



**STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD**

CALIFORNIA STATE UNIVERSITY
EMPLOYEES UNION,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (SAN MARCOS),

Respondent.

Case No. LA-CE-1260-H

PERB Decision No. 2738-H

July 28, 2020

Appearances: Weinberg, Roger & Rosenfeld by Kerianne R. Steele and Katharine R. McDonagh, Attorneys, for California State University Employees Union; Neha R. Shah and J. Kevin Downes, Managers of Systemwide Labor Relations, for Trustees of the California State University (San Marcos).

Before Banks, Shiners, and Paulson, Members.

DECISION

SHINERS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by California State University Employees Union (CSUEU or Union) to the proposed decision of an administrative law judge (ALJ). The amended complaint alleged, in pertinent part, that the Trustees of the California State University (San Marcos) (CSU San Marcos) violated the Higher Education Employer-Employee Relations Act (HEERA)¹ by unilaterally changing procedures for reviewing and responding to employee-requested salary increases under a negotiated In-Range

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

Progression (IRP) policy.² Specifically, the amended complaint alleged that CSU San Marcos unilaterally changed the IRP policy by: (1) violating a contractual requirement to provide a “written reason” for denying an IRP request, and (2) departing from existing practices in the way it reviewed Rauch’s request. Following an evidentiary hearing, the ALJ dismissed both allegations, finding the former allegation untimely and the latter unproven.

Based on our review of the proposed decision, the entire record, and relevant legal authority in light of the parties’ submissions, we conclude that the ALJ’s factual findings are supported by the record and affirm his dismissal of the unilateral change allegations for the reasons discussed below.

FACTUAL BACKGROUND³

The California State University (University) is a higher education employer covered by HEERA. CSUEU is the exclusive representative of four statewide University bargaining units, including Bargaining Unit 9 - Technical Support Services.

² The amended complaint also alleged that CSU San Marcos violated HEERA by denying employee Pete Rauch’s IRP request in retaliation for his exercise of protected rights and refusing to provide requested information related to that denial. The ALJ dismissed the retaliation allegation but found CSU San Marcos did not properly respond to the Union’s request for information. Neither party excepted to these findings. Accordingly, they are not before the Board on appeal but remain binding on the parties. (PERB Regs. 32215, 32300, subd. (c); *County of Orange* (2018) PERB Decision No. 2611-M, p. 2, fn. 2; *City of Torrance* (2009) PERB Decision No. 2004-M, p. 12.) (PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.) Also, as neither party excepted to the ALJ’s proposed remedy for the information request violation, we incorporate that remedy into our order.

³ Neither party excepted to the ALJ’s factual findings.

Rauch, a University employee in Bargaining Unit 9, is an Information Technology Consultant in the Instructional and Information Technology Services Department (IITS) at CSU San Marcos. During the relevant time period, he was CSUEU's San Marcos Chapter President.

I. The Collective Bargaining Agreement and Existing Practices Regarding the IRP Policy

CSUEU and the University are parties to a single collective bargaining agreement (CBA) covering the Union's four statewide bargaining units. The relevant CBA was in effect from November 14, 2014, through June 30, 2017.

CBA section 20.24 describes the IRP policy. Section 20.24(a) defines an IRP as “[a salary] increase within a salary range for a single classification or within a subrange of a classification with skill levels.” Whether an IRP is warranted is determined by “the President, the President’s designee, or an appropriate administrator.”⁴ (*Ibid.*) A decision regarding an IRP is “final and shall not be subject to [the CBA’s grievance or complaint procedures].”

Section 20.24(b) provides a non-exhaustive list of criteria that may warrant an IRP, including: “[1] Assigned application of new or enhanced skill(s), [2] Retention, [3] Equity, [4] Performance, [5] Out-of-classification work that does not warrant a reclassification, [6] Increased workload, [7] New lead work or new project coordination functions given to an employee on an on-going basis by an appropriate administrator

⁴ CBA Article 2, section 2.2 defines an “appropriate administrator” as “the immediate non-bargaining unit supervisor or manager to whom the employee is normally accountable, or who has been designated by the President.”

where the classification standard/series do not specifically list lead work as a typical duty or responsibility, and [8] Other salary related criteria.”

