

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES
ASSOCIATION,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Respondent.

Case No. LA-CE-899-H

PERB Decision No. 1970-H

July 18, 2008

Appearance: Steven Raskovich, University Counsel, for Trustees of the California State University.

Before Wesley, Rystrom and Dowdin Calvillo, Members.

DECISION

DOWDIN CALVILLO, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Trustees of the California State University (CSU) to an administrative law judge's (ALJ) proposed decision (attached). The complaint alleged that CSU, through the actions of administrators and faculty at San Diego State University, violated section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)¹ by failing to rehire Terrence Ireland (Ireland) into a permanent Equipment Technician II (ETII) position in retaliation for his filing an unfair practice charge against CSU. The ALJ concluded that CSU unlawfully retaliated against Ireland by: (1) modifying the ETII job description to make him a less competitive applicant; (2) appointing a selection committee that was biased against him; and (3) denying him an interview for the permanent ETII position.

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

The ALJ ordered CSU to rehire Ireland to the ETII position or a substantially similar position, and to pay him back pay from the date it rejected him as an applicant to the date of its offer of reinstatement.

The Board reviewed the entire record, including but not limited to the complaint, CSU's answer, the hearing transcripts and exhibits, the parties' post-hearing briefs, the ALJ's proposed decision and CSU's exceptions.² Based on this review, the Board adopts the ALJ's proposed decision as the decision of the Board itself, subject to the discussion below.

DISCUSSION

We agree with the ALJ that CSU's failure to rehire Ireland constituted retaliation for his protected activities of filing grievances and an unfair practice charge. However, contrary to the ALJ's conclusion, CSU has given legitimate, non-retaliatory reasons for its actions that are intertwined with evidence of retaliatory motive. Separating these strands in order to determine CSU's true motivation requires an additional analytical step not taken by the ALJ.

Once the charging party establishes a prima facie case of retaliation, as CSEA has done here, the employer then bears the burden of proving that it would have taken the adverse action even if the employee had not engaged in protected activity. (Novato Unified School District (1982) PERB Decision No. 210; Martori Brothers Distributors v. Agricultural Labor Relations Bd. (1981) 29 Cal.3d 721, 729-730 [175 Cal.Rptr. 626] (Martori Brothers); Wright Line (1980) 251 NLRB 1083 [105 LRRM 1169].) 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." (Martori Brothers.) The "but for" test is "an affirmative defense which the employer must establish by a

²Charging party California State Employees Association (CSEA) did not file a response to CSU's exceptions.

preponderance of the evidence.” (McPherson v. Public Employment Relations Bd. (1987) 189 Cal.App.3d 293, 304 [234 Cal.Rptr. 428].) For the following reasons, CSU has failed to meet this burden.

The Revised Job Description

While we agree with the ALJ that the revised job description “was written in an attempt to keep Ireland from being rehired,” we do not agree with the conclusion that it “was not created for a legitimate business purpose.” Karen May-Newman (May-Newman), chair of the Mechanical Engineering Department (Department), testified that she updated the job description to include more current technology and to reflect the qualities she wanted in an ETII. Thus, the revised job description served the legitimate business purpose of ensuring that the job description met the current needs of the Department and accurately reflected the duties performed by the ETII. Nonetheless, given the evidence of May-Newman’s past retaliation against Ireland for filing grievances and her knowledge that Ireland would narrowly meet the modified qualifications, the record establishes that Ireland’s grievances, and not the business needs of the Department, motivated May-Newman to modify the ETII job description. Accordingly, CSU has failed to establish that it would have revised the job description in the same way had Ireland not engaged in protected activity.

Composition of the Selection Committee

CSU’s reasons for appointing the particular members of the selection committee do not overcome the inference of retaliation established by the record. May-Newman testified that she put three technicians on the committee because she felt they were best able to evaluate the applicants’ skill sets. Having technicians evaluate the applicants’ ability to perform the job duties of a technician is a legitimate business reason for creating a committee comprised of technicians. However, Tracy Arnold (Arnold) had minimal experience as a technician.

Moreover, though Greg Morris (Morris) was an experienced technician, May-Newman knew of Morris' dislike of Ireland before appointing him to the selection committee. Thus, the ability to evaluate technical skills seems not to have been the primary factor in May-Newman's choice of committee members. Accordingly, CSU has failed to prove that it would have selected Arnold and Morris to serve on the selection committee even if Ireland had not engaged in protected activity.

We disagree with the ALJ's further conclusion that the composition of the selection committee was retaliatory because May-Newman departed from established procedure by appointing technicians, rather than faculty, to serve on the committee. Under PERB Regulation 32178, the charging party has the burden of proving its prima facie case by a preponderance of the evidence.³ CSEA argued that CSU deviated from established procedure in 2005 because the selection committee that interviewed Ireland for the ETII position in 2001 consisted entirely of Department faculty. However, CSEA presented no evidence of the composition of any other selection committee besides the two that had considered Ireland for the ETII position. Because CSEA failed to demonstrate that CSU had an established procedure regarding the composition of selection committees, we cannot conclude that CSU deviated from established procedure in appointing three technicians to the selection committee. Accordingly, we do not adopt the ALJ's conclusion of law on this point.

Ranking of the Applicants

May-Newman's and Morris' explanations of why they gave Ireland low rankings also fail to rebut the inference of retaliatory motive. Each justified their low rankings of Ireland by stating that his application materials were weak and that they had concerns about his ability to

³PERB regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

do the job based on their past experiences with him. However, the record shows that May-Newman had previously retaliated against Ireland for his grievances and Morris had expressed strong disapproval of Ireland's out of class pay grievance. Thus, while they presented legitimate, non-retaliatory reasons for their rankings, we cannot conclude on these facts that May-Newman and Morris would have ranked Ireland the same had Ireland not engaged in protected activity.

We disagree with two parts of the ALJ's conclusion of law regarding Morris' ranking of Ireland. First, the ALJ concluded that Morris' rankings were motivated in part by his desire to please his supervisor, May-Newman. However, the record is devoid of evidence that Morris had any desire or inclination to please May-Newman by ranking Ireland last among the applicants. Instead, the record shows that Morris was motivated by his own dislike of Ireland. Second, there is no factual or legal basis for the ALJ's conclusion that May-Newman's unlawful motivation in ranking Ireland last should be imputed to Morris. Accordingly, we do not adopt these portions of the ALJ's conclusion.

