STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES LOCAL 3299, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1035-H PERB Decision No. 2601-H December 10, 2018

Appearances: Leonard Carder by Jennifer Keating, Attorney, for American Federation of State, County & Municipal Employees Local 3299; Atkinson, Andelson, Loya, Ruud & Romo by James C. Romo, Attorney, for Regents of the University of California

Before Banks and Winslow, Members.

DECISION[1]

BANKS, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions by the American Federation of State, County and Municipal Employees Local 3299 (Local 3299) to the proposed decision of a PERB administrative law judge (ALJ). The complaint alleged that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA) by investigating and disciplining employee Patrick Mitchell (Mitchell) in reprisal for participating in and assisting a delegation of Local 3299-represented employees who wished to present their

[1] Pursuant to Government Code section 3541.3, subdivision (k), this case has been delegated for decision to a two-member panel of the Board. Unless otherwise specified, all further statutory references are to the Government Code.

concerns to the president of the Ronald Reagan Medical Center (RRMC) at the University's Los Angeles campus.

The University filed no answer to the complaint. At the hearing, it requested leave to file a late answer and to have the untimeliness excused, pursuant to PERB Regulation 32136. Local 3299 moved to have the University's failure to file an answer deemed an admission of the material facts alleged in the charge and as a waiver of the University's right to a hearing, pursuant to PERB Regulation 32644, subdivision (c). The ALJ denied both motions and ruled that the University's failure to file an answer waived any affirmative defenses. He then conducted a formal hearing, in which he took evidence and heard argument on the issues raised in the complaint, before issuing the proposed decision.

The proposed decision concluded that Local 3299 had established a prima facie case of discrimination or reprisal because the written warning issued to Mitchell provided direct evidence of a causal link between his protected activity and the University's actions against him. However, applying the "but for" test used when an employment action is motivated by both protected and unprotected conduct, the ALJ found no evidence that the University had applied its policies in a discriminatory manner against Mitchell, or that it had condoned other non-union conduct of a similar nature. Based on these findings, the ALJ concluded that Mitchell's protected activity was not the actual cause or "but for" of the University's investigation and disciplinary action against Mitchell, and, accordingly, dismissed the complaint and Local 3299's unfair practice charge.

Local 3299 excepts to the ALJ's findings and conclusion that the University met its burden of proving that Mitchell's protected activity was not the actual or "but for" cause of the adverse actions taken against him. It argues, among other things, that the ALJ erred by

considering this issue, after ruling at the hearing that the University had waived all affirmative defenses by failing to file an answer. The University argues that Local 3299's exceptions are without merit and urges the Board to adopt the proposed decision.

We have reviewed the proposed decision and the entire record in light of the issues raised by Local 3299's exceptions and supporting brief and the University's response thereto. Based on this review and for the reasons set forth below, we reverse the proposed decision.

FACTUAL AND PROCEDURAL BACKGROUND

Local 3299 is the exclusive representative of the University's employees in the Service Unit. Mitchell is a Senior Security Officer assigned to RRMC. At all times relevant to this case, Mitchell was Local 3299's statewide Vice President for service workers. He had also previously served as a member of Local 3299's bargaining committee.

RRMC Security Measures

RRMC has restricted areas not accessible to the general public. To gain access to these areas, employees must use a "Prox card," i.e., an electronic keycard not unlike those found in nearly every modern workplace. The University-issued Prox card functions both as the employee's identification card and an electronic key to unlock doors. To use a Prox card, an employee simply swipes it against a card reader adjacent to a locked door. The card reader will then unlock the door if the employee is authorized to enter that area. Each Prox card is linked to a specific employee and it allows him or her to access certain areas within RRMC, depending on the employee's security clearance. Although the University might restrict an employee's access to certain locations, it does not restrict access to certain dates or times, nor does it suspend an employee's access when an employee is off-duty. On the contrary, once

granted, access is constant until revoked. Each time an employee swipes his or her Prox Card, the card reader records the user's identity along with the date and time of access.

Mitchell has had a University-issued Prox card since he began working in the Security Department in or about 2001.[2] At that time, he received training regarding his job duties, such as how to handle a cash detail or a patient arriving by helicopter. His training also contained a written component, which included receipt of several policies that he was required to follow. "Since his initial training, Mitchell has received new policies through a [shared] pass-on binder," which employees are periodically required to review and sign. Among these policies is the Security Department's Equipment & Uniform Policy, which identifies the Prox card as part of the equipment issued to security officers and states in relevant part: "All issued equipment is only to be used while on duty, and for official business only."