Individual employees or management may file an IRP request.⁵ All requests must be submitted on an IRP Review Form signed by the appropriate administrator and accompanied by a written memorandum identifying the specific increase sought and supporting criteria or rationale. Human Resources (HR) must complete its review within 90 days from the date it receives the request.

The CBA does not list the possible reasons for denying an IRP request. However, should it deny an employee’s IRP request, the University “shall provide the employee with a written reason for the denial.” Generally, an employee must then wait at least 12 months from the date they receive the response before they may file another IRP request. However, when the University denies the employee’s IRP request “solely due to a lack of funds, upon the employee’s request, the employee’s in-range progression application shall be re-evaluated in the following fiscal year”.⁶

At CSU San Marcos, the evaluation of an employee-initiated IRP request begins with a department-level review. The request and the department’s assessment are forwarded to HR, which then reviews the request. If the request is approved, HR works with department administration to determine the appropriate salary increase to be awarded. If the request is denied, HR will draft a notification letter for the department’s use to inform the employee their request has been denied.

⁵ Management-initiated IRP requests may cover more than one employee.

⁶ The University’s fiscal year runs from July 1 to June 30 of the following year.

II. Rauch's IRP Request

On April 17, 2015, Rauch submitted an IRP request to his supervisor, Teresa Macklin, Associate Dean in the IITS Department and CSU San Marcos' Chief Information Security Officer. Rauch's request was based on the "equity" criterion in CBA section 20.24(b).

Macklin and the Interim Dean of IITS, Bill Ward, reviewed Rauch's request. On April 21, 2015, Ward forwarded Rauch's request to HR with the statement, "I do not support this IRP request at this time since it was not part of IITS managers[] plan for 2014/15 salary adjustments."

On June 24, 2015, Macklin sent Rauch a memorandum denying his IRP request. The memorandum, authored by then-HR Director Ellen Cardoso, said Rauch's request was denied "based on the strategic business planning purposes of the department." It further explained: "In accordance with [CBA] Article 20.24(d), Mr. Rauch must wait at least twelve (12) months from the date of this letter before becoming eligible to submit an employee-initiated [IRP request]." Shortly thereafter, Rauch shared a copy of the memorandum with CSUEU Senior Labor Relations Representative Brian Young.

III. Subsequent Correspondence between CSUEU and CSU San Marcos

On July 6, 2015, Young sent Cardoso a letter asserting that, under the CBA, IRP requests may be denied only for lack of merit or lack of funds. He continued, "If denied for funds, Mr. Rauch would be automatically eligible for reevaluation in the next fiscal year (which would be this month). If denied for merit, he would have to wait for [12] months." Young stated that Rauch's request seemed to be denied for a different

reason—the department’s strategic business planning purposes—which appeared to him to be a unilateral change to the CBA. As a result, Young requested “clarification of the term ‘*strategic planning purposes*’” and “any documentation associated with the strategic planning process and the IRP process.” (Original italics.) Young testified that he requested such documentation “[b]ecause [‘strategic planning purposes’] had nothing to do with any of the criteria listed in IRP,” and “[b]ecause it appeared by the term, strategic planning purposes, that that was something more significant than we don’t want to give it and implied some more comprehensive planning process on the part of management.” To Young, “it appeared that Human Resources actually did no[t] review [Rauch’s request] at all,” but instead accepted IITS’s assessment on its face. This was contrary to Young’s belief that HR was required to independently review the merits of an employee-initiated IRP request.

Cardoso responded on July 14, 2015, in part to inform Young that she was referring his information request to Senior Manager of Labor and Employee Relations Lisa McLean for response. McLean and Young communicated about the issue several times over the next three months.