We also do not adopt the ALJ's conclusion that there was "no legitimate reason why Ireland, with his three years' prior experience in the position, should not have been rehired." CSU articulated a legitimate reason why it did not interview Ireland: he was not among the top two qualified applicants. However, the ranking process itself was tainted by the revised job description and May-Newman's and Morris' rankings. Thus, the record fails to establish that Ireland would not have been one of the top two applicants even if retaliatory motive had played no part in the hiring process. Accordingly, despite giving a legitimate reason for its action, CSU has failed to prove that Ireland's protected activity was not the driving force behind its decision to deny him an interview.

Adverse Inference

Finally, we do not adopt the adverse inference drawn by the ALJ against CSU based on CSU's failure to call selection committee member Stig Johansson (Johansson) as a witness. In drawing this inference, the ALJ relied on a rule applied in National Labor Relations Board (NLRB) proceedings that when a party fails to call a witness assumed to be favorable to the party, the ALJ may infer that the witness would have testified adversely to the party. (International Automated Machines (1987) 285 NLRB 1122, 1123 [129 LRRM 1265].) Here, because CSU did not call Johansson to testify, the ALJ inferred that his testimony would have been adverse to CSU.

In support of her application of the NLRB adverse inference rule, the ALJ stated that "PERB has not specifically expressed this principle." In fact, PERB has expressed the opposite principle. In Victor Valley Community College District (1986) PERB Decision No. 570, the Board refused to draw an inference when a material witness was not called to testify by either side. The Board noted that this was "consistent with judicial interpretations of California Evidence Code section 412, which hold that no adverse inference should be drawn when a material witness who does not testify could have been called by either party. See, e.g., Patton v. Royal Industries, Inc. (1968) 263 Cal.App.2d 760." Here, both parties had the opportunity to call Johansson to testify but neither did. Accordingly, no adverse inference should have been drawn against CSU for failing to call Johansson as a witness.

ORDER

Upon the entire record in this matter, the Public Employment Relations Board finds that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), by failing to rehire Terrence Ireland (Ireland) in retaliation for filing grievances and an unfair practice charge.

Pursuant to HEERA section 3563.3, it is hereby ORDERED that CSU, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees because of their protected activities; and
2. Failing to rehire Ireland.

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

1. Offer to Ireland reinstatement to his former position of employment, or if that position no longer exists, then to a substantially similar position.

2. Make Ireland whole for losses which he suffered as a result of CSU's failure to rehire him, including back pay from May 2005 to the date of the offer of reinstatement.

3. Within ten (10) workdays following the date this Decision is no longer subject to appeal, post at all work locations where Notices to employees of CSU are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CSU, indicating that CSU will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

4. 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. CSU 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 California State Employees Association.

Members Wesley and Rystrom 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-899-H, California State Employees Association v. Trustees of the California State University, in which all parties had the right to participate, it has been found that the Trustees of the California State University (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), by failing to rehire Terrance Ireland (Ireland) in retaliation for filing grievances and an unfair practice charge.

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

A. CEASE AND DESIST FROM:

1. Retaliating against employees because of their protected activities; and
2. Failing to rehire Ireland.

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

1. Offer to Ireland reinstatement to his former position of employment, or if that position no longer exists, then to a substantially similar position.
2. Make Ireland whole for losses which he suffered as a result of CSU's failure to rehire him, including back pay from May 2005 to the date of the offer of reinstatement.

Dated: _____

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY

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.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA STATE EMPLOYEES
ASSOCIATION,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY,

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-899-H

PROPOSED DECISION
January 22, 2007

Appearances: Brian Young, Labor Relations Representative, for California State Employees Association; Steven Raskovich, University Counsel, for California State University.

Before Ann L. Weinman, Administrative Law Judge.

PROCEDURAL HISTORY

On July 6, 2005, the California State Employees Association (CSEA) filed an unfair practice charge alleging that the Trustees of California State University (CSU) failed to rehire applicant Terry Ireland (Ireland) in retaliation for his having filed a prior unfair practice charge.¹ On October 4, 2005, the Office of General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint alleging that by the above conduct, CSU violated the Higher Education Employer-Employee Relations Act (HEERA) section 3571(a).²

¹ The prior charge, Case LA-CE-871-H, alleged that CSU unlawfully refused to process one of Ireland's grievances. The charge was withdrawn upon CSU's reinstatement and processing of the grievance.

² HEERA is codified at Government Code section 3560 et seq. Section 3571(a) makes it unlawful for a higher education employer to "(I)mpose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter."

An informal settlement conference was held on November 9, 2005, at the Los Angeles offices of PERB but the matter was not resolved. Formal hearing was held before the undersigned on July 28, August 2, 24, and 25, 2006. After the submission of post-hearing briefs the matter was submitted for decision on November 17, 2006.

FINDINGS OF FACT

CSU is a higher education employer within the meaning of HEERA section 3562(g). CSEA is a recognized employee organization within the meaning of section 3562(p). At all times relevant, Ireland has been a higher education employee within the meaning of section 3562(e) or for the purposes of section 3571(a).³

Ireland was employed as an Equipment Technician II in the Mechanical Engineering Department, College of Engineering at CSU's San Diego campus since June 2001. At that time there was a hiring freeze but his position was exempt, allowing him to be appointed for one-year renewable terms. The exemption provided that if he were reappointed for a fourth year he would then become a permanent employee. He was reappointed in 2002 and 2003.

Ireland's duties were set forth in a written job description:

A. Position Information

Current Classification: Equipment Technician II, E/M

Department: Mechanical Engineering

Supervisor: Chair

Mechanical Engineering Department

B. The Mechanical Engineering Department is one of four academic units in the College of Engineering at San Diego State University. It currently has 365 students and 9.0 full-time equivalent faculty. The function of the position as it relates to the department is as follows:

The incumbent assist primarily the faculty and the students of the Mechanical Engineering Department in research and instructionally

³ Some years ago, MMBA section 3571(a) was amended to specify that an applicant for employment was an employee for purposes of that section.

related laboratory activities necessary for the conduct of the Department's mission. This includes the principal function of designing and fabricating unique high technology research and instructional equipment to interface as necessary with existing computer, plotting and read out systems: and requires innovative application of knowledge of equipment components and practical experience. The technician will also plan, organize and supervise various aspects of laboratory projects, and evaluate and calibrate prototype equipment utilized for research and instruction. Additional functions pertaining to this position include repair, overhaul and maintenance of specialized technical equipment pertaining to electronics, sophisticated vibration measurement systems, data acquisition systems, plotter, digital and analog computers, gasoline and diesel engines, pumps, fans, motors, metallurgical furnaces and controls, cameras, solar collectors, robots; and maintaining supplies and records as necessary for the above functions. A thorough knowledge of sources of scientific equipment in the specialized fields of Mechanical Engineering is necessary. Due to the high volume of students entering the mechanical engineering labs, the candidate should have thorough knowledge of safety protocol and ability to enforce them. Also to serve as chief property clerk for the Mechanical Engineering Department, maintaining the necessary records for the equipment under department jurisdiction. Mature attitude and good judgment is essential for this function. The technician will now be in charge of supervising the student machine shop and students using the machine shop. This includes the development of safety materials and suitable safety instructions/ test procedures to ensure that students are adequately prepared to use the machine shop tools in a safe manner. The technician will also be involved in the training of students on specific machine shop tool operation procedures.