The University sometimes places RRMC on "lockdown" status in response to unusual activity, such as a protest, an active shooter, or a high profile celebrity patient. Paul Watkins, the Chief Administrative Officer of the UCLA Santa Monica Medical Center and the Executive Director of General Services for the UCLA Health System between 2006 and 2013, testified that there are two levels of lockdown: one in which the perimeter of the Medical Center is secured, and another in access to designated "sensitive" areas is restricted to those with Prox card access. There is no written policy outlining when the University will order a lockdown. The decision is made at the discretion of University personnel on a case-by-case basis and communicated to on-duty security personnel via radio.

[2] The precise date is unclear. At the hearing, Mitchell testified without contradiction that he had worked in the Security Department "over 13 years," initially as a regular security officer and, since approximately 2003 or 2004 as a senior security officer. Mitchell gave this testimony on January 28, 2015, making his date of hire approximately 2001.

During a lockdown, additional security personnel may be posted to strategic areas, including the entrance to the Executive Suite, which is located on the first floor of RRMC, and which includes the office of Dr. David Feinberg (Feinberg), the President and Chief Executive Officer of the UCLA Health System. Although the Executive Suite is normally open to the public from 7:00 a.m. to 5:00 p.m., its door may be locked during a lockdown, depending upon the level of lockdown and location of the perceived threat. Despite being locked, the Executive Suite is still open for business during a lockdown, and typically those without the appropriate Prox card who wish to gain entry will simply knock on the door to be let in by someone inside the suite.

Mitchell's Off-Duty Prox Card Usage and Subsequent Discipline

On January 31, 2013, Local 3299 held two rallies, one in the morning and one in the afternoon, in front of RRMC to highlight the expiration of its collective bargaining agreement with the University on that date. There was no allegation or evidence of any misconduct or disruption at these rallies, which appear to have been peaceful at all times. Nevertheless, the University placed RRMC on lockdown in response to these activities. However, as was customary, there were no visible signs or general announcements that a lockdown was in effect. Mitchell was off duty that day and attended the morning rally. He was not aware that RRMC had been placed on lockdown.

After the morning rally concluded, Mitchell met in the RRMC cafeteria with other employees, who voiced various concerns relating to their employment. The group decided to form a delegation to present their concerns directly to Feinberg. In particular, Mitchell wished to discuss a disciplinary action taken against another employee. Mitchell had met with Security Director Vernon Goodwin (Goodwin) and Security Manager Daniel Schmidt

(Schmidt) the previous day on this matter, but was not satisfied with the response. At that time, he had advised Goodwin and Schmidt that he intended to raise his concerns about the discipline with Feinberg.

The delegation, which consisted of about 15 to 20 University employees, including Mitchell, and a Local 3299 staff organizer, proceeded from the cafeteria to the Executive Suite. Although a security officer had been posted at the door of the Executive Suite earlier in the day, the officer was removed after Local 3299's rally had concluded, and no security officer was at the door when the delegation reached the Executive Suite. And although, the door was locked, there was no sign or other indication that the Suite was on lockdown. Moreover, Mitchell testified, without contradiction, that neither he nor anyone else in the delegation was aware that the lockdown was in place for the Executive Suite.

Mitchell used his Prox card to gain entry. He testified that he had previously used his Prox card while off duty to gain entry to locked areas of the hospital, for such reasons as attending a potluck event, attending to union business, and seeing his doctor—and that no one had advised him doing so was prohibited. More specifically, Mitchell testified without contradiction that when the door to the Executive Suite was locked, he had used his Prox card, both while on duty and off duty, to enter the Executive Suite for the purpose of speaking with Feinberg's assistant Daniela Ware (Ware). Mitchell also testified that other security officers routinely used their Prox cards while off duty. Goodwin testified that he knew of no prior occasions when Mitchell or any other employee had used a Prox card while off duty, except to enter the Security Department itself to begin work. He acknowledged, however, that he and other Security Department managers had ready access to such information, which was recorded by the Prox card system. There is no evidence that Goodwin or anyone else in management

ever reviewed this information or previously disciplined someone other than Mitchell for using the Prox card while off duty.

