact. I was, I was pulling, I was about to put the work order in and all that stuff in your, in your, uh, pager right now. So I am writing it up right now.
>
> "Saldivar: Okay, I'll just, I'll just – I'll give 'em a call and, and you know, I mean I'm gonna figure out a way to charge them another 4 hours 'cause this, I mean, for me to go back, I mean, I'm just gonna say that I, I had already left and that they called you and you called me back and I just said fuck it, I'll just take care of it.
>
> "TC: Alright, sounds good.
>
> "Saldivar: cool.
>
> "TC: alright.
>
> "Saldivar: see ya man
>
> "TC: bye
>
> "Saldivar: bye-bye"

Saldivar parked in the alley, went up to the plumbing shop, clocked in at 12:57 a.m., completed the work, and clocked out at 2:13 a.m.

4. The Disciplinary Investigation

On Monday, November 28, 2016, Moore reviewed the timekeeping records as he does every Monday after the weekend. Moore noticed call backs that looked like

they might be questionable. He did not call Saldivar or Flores about the anomalies. Instead, he called Conover, but could not reach him and then called Grode, who told him not to edit the entries. Sometime that week, Moore also went to the Director of Maintenance and Alterations, Leroy Sisneros, and reported the same anomalies. Moore's report triggered an investigation into Saldivar and Flores. Grode ran the investigation.

The University reviewed their time entries for the prior year and found entries on November 25, 2016, where Flores punched in a call-back after his regular shift and entries on December 6, 2015, where Saldivar had two call-back punches somewhat close in time. Managers also interviewed Saldivar and Flores. On February 24, 2017, the University sent Notice of Intent to Dismiss letters to Saldivar and Flores.

The letter to Saldivar summarized evidence about the November 26 and December 6 calls for service. It confirmed that in his interviews Saldivar told managers he clocked out at 2:52 p.m. on November 26 because he thought he was going home. He explained that after he talked to the dispatcher about the remaining pending call, Thompson agreed to take both pending calls, but that, after he had clocked out, Thompson told him he would only take one of them. It also confirmed that he believed he "didn't do anything wrong," and that his conduct that day was "what is normal and usual." The letter stated that "departmental records do not support your assertion that you were unaware that the Sepulveda Boulevard trouble call was still pending before the end of your shift on November 26, 2016. During the investigation, audio recordings of your calls with the TC confirmed you were fully

aware of the University Apartments[2] trouble call prior to swiping out at 2:52 p.m." The letter did not discuss any interview of Thompson and did not explain what records supported its conclusion about what happened between the time Saldivar spoke with the dispatcher and when he clocked out.

The letter asserted that, "[a]s a Facilities Management employee of eleven years, you are well aware of the call-back process." In support, it noted that "on November 11, 2016, you responded to a call back [], and upon your completion of that work order, you knew not to swipe out in order to respond to the next work order." The letter concluded that Saldivar's conduct was a "conscious action" to "engage[] in timecard fraud on November 26, 2016 and December 6, 2015 . . ."

The Notice of Intent to Dismiss letter directed to Flores was similar, except that it charged him with timecard fraud on November 25 and 26, 2016. On April 4, 2017, the University sent Saldivar and Flores dismissal letters. Both dismissal letters cite information provided in the earlier Notice of Intent to Dismiss letters. Although the Notice of Intent to Dismiss letters had charged each employee with "timecard fraud," the eventual dismissal letters described the offenses as "serious misconduct." Charging Parties dispute that they knowingly violated policy or attempted to defraud the University.

DISCUSSION

HEERA prohibits the University from imposing reprisals on employees because of their exercise of rights guaranteed by the Act. (HEERA, § 3571, subd. (a).) To demonstrate that an employer has discriminated or retaliated against an employee in

[2] "Sepulveda" and "University Apartments" are different shorthand names for the same place.

violation of the Act, the charging party must show: (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, meaning that protected activity was at least a motivating or substantial reason for the adverse action. (*Novato Unified School District* (1982) PERB Decision No. 210 (*Novato*), pp. 6-8; *State of California (Department of Corrections and Rehabilitation*) (2010) PERB Decision No. 2118-S, p. 5.) If a charging party proves each of these elements, a respondent may still prevail by proving that it also had a non-discriminatory reason and would have taken the same actions based solely on that reason, even absent any protected activity. (*NLRB v. Transportation Management Corp.* (1983) 462 U.S. 393, 395-402; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.* (1981) 29 Cal.3d 721, 729-730.)[3]

1. Protected Activity

[3] Our analytic framework thus differs from that applied by an arbitrator making a just cause determination, though the facts evidencing intent, which we discuss below, may also be relevant in a just cause determination. (See, e.g., *Adelanto Elementary School District* (2019) PERB Decision No. 2630, pp. 10-11 [PERB does not determine just cause, but must consider, for instance, "evidence of the alleged wrongdoing in order to determine if the employer exaggerated or otherwise mischaracterized what occurred, thereby evidencing an unlawful motivation."].) In this case, the parties had no neutral, binding arbitration process in place, because the parties' contract had expired. In lieu of a labor arbitration, the University offered Saldivar and Flores a post-deprivation hearing that involved an arbitrator making a non-binding recommendation to a UCLA Vice Chancellor. After the close of the PERB hearing, the University added to the record a copy of the arbitrator's recommendation that the terminations be upheld. The ALJ declined the University's request that the arbitrator's decision be found to be binding on any issue in the instant case. Neither party excepted to that ruling and we find no cause to defer to the arbitrator's non-binding ruling on any issue. While we consider it for its persuasive value, we depart from the arbitrator's analysis on several key issues.

The Complaint, as amended, alleges that "Mr. Saldivar and Mr. Flores participated in activities protected under HEERA by participating in the November 16th, 2016, strike and *engaging in other activities on behalf of their Union*." Saldivar and Flores engaged in protected activities on November 4, 2016, when they participated in a union picket, carrying signs advocating higher wages. Likewise, the parties agree Saldivar served on his union's negotiating team during the relevant period.[4]

2. Employer Knowledge

There is no dispute Moore knew about Saldivar's contract negotiation responsibilities. But Moore testified he did not know Saldivar and Flores participated in the November 4 union demonstration. This testimony is in direct conflict with Saldivar's testimony that he placed a flyer containing a picture of himself and Flores at that demonstration on tables in the plumbing shop, that he posted the flyer on a plumbing shop corkboard near Moore's office, and that Moore took down the posted copy and talked to Saldivar about it. Moore's testimony also conflicts with other evidence, including Flores' testimony that he saw the flyer posted in the plumbing shop one morning, but it was gone by the end of the day.