C. Duties and Responsibilities of the Position

a. Critical Duties Performed

Time

50% Design, construct and maintain new research and instructional instruments for highly specialized Mechanical Engineering experiments. This function requires (a) a thorough knowledge of electro-mechanical principals and state-of-the-art electronics, some familiarity with UNIX and/or Window/NT computer operating systems, and (b) ability to use independent judgment and innovation for development of one-of-a-kind research test facilities from design to fabrication and operation. It encompasses design, fabrication (with the help of machinists and

other technicians) and operation of special amplifiers, circuits, fuel cell test apparatus, one-of-a-kind recorders, instrument panels, integrated circuit applications. In addition, the technician must maintain familiarity with a wide range of electrical, optical, mechanical and thermal instrumentation pertaining to Mechanical engineering measurements and incorporate this instrumentation into various fabricated devices as necessary. The technician must also test, evaluate and calibrate newly purchased devices to verify performance; and when requested evaluate designs of new equipment and make purchase recommendations based on specific performance needs.

25% To maintain in proper and safe operating condition all electronic, computer, and mechanical equipment relating to more than 6600 square feet of laboratories under jurisdiction of the Mechanical Engineering Department: to establish and keep record of maintenance procedures and schedules, and to keep a file of maintenance manuals for repair, calibration, and operation of this highly specialized equipment. A partial listing of this specialized equipment requiring service includes: analog computers, printers, disc drives, vibration machines, large power amplifiers for the vibration machines, numerous x-y recorders, oscilloscopes, amplifiers, power supplies, noise meters, digital volt meters, oscillators, robots, misc. metallurgical equipment, engines, pumps, fans and numerically controlled machines such as lathes, mills and 3D rapid prototyping machine.

5% To work with the facility in determining needs for equipment, instrumentation, and supplies used in conjunction with the laboratories and facilities in the Mechanical Engineering Department.

10% Establish and update a file for the purpose of making sound purchase decisions for the maintenance of all equipment in the Mechanical Engineering Department, including spares, supplies, tools, safety and other related equipment. Initiate a follow-up on purchase requisitions concerning equipment tools, supplies, spares, catalogs, etc.

5% Establish and keep records of maintenance procedures and schedules and to keep a file of maintenance and operators manuals for the troubleshooting, repair, calibration, overhaul and operation of all equipment.

5% Establish and maintain an inventory of all equipment in the Mechanical Engineering Department and advise the campus property clerk of changes.

b. Training and Experience

Equivalent to two years of college with specialization in electro-mechanical systems, their design, construction and repair,

or

Equivalent to three years of progressively responsible journey-level or skilled experience in the design, maintenance and operation of scientific or technical equipment, including one year involving modifications and fabrication of complex and highly technical equipment,

or

Equivalent to two years of skilled experience maintaining and repairing scientific or technical equipment or related equipment. Experience as part of instructional support activities may be substituted for one year of required experience,

or

Equivalent to two years of trade school or technical arts training with specialization in electro-mechanical equipment repair, completion of an apprenticeship program, or completion of a full military specialization in electro-mechanical equipment maintenance and repair may be substituted for one year of required experience.

c. Scope and Effect of Work

The Mechanical Engineering laboratories are used every day of the week for instruction, senior students are assigned to work on special projects as an important part of their engineering training, and they regularly use equipment and require the services of the technician in the completion of their projects. Further, and often more demanding, services are required for graduate and faculty research.

d. Supervision and Guidance Received

The supervisor is the Chair of the Mechanical Engineering Department, but guidance also comes primarily in the form of written and oral communications describing the task to be completed and establishing work priorities; however, independence and originality are additional job requirements.

e. Demand for Independent Judgment and Action

Some tasks are assigned in which only a minimum oral outline of the project is given. Also, in design of instrumentation, it is left to the technician's judgment and experience to determine the details of the design, fabrication, material selection and time required to complete the task. It is then the technician's task to verify availability and cost of materials and to satisfy the requirements of the Purchasing Department in ordering and acquiring the needed goods and to complete the task in a minimum of time.

The technician is responsible for establishing and following maintenance schedules in accordance with good engineering practices, and when necessary seek the advice of manufacturing representatives in the repair of complex and costly equipment.

f. Other Qualifications

The skills required for the position are of a special type, and the position is a challenging one in trying to keep pace with the continuing rapid growth and development on instrumentation and equipment in the mechanical engineering field. Continual study of materials, process, and catalog literature is required to keep abreast of the state-of-the-art in this field of endeavor.

The technician's combined knowledge of electronics and mechanical principles, and familiarity with available equipment components and a variety of computers (Windows and/or UNIX) are essential.

Ireland received two performance reports, one for the period ending June 30, 2002, and one for the period ending June 30, 2003. In the first report, he received all "Superior" marks; in the second report, mostly "Outstanding" marks and a few "Good" marks, with the following comments:

Good job in moving and cleaning the labs. Excellent technical skills. Faculty complained about work not completed on time. Improve communication with some faculty. Divide your time more equally (some faculty complained that you serve only one person).

In January 2004 Karen May-Newman (May-Newman) became chair of the Mechanical Engineering Department. On April 4, 2004, Ireland filed a grievance complaining that he was performing supervisory work without being paid for the higher level classification. In this regard, Ireland claims that, at the request of David Hayhurst (Hayhurst), dean of San Diego State's College of Engineering, he performed certain supervisory duties over Greg Morris (Morris), an Engineering Technician III, and found out later that Morris had a higher wage classification than himself. Hayhurst, May-Newman, and Morris all deny that Ireland ever acted as Morris' supervisor. Morris told Ireland that filing a grievance against your boss was not the way to ask for more money, and he should tear it up. CSU denied the grievance and Ireland decided not to pursue it further.