For instance, on September 24, 2015, McLean wrote to Young about the “strategic planning purposes” of IITS as they relate to the Department’s evaluation of employee-initiated IRP requests. Describing that process, McLean explained that the Department reviewed the requests in comparison with its current strategic priorities. To “determine the current department strategic priorities for discretionary IRPs,” IITS considered both employee salaries and other “salary[-]related criteria including, but not limited to: employee growth in skills, changes in scope of responsibility, notable

organizational contributions, local job market demand, campus training investment, difficulty of replacing specific skill sets, retention of 'key' personnel, and review of salaries of lowest-paid employees.”

On October 9, 2015, McLean again wrote to Young, stating IITS had denied Rauch’s IRP request because it “had other priorities for discretionary IRPs at the time of his request.” She further explained that IITS, like other campus departments, has only limited funds to grant discretionary compensation increases in a given fiscal year. Accordingly, IITS management evaluates “[employee] salaries . . . in conjunction with salary-related criteria for providing an IRP. IITS refers to this as their strategic planning process.”

On January 28, 2016, CSUEU filed the instant unfair practice charge. The first amended complaint alleged that CSU San Marcos made an unlawful unilateral change by denying Rauch’s IRP request based on “strategic business planning purposes” rather than lack of merit or lack of funds. On the third day of hearing, the ALJ granted CSUEU’s motion to amend the complaint to allege that CSU San Marcos made an unlawful unilateral change by deviating from established procedure in evaluating Rauch’s IRP request.

DISCUSSION

When resolving exceptions to a proposed decision, the Board applies a de novo standard of review. (*County of Santa Clara* (2019) PERB Decision No. 2629-M, p. 6.) Under this standard, we review the entire record and are free to make different factual findings and reach different legal conclusions than those in the proposed decision. (*City of Milpitas* (2015) PERB Decision No. 2443-M, p. 12.)

HEERA section 3563.2, subdivision (a) prohibits PERB from issuing a complaint with respect to “any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge.” (*CSU Employees Union, SEIU Local 2579 (Kyrias)* (2011) PERB Decision No. 2175-H, pp. 4-5.) The statute of limitations begins to run when the charging party knows or should have known of the conduct underlying the charge. (*Ibid.*, citing *Gavilan Joint Community College District* (1996) PERB Decision No. 1177, p. 4.) CSUEU filed the unfair practice charge in this case on January 28, 2016. Thus, any allegation concerning conduct by CSU San Marcos that the Union knew or should have known about before July 28, 2015 is untimely.

In unilateral change cases, the statute of limitations period begins to run on the date the charging party obtains actual or constructive notice of the respondent’s clear intent to implement a unilateral change in policy, provided that nothing subsequently evinces a wavering of that intent. (*Regents of the University of California (Davis)* (2010) PERB Decision No. 2101-H, p. 16.) The irreducible core of this case is CSU San Marcos’ June 24, 2015 memorandum, which cited “strategic business planning purposes” as the reason it denied Rauch’s IRP request. On July 6, 2015, Young asserted in a letter to then-HR Director Cardoso that the CBA allows IRP requests to be denied only for lack of merit based on the criteria in the CBA or for lack of funds, and CSU San Marcos’ response therefore did not comply with the CBA. Young further explained CSUEU’s concern that CSU San Marcos’ cited basis muddied the resubmission timelines and asserted its “unique response appear[ed] to be a unilateral change to the [CBA].” CSUEU’s own statements show the Union knew of the conduct

underlying its contractual breach theory of a unilateral change on July 6, 2015, and at that time considered the conduct an unlawful unilateral change.

The record also establishes CSUEU knew on July 6, 2015, of the conduct underlying its second unilateral change theory, viz., that CSU San Marcos deviated from existing procedures when, instead of considering the merits of Rauch's IRP request, HR acquiesced in the Department's categorical denial of the request because a salary increase for him was not part of the Department's strategic business plan at the time.⁷ Young testified that he requested documentation about the strategic planning process and IRP process on July 6, 2015 "[b]ecause ['strategic planning purposes'] had nothing to do with any of the criteria listed in IRP," and "[b]ecause it appeared by the term, strategic planning purposes, that that was something more significant than we don't want to give it and implied some more comprehensive planning process on the part of management." Thus, "it appeared [to Young] that Human Resources actually did no[t] review [Rauch's request] at all," instead accepting IITS's assessment on its face. This contradicted Young's belief that HR was to independently review the merits of an employee-initiated IRP request. Young's testimony shows that as of July 6, 2015, CSUEU knew of the conduct underlying its belief that CSU San Marcos had not followed existing procedures in reviewing Rauch's IRP request.