To resolve the dispute, we must make a credibility determination. The ALJ credited Moore over Saldivar and Flores on this point because of non-observational factors, noting alleged inconsistencies in Saldivar's testimony and finding Moore's testimony relatively consistent. While we generally defer to an ALJ's credibility determination based on observational factors, we accord no particular deference to

[4] Having found Charging Parties engaged in protected activities and in light of our ultimate conclusion, we do not need to determine whether their participation in the strike, sick out, or work-to-rule action were also protected activities.

those aspects of an ALJ's credibility determination, such as those relied on here, that are not based on the ALJ's firsthand observations. (*County of Riverside* (2018) PERB Decision No. 2591-M, p. 6; *Los Angeles Unified School District* (2014) PERB Decision No. 2390, p. 12; *State of California (Department of Corrections & Rehabilitation)* (2012) PERB Decision No. 2285-S, pp. 10-11.) Here, we disagree with the ALJ's determination and credit Saldivar and Flores over Moore, as explained below.

a. Moore's Credibility

Moore was repeatedly inconsistent or less than truthful when asked about union activity in the shop. For instance, while testifying about the timeline of an occasion he treated Charging Parties favorably, Moore tried to create the false impression it was after, rather than before, the strike. During cross examination, counsel for Charging Parties pressed Moore about whether he treated Saldivar and Flores differently before and after the November 16 strike, signaling the importance of the distinction. Then, later in the cross examination, counsel asked if Moore had ever dealt with other anomalies in Saldivar and Flores' timekeeping records. He responded that "[t]he very weekend before" November 26, there were some anomalies in Saldivar and Flores' timekeeping records that he talked to them about and cleared up to his satisfaction. Pressed to confirm the date, he repeated that it was the weekend before the November 26 weekend, positioning this conversation with Saldivar and Flores after the strike. Then, after a heated exchange about whether counsel for Respondent was coaching him, Moore hesitated on the date. Then, counsel for Charging Parties asked, "Well, would it refresh your recollection that he was on call the weekend of November 11th?" Moore then conceded that the conversation in which he informally resolved the timekeeping discrepancy with Saldivar and Flores was before the strike.

This exchange revealed Moore's inconsistency, perhaps in an attempt to mislead about whether union activities influenced how he treated Saldivar and Flores.

Second, Moore was evasive when asked about how many plumbers participated in the strike. Initially, when asked on cross examination, Moore stated he did not know. Pressed, he admitted it was a majority. But Conover admitted all of the plumbers participated in the strike. It strains credulity for Moore not to have known that all plumbers participated, because managers had to backfill the strikers and closely scrutinized who was striking. Rather, Moore was trying to minimize the appearance of his knowledge of the extent of union activity in the shop.

Most importantly, Moore's explanation about the disputed flyer lacks credibility. Moore testified he took down "a Union pre-strike [flyer] or something regarding the strike and Union business that was placed on the overtime board, the University bulletin board and the safety board and various places throughout the shop, on my office door. And I took those down and put them on the table in the shop." The flyer with Saldivar and Flores' picture discusses the pending strike and is plainly about union activities. Moore insisted that the flyer he took down was not the flyer with Saldivar and Flores' picture on it. But he did not describe any distinguishing features of the flyer he took down, and the University did not offer any other flyers into evidence. In light of Moore's efforts to minimize his knowledge of union activity in the shop, and in light of credible evidence that the flyer in question was circulated in the plumbing shop and throughout campus, we do not credit his testimony that he did not see it.

b. Saldivar's Credibility

The University attacks Saldivar's credibility by arguing differences in his various statements show dishonesty and that he was deceitful in other ways. We disagree.

Saldivar made five statements during the investigation, testified at the grievance hearing regarding his termination, and testified at the PERB hearing. Particularly given the number of statements Saldivar gave over time, we find the level of consistency to be credible. The University draws attention to purported inconsistencies between these statements to cast doubt on Saldivar's credibility. As an initial matter, the evidence about Saldivar's statements during the investigation is weak. The statements were not recorded. The evidence presented about the statements consists of notes taken by Edie Oligane and Carol Lopez, neither of whom testified, and by other unidentified authors. These notes have little value for impeachment because there was no testimony to indicate, nor is it self-evident, what questions were asked, whether portions of the notes are direct quotes or not, and, most importantly, whether Saldivar was stating his recollection or what he surmised had happened. Without this information, we cannot conclude Saldivar was "changing his story" as the University contends. Rather, it seems more likely that Saldivar was honestly surmising the sequence of events on chaotic workdays, an activity which naturally changes with time and new information.

For example, the University challenges Saldivar's credibility by arguing that in his first interview, he stated that the Trouble Desk, not Thompson, called to tell him on November 26, 2016, to do the University Apartments job after he had already clocked out. But the notes of that interview merely state, "Then I was told about the Univ apartment so I swiped at 3:02 pm." This is plainly not a complete quote if it is a quote at all and does not contain the key information: who told him that. Even assuming he

said it was the Trouble Desk that told him to come back, we conclude the statement was most likely surmise or an honest error because he had talked to both the Trouble Desk dispatcher and Thompson in a short period of time about the same general topic.

The University relies on purported inconsistencies between Saldivar's testimony at the grievance hearing and at the PERB hearing, but these likewise present little value. The University notes that at the first hearing, Saldivar testified he was unsure of the exact words Thompson used when he initially agreed to take both calls on November 26, but that he had the understanding Thompson would take the calls. The University stresses that at the PERB hearing, Saldivar said, "I asked him if he would and he agreed." We reject the University's attempt to draw a meaningful difference between the two accounts, much less one that would elevate Moore's account over Saldivar's account on the flyer issue. Indeed, Saldivar specifically qualified his recitation in his second account, noting, "Word for word, I don't recall, but it was my understanding that they would [cover both calls]." We see no meaningful difference between these accounts of that exchange and note that Saldivar was honest that he could not recall the exact words used.[5]

The ALJ also accepted the University's interpretation that Saldivar made fraudulent statements in the above-quoted December 2015 phone call with a dispatcher, which occurred late at night when Saldivar realized he needed to turn

[5] The University also argues that Saldivar lied when he testified that the time keeping system requires a waiting time between clocking in for the day and swiping into a work order. But Moore confirmed Saldivar's explanation of how the system works, testifying that "There's a lapse between the time that you can swipe in. So, I walk up to the Kronos device. I swipe in. I do not know how long the delay is . . . before it will let you swipe into a job number. If he tried to swipe into that job number [too soon], it would reject the punch."

around and resolve a plumbing issue that could potentially escalate. We discuss that call at length below and find that the University's limited investigation thereof at most showed it to have involved Saldivar taking a self-serving position.