The June 2004 Termination

On June 16, 2004, Ireland was called to the office of Human Resources Director Carol Cunard (Cunard) and told that he would not be reappointed for the fourth year; he was given no reason. Although Ireland's termination would not officially take effect until the expiration of his current contract on June 30, he was required to immediately turn in his keys, gather his belongings, and leave the campus.

Hayhurst, along with May-Newman, made the decision not to renew Ireland's contract. He testified that he had three concerns about Ireland: his lack of skills; his failure to keep the areas to which he was assigned at the required safety level; and his lack of response to faculty members. As to skills, Hayhurst testified that he had several conversations with Ireland regarding the new "CNC" computer-driven machine; in one conversation, Ireland said it did not work properly and he wanted to get a new one; Hayhurst agreed and suggested he get prices, but Ireland never followed up with anything in writing. As to safety, Hayhurst testified that students were not wearing required safety glasses or gloves, and labs were not in good

order. He assigned a faculty member to evaluate all of the college's labs, which resulted in a finding of "minor violations." Hayhurst spoke to Ireland about his concerns and Ireland made suggestions for improvement, but according to Hayhurst, "very little got done." As to working with faculty, Hayhurst relied on reports that Ireland favored only one faculty member, Dr. James Burns, and was not responsive to the needs of others. There is no evidence that Hayhurst ever criticized Ireland's work or disciplined him about it or that he ever spoke to Ireland about his favoring Dr. Burns.

May-Newman also testified that Ireland's work was deficient. She claimed that in early 2003, before she became his supervisor and before he filed his first grievance, he failed to complete a project involving plastic components for a machine, students complained that they could not get completed parts from him, and he did not properly install a gasket seal. At some point in time she discussed department safety concerns in general with Hayhurst, including clutter, lack of cleanliness, containers not properly labeled, and potential OSHA problems in her labs; she also discussed with Ireland measures which could be taken to remedy safety problems. When she became department chair, she met with Ireland regarding her expectations regarding the need for safety and for adequate responses to faculty requests; she said she hoped Ireland could start off "on a new foot." May-Newman testified that she got complaints about Ireland's work from one faculty member and from Morris (himself the subject of a faculty complaint), who she said expressed frustration with him. She discussed Ireland's work performance with Hayhurst and they decided not to renew his contract; she claims that her reasons were that work was not getting done, projects were not getting finished, and the shop was a "mess." However, there is no evidence that she ever issued an oral or written warning or otherwise disciplined Ireland because of safety concerns or because of his performance.

Hayhurst and May-Newman also raised the inspection of San Diego State's College of Engineering by the Accreditation Board for Engineering Technology (ABET),⁴ which was scheduled to be performed in late 2003. It is undisputed that preparation for ABET's visit was a stressful time for everyone at the college, as it was extremely important that CSU receive a favorable report and be accredited. Staff meetings were held for this purpose, at which several areas were discussed including design, cleanup, and safety. May-Newman testified that Ireland, who had responsibility for ensuring that safety standards were met in the Mechanical Engineering Department, did not remedy all of the problems. However, there is no evidence that he was counseled about any such failure, and the college received a good report and a 6-year accreditation from ABET. Hayhurst acknowledged that ABET did not make any criticism of the Mechanical Engineering Department labs; but May-Newman testified that in one paragraph of its report, ABET noted student complaints about broken equipment and poor laboratory conditions.

After the Termination

In July 2004, after Ireland's termination, Newman-May took photos of the department's labs and machine shop, which show a fair degree of clutter and disorganization, mostly created by students eating and drinking in the labs. According to May-Newman, the photos also reflect safety concerns, as one might have to "trip" over a non-working machine to reach a working machine. She contended that during Ireland's employ she had asked him in general to clean up the department, and that it was his responsibility to notify the faculty, students, or anyone else responsible for fixing those areas. She testified that the areas shown in the photos had not been touched since Ireland left, but she did not say how much more clutter the students caused since he left. The photos were filed away and the areas were

⁴ ABET accredits engineering schools for either a 2- or 6-year period.

cleaned up over the next several months in preparation for a student contest. May-Newman also prepared a time-line of the clean-up process at the request of Dean Hayhurst, and decided to close some of the labs. The photos were used for the first time at the instant hearing. When asked why she took the photos, May-Newman testified:

I was concerned that there would be some issues raised regarding my perception of what needed to be done to clean up this laboratory space . . . (raised by) Mr. Ireland or Dr. Burns.

May-Newman also engaged in the following exchange:

Q: There would be a challenge to your closing the lab?

A: Yes.

Q: Why? Why would there be a challenge to you closing the lab?

A: Because it would interfere with some people getting work done in there.

Q: Well, if this was after Mr. Ireland was no longer employed by the University, why would he - why could he possibly be one of the people to challenge closing the lab?

A: I was more concerned about Dr. Burns making a challenge.

Q: Yeah, but apparently there was some concern that Mr. Ireland might challenge it. Why would that be if he was no longer employed there, in your mind?

A: I thought he would want to come back and that he would – he would – I know he was not happy with not being reappointed and that he would likely seek employment again. And I wanted to document the condition of the lab for that purpose, but also for this other purpose of, more importantly, of closing it on the basis of environmental health and safety's advice.

Q: Okay. So in your mind at the time that you took these pictures, you thought that if he wanted to come back, you didn't want him to?

A: I wanted to document the condition the laboratory had been in when he left.

Q: But did you feel at that time that if he made such a request, you would not want to honor it?

A: I wouldn't say that. I just wanted to cover my behind in the decisions that I had made why they were justified.

Q: Why? Why what was justified?

A: Why closing the laboratory to general use was justified. Why not renewing Mr. Ireland's appointment was justified.

As noted above, Ireland's job performance was not mentioned by either Hayhurst or Cunard when he was notified of his termination.

On August 9, 2004, Ireland filed a second grievance alleging that the termination of his appointment was in retaliation for the first grievance. He and a CSEA representative met on the grievance with May-Newman, who said his termination was because the department needed to make some changes. The CSEA representative asked her what changes; she said she did not know. At that meeting, Ireland's job performance was not mentioned as a reason; as noted above, during his tenure at CSU he had never been disciplined, warned, or counseled. CSU denied the second grievance.

Filling the Vacant Position

In October 2004 May-Newman decided to fill Ireland's vacant position on an emergency basis. A temporary agency was contacted and applications submitted by the agency were reviewed. But the successful candidate, Mike Lester (Lester), did not come through the agency; rather, he was a soccer acquaintance of May-Newman's husband. CSEA witnesses testified without contradiction that Lester performed the same duties as Ireland. During this period CSU arranged for Lester to receive training at the local city college on the new CNC procedures, specifically the CAD/CAM machine.