Upon entering the Executive Suite, the delegation informed the receptionist that they were there to speak to Feinberg. The receptionist advised them that Feinberg was out of the office, but that Ware was available. The delegation asked to speak to Ware, who came out of her office, and greeted the group. Ware routinely fields messages from employees, both individually and in groups, when Feinberg is out of the office or otherwise unavailable, and passes along the information to Feinberg. Sometimes Ware will receive the group inside the suite and other times she will do so outside the suite, depending on the size of the group and the degree of notice given by the group.

Ware recognized Mitchell and other individuals in the delegation and led part of the group into a conference room inside the Executive Suite. Because the conference room was too small to accommodate the entire delegation, she only took some of the delegation members with her. The remainder stayed in the reception area at the front of the suite. Part way through the meeting, the Security Manager and Dispatch Supervisor entered the Executive Suite, ostensibly to check on Ware and at the request of someone inside the Executive Suite. Ware advised Schmidt and the Dispatch Supervisor that everything was fine, and the meeting continued after the two left. Mitchell testified that at some point a second group of individuals entered the conference room. He was told that they were let into the Executive Suite by the receptionist. Ware met with the delegation for 30 minutes to an hour, after which the delegation left. There was no evidence of any disruption or misconduct by Mitchell or any member of the delegation during this meeting. The delegation was not asked to leave the Executive Suite or informed at any time that the Executive Suite was in a lockdown.

Later that day, the University informed Mitchell that it was placing him on investigatory leave. Sometime thereafter, he received a letter from the University dated February 1, 2013, informing him that he was being placed on investigatory leave for "using [his] University Healthcare Prox Access card while not engaged in business related to the security department, to gain access to a restricted area" and for allowing "unauthorized, non-UCLA Health System staff entrance to the same area."

As part of its investigation, Goodwin reviewed the log for the card reader to the Executive Suite and the pertinent surveillance footage for the day, both of which confirmed that Mitchell used his Prox card to access the Executive Suite at the time the delegation was reported to have entered the Executive Suite. Goodwin testified that when he reviewed the security camera footage he did not see a second group enter the Executive Suite. Mitchell was not interviewed as part of the University's investigation. University witnesses testified that the decision to conduct an investigatory interview is left to the discretion of Human Resources. Yet this was the first and only time anyone in management ever conducted a disciplinary investigation exclusively into an employee's off-duty use of his or her University Prox card.

On February 5, 2013, the University informed Mitchell that it had completed its investigation, and that he should report to work the next day. Sometime thereafter, Mitchell received a warning letter in the mail from the University. The warning letter is dated February 5, 2013, and disciplines Mitchell for permitting "unauthorized persons to trespass into the Executive suite," which, according to the warning letter, was "inappropriate, unprofessional and could have resulted in an unsafe situation." The warning letter directs Mitchell not to use University equipment in an unauthorized manner while off duty. The record contains no evidence that any other employee was ever disciplined on this basis.

On July 10, 2013, in response to a grievance filed on Mitchell's behalf, the University stated that it disciplined Mitchell because he used his Prox card while off duty to gain access to the Executive Suite for himself and "15-20 unauthorized individuals." According to the University, Mitchell "was fully aware of the security lock down procedures for the [Executive] Suite," and permitted access to the delegation in contravention of these procedures. As noted above, the record evidence in this case contradicts this assertion, since Mitchell testified that he did not know and had no way to know that the Executive Suite was locked as part of a security lockdown that day.

PERB Unfair Practice Proceedings

On June 14, 2013, Local 3299 filed the instant unfair practice charge with PERB. The University filed a position statement with PERB on July 15, 2013 via facsimile and PERB received an original position statement by mail on July 22, 2013. However, Local 3299 denies ever receiving a copy of the position statement, and there is no proof of service or other evidence in PERB's file indicating that this document was served on Local 3299 at any time before January 27, 2015, the day before the hearing began.

On October 29, 2013, PERB's Office of the General Counsel issued a complaint alleging that the University violated HEERA by placing Mitchell on investigatory leave and then disciplining him in reprisal for protected activity. All other allegations in the charge were dismissed, and Local 3299 filed no timely appeal regarding the dismissed allegations.

The University filed no answer to the complaint.

The parties participated in an informal settlement conference on January 10, 2014, but did not resolve the dispute.