Saldivar and Moore both showed efforts—common among witnesses in a fraught trial—to bend events to their pre-determined viewpoint. Neither is inherently more believable than the other as to every point. However, at least on the issue of Moore's knowledge that Saldivar and Flores participated in the lunchtime demonstration, we cannot affirm the ALJ's finding. The record as a whole does not support Moore's claim that he did not see a flyer posted in the plumbing shop and throughout the campus, or his integrally related claim that he instead saw and took down an unspecified, different strike flyer that he claims happened to be posted at the same time. While we do not credit Moore's self-serving story about the flyer, and we note that his story somewhat eroded his credibility on the critical motive issues we discuss below, we find this to be only one relevant fact in our motive determination, as discussed below.

3. Adverse Action

There is no dispute the terminations were adverse actions. (*Jurupa Unified School District* (2015) PERB Decision No. 2450, p. 7 (*Jurupa*).)

4. Unlawful Motive

The final feature of a Charging Party's prima facie case is to show that the employer's action was at least substantially motivated by the employee's protected activities. This can be done with either direct or circumstantial evidence. (*Napa Valley Community College District* (2018) PERB Decision No. 2563, p. 21; see *Novato*, *supra*, PERB Decision No. 210, p. 6.) While we consider all relevant facts and

circumstances in assessing an employer's motivation, we have identified the following factors as being the most common types of circumstantial evidence establishing a discriminatory motive, intent, or purpose: (1) timing of the employer's adverse action in close temporal proximity to the employee's protected conduct is an important factor; (2) disparate treatment of the employee; (3) departure from established procedures and standards when dealing with the employee; (4) failure to offer a contemporaneous justification, or offering exaggerated, questionable, inconsistent, contradictory, or ambiguous justifications for the employer's actions; (5) a cursory or inadequate investigation of the employee's alleged misconduct; (6) a punishment that is disproportionate based on the relevant circumstances; (7) employer animosity towards union activists; and (8) any other facts that might demonstrate the employer's unlawful motive. (*City of Santa Monica* (2019) PERB Decision No. 2635a-M, p. 42; *County of Santa Clara* (2019) PERB Decision No. 2629-M, pp. 9-10; *County of Yolo* (2009) PERB Decision No. 2020-M, pp. 12-13; *Novato*, *supra*, PERB Decision No. 210, pp. 6-7.) Here, timing, departure from established procedures, and cursory investigation indicate unlawful motive.

a. Timing

Timing of the employer's adverse action in relation to the protected conduct is an important factor relating to strength of the unlawful inference to be drawn, but temporal proximity alone is generally insufficient to demonstrate the requisite nexus. (*Los Angeles Unified School District* (2016) PERB Decision No. 2479, adopting proposed decision at p. 26.) Charging Parties engaged in the protected union picket on November 4, 2016 and were placed on "investigative leave" on November 29,

2016. The close temporal proximity between Charging Parties' protected activity and the initiation of the disciplinary process supports the inference of unlawful motive.

b. Departure from Established Procedures

Moore deviated from his established procedures with Saldivar and Flores when he initiated the disciplinary investigation. We may infer unlawful motive from a respondent's departure from existing practices in its dealings with the charging party. (*Garden Grove Unified School District* (2009) PERB Decision No. 2086, adopting dismissal letter at p. 4.) To establish such an inference, the charging party must demonstrate what the respondent's practice is and how the respondent deviated from that practice. (*Id*.; *Los Angeles Unified School District*, *supra*, PERB Decision No. 2390, pp. 11-12 and adopted proposed decision at p. 16.)

Moore typically reviews plumbers' time entries and on-call punches daily, making edits as necessary. He regularly has to make edits because of plumbers' errors. He does not initiate discipline for these errors. Instead, he contacts the plumbers to reconcile inconsistences in their time records and correct mistakes. It is undisputed that prior to November 2016 and the protected activities at issue, Moore called Saldivar into his office many times to edit his time entries. Sometimes Moore initiated these meetings and sometimes Saldivar reported a timekeeping problem. Likewise, when Flores had timekeeping problems, Moore would correct them.

On Monday, November 28, 2016, Moore reviewed the timekeeping records as he does every Monday after the weekend. The records reflected some anomalies: Saldivar and Flores each had a close pair of call-back punches. These drew Moore's attention because it was unusual to have more than one call-back in a day. Importantly, there was nothing inherent in the timekeeping records to indicate whether

the punches were a user error, the result of an unusual circumstance, or misconduct. But Moore broke with his customary practice and did not contact Saldivar or Flores to ask why they had punched call-back twice.

This is probative of unlawful motive because Moore had good reason to know that there were unusual circumstances and confusion on the hectic days in question, immediately following Thanksgiving. He testified "[t]here was some confusion [on November 26], and we were inundated with calls, and we were trying to get them all covered." Moore knew Saldivar had been trying to sort out which calls he would handle and which would go to Barrett and Thompson. On cross examination, Moore admitted that the circumstances were fast-paced and confusing. When pressed to explain what he told different plumbers about how to handle the calls that day, he offered that "[b]etween all the phone calls made between Manny and myself, Craig and Marc Thompson to get permission to go to which calls and for who could come where to help, I couldn't give you all the details of what was said." Moore's break with past practice in contacting his superiors, occurring soon after he learned of Saldivar and Flores' high profile protected activity, and layered on top of Moore's incredible claim that he did not know about their protected activity, evidenced an unlawful motive.

c. Cursory Investigation and Disproportionate Punishment

An inadequate or cursory investigation supports an inference of unlawful motive because it reveals an employer's disinterest in whether misconduct truly occurred and thus that the stated reasons for the adverse action are not the actual motivating reasons. (*City of Torrance* (2008) PERB Decision No. 1971-M, p. 17; *Coast Community College District* (2003) PERB Decision No. 1560, p. 36, citing

Baldwin Park Unified School District (1982) PERB Decision No. 221.) While our cases often use the word "cursory" to describe this indicium, it is not merely hasty or perfunctory investigations that indicate unlawful motive.

