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-1206-H PERB Decision No. 2549-H February 16, 2018

Appearance: John A. Swarbrick and J. Kevin Downes, Labor Relations Representatives, for Trustees of the California State University (San Marcos).

Before Gregersen, Chair; Banks and Winslow, Members.

DECISION

GREGERSEN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Trustees of the California State University (San Marcos) (University) to the proposed decision of a PERB administrative law judge (ALJ). The complaint alleged that the University violated the Higher Education Employer-Employee Relations Act (HEERA)[1] section 3571, subdivision (a), when it took adverse action against bargaining unit member Rafael Lopez (Lopez) by investigating an allegation that he had demanded money from bargaining unit members in retaliation for his engagement in protected activity.

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

The Office of the General Counsel issued the complaint on May 27, 2014. The University answered the complaint on June 20, 2014, denying the substantive allegation and asserting affirmative defenses. The parties participated in a settlement conference on August 22, 2014, but were unable to resolve their dispute. A formal hearing was held on December 8, 2014, and following the filing of simultaneous post-hearing briefs, the case was submitted for decision on February 9, 2015.

On February 19, 2015, the ALJ issued a proposed decision, dismissing the retaliation allegation, but finding an unalleged violation that the University had interfered with the protected rights of bargaining unit employees in violation of HEERA section 3571, subdivision (a), when it issued a directive prohibiting employees from remaining at the worksite after hours. On March 11, 2015, the University filed its exceptions and supporting brief, arguing that the ALJ had erred in considering the unalleged interference violation. The California State University Employees Union (Union) did not file a response. As neither the University nor the Union have excepted to the ALJ's findings and conclusions of law regarding the retaliation allegation, that allegation is not before us. (PERB Reg. 32300, subd. (c).)[2] The only issue before the Board is whether the ALJ erred in considering the unalleged interference violation.

The Board has reviewed the entire record in this case including the unfair practice charge and the University's position statement, the complaint and answer, the hearing record, the parties' post hearing briefs, the proposed decision, and the University's exceptions. Based on this review, we reverse the ALJ's conclusion regarding the unalleged interference allegation, for the reasons that follow.

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[2] PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

DISCUSSION

The University's sole exception on appeal is that the ALJ erred in his application of PERB's criteria for finding an unalleged violation and that the interference violation should not have been considered. We agree.

The Board may only consider an unalleged violation when: "(1) adequate notice and opportunity to defend has been provided the respondent; (2) the acts are intimately related to the subject matter of the complaint and are part of the same course of conduct; (3) the unalleged violation has been fully litigated; and (4) the parties have had the opportunity to examine and be cross-examined on this issue." (*Fresno County Superior Court* (2008) PERB Decision No. 1942-C; *City of Roseville* (2016) PERB Decision No. 2505-M, p. 25.) Each part of this test must be satisfied. In addition, the alleged violation must have occurred within the applicable statute of limitations period. (*Ibid.*) These criteria were not met in this case.

1. The University had insufficient notice that the unalleged violation was being litigated and had no opportunity to defend against it.

The Union's original unfair practice charge included the allegation that the University interfered with Lopez's right to union representation when it provided him the directive that he was prohibited from remaining at the worksite after hours, during which time he typically met with Union Representative Jim Carr.[3] The University responded to this allegation in its position statement. The Office of the General Counsel, however, did not include this allegation, or any related facts, in the complaint.

[3] The original unfair practice charge contained multiple other allegations, all of which were subsequently withdrawn by the Union and are not presently at issue.

After the complaint issued, there was no motion to amend the complaint to include the additional interference allegation or the facts related to the allegation. During opening arguments, the Union's representative exclusively discussed the allegations that the University had retaliated against Lopez and made no reference to a separate interference violation. Nor did he discuss the University's directive that employees refrain from remaining on the premises after work. As a result, we find that the University had insufficient notice that a separate interference violation was at issue.

2. The conduct was not intimately related to the subject matter of the complaint.

The complaint concerned the University's retaliatory actions against Lopez related to its investigation into his alleged demands for money. The ALJ found that the University's directive closely related to the subject matter of the complaint because the complaint generally concerned the University's alleged retaliation and interference against Lopez for his protected activity. We disagree. We have found allegations of retaliation and interference to be intimately related when they are alternate legal theories "to be applied to the exact same conduct." (*Los Angeles County Superior Court* (2008) PERB Decision No. 1979-C, p. 12; *County of Santa Clara* (2017) PERB Decision No. 2539-M.) Here, however, the retaliation and interference allegations arose from entirely different conduct. The decision to conduct the investigation was made by Lisa McClean (McClean), the University's Senior Manager of Labor and Employee Relations, while the directive to Lopez was issued by University Director of Facilities Services Floyd Dudley (Dudley). McClean's investigation concluded several weeks before Dudley's directive, with no finding of misconduct by Lopez. There is no evidence that the two actions were related to each other. As a result, we find that the conduct comprising the University's directive is not intimately related to the subject matter of the complaint.

3. The interference allegation was not fully litigated.

After the complaint issued, the interference allegation was only clearly raised for the first time in the Union's post-hearing brief. The University did not address the allegation at all in its post-hearing brief. These briefs, however, were simultaneously filed and there was no provision for filing reply briefs. Because the University did not have the opportunity to brief the issue, we conclude that the interference allegation was not fully litigated.

4. The University had an opportunity to examine and cross examine on the issue of interference.

The Union introduced evidence of the University's directive through testimony from both Lopez and Dudley. Although the University's representative asked no questions related to the directive, either on direct or cross examination, the University had the opportunity to examine witnesses in response to the evidence presented by the Union. Thus, only one prong of the unalleged violation test has been met. All must be met.

Accordingly, we do not consider whether the University's directive prohibiting employees from remaining at the worksite after hours constituted unlawful interference in violation of HEERA. We therefore reverse that portion of the proposed decision finding that the University interfered with the protected rights of bargaining unit employees in violation of HEERA section 3571, subdivision (a), when it issued a directive prohibiting employees from remaining at the worksite after hours.

ORDER

The complaint and the underlying unfair practice charge in Case No. LA-CE-1206-H are hereby DISMISSED.

Members Banks and Winslow joined in this Decision.