PERB held a formal hearing on January 28-29, 2015. At the hearing, the University requested leave to file an answer to the complaint as a late filing pursuant to PERB Regulation 32136, and Local 3299 moved to deem the University's failure to file an answer as an admission of the truth of the material facts alleged in the charge and a waiver of the University's right to a hearing pursuant to PERB Regulation 32644, subdivision (c). The ALJ denied both motions, stating that, although the University's failure to file an answer did not constitute an admission of all material facts in the charge, all affirmative defenses were waived.

Following submission of post-hearing briefs, the ALJ issued his proposed decision on May 29, 2015.

Local 3299 filed its statement of exceptions and supporting brief with the Board itself on June 23, 2015, and the University filed its opposition and supporting brief on July 20, 2015.

THE PARTIES' POSITIONS BEFORE THE BOARD

Local 3299 asserts that the proposed decision is fundamentally flawed and must be reversed on any one of three alternative grounds. First, it argues that the University's failure to file an answer to the complaint coupled with its failure to properly serve its position statement precludes it from asserting any affirmative defenses, including the "but for" analysis relied on by the ALJ to dismiss the complaint. Second, it argues that the University's affirmative defense has no application in this case, because the ALJ properly found direct evidence of nexus, i.e., that the University's adverse actions against Mitchell were taken in response to protected activity. Third, Local 3299 contends that even if the University's affirmative defenses were properly before the ALJ, the University failed to prove by a preponderance of

the evidence that it would have investigated and disciplined Mitchell regardless of protected activity.

In its post-hearing brief before the ALJ, the University argued that its failure to file an answer should not limit what evidence it may present in its defense, nor preclude the ALJ from making appropriate factual findings and legal conclusions based on the record. Although it has not excepted to the proposed decision or to the ALJ's denial of its pre-hearing motion to accept a late-filed answer, the University essentially renews this argument in its response to Local 3299's exceptions. Accordingly, the University contends that the ALJ properly considered whether protected activity was the "but for" cause of the University's investigation of and disciplinary action against Mitchell, and that the ALJ appropriately answered this question in the negative.

The University also reiterates its alternative argument before the ALJ that, although the delegation of employees to Feinberg's office may have started out as protected activity, under *Konocti School District* (1982) PERB Decision No. 217 and similar cases, it lost its protection under HEERA because of the unacceptable means employed by Mitchell. Specifically, the University contends that because Mitchell was off duty at the time, "he was no different than any other passerby or visitor to the Medical Center in terms of gaining access to the reception area in the Executive Office suite when the doors were locked," and that his improper use of his Prox card was sufficiently indefensible to deprive him of any protection otherwise afforded by HEERA for his concerted activity.

DISCUSSION

Standard of Review

The Board reviews exceptions to a proposed decision de novo and may issue a decision based upon the hearing record; affirm, modify or reverse the proposed decision; order the record re-opened for the taking of further evidence; or "take such other action as it considers proper." (PERB Reg. 32320, subd. (a)(2).) Although PERB Regulation 32300, subdivision (c), provides that an exception not specifically urged shall be waived, the parties' failure to raise an issue does not preclude the Board from addressing it on appeal. (*Morgan Hill Unified School District* (1985) PERB Decision No. 554, pp. 21-22, fn. 13; *Fresno Unified School District* (1982) PERB Decision No. 208, pp. 23-24.) The Board may raise an issue sua sponte, where necessary to correct an error of law or to prevent an erroneously-decided issue in a proposed decision from becoming Board precedent. (*State Employees Trades Council United (Ventura, et al.)* (2009) PERB Decision No. 2069-H, pp. 6-7; *ABC Unified School District* (1991) PERB Decision No. 831b, p. 4.)

We first review the ALJ's ruling on the parties' pre-hearing motions to determine the scope of issues properly before the ALJ and then consider whether the ALJ adequately explained and applied his ruling.

Denial of the University's Pre-Hearing Motion and the Issues Properly Before the ALJ

The parties' motions implicate several statutory and regulatory provisions and well-settled principles of Board law. First, as a general matter, PERB follows the policy of California courts favoring the liberal amendment of pleadings, so that parties are not deprived of the opportunity to have their issues heard on the merits due to legal technicalities. (*Roseville*, *supra*, PERB Decision No. 2505-M, p. 22, fn. 15; *United Teachers Los Angeles*

(Raines, et al.) (2016) PERB Decision No. 2475, p. 50.) Thus, as a general matter, a timely-proposed amendment that is closely related to the matters asserted in the complaint or in an answer to the complaint that has been properly filed and served should be allowed to serve the principles of economy and finality. (*Cloverdale Unified School District* (1991) PERB Decision No. 911, pp. 23-24; *Inglewood Unified School District* (1990) PERB Decision No. 792, pp. 6-7; *Riverside Unified School District* (1985) PERB Decision No. 553, pp. 4-8; see also *Monterey Peninsula Unified School District* (2014) PERB Decision No. 2381, pp. 37-38; *San Diego Unified School District* (1991) PERB Decision No. 885, pp. 62-63.)