We have found unlawful motive where an employer makes an allegation of misconduct against an employee but fails to investigate critical elements of the accusation. For example, in *Escondido Union Elementary School District* (2009) PERB Decision No. 2019, a manager wrote up an employee for allegedly organizing a dangerous event. (*Id*. at p. 20.) But the manager had not conducted any investigation of the employee's role. (*Ibid*.) The Board noted that, "Given the severity of the [allegation], at a minimum the District would be expected to conduct an investigation sufficient to confirm that [the employee] was in fact the organizer. The record indicates that this was not done . . . ." (*Ibid*.)

Likewise, an investigation tailored to produce a predetermined outcome indicates unlawful motive. For example, in *Jurupa*, *supra*, PERB Decision No. 2450, a human resources representative interviewed students about a teacher. (*Id*. at p. 6.) If the student indicated they liked the teacher, the representative asked no further questions and produced no record of the interview. (*Ibid*.) But if the students had negative things to say, the representative interviewed them in greater detail. (*Ibid*.) The Board concluded that the representative's approach demonstrated an inordinate focus on supporting an adverse action rather than an impartial investigation, thus indicating unlawful motive. (*Id*. at p. 23, adopted proposed decision, p. 31.)

Context is critical when examining whether an inadequate or cursory investigation signals unlawful motive. For example, the Board found that a brief investigation of a grievance was not evidence of unlawful motive where a grievance

procedure allowed only five days to conduct an investigation and respond. (*Los Angeles Community College District* (1997) PERB Decision No. 1222, adopted dismissal letter, p. 4.) Likewise, in *City of Santa Monica* (2011) PERB Decision No. 2211a-M, the Board found that where an employer had video evidence showing an employee engaging in misconduct, the employer's failure to interview the employee, being redundant, did not indicate unlawful motive. (*Id.* at p. 5.)[6] But in *City of Torrance*, the failure to interview the employee did indicate unlawful motive because it betrayed a disinterest in whether there was actual wrongdoing. (*City of Torrance*, *supra*, PERB Decision No. 1971-M, pp. 17-18.)

The National Labor Relations Board (NLRB) similarly looks beyond the mere duration of the investigation and scrutinizes whether it supports the employer's stated reason for taking adverse action. To be sure, a wholly inadequate investigation can strongly indicate unlawful motive when an employer disciplines an employee for alleged misconduct. (See, e.g. *W.W. Grainger, Inc.* (1977) 229 NLRB 161, 162 *affirmed by W.W. Grainger, Inc. v. N.L.R.B.* (7th Cir. 1978) 582 F.2d 1118, 1121.) But

[6] Some cases have interpreted *City of Santa Monica* (2011) PERB Decision No. 2211-M, to stand for the proposition that the failure to interview an employee before taking adverse action is evidence of unlawful motive *only* if the employer routinely interviews employees under such circumstances. (See *Napa Valley Community College District*, *supra*, PERB Decision No. 2563, p. 25.) This is incorrect. "Departure from established practice" is a distinct indicium of unlawful motive. (See *City of Davis* (2016) PERB Decision No. 2494-M, p. 34.) "Departure from established practice" and "cursory investigation/disproportionate punishment" are not necessarily interrelated. Thus, regardless of whether an employer routinely interviews employees before taking adverse action, failing to do so indicates unlawful motive where it reveals an employer's disinterest in whether misconduct truly occurred. In *City of Santa Monica*, it was because the employer had a video recording of the misconduct that its failure to interview the employee did not show a cursory investigation. The fact that the employer did not have a practice of conducting interviews before releasing employees from probation defeated the claim that it departed from established practices.

even when an employer conducts a seemingly broad investigation, unlawful motive is still found if the investigation does not support the stated reasons for the adverse action. For example, in *Nursing Facility-Oak Knoll* (1991) 301 NLRB 659, the NLRB found an employer's inadequate investigation supported the inference that it terminated employees for protected activity. (*Id.* at pp. 659 and 677.) The investigation was not brief or hasty. There, the employer suspected sabotage because the bulbs in its nursing home patients' call-lights repeatedly went missing during a multi-day state inspection of its two-story facility. Managers reviewed maintenance logs, interviewed patients, and assembled all employees to solicit information about the missing bulbs, and individually interviewed several nursing assistants. (*Id*. at pp. 660-61.) But management learned little about the missing bulbs. Nonetheless, management decided to lay blame on eight second floor nursing assistants, who were known to be among the most pro-union employees. (*Id*. at p. 677.) The NLRB emphasized the investigation was inadequate to form a basis for their termination and thus demonstrated the employer terminated them for unlawful reasons. (*Ibid*.)

Here, the University failed to investigate the several critical predicate facts underlying its conclusion that Saldivar and Flores knowingly violated policy. As explained below, these missing parts of the investigation were not needless redundancies, but rather go to the heart of whether Saldivar and Flores engaged in conscious and knowing violations as the University claimed when it terminated them. Thus, the University's failure to pursue these facts indicates disinterest in whether the alleged misconduct actually occurred and strongly signals unlawful motive. Indeed, because an inadequate investigation can prevent an employer from learning the true

facts, it can, as here, result in a disproportionate punishment, which is a further indicator of unlawful motive. (*City of Santa Monica*, *supra*, PERB Decision No. 2635a-M, p. 42; *San Joaquin Delta Community College District* (1982) PERB Decision No. 261, pp. 5-9.)

November 2016 Incidents

Flores is charged with wrongdoing on both November 25 and 26, while Saldivar is charged with wrongdoing only on November 26. The University claims both men engaged in timecard fraud and dishonesty. Considering the elements of these charges, the allegation of timecard fraud required the University to prove that Saldivar and Flores made material false representations on their timecards, with knowledge (or "scienter") of the falsity, in order to obtain from the University wages to which they were not entitled. (See *Los Angeles Memorial Coliseum Com. v. Insomniac, Inc.* (2015) 233 Cal.App.4th 803, 831 [elements of fraud].) Dishonesty is less complex but still required the University to prove that Saldivar and Flores knowingly misrepresented an important fact. A proper investigation, therefore, would have inquired into each of these elements.

i. Saldivar

As noted above, multiple undisputed facts weigh in Saldivar's favor in considering the events of November 26, 2016. The parties agree: (i) November 25-26, immediately following Thanksgiving, were exceedingly busy and confusing; (ii) it was appropriate for Saldivar to select call-back for the Weyburn job on November 26; (iii) Saldivar clocked out that day at 2:52 p.m. and clocked back in and pressed call-

back at 3:02 p.m.; and (iv) under some circumstances, it would be appropriate for an on-call plumber to have two call-backs in one day.