⁷ CSU San Marcos did not except to the ALJ's determination that the unilateral change allegation based on this theory was timely. "Although PERB Regulation 32300, subdivision (c), provides that '[a]n exception not specifically urged shall be waived,' the parties' failure to raise an issue does not preclude the Board from addressing it on appeal" to correct an error. (*Regents of the University of California* (2018) PERB Decision No. 2601-H, p. 12.)

The record does not evince any subsequent wavering of intent by CSU San Marcos. Rather, it demonstrates that from July 13, 2015 through October 9, 2015, McLean consistently explained to Young that the Department's "strategic planning process" included consideration of both employee salaries and other salary-related criteria, including funding availability. Specifically, McLean wrote to Young on September 24, 2015, that the other salary-related criteria used to "determine the current department strategic priorities for discretionary IRPs," included but was not limited to "employee growth in skills, changes in scope of responsibility, notable organizational contributions, local job market demand, campus training investment, difficulty of replacing specific skill sets, retention of 'key' personnel, and review of salaries of lowest-paid employees."

On October 9, 2015, McLean again wrote to Young, stating IITS had denied Rauch's IRP request because it "had other priorities for discretionary IRPs at the time of his request." She further explained that IITS, like other campus departments, has only limited funds to grant discretionary compensation increases in a given fiscal year. Accordingly, IITS management evaluates "[employee] salaries . . . in conjunction with salary-related criteria for providing an IRP. IITS refers to this as their strategic planning process."

CSUEU argues the statute of limitations did not begin to run until October 9, 2015, when it learned from McLean's e-mail that CSU San Marcos had actually denied Rauch's IRP request for lack of funds but instead gave "strategic business planning purposes" as the reason for denial to circumvent the potentially shorter resubmission

period for IRP requests denied solely for lack of funds.⁸ We reject this argument for two reasons.

First, McLean's October 9, 2015 e-mail merely reiterated the position stated in CSU San Marcos' previous communications to Young and cannot fairly be characterized as explaining that Rauch's IRP request was denied solely for lack of funds. The October 9 e-mail therefore could not initiate a new statute of limitations period. (See *County of Riverside* (2011) PERB Decision No. 2176-M, p. 6 [statute of limitations does not restart "when the respondent's action during the limitations period merely confirms or reiterates the position it took and communicated to the charging party outside of the limitations period"]; compare *Omnitrans* (2009) PERB Decision No. 2001-M, p. 7 [employer wavered in intent to implement new drivers' rulebook when it indicated it was amenable to making changes to the rulebook based on feedback it received from the union].)⁹

⁸ In its exceptions, CSUEU argues that CSU San Marcos unilaterally eliminated the reevaluation period in CBA section 20.24(c) when it failed to deny Rauch's IRP request on the express basis of lack of funds. But the Union did not raise this unilateral change theory before the ALJ. Accordingly, we decline to consider it. (*Los Angeles County Superior Court* (2018) PERB Decision No. 2566-C, pp. 12-13.)

⁹ We further note that there is no basis to toll the statute of limitations under PERB's equitable tolling doctrine because the parties expressly exempted the University's decisions regarding IRP requests from their contractual grievance procedure. (See *Long Beach Community College District* (2009) PERB Decision No. 2002, p. 15, overruled on other grounds by *Los Angeles Unified School District* (2014) PERB Decision No. 2359 [PERB will equitably toll the six-month limitations period during a contractual grievance adjustment process].) Therefore, CSUEU's efforts to dispute CSU San Marcos' denial of Rauch's IRP request could not have tolled the statute of limitations.