On December 3, 2004, Ireland filed a third grievance regarding the filling of his former position, in which he restated the complaints in his prior grievances. CSU denied the grievance on the basis that Ireland was no longer an employee. On February 25, 2005, CSEA filed the unfair practice charge in Case LA-CE-871-H, alleging CSU's failure to process Ireland's termination grievance.⁵

Thereafter, Hayhurst told May-Newman to review the current job description to ensure that it was appropriate for hiring a new employee. According to May-Newman, she found the current job description "a bit confusing . . . a lot of redundancy and overlapping descriptions." In consultation with Cunard, she prepared a new job description; she claimed her purpose was to ensure that the new employee would have "the qualifications necessary for the job that needed to be done," including "specific things that I cared about, which was the CNC machining, computer skills, ability to produce solid models." May-Newman contended that the new description differs from the old in its emphasis on modern technology and equipment, specifically the new CNC machine and in its requirement for a higher level of skills and experience.⁶ The new job description reads:

Job Title: Equipment Technician II, Electro-Mechanical
Department: Mechanical Engineering
Name and Title of Supervisor: Karen May-Newman, Chair

A. Function of the Employing Unit

The College of Engineering is one of seven major instructional

⁵ As noted above, this case was settled and withdrawn upon CSU's processing of the grievance.

⁶ Back in May 2004 Cunard had sent Ireland a written response to his first grievance, in which she stated, *inter alia*, that May-Newman would review his current job description and contact him no later than June 4 to "share any changes or revisions she believes are appropriate . . ." However, neither Cunard nor May-Newman ever contacted Ireland to discuss potential changes.

units of San Diego State University. The primary objective of the College is to prepare students for professional career in engineering. The Department of Mechanical Engineering is one of four departments in the College. The department currently has nine full-time faculty members, and serves approximately 400 undergraduates and 50 graduate students. In addition to our undergraduate program, our students populate two Master of Science degree programs, a Master of Engineering and a Joint Ph.D. program.

B. Function of the Position

The position of the technician is primarily technical, but good record keeping, computer and communication skills (verbal and written) are essential to proper job function. The technician will plan, organize and supervise various aspects of laboratory projects, and design, fabricate and calibrate prototype and other equipment and instrumentation utilized for research and instruction. This includes providing a safe work environment and providing safety training to users of lab facilities. In order to oversee the general state of experimental facilities, the technician is responsible for the cleanliness, safety, security and effective utilization of laboratories and other department-maintained space. The technician must communicate regularly with faculty and Department Chair regarding status and needs of instructional laboratories, shops and project courses.

The technician supports the faculty and students of the College of Engineering in instructionally-related and research laboratory activities. The position reports to and is supervised by the Chair of Mechanical Engineering.

C. Duties

Approximate Distribution of Time

(40%) Lab/Equipment

The technician is responsible for the repair, maintenance and replacement of specialized technical and instructional equipment. The technician will coordinate maintenance and repair of departmental equipment and arrange for acquisition and disposition of equipment and supplies.

(20%) Student Fabrication Laboratory (E105)

The technician will also oversee the fabrication shop currently located in E105, and must coordinate with the design course instructions and the Department Chair to maintain the laboratory

in safe operating condition. This includes providing safety materials and keeping equipment in safe working order.

(20%) Design/Fabrication

The technician will design and fabricate new experimental apparatus for instructional and research laboratories.

(20%) Student Interaction

Technician will assist undergraduate and graduate students with projects. Provide lab instruction/presentations that include technical information and safety policies and procedures. Project scheduling will be prioritized with the help of the faculty and Department Chair.

Knowledge, Skills and Abilities

- * Extremely diverse background fabrication of metals, plastics, and wood,
- * Knowledge of principles of welding and welding equipment,
- * Experience with troubleshooting and maintenance of engineering and shop equipment,
- * Knowledge of computers and software including CAD/CAM, CNC programming knowledge,
- * Ability to produce finished parts from solid models,
- * Ability to solve problems with equipment and science-related issues with minimal expense and time,
- * Effectively organized, able to work well with diverse personalities in a professional and respectful way,
- * Experience with implementation and enforcement of laboratory/shop safety practices,
- * Ability to lift 50 pounds,
- * Strong oral and written communications skills

Qualifications

Equivalent to three years of journey-level or skilled experience in the maintenance, repair, fabrication and operation of scientific or technical electro-mechanical equipment including one year involving construction and fabrication with a variety of materials.

Formal course experience or certification in CAD/CAM, Machining, GD & T, Welding, Safety and other fabrication shop skills is highly desirable.

Working Environment

Mechanical Engineering department laboratories including the student machine shop, project fabrication lab, and engineering lab building. Research and instructional laboratories for department faculty, including offices and classrooms. Some local trips for equipment and supplies may be needed, but not central to the position.

License and/or certificates

Valid California driver's license
See above qualifications

In March 2005 CSU posted Ireland's former position as a permanent position, citing the requirements of the new job description. May-Newman directed the search process. Prior to that search process, the customary selection committee had consisted of Mechanical Engineering Department faculty; the most recent committee had included Drs. Burns and Lambert, both supportive of Ireland. However, instead of appointing faculty, May-Newman, in collaboration with Hayhurst and Cunard, appointed three unit employees to form the selection committee along with herself: Morris, the engineering technician whom Ireland claimed he supervised; Tracy Arnold, an information technology consultant; and Stig Johansson, an equipment technician specializing in aerospace. Neither Arnold nor Johansson were employed in the Mechanical Engineering department; Arnold had little contact with Ireland during his tenure, and it is not known whether Johansson had any. May-Newman testified that she chose them to "assess the skill sets," and that Arnold was there particularly to assess the computer knowledge, including the CNC machine, notwithstanding that she had no direct experience with the other principal machines used in the position. Four individuals applied for the position, including Ireland and Lester. Instructed to use the new job description as a guide, the committee members rated the four applicants; Ireland received the lowest rating. Two applicants, including Lester, were chosen to be interviewed, and Lester

was hired in late May 2005.⁷ It is CSU's failure to rehire Ireland at that time which inform these proceedings.

As to the selection process, May-Newman testified that she rated Ireland the lowest because he lacked the necessary qualifications. She contended that his prior jobs before CSU were "primarily related to the automotive field," skills not necessary for a Mechanical Engineering technician. When asked why Ireland was hired in the first place with even less experience, she responded that she did not know what the pool of applicants or the selection process was at that time. When asked why his past three years' experience in the very position he was now applying for did not get him a higher rating, May-Newman said that the others were more qualified, but if there had been no other candidates, he would have been interviewed. She said he primarily lacked "CNC experience and training and ability to produce solid models." As to why the committee selected only two candidates to interview, she stated:

We thought we'd start with two and if we found someone that we – was satisfactory, then we did not feel the need to continue.