Management argues that Saldivar was aware he had a second call pending and "[h]aving had that knowledge, [he] made a conscious decision to clock out, thus ending his shift and then made a conscious decision to enter a work order number using the call-back work rule." But during the investigation, Saldivar told management that he did not know he had a second call pending when he clocked out. Indeed, he knew the opposite to be true, as management also knew or should have known, which casts significant doubt on management's motives: Thompson had agreed to take that call and, after Saldivar clocked out, Thompson told Saldivar he would not take it after all. Saldivar also told management that he believed he followed the policy when he pressed call-back upon clocking back in. Thus, in order to conclude that Saldivar knowingly violated policy to obtain money to which he was not entitled, the University needed to investigate and determine 1) whether Saldivar knew he had a second call to respond to when he clocked out and 2) whether Saldivar knew he should not have pressed call-back when he clocked back in.

Despite the importance of Saldivar's conversation with Thompson, the University did not interview Thompson before deciding to terminate Saldivar. At the hearing, management offered differing explanations for this troubling omission. Conover testified that even if what Saldivar said was true, Saldivar still did not leave the shop and come back, and therefore it didn't matter whether the conversation happened. But he admitted he nonetheless came to the conclusion that Saldivar's account was not true and that Saldivar was thus dishonest. Thus, clearly it did matter. Conover also testified that he did not think it was plausible that Thompson would have

agreed to take the call without knowing the details. But Conover admitted he did not know Thompson very well, having only been on one or two calls with him. Faced with the holes in his justification, Conover pivoted sharply, arguing that "[his] opinion of plausibility [was] based on [his] experience as a plumber, not [his] intimate knowledge of Marc Thompson." This decision to disbelieve the likely facts, and to do so based on a conscious decision to remain ignorant of facts supporting the accused, is highly probative of motive. Faced with that reality, Conover tried to excuse himself. He claimed he did not interview Thompson because "[h]e didn't really want to be a part of it unless forced to be a part of it." But when pressed by the ALJ, he changed his story again, admitting he did not know if Thompson had an opinion about being involved in the investigation. Stacking dishonest cards in this manner is further evidence of an unlawful motive. Grode similarly chose to believe the worst about Saldivar without investigating. He admitted it was possible that what Saldivar said was true, but that he did not think it was valuable to interview Thompson because it was not Thompson's "style" to change his mind.

The University's misleading arguments supporting a highly unlikely claim—that Saldivar knew he had a second job to work when he clocked out on November 26, 2016 at 2:52 p.m.—also raises several additional questions regarding the investigation. For instance, the University did not investigate whether Saldivar rushed the first job to create an opportunity to log out before the second job. Saldivar told managers that he finished the first job early because he determined the problem required an engineer, but the University did not interview the engineer or otherwise investigate. Moreover, management never interviewed witnesses in the shop regarding Saldivar's statement that after finishing the first job, he returned to the shop,

took off his work shirt, filled out an incident report, and put his keys away. This detail is important because it suggests he did not rush to leave and then return to claim a further call-back bonus.

The evidence does not show Saldivar contrived reasons to clock out, but rather that he clocked out for normal and appropriate reasons and then had to clock back in because circumstances changed. Management's refusal to acknowledge that reality, or even to investigate it prior to terminating Saldivar, is persuasive proof of Charging Parties' contentions.[7]

The University likewise did little to investigate whether Saldivar reasonably understood the policy to require him to press call-back when he clocked back in. He told management that the policy directs him to press call-back because it states that after clocking in, an on-call plumber is supposed to "Use the call back mode on the wand or the wall clock when you swipe in on the work order number." He also told them he was following the normal practice in an unusual circumstance as best as he could. Saldivar's explanation was reasonable, even if it did not match what management actually desired plumbers to do. The policy can be read as requiring employees to use call-back mode every time one clocks in on a call-back, or it can be read to mean only for the first of a series of jobs done while on call-back. Thus, even if Saldivar had not clocked out due to Thompson's promise to perform all the

[7] Labor Relations Specialist Michael Simidjian reviewed the discipline as part of his role in the grievance process. As part of that process he interviewed Thompson after the terminations had already taken place. Thompson told him he had a telephone call with Saldivar but couldn't remember the details and did not recall agreeing to take the Mentone and Sepulveda calls. We give this hearsay statement little weight and note that Thompson could not remember the details, and further note that the interview occurred after the decision to terminate Charging Parties was made, making it of little probative value regarding unlawful motive.

remaining work, it was not unreasonable for Saldivar to believe that once he was on call-back, as he undisputedly was for the Weyburn job, he should also press call-back for another job coming immediately thereafter. Given that Saldivar never received instruction about how to punch in call-backs, apart from the Plumbing Shop Call-Back Procedure which on its face is ambiguous as to how to clock in to a second successive job once a plumber is called back, management could not assume that Saldivar's interpretation as unique among plumbers. But rather than considering the possibility that Saldivar's conduct was normal practice as he insisted, managers dismissed it without investigating.

Grode was in charge of the investigation. His testimony confirms our finding that management pre-emptively ruled out innocent explanations for what occurred. (Cf. *California Virtual Academies* (2018) PERB Decision No. 2584, p. 35 [management evidenced unlawful intent when it concluded employee committed intentional falsification despite reasonable alternative explanations for the employee's conduct].) Grode testified that he could tell Saldivar violated policy because his swipes were too close in time for him to have left campus and come back. He explained that he understood the Teamsters contract to define when it was appropriate to press call-back, which he said was "when you are called back into work after you have left the premises, you are at home where it is no[t] a continuation of a shift. . . ." Thus, he explained, it was inappropriate for Saldivar to press call-back on the second call because, "he was not called back in from home or from an extended period of time from the—from leaving the job. He had never left the campus, so it's not a call-back." The University offered little evidence that Grode's supposed understanding of the procedure was shared by any plumbers. It is certainly not self-apparent that plumbers

would interpret the contract that way, because Grode's explanation conflicts with the contract itself (which makes no mention of going home, instead indicating only that a plumber must leave the "premises"). Managers did not interview any plumbers other than Saldivar or attempt to determine whether others had the same belief as Saldivar. The University cannot prove the kind of knowledge necessary to support the allegations of fraud and dishonesty without establishing that management had clearly conveyed to the plumbers Grode's understanding of the policy.