Second, McLean's October 9, 2015 e-mail at most alerted the Union to another potential legal ramification of CSU San Marcos' alleged unilateral change. But "a charging party's belated discovery of the legal significance of the underlying conduct does not excuse an otherwise untimely filing." (*Orange County Fire Authority* (2008) PERB Decision No. 1968-M, p. 4; *Empire Union School District* (2004) PERB Decision No. 1650, pp. 2-3.) In order to toll the statute of limitations based on lack of notice or discovery, CSUEU had to show that it did not have "clear and unequivocal notice" of the alleged misconduct. (See, e.g., *Riverside Unified School District* (1985) PERB Decision No. 522, adopting warning letter p. 5 [limitations period not tolled because parties had "clear and unequivocal notice" of the facts underlying the alleged unfair practice]; *A & L Underground* (1991) 302 NLRB 467, 469 [NLRA's analogous limitations period begins to run when charging party has "clear and unequivocal notice" of the conduct alleged to be an unfair labor practice].) But here it is uncontested that CSUEU knew of CSU San Marcos' reasons for denying Rauch's IRP request on July 6, 2015. Moreover, while CSU San Marcos was not forthcoming with relevant information, there is no evidence that it fraudulently concealed any material or operative fact surrounding its decision to deny the IRP.

We conclude based on the entire record that the statute of limitations for CSUEU's unilateral change allegations began to run no later than July 6, 2015. The Union filed this charge more than six months later, on January 28, 2016. Consequently, the unilateral change allegations are untimely and must be dismissed.¹⁰

¹⁰ Having found the unilateral change allegations untimely, we express no opinion regarding the ALJ's conclusion that CSU San Marcos did not change how it reviews or evaluates employee-initiated IRPs.

ORDER

Upon the findings of fact and conclusions of law, and the entire record in the case, it is found that the Trustees of the California State University (San Marcos) (CSU San Marcos) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., by unreasonably delaying its response to California State University Employees Union's (CSUEU) request for information that was necessary and relevant to its duty to represent its bargaining units. CSU San Marcos further violated HEERA by failing to produce a spreadsheet maintained by the Instructional and Information Technology Services (IITS) Department to assess different In-Range Progression (IRP) salary scenarios. All other allegations in the amended complaint are dismissed.

Pursuant to Government Code section 3563.3, it hereby is ORDERED that CSU San Marcos, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unreasonably delaying the production of necessary and relevant information requested by CSUEU.
2. Refusing to fully respond to CSUEU's request for necessary and relevant information, namely by failing to produce IITS's spreadsheet of different IRP scenarios.
3. Interfering with employees' right to be represented by CSUEU.

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

1. Upon request, provide CSUEU with a current version of the IITS spreadsheet of different IRP scenarios.

2. Within 10 workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to employees in CSUEU's bargaining units customarily are 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. The Notice shall also be sent to all bargaining unit employees by electronic message, intranet, internet site, or other electronic means customarily used by the University to communicate with employees in CSUEU's bargaining units. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.¹¹

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

¹¹ In light of the ongoing COVID-19 pandemic, Respondent shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If Respondent so notifies OGC, or if Charging Party requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing Respondent to commence posting within ten workdays after a majority of employees have resumed physically reporting on a regular basis; directing Respondent to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing Respondent to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on CSUEU.

Members Banks and Paulson joined in this Decision.

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



After a hearing in Unfair Practice Case No. LA-CE-1260-H, *California State University Employees Union v. Trustees of the California State University (San Marcos)*, in which all parties had the right to participate, it has been found that the Trustees of the California State University (San Marcos) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., by unreasonably delaying its response to California State University Employees Union's (CSUEU) request for information that was necessary and relevant to its duty to represent its bargaining units, and by failing to produce a spreadsheet maintained by the Instructional and Information Technology Services (IITS) Department to assess different In-Range Progression (IRP) salary scenarios. As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Unreasonably delaying the production of necessary and relevant information requested by CSUEU.
2. Refusing to fully respond to CSUEU's request for necessary and relevant information, namely by failing to produce IITS's spreadsheet of different IRP scenarios.
3. Interfering with employees' right to be represented by CSUEU.

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

1. Upon request, provide CSUEU with a current version of the IITS spreadsheet of different IRP scenarios.

Dated: _____

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (SAN MARCOS)

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.