Arnold testified that Ireland's application and resume had the following defects: (1) he did not have experience with the CAD/CAM machine; (2) his education was not relevant to the job; and (3) he misspelled words, which Arnold said is her pet peeve. The only spelling errors which I could find on Ireland's 3-page application and 3-page resume are "Mooved" instead of "Moved", "Chesnit St." instead of "Chesnut St." and "employee's" instead of "employees", while hundreds of more difficult words were correctly spelled. It appears that

⁷ May-Newman recommended two applicants for further consideration (these two were interviewed) and two not for further consideration (Ireland and another applicant); Arnold did the same. Morris recommended two yes (Lester and an applicant who was not interviewed) and two no (Ireland and an applicant who was interviewed). Johansson recommended three yes and one no (Ireland).

these errors were typographical and that he did not use a spell-check. Arnold knew Ireland while he was employed, but had never worked directly with him. She testified that she knew there was some “controversy” in the Mechanical Engineering department but did not know why; and she knew Ireland had been terminated but did not know why. She claimed that she was not aware of his wage grievance until the instant hearing. (In rebuttal, Ireland testified that at the time he filed the wage grievance, Arnold came into his office to use his microwave, as she often did, and he told her he had filed it. “She didn’t have much to say about it. She just said, you know, I hope it works for you.”) Arnold claimed that no one told her how to view Ireland’s application or how to rate the candidates. As to why only two candidates were interviewed, Arnold testified as follows:

Q: Did anybody at any time ever tell you how many people you could recommend for no further consideration or conversely for further consideration?

A: You know, I don’t remember that, but – I don’t recall that. I mean, you know, I found out at some point that we could just do two.

Q: You found out at some point that you could just do two?

A: Yeah.

Q: How did you find that out?

A: I don’t remember. I mean, this is a long time ago. And I don’t remember when.

Morris also testified that he received no instructions on how to rate the applicants or evaluate Ireland. He contended that he rated Ireland low because there were errors on his resume, which Morris did not specify; it was incomplete, which Morris did not explain; and he had a “jumpy” history, which Morris did not explain. Morris acknowledged that Ireland had a good background in mechanics and had management experience, but that he had no

experience in fabrication. He also contended that Ireland was untruthful in his application by stating that he supervised Morris. He testified that several times before Ireland's termination he observed Dr. Burns talking to Ireland about his attitude. On one occasion in spring 2004, Morris joined the conversation and said he agreed that Ireland's attitude was not positive but rather was defiant and proud; in response, Ireland said, "I've been acting like this forever and I'm not going to change." Morris testified that Ireland's first grievance was "inappropriate," that he should have discussed the matter informally with his supervisor or with Human Resources, and that he (Morris) would never have filed a grievance for more money. Morris claimed that May-Newman told him Ireland was not reappointed because things were not getting done. As to Lester, Morris had met him five years before his hire, and knew that May-Newman had a "connection" with him; Morris testified that he "got along great with him." Morris was aware that Lester received training while in his emergency position; Morris said this "improved his ability to work to a limited extent." Morris, as well as Arnold, indicated that although Ireland was the lowest rated, he was not unqualified for the position.

Johansson did not testify.

ISSUE

Did CSU fail to rehire Terry Ireland in retaliation for his protected activities?

CONCLUSIONS OF LAW

To demonstrate a violation of HEERA section 3571(a), the charging party must show that: (1) the employee exercised rights under HEERA; (2) the employer had knowledge of the exercise of those rights; and (3) the employer imposed or threatened to impose reprisals, discriminated or threatened to discriminate, or otherwise interfered with, restrained or coerced the employees because of the exercise of those rights. (Novato Unified School District (1982))

PERB Decision No. 210 (Novato); Carlsbad Unified School District (1979) PERB Decision No. 89.

Here, there is no question that Ireland engaged in protected activities, i.e., his grievances and prior unfair practice charge, and that CSU, in particular Hayhurst and May-Newman, were aware of them.⁸ The issue then is whether there is a connection, or “nexus”, between those activities and the adverse actions taken against Ireland. As direct evidence of nexus is seldom available, it may be shown by circumstantial evidence. (Contra Costa Community College District (2003) PERB Decision No. 1520.)

Circumstantial evidence of nexus includes the important factor of timing, i.e., whether the employer’s adverse action occurred in close temporal proximity to the employee’s protected conduct. (North Sacramento School District (1982) PERB Decision No. 264.) However, timing, without more, does not demonstrate the necessary connection. (Moreland Elementary School District (1982) PERB Decision No. 227.) Facts establishing one or more of the following additional factors must also be present: (1) the employer's disparate treatment of the employee (State of California (Department of Transportation) (1984) PERB Decision No. 459-S); (2) the employer's departure from established procedures and standards when dealing with the employee (Santa Clara Unified School District (1979) PERB Decision No. 104.); (3) the employer's inconsistent or contradictory justifications for its actions (State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S; (4) the employer's cursory investigation of the employee's misconduct; (5) the employer's failure to offer the employee justification at the time it took action or the offering of exaggerated,

⁸ Although the instant complaint cites Ireland’s protected activity as only his filing of the prior unfair practice charge, the record reveals that his three grievances also played a part in his failure to be rehired. Accordingly, I shall consider them as part of the protected activities at issue.

vague, or ambiguous reasons; (6) employer animosity towards union activists (Cupertino Union Elementary School District) (1986) PERB Decision No. 572.); or (7) any other facts which might demonstrate the employer's unlawful motive. (Novato; North Sacramento School District, supra, PERB Decision No. 264.)

Here, the adverse actions taken against Ireland include his termination, the emergency filling of his position by Lester instead of himself, and the failure to rehire him on a permanent basis. I cannot find independent violations based on either his termination in June 2004 or the emergency filling of his position in October 2004 as these were not alleged in the complaint, are time-barred, and do not arise from the same set of facts as those relating to the failure to rehire him in May 2005. However, they were all decided by May-Newman along with Hayhurst, thus they may serve as background evidence of their motivation. (California State University, Hayward (Dees) (1991) PERB Decision No. 869-H; North Sacramento School District (1982) PERB Decision No. 264.)