Further, any investigator truly aiming to uncover whether Saldivar knowingly violated policy would have interviewed Moore and discovered that Moore did not enforce the minimum period of time requirement mentioned in the contract. This past practice may explain why Saldivar would reasonably believe that a brief period of being legitimately clocked out (while he thought Thompson would cover all remaining jobs) was enough to earn him an additional four-hour bonus when Thompson changed his mind and Saldivar had to come back and work. But Grode did not interview Moore or take his statement. Instead, he relied on his own dated, contradictory, and private understanding of what was expected as the benchmark from which to evaluate Saldivar's conduct. Again, the private interpretations of management do not satisfy the elements of the University's charges against Saldivar or prove that he knowingly violated the policy.

Given the confusion of the day, the ambiguous policy, and the failure to investigate either what Thompson said or whether Saldivar was reasonable in his interpretation, and especially given that Moore referred the matter to his superiors in a highly unusual manner shortly after he learned of Saldivar and Flores' protected conduct, we cannot help but find unlawful motive.

ii. Flores

When an employer considers only evidence adverse to the employee and refuses to consider evidence supporting a competing version of events, the Board has found a suspiciously cursory investigation. (*Jurupa*, *supra*, PERB Decision No. 2450, p. 23 and adopting proposed decision at p. 32.) Here, management never investigated the critical facts concerning Flores' November 25 and November 26 call-backs.

On both November 25 and 26, Flores finished his shift assisting Luckett at 12:30 p.m., clocked out, changed, and proceeded to leave. In one case he was downstairs and leaving the Facilities Management Building before Saldivar asked him to come back to work, and in the other case had already driven away before Saldivar asked him to come back to work. Managers knew video cameras could have captured Flores having driven away in one case and in the process of leaving in the other case, but the University chose not to check the video recordings. Management's failure to investigate indicates a rush to judgment and an unlawful motive.

Management claims that it does not matter whether Flores had clocked out and left the building, because, the University claims, he had not left "the premises." The linchpin of the University's theory is that "the premises" means the entire UCLA campus and that employees knew this. It is not readily apparent that "the premises" should mean an entire multi-acre urban campus containing dozens of buildings and intersected by several streets. The common definition of the term is "A house or building, along with its grounds." (PREMISES, Black's Law Dictionary (11th ed. 2019).) This would suggest that "the premises" means the Facilities Management Building and the area immediately around it. Of course, parties sometimes have private definitions

for words. But the University only offered evidence about what a handful of managers thought the term meant and their speculation that employees understood it the same way. To prove dishonesty or fraud, the University had to prove that Saldivar and Flores shared this understanding and willfully acted contrary to it. However, and in contrast, Saldivar and Flores testified—and repeatedly insisted throughout the discipline process—that their conduct conformed to the policy. In the absence of more compelling evidence, we cannot conclude that employees shared the managers' belief that "the premises" encompass the entire UCLA campus.

The University's exaggerated approach to Flores' alleged transgressions is doubly apparent considering that Flores worked under Saldivar's direction, and pressed the call-back button at his direction. Management's allegation that Flores engaged in timecard fraud is simply not credible.

December 2015 Incident

The University argues Saldivar was dishonest during and after his December 5-6, 2015 call for service. The University mainly argues that Saldivar articulated a plan to commit fraud during a conversation with a Trouble Call dispatcher. The University may not rely on this evidence given that it came to light only because of Moore's discriminatory departure from practice, leading to a full-year review of Saldivar and Flores' records. We review the evidence nonetheless, as an alternative basis for our decision.

It is undisputed that starting in the late evening on December 5 and continuing in the early morning on December 6, Saldivar properly selected call-back on his first and only call for service, but he was unable to complete the work through no fault of

his own—the dispatcher had a wrong address.[8] It is further undisputed that, as result of the dispatcher's instruction to go home, Saldivar returned to the shop, clocked out, left the Facilities Management Building and started to return toward home, before promptly realizing that the problem could escalate and he should turn around and fix it. Saldivar called the dispatcher, returned to the Facilities Management Building, clocked in, selected call-back, reported to the service location, and performed the required work.

In his call with the dispatcher at 12:50 a.m. on December 6, Saldivar told the dispatcher that he would go ahead and take care of the call if the dispatcher could give him the correct address. The dispatcher proceeded to say that, in fact, he had been in the process of putting it into Saldivar's pager. That may mean the dispatcher was paging Saldivar to return immediately. If so, the remainder of the call makes more sense: Saldivar said he was going to "figure out a way to charge them another 4 hours 'cause this, I mean, for me to go back, I mean, I'm just gonna say that I, I had already left and that they called you and you called me back and I just said fuck it, I'll just take care of it." If the dispatcher had just told Saldivar that he had been in the progress of paging Saldivar to return, then Saldivar's statement about what he was going to say was roughly correct—even though it had been Saldivar who had initiated the call (after realizing he should return), he discovered that he was about to be paged

[8] Saldivar reported that between 10:28 p.m. and 11:53 p.m. on December 5, he "drove to campus, swiped in, punched—clocked into call-back, grabbed the facilities truck, drove to the University apartments." The University offered no evidence managers investigated this timeline. As with the rest of the chronology, management made little effort to seek out witnesses, campus surveillance, mileage records or other evidence, and management appears to concede that Saldivar accurately reported the work that he performed, as well as the obstacles he faced preventing him from doing it in the first couple of hours after he clocked in at 10:28 p.m.

to return, meaning he was right that the thrust of what occurred was that he'd been called back. Given the critical question of what the dispatcher had meant when he said that he had been in the midst of putting it into Saldivar's pager, management clearly should have interviewed the dispatcher.[9] The record reveals no such interview.

Management's failure to interview the dispatcher is equally glaring if one considers the alternate interpretation of the call, espoused by the University: that Saldivar was suggesting they should lie about the circumstances of Saldivar's return, to falsely make it seem like he was being required to return. Under this interpretation, the dispatcher agreed with an allegedly fraudulent plan, for which the dispatcher, too, could receive discipline. Management declined to ask, instead choosing to assume the worst possible interpretation about Saldivar while holding the dispatcher entirely harmless.

The University argues that Saldivar lied in asserting he "already left," again using a definition of "premises" that includes the entire campus rather than just the plumbing shop. But Saldivar believed he had left "the premises" within the meaning of the policy, after he had left the Facilities Management Building and was driving toward the freeway. Saldivar's interpretation was reasonable, indeed, on its face, more reasonable than management's interpretation. Thus, the University's failure to investigate whether Saldivar reasonably believed he was within policy strongly indicates a disinterest in whether the charged misconduct truly occurred and thus the presence of unlawful motive.

[9] As noted above, it is evidence of unlawful motive if an employer presumes dishonesty, without a full investigation, where other reasonable interpretations exist.