However, PERB Regulations expressly state that the answer to a PERB complaint "shall" contain, among other things, a "specific admission or denial of each allegation contained in the complaint" and "[a] statement of any affirmative defense[s]" which the respondent wishes to assert. (PERB Reg. 32644, subd. (b)(5), (6).) Requiring parties to give reasonable notice of their claims and defenses is necessary to ensure a fair litigation process, particularly since PERB's unfair practice procedures do not provide for pre-hearing discovery. (*Beverly Hills Unified School District* (1990) PERB Decision No. 789, p. 12 (*Beverly Hills*); *Los Angeles Unified School District* (1988) PERB Decision No. 659, pp. 3-4; see also PERB Reg. 32150, subd. (a); *Roseville*, *supra*, PERB Decision No. 2505-M, p. 13; *Fresno County Office of Education* (1996) PERB Decision No. 1171, p. 6.)

Where the respondent has filed an answer but omitted an issue, such as a specific or general denial or an affirmative defense, the omitted issue is considered waived, unless leave is granted to amend the answer. (*Claremont Unified School District* (2014) PERB Decision No. 2357, p. 17 (*Claremont USD*); *City of Burbank* (2008) PERB Decision No. 1988-M, pp. 19-20; *City of Torrance* (2008) PERB Decision No. 1971-M, pp. 27-28; see also PERB

Reg. 32136.) While a respondent's denial of an allegation gives notice that it will attempt to rebut the prima facie case, it does not give notice that it will assert a separate affirmative defense. (*Beverly Hills USD*, *supra*, PERB Decision No. 789, pp. 12-13.)

Where the respondent has failed even to file any answer, it likewise waives not only its affirmative defenses, but also any specific or general denial it might have asserted, unless it is granted leave to file a late answer and have the untimeliness excused for good cause. (PERB Reg. 32136.) Moreover, PERB Regulation 32644 provides that, "[i]f the respondent fails to file an answer as provided in this section, the Board may find such failure constitutes an admission of the truth of the material facts alleged in the charge and a waiver of respondent's right to a hearing." (PERB Reg. 32644, subd. (c).) Although the language of the regulation appears to be discretionary, when read together with the language of subdivision (b) of 32644 regarding the contents of the answer, the implication is clear that a respondent's failure to answer a PERB complaint effectively results in an admission of the matters alleged therein, as well as those alleged in the charge. That is, without an answer, there can be no general or specific denial of the allegations in the complaint, nor any affirmative defenses.

With these considerations in mind, we turn to the ALJ's ruling regarding the party's preliminary motions.

The University's Motion to Accept a Late-Filed Answer

PERB Regulations provide that a late filing may be excused at the discretion of the Board "for good cause only." (PERB Reg. 32136.) If excused, a late filing is considered timely. (*Ibid*.) Consistent with the policy favoring preservation of the right to appeal and hearing appeals on their merits, the Board's application of the Regulation to a variety of factual scenarios reveals that "good cause" is a flexible standard, defined and constrained by

considerations of fairness and reasonableness. (*Trustees of the California State University* (1989) PERB Order No. Ad-192-H, pp. 4-5.) Whether good cause exists is a separate inquiry from whether accepting a late filing would result in prejudice. (*Bellflower Unified School District* (2017) PERB Order No. Ad-447, p. 5 (*Bellflower USD*).)