The Termination

At the time of Ireland's termination in June 2004 he was given no reason at all; and when he met with May-Newman in August 2004 regarding his termination grievance, he was told only that the department needed to make some changes, but she was unable or unwilling to specify what those changes were. Yet at the instant hearing, May-Newman, as well as Hayhurst, proffered that Ireland's job performance was lacking. Thus, CSU's failure to offer justification at the time of the termination, and its contradictory justification for the termination made at the hearing are indicia of unlawful motivation. (Novato, supra; State of California (Department of Parks and Recreation), supra.) Timing is also a factor, as Ireland received notice of termination only two months after he filed his wage grievance. Further, as Ireland's initial contract was renewed twice, he had received generally excellent performance

reviews, and had never received any reprimand or discipline, I find May-Newman's and Hayhurst's complaints about his job performance to be pretextual, in order to hide their true motivation, i.e., Ireland's grievance. (Sonoma County Junior College District (1991) PERB Decision No. 895.)

The Filling of Ireland's Position on an Emergency Basis

May-Newman's decision in October 2004 to temporarily fill Ireland's vacant position on an "emergency" basis was made shortly after his termination grievance was filed in August 2004. Thus timing is also factor here. And for the reasons stated above, I conclude that CSU's decision to hire Lester instead of Ireland was not because of Ireland's prior job performance, but rather cited as pretext to hide an unlawful motivation.

Added to that is May-Newman's admission that she took the lab and shop photos, which she used only for the instant hearing, in order to justify Ireland's termination and to keep him from coming back, which also evidences an unlawful motivation. (North Sacramento School District, supra.)

The New Job Description

May-Newman's decision in early 2005 to issue a new job description and permanently fill the position was made shortly after the prior unfair practice charge was filed in February 2005. Thus timing is also a factor here. In addition, a thorough reading of the old and the new job descriptions for Equipment Technician II shows striking similarities between the two. In this regard, the sequence of paragraphs in the old job description was drastically altered for the new job description, thereby making comparison difficult. However, a color-coded comparison of the two documents, submitted as an exhibit by CSEA, was a great help in making this analysis. The similarities include: the description and supervision of the Mechanical Engineering Department; the functions and duties of the position, most

importantly keeping a safe work environment, instructing students in safety measures and machine shop procedures, assisting students and faculty, repairing, maintaining, and acquiring equipment, and designing and fabricating new equipment; required knowledge and skills in fabrication, welding, engineering and shop equipment; skill in working with scientific equipment and with faculty and students; and enforcing safety practices.

One difference between the two documents is that the old job description lists several specific types of equipment in sections B and C, including computers, while the new job description specifically cites knowledge and skill in the new computer-driven CAD/CAM and CNC machines, and CAD/CAM course-work or certification as a “highly desirable” but not required qualification. However, Lester, who was awarded the permanent position, was hired as an emergency replacement without such experience or certification and was provided it by CSU during his emergency tenure. I see no legitimate reason why Ireland, who already had some CNC experience, or any other new hire, could not have been given this same opportunity after rehire. Another difference is that the old job description cites the required training as two years of college or either the equivalent of three years’ journey-level experience or other similar alternatives; the new job description requires three years journey-level experience including one year of construction and fabrication, with no alternatives. During Ireland’s tenure at CSU, he had already gained the required three years of journey-level experience.

In summary, except for the CAD/CAM and CNC qualification and the elimination of alternatives to the required three years’ experience, the new job description does not materially alter the description, duties, or requirements of the position. I therefore find that it was not created for a legitimate business purpose, but rather was written in an attempt to keep Ireland from being rehired. (Novato, supra.)

The Selection Committee

This selection committee was unusual in that it was composed of unit employees rather than faculty. May-Newman testified that she chose people experienced in new technology. However, neither Arnold nor Johansson were employed in the Mechanical Engineering Department and there is no evidence that they knew the real requirements or workings of that department. Thus, they had to rely entirely on the new job description, which specifically lists experience with the CNC and CAD/CAM machines. Had the committee been composed instead of Mechanical Department faculty, they would have known the many similarities between the new and old job descriptions, that Ireland already had some experience with the CNC machine, and that he could have been further trained as Lester had been. I find May-Newman's reasons for her appointments unconvincing and her departure from established procedure to be evidence of unlawful motivation. (Santa Clara Unified School District, supra.) Further, I find that the appointment of Morris to the committee was a deliberate attempt to sabotage Ireland's rehire, as May-Newman was well aware of Morris' hostility toward Ireland.

Accordingly, I find that May-Newman's unusual appointments to the selection committee were motivated by a desire to keep Ireland from being rehired because of his grievances and unfair practice charge.

The Committee Ratings

Ireland was not rehired after he was rated the lowest of four applicants by the selection committee, with each member rating him as not qualified for further consideration. Although three committee members - Arnold, Johansson, and Morris - were not in supervisory or management positions, they were given the authority by May-Newman to make a hiring decision, later ratified by CSU; thus they were acting as agents of CSU. (Chula Vista

Elementary School District (2004) PERB Decision No. 1647; Compton Unified School District (2003) PERB Decision No. 1518.) Their motivation in giving Ireland the lowest rating is therefore at issue.

Arnold testified that she was motivated by Ireland's lack of experience with the new CAD/CAM machine, his lack of certification on the CNC machine; and misspellings on his application. However, Arnold was probably unaware that Ireland already had CNC experience, as she did not work in his department and had infrequent contact with him. Arnold was probably also unaware that Lester did not have CAD/CAM experience when he was first hired as Ireland's replacement, but was later provided training by CSU. As to misspellings, there were but a few minor mistakes, which might have been typographical errors. I therefore do not find Arnold's reasons convincing. Further, I find suspicious her lack of memory as to how she learned there were to be only two applicants rated for interviews, while she was very specific in her objections to Ireland's application. As to knowledge, there is a conflict as to whether she knew of Ireland's wage grievance. She summarily denied she ever heard of the grievance until the instant hearing. Ireland, however, testified that while Arnold was using the microwave in his office, he told her about having filed the grievance and she responded, "I hope it works for you." Because of the specificity of Ireland's testimony, and the problems with Arnold's testimony noted above, I credit Ireland in this regard and find that he told Arnold about the grievance around the time it was filed in April 2004. However, there is no evidence that her response to the grievance indicates any anti-union animus nor is there any other evidence upon which to find her motive unlawful.