While Saldivar's statements to the dispatcher on a recorded line would have been an odd place to spell out a conspiracy, the University centers its theory around its assertion that Saldivar looked "stunned" when he heard the recording. We have carefully considered this self-serving statement. We do not know how credible it is, given our findings about other instances in which management has aggressively spun the facts in misleading ways, but we need not decide. It is quite possible that Saldivar, if indeed he was stunned, was concerned about how his words were being twisted to make it seem as if he had recruited the dispatcher to lie. The dispatcher responded to Saldivar's statements by saying, "Alright, sounds good," which is an unlikely reaction if Saldivar had just suggested a fraudulent plot to lie about the circumstances of his return to campus.

Ultimately, we cannot assume the dispatcher would have confirmed or denied management's accusation against Saldivar. Management's failure to interview the dispatcher, however, suggests that the dispatcher, if interviewed, might have said that he was in the process of paging Saldivar, which would make Saldivar's description of what occurred largely accurate. It is also possible the dispatcher intended to put the address is Saldivar's pager only for the next morning, but Saldivar misunderstood. In either instance, we have no trouble determining that Saldivar aggressively interpreted the contract in a way that would benefit him. But the record does not support a finding that Saldivar contrived the whole episode, leaving and returning merely to earn an extra four hours' pay, or concocted a fraudulent plan to lie about having left and returned to perform the work. This is especially the case given management's lack of interest in getting the dispatcher's view, combined with Saldivar having been frustrated

by a wrong address and a police matter before being dispatched home and then turning around to responsibly resolve an issue before it could escalate.

For all these reasons, in speaking out loud about how he was going to spin an unusual circumstance, Saldivar was not necessarily recruiting the dispatcher to become a coconspirator in a fraudulent plan. Saldivar certainly demonstrated he wanted to be paid the bonus for his extra efforts and thought the circumstances qualified given he had left and was returning for a good reason. We have no doubt he sought to put the facts in the most favorable light for a contractual claim for four hours of pay.[10] But Moore testified it's not frowned upon for employees to "make it big and loud and clear" that they get paid properly.

Whether Saldivar was right or wrong in his aggressive contract interpretation and factual spin, the record is more than sufficient for us to conclude that, absent protected activity, management would likely not have moved to summary termination but instead would have at most issued Saldivar a suspension or other lower form of discipline as a warning. We are cognizant of the many mitigating circumstances management ignored, which further confirm this conclusion: an emergency plumber—a lay person—briefly summarizing things in an arguably inaccurate way, while going out of his way (well past midnight) to benefit the University by preventing a problem from escalating. Given Saldivar's long history as a valued employee, we find that

[10] Notably, PERB precedent protects employees' attempts to assert contractual rights, but not if those efforts are fraudulent. Thus, in *State of California (Department of Corrections)* (2006) PERB Decision No. 1826-S, an employee lost protection by fraudulently seeking reimbursement for money that the employee had never spent. (*Id*. at p. 6.) If the University had evidence of a truly fraudulent claim, rather than a stark disagreement in how to interpret the relevant contract and policy language, the outcome here would be different.

management viewed his arguably transgressive conduct in light of he and Flores being featured on the union's poster advertising a strike.

When Saldivar saw his supervisor, Moore, on Monday, December 7, Saldivar told Moore about the unusual circumstances of the wrong address and his return in the early hours of December 6. Management claims Saldivar misled Moore by not disclosing that he was still on campus when he turned around. As discussed above, however, under Saldivar's reasonable interpretation of the term "premises," that was not a relevant fact.

Thus, even to the extent the December 2015 facts are properly before us, they show both parties spinning the facts—beginning with Saldivar's spin to get paid more for returning after clocking out and starting to return home, but just as quickly turning into counter-spin by management claiming "fraud." Ultimately, as discussed further below, the December 2015 events cannot fairly be seen as a "but-for" cause of Saldivar's termination, especially because management also terminated Flores, who was only involved in the November 2016 events.

Other Omissions in the Investigation

Management also failed to investigate whether Saldivar and Flores committed timecard fraud in other respects, suggesting their disinterest in whether Charging Parties in fact committed misconduct. For example, while the University argues Saldivar knew he had a second job to work when he clocked out on November 26, 2016 at 2:52, it curiously did not investigate whether he rushed the first job to create an opportunity to clock out before the second job. But it would have been straightforward to investigate because Saldivar told managers that he finished the first job early because he determined the problem required an engineer. Oddly, the

University did not interview the engineer or seek to determine whether Saldivar left the first job prematurely.

Saldivar told managers that in between when he swiped out at 2:52 p.m. and swiped back in at 3:02 p.m., he took his time in the shop taking off his work shirt, filling out an incident report from the prior job, and putting his keys away. This detail is important because it suggests he did not have a plan to log back in and claim an unearned call-back because he wasn't rushing to leave in order to be further from the shop when he had to come back. But managers never pursued any witnesses who may have seen Saldivar in the shop at the relevant time.

Flores told investigators that after he logged in at 3:02 p.m. and arrived at the University Apartments, he and Saldivar waited for someone to let them into the room where the work was to be performed. But the University did not interview this person or attempt to determine whether they would confirm or refute Flores' statement.

Saldivar told managers during the investigation that between 10:28 p.m. and 11:53 p.m. on December 5, he drove to campus, swiped in, punched into call-back, grabbed the facilities truck, drove to the University apartments. But the University offered no evidence managers investigated this timeline despite their access to Facilities Management surveillance. These examples are among the most obvious, but it is likewise telling that managers made no effort to seek out witnesses, campus surveillance, mileage records or other evidence that could have shed light on whether Charging Parties in fact performed the work they claimed to have done.

5. Affirmative Defense

When the charging party has proven that discrimination or retaliation contributed to the employer's decision, but the employer asserts that one or more

other nondiscriminatory reasons also exist, the burden shifts to the employer to establish as an affirmative defense that it would have taken the same action(s) even absent any protected activity. (*NLRB v. Transportation Management Corp.*, *supra*, 462 U.S. at pp. 395-402; *Martori Brothers Distributors v. Agricultural Labor Relations Bd.*, *supra*, 29 Cal.3d at pp. 729-730; *Wright Line* (1980) 251 NLRB 1083, 1089.) The employer must establish the "but for" affirmative defense by a preponderance of the evidence. (*McPherson v. PERB* (1987) 189 Cal.App.3d 293, 304.) Simply presenting a legitimate reason for acting is not enough to meet the burden. The respondent "must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct." (*Roure Bertrand Dupont, Inc.* (1984) 271 NLRB 443.) To prevail on its affirmative defense, the employer must establish that it had a legitimate, nondiscriminatory reason for taking the adverse action and that the reason proffered was, in fact, the employer's reason for taking the adverse action. (*Cabrillo Community College District* (2015) PERB Decision No. 2453, p. 12.) To properly scrutinize an employer's affirmative defense, we must look both at initiation of the disciplinary process and the discipline itself.