In *Trustees of the California State University* (2016) PERB Order No. Ad-432-H (*Trustees of CSU*), we noted that the Board previously excused a late filing for good cause where a "non-prejudicial delay of short duration resulted either from circumstances beyond the control of the filing party or from excusable misinformation," and where "the filing party's explanation was credible on its face or was corroborated by other facts or testimony." (*Id*. at p. 8.) We also noted that "regardless of the particular reason(s) given, the moving party must provide sufficient factual detail to establish a 'reasonable and credible' explanation for its untimely filing or show that it at least made a conscientious effort to comply with the deadline." (*Ibid.*) In *Trustees of CSU*, the charging party's appeal was within the possession of the respondent's General Counsel, which then failed to file a timely opposition to the appeal. (*Ibid.*) Because the respondent offered no reasonable and credible explanation for its failure to file before the deadline or to request an extension of time in which to file, the Board had no grounds to find good cause to excuse the untimely filing. Additionally, while "the Board has [historically] excused late filings caused by 'honest mistakes,' such as mailing or clerical errors," or where an untimely filing "was a result of honest error . . . resulting from misunderstood communications" with an unrepresented appellant (*Bellflower USD*, *supra*, PERB Order No. Ad-447, p. 3), it "has not found good cause in situations where the party's attorney was directly responsible for the late filing." (*Lake Elsinore Unified School District* (2017) PERB Order No. Ad-446, pp. 9-10, and cases cited therein.)

In the present case, a University Labor Relations Specialist provided a sworn declaration indicating that he had drafted an answer to the complaint and then forwarded the document to the University's Office of the General Counsel. For reasons that were never explained, no one filed it with PERB within 20 days following service of the complaint or at any other time set by an authorized Board agent, as required by PERB Regulation 32644, subdivision (a). That is, the University never submitted a declaration from anyone in its General Counsel's office regarding the failure to file and serve the answer.

The University's motion included a declaration from outside counsel, James Romo (Romo), explaining that he was retained by the University in or about September 2014, and that as he was preparing the case, he discovered that the University had not filed and served its answer. The declaration explains that the hearing was originally scheduled to begin on December 2, 2014, and attorneys for both parties appeared and were ready to proceed with the hearing. However, the hearing was re-scheduled for January 28 and 29, 2015. According to the declaration of Maurice McGlethern, a labor relations specialist with the University, Romo was aware sometime before December 2 that no answer had been filed. On January 27, 2015, one day before the hearing was set to begin, the University filed its motion for the ALJ to find good cause to excuse the University's untimeliness and to accept its late-filed answer. The University offers no explanation as to why this motion was not made when Romo discovered that no answer had been filed, rather than waiting until the eve of the hearing to do so.[3]

As in *Trustees of CSU*, *supra*, PERB Order No. Ad-432-H, the University's motion included no reasonable and credible explanation for its failure to comply with the deadline for

[3] Romo admitted on the record of this administrative hearing that on December 2, 2015, he was prepared to submit his motion to file a late answer. But he provided no credible or reasonable explanation for not doing so on the earlier date.

filing, nor any facts demonstrating that the University's attorneys had at least made a conscientious effort either to comply with that deadline or to request an extension of time in which to file. For this reason alone, we conclude the ALJ properly denied the University's motion to submit a late-filed answer because the University failed to show good cause for its delay. We therefore do not need to consider whether the late filing would have prejudiced Local 3299 in the presentation of its case. (*Bellflower USD*, *supra*, PERB Order Ad-447.)

Although the University filed with PERB a position statement in which it denied any wrongdoing, the document was filed *before* the complaint issued, and it did not conform to the requirements of an answer, as set forth in PERB Regulation 32644, including a specific or general denial of each allegation included in the complaint. Moreover, the University's position statement was not served on Local 3299 until the day before the hearing. Thus, even if it could be construed to meet the procedural requirements of an answer, as a practical matter it failed to provide reasonable notice of the University's position in this matter, such that Local 3299 could preserve evidence or identify and prepare witnesses in advance of the hearing.

Ultimately, in the absence of an answer, the ALJ properly ruled that the University had waived any and all affirmative defenses. (PERB Reg. 32644, subd. (b)(6); *Claremont USD*, *supra*, PERB Decision No. 2357, p. 17; *City of Burbank*, *supra*, PERB Decision No. 1988-M, pp. 19-20; *City of Torrance*, *supra*, PERB Decision No. 1971-M, pp. 27-28.) Moreover, with no answer on file, since there were also no general or specific denials of any of the allegations in the complaint (PERB Reg. 32644, subd. (b)(5), (6)), there was no compelling reason to conduct a hearing. (PERB Reg. 32207.) Yet having done so, the ALJ concluded that AFSCME proved a prima facie case of unlawful retaliation against Mitchell when it

disciplined him specifically because of his protected activity, viz., leading the delegation of fellow workers to express their dissatisfaction with working conditions. The record amply supports this conclusion and we therefore affirm it.