Johansson did not testify, thus there is no direct evidence regarding the motivation for his ratings. "When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual

question on which the witness is likely to have knowledge,” International Automated Machines (1987) 285 NLRB 1122, 1123; Daikichi Sushi (2001) 335 NLRB 622.⁹ Here, it may reasonably be assumed that Johansson would be favorably disposed toward CSU’s selection process and its hiring decision, in which he took part. Accordingly, as CSU failed to call him as a witness, I make an inference that if called, his testimony would not be any more convincing than Arnold’s or Morris’. However, there is no evidence that Johansson was aware of any of Ireland’s grievances or his prior unfair practice charge. I therefore cannot find that his ratings were unlawfully motivated.

Morris, however, is another matter. He expressed animus toward Ireland’s wage grievance in testifying that it was an “inappropriate” way to ask for more money. He also testified that the grievance, as well as Ireland’s application, were untruthful, as they falsely claimed that Ireland had supervisory duties over him. Morris also criticized Ireland’s resume for errors and incompleteness, but he gave no details. He acknowledged that Ireland had a good background in mechanics and had management experience, but proffered that he had no experience in fabrication. However, the job description under which Ireland was initially hired, states that the position “includes the principal function of designing and fabricating unique high technical research and instructional equipment...” As Ireland’s contract was renewed twice before his termination, it must be assumed that CSU was satisfied with his design and fabrication abilities. I therefore do not find Morris’ concerns well-founded. Morris also testified to Ireland’s defiant attitude, but that he “got along great” with Lester, whom he had known for some time before his hire and whom he knew had a personal connection with May-Newman. He also testified that May-Newman told him that Ireland was

⁹ Although PERB has not specifically expressed this principle, it may appropriately take guidance from decisions of the National Labor Relations Board. (Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507].)

not reappointed because things were not getting done. Thus, it appears that Morris was motivated by his animus toward Ireland's wage grievance and by his desire to please May-Newman, his supervisor, rather than by any legitimate concerns about Ireland's work. As May-Newman was herself unlawfully motivated, I therefore conclude that Morris' ratings were also unlawfully motivated.

As to May-Newman, she testified generally that she rated Ireland lowest because his background did not satisfy the new job description. However, as discussed above, the new job description did not impose any additional requirements which Ireland could not have been trained to fulfill, and was itself unlawfully motivated, as were May-Newman's other actions with regard to Ireland. Accordingly, I conclude that her ratings of Ireland during the selection process were similarly unlawfully motivated.

I have therefore found that two out of the four selection committee members were unlawfully motivated when they rated Ireland the lowest of the candidates. This in itself would not guarantee that Ireland would have been selected but for their ratings. However, the selection committee itself and the job description upon which they were instructed to rely were unlawfully created, and I find no legitimate reason why Ireland, with his three years' prior experience in the position, should not have been rehired.

Accordingly, I find that CSU failed to rehire Ireland in May 2005 in retaliation for his protected activities, i.e., his grievances and prior unfair practice charge, in violation of MMBA section 3571(a).

REMEDY

HEERA section 3563.3 gives PERB:

. . . the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action . . . as will effectuate the policies of this chapter.

Here, CSU failed to rehire Terry Ireland in retaliation for his filing grievances and a prior unfair practice charge, in violation of HEERA section 3571(a). In two fairly recent cases, the National Labor Relations Board (NLRB) defined the differences between a failure to consider for hire and a failure to hire, and delineated the different remedies thereupon. In FES (A Division of Thermo Power) (2000) 331 NLRB 9 [164 LRRM 1065], the NLRB declared that the elements of a discriminatory refusal to hire are: (1) the employer was hiring; (2) the applicant(s) had experience in the position; and (3) anti-union animus contributed to the decision not to hire; and the remedy for a violation includes an order to hire the applicant to the applied-for position or an equivalent position. The elements of a discriminatory refusal to consider for hire are: (1) the employer excluded applicants from the hiring process; and (2) anti-union animus contributed to the decision; the remedy includes an order to offer the applicants a subsequent position when it becomes open. In Stamford Taxi, Inc. (2000) 332 NLRB No. 149 [170 LRRM 1483], the employer had terminated drivers' lease agreements and the union called a strike. Several drivers then abandoned the strike, agreed to the employer's new lease terms, and were rehired. However, three of these drivers were refused rehire for anti-union reasons. The union then made an unconditional offer for the 32 remaining drivers to return to work; however, the employer hired seven new drivers and refused to consider the returning strikers as applicants. Following the guidelines set forth in FES, the NLRB found that the three drivers who abandoned the strike and agreed to the new lease terms were victims of an unlawful refusal to hire, and ordered their immediate reinstatement; the drivers offering to return to work after the strike were found victims of an unlawful refusal to consider for hire, and potential reinstatement to further openings was ordered.

Here, Ireland was considered as an applicant, but was not rehired for discriminatory reasons. He is therefore the victim of a refusal to hire, and the appropriate remedy is to order CSU to rehire Ireland to his former position or, if that position no longer exists, then to a substantially similar position, and to pay him back pay for his loss of earnings. It is also appropriate that CSU be ordered to post a notice incorporating the terms of the order. It effectuates the purposes of the HEERA that employees be informed by a notice, signed by an authorized agent, that the respondent has acted unlawfully, is being required to cease and desist from its unlawful activity, and will comply with the order.

PROPOSED ORDER

Upon the foregoing 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 (CSU) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571(a), by failing to rehire Terry Ireland in retaliation for his filing a grievance and a prior unfair practice charge.

Pursuant to HEERA section 3563.3, it hereby is ORDERED that CSU, its governing board and its representatives shall:

A. CEASE AND DESIST FROM:

1. Retaliating against employees because of their protected activities;
2. Failing to rehire Terry Ireland.

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

1. Within ten (10) work days of the service of a final decision in this matter, offer to rehire Terry Ireland to his former position of employment or, if that position no longer exists, then to a substantially similar position;

2. Within ten (10) work days of the service of a final decision, make Terry Ireland whole for losses which he suffered as a result of CSU's failure to rehire him, including paying him back pay for his loss of earnings from May 2005¹⁰ to the date of its offer of rehire.

3. Within ten (10) workdays of the service of a final decision, post at all work locations where notices to employees of CSU customarily are posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of CSU, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or 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 CSEA.

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


Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174

¹⁰ As noted above, the instant case cannot remedy Ireland's termination in June 2004, or CSU's failure to rehire him on an emergency basis in October 2004, thus the back pay should not be figured back to those dates, but rather to May 2005 when CSU failed to rehire him, as alleged in the complaint.

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

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing. (Cal. Code Regs., tit. 8, secs. 32135(a) and 32130.) A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of California Code of Regulations, title 8, section 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, sec. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

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


Ann L. Weinman
Administrative Law Judge