Where an adverse action results from a process triggered at least in part by an unlawful motive, the affirmative defense fails if the process would not have been triggered absent the protected activity. (See *State of California (Department of Correctional Health Care Services*) (2019) PERB Decision No. 2637-S, pp. 20-21.) The NLRB similarly bars employers from meeting their burden of proof when the proffered reason for taking the adverse action was discovered through an investigation that was itself tainted by unlawful motive. (See, e.g., *Consolidated Bus Transit, Inc.* (2007) 350 NLRB 1064, 1066; *Supershuttle of Orange County, Inc.* (2003) 339 NLRB

1 (*Supershuttle*); *Kidde, Inc.* (1989) 294 NLRB 840, 850.) As the NLRB has described it, in these circumstances, the employer "has created its own barrier to satisfying its burden of proof." (*Supershuttle*, *supra*, at p. 1.)

We also applied these principles in *County of San Joaquin (Sheriff's Department)* (2018) PERB Decision No. 2619-M. There, a line supervisor initiated a disciplinary investigation, rather than correcting behavior with a verbal warning, because of protected activity. (*County of San Joaquin (Sheriff's Department)*, *supra*, PERB Decision No. 2619-M, p. 13.) Later, a senior manager asserted that discipline was appropriate without regard to the protected activity. *(Ibid.*) But we held that it was immaterial whether the senior manager considered the protected activity in arriving at the measure of discipline because "discipline would not have been proposed in the first place had [the employee] not engaged in protected activity." (*Ibid*.)

The record persuades us that Moore's decision to investigate Saldivar and Flores was influenced by their protected activity. We reach this conclusion based upon the many factors discussed above, including Moore's departure from his customary dealings with employees, the close proximity in time to protected activity, and Moore's dubious claim of ignorance concerning the extent of union activities in the shop. It is highly unlikely that a disciplinary investigation would have begun at all had Moore used his customary practice and contacted Saldivar and Flores to explain their second punches on November 26, 2016. For instance, Saldivar would have explained that he thought he was supposed to punch in that way because he had logged out, in which case Moore could have directed him to do it differently in the future and then could have deleted the punches. In this case, the disciplinary investigation Moore

triggered based on his unlawful motive was the sole cause of the full year audit. Thus, the University does not meet its burden as to any of the allegedly nondiscriminatory reasons for the adverse actions.

As discussed above, even considering all incidents management looked at in its investigation, we would still find that the University failed to meet its burden of proof. In this part of the inquiry, we ask whether the respondent proved that the same action would have taken place even in the absence of the protected conduct, meaning we must scrutinize the level of discipline. Management cannot meet its burden, particularly given that management chose to skip speaking with Thompson and the dispatcher while telling itself an unlikely story about what Thompson would have said, and then skip all progressive discipline and jump to summary termination for both employees who engaged in protected activity, glossing over significant differences in the allegations against them. Management's failure to meaningfully consider whether Saldivar and Flores knowingly violated policy is inextricably intertwined with the decision to terminate each of them rather than impose some lesser discipline on one or both of them.

The facts of this case also do not present as typical timecard fraud because there is no dispute Charging Parties did the work. Rather, management's decision on the measure of discipline depends on the premise that Charging Parties were knowingly dishonest to the point of submitting a fraudulent claim for pay. But as explained above, managers did not meaningfully consider or investigate whether Saldivar and Flores did what they did because they believed it was consistent with a poorly-defined policy, past practice, and a non-frivolous interpretation of the word "premises." Since management admittedly arrived at the decision to terminate at least

in part because of this failure, the University cannot meet its burden to show that it would have engaged in the same course of conduct absent unlawful motive. In contrast, had management meaningfully investigated Charging Parties' understandings, they would have at least discovered that Moore was more lax about the on-call policy than Grode assumed, and likely would have uncovered at least a diversity of opinions about what "leaving the premises" means. The University has simply not met its burden of proving it would have taken the same action against Saldivar and Flores regardless of their protected activity, and we accordingly conclude that the University retaliated against them in violation of HEERA section 3571, subdivision (a).[11]

ORDER

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

A. CEASE AND DESIST FROM:

Retaliating against employees for engaging in protected activity;

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

[11] Although Charging Parties have raised no classical disparate treatment allegation, and indeed we find it relatively unlikely that these facts have arisen before, the University asked us to consider such comparisons in its defense, asserting that it always terminates employees who engage in timecard fraud. The University did not disclose any relevant facts allowing us to compare this case to the others it mentions, and, as we noted, the instant facts do not fall into the usual category.

1. Make Saldivar and Flores whole by offering them reinstatement to their prior positions, and providing back pay and benefits, with interest at the rate of 7 percent per annum for wages lost from the date of termination to the date they are reinstated or decline the offer of reinstatement, subject to offset for wages earned during the relevant period;

2. Within 10 workdays following the date this decision is no longer subject to appeal, post at all locations where notices are customarily posted, copies of the notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. In addition to physical posting of paper notices, the Notice shall be posted by electronic message, intranet, internet site, and other electronic means customarily used by the University to communicate with its employees in such a way to effect communication of the Notice to all employees in bargaining units represented by or affiliated with Teamsters Local 2010. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

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

Members Banks and Krantz joined in this Decision.

APPENDIX

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

After a hearing in Unfair Practice Case Nos. LA-CE-1291-H & LA-CE-1292-H, *Manuel Saldivar & Victor Flores v. Regents of the University of California*, in which the parties had the right to participate, it has been found that the Regents of the University of California (the University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571, subdivision (a) by retaliating against UCLA Facilities Management Employees Manual Saldivar and Victor Flores for engaging in protected activities on behalf of their union, Teamsters Local 2010.

We have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Retaliating against employees for engaging in protected activities on behalf of their unions or other activities protected by HEERA.

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

1. Make Saldivar and Flores whole by offering them reinstatement to their prior positions, and providing back pay and benefits, with interest at the rate of 7 percent per annum for wages lost from the date of termination to the date they are reinstated or decline the offer of reinstatement, subject to offset for wages earned during the relevant period.

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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