We disagree, however, with the ALJ's consideration of the University's affirmative defense. Having declared at the beginning of the hearing that affirmative defenses had been waived, the ALJ should not have permitted the University to present evidence to support its claimed non-discriminatory business justification for disciplining Mitchell, since that is an affirmative defense. Indeed, the Board has long treated the employer's burden to rebut a prima facie case of discrimination as an affirmative defense: "Thus, where, as here, it appears that the employer's adverse action was motivated by both valid and invalid reasons, 'the question becomes whether the (adverse action) would not have occurred 'but for' the protected activity.' [Citation.] *The 'but for' test is 'an affirmative defense* which the employer must establish by a preponderance of the evidence.' (*Baker Valley Unified School District* (2008) PERB Decision No. 1993, p. 13, emphasis added, internal citations omitted; see also *Palo Verde* (2013) PERB Decision No. 2337, p. 13 [employer claiming legitimate basis for discipline must establish its affirmative defense by a preponderance of evidence].) In this, our treatment of an employer's business justification for facially discriminatory discipline mirrors that of the National Labor Relations Board (NLRB): "Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases." (*Wright Line* (1980) 251 NLRB 1083, 1084; see also *NLRB v. Transportation Mgmt. Corp.* (1983) 462 U.S. 393, 401-402 [approving NLRB's treatment of employer's assertion that it would have taken adverse action regardless of its forbidden motivation as an affirmative defense].)

Neither the Board itself nor its agents may ignore the plain language of our Regulations nor modify or repeal them through decisional law. (*Regents of the University of California* (2017) PERB Order No. Ad-453-H, pp. 8-9; *Regents of the University of California* (2016) PERB Order No. Ad-434-H, pp. 9-10.) Here, the University's failure to file an answer or otherwise timely apprise the Charging Party of its position on the merits of the charge undermined the effective and efficient administration of the law. There was simply no excuse for this conduct. Thus, the ALJ rightly announced that the University would be precluded from presenting any affirmative defense to the complaint. But the ALJ's decision had an additional legal consequence: since the University could not validly interpose an affirmative defense, the ALJ should have found the University's conduct constituted a waiver of its right to a hearing to contest the allegations of the complaint and to present affirmative defenses. (PERB Reg. 32644, subd. (c).) Board agents and parties alike must know that an unjustified or inexcusable failure to file an answer may well result in a default judgment. That is the case here.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, the Public Employment Relations Board (PERB or Board) has found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code sections 3571, subdivision (a), by imposing reprisals, discriminating against employees, and/or otherwise interfering with the rights of employees because of their protected activity, when it investigated and then issued a written warning to Patrick Mitchell (Mitchell) for engaging in protected activity. Pursuant to HEERA,

Government Code section 3563, subdivisions (h), (j) and (m), it is hereby ORDERED that the University, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Imposing reprisals and/or discriminating against employees because of their participating in protected activity.

2. Interfering with the rights of employees represented by the American Federation of State, County and Municipal Employees Local 3299 (Local 3299).

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

1. Rescind the February 1, 2013 Notice of Investigatory Leave and the February 5, 2013 Written Warning issued to Mitchell and remove all originals and copies of these documents from Mitchell's personnel file.

2. Within ten (10) workdays of the service of a final decision in this matter, post at all work locations where notices to employees in the Service Unit employed at the University's Ronald Reagan Medical Center 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 thirty (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 the bargaining unit represented by Local 3299. (*City of Sacramento* (2013) PERB Decision No. 2351-M.) 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 PERB, or the General Counsel's designee. The University 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 the Local 3299.

Member Winslow 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 No. SF-CE-1035-H, *American Federation of State, County & Municipal Employees Local 3299 v. Regents of the University of California* , in which all parties had the right to participate, it has been found that the Regents of the University of California violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3560 et seq., by placing Patrick Mitchell (Mitchell) on investigatory suspension and issuing him a written warning because he exercised his rights under the HEERA.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Placing employees on investigatory suspension, issuing employees discipline, or otherwise retaliating against employees because of their exercise of protected rights.

2. Interfering with employees' right to participate in the activities of an employee organization of their own choosing.

3. Denying recognized employee organizations the right to represent their members

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

1. Rescind the written warning issued to Mitchell on February 5, 2013.

2. Purge the written warning and notice of investigatory suspension from its records, including Mitchell's personnel file.

Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

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