

grievances.² The ALJ dismissed the complaint and underlying unfair practice charge finding that Pelonero failed to prove his case by a preponderance of the evidence.

The Board has reviewed the proposed decision and the record in light of Pelonero's exceptions, CSU's response and the relevant law. Based on this review, we find the proposed decision to be well-reasoned, adequately supported by the record and in accordance with applicable law. Accordingly, the Board adopts the proposed decision as the decision of the Board itself, as supplemented by the discussion below.

BACKGROUND³

The essence of this case involves incidents surrounding a regular monthly department meeting held on October 12, 2006.

At some point thereafter, Pelonero filed a grievance regarding the October 12, 2006 meeting. A Level Four grievance meeting was held on June 5, 2009, to consider the grievance and ten other grievances filed by Pelonero and other employees.⁴ Pelonero attended the June 5 meeting with representatives of CSU and the exclusive representative, the State Employees Trades Council (SETC). Nine of the 11 grievances, including Pelonero's grievance regarding the October 12 meeting, were settled by SETC on June 15, 2009, just prior to the June 23, 2009 hearing held in this case.

Pelonero filed the instant unfair practice charge on May 20, 2008.

² A Board agent dismissed two additional allegations that CSU interfered with Pelonero's rights and retaliated against him when CSU settled approximately 70 contracting out grievances filed by Pelonero and others.

³ A complete summary of the facts is contained in the proposed decision.

⁴ Level Four of the grievance procedure is the last step before arbitration.

DISCUSSION

The ALJ's decision is based entirely on credibility determinations. The ALJ concluded that the witness testimony submitted by Pelonero was outweighed by the contradictory testimony of four other witnesses.

When the Board considers the record, it is free to draw its own and perhaps contrary inferences from the evidence. It is a well-established principle, however, that the Board will grant deference to ALJ credibility determinations absent evidence to support overturning such conclusions. (*State of California (Department of Corrections)* (2000) PERB Decision No. 1388-S; *American Federation of State, County and Municipal Employees (Owens)* PERB Decision No. 1974-H.) After a review of the transcript, exhibits and the entire record, the Board agrees that the ALJ's credibility determinations are proper and they support the conclusion that Pelonero has not proven his case.

We address here whether the charge was filed within the statutory limitations period. HEERA section 3563.2(a) prohibits PERB from issuing a complaint with respect to "any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The limitations period begins to run once the charging party knows, or should have known, of the conduct underlying the charge. (*Gavilan Joint Community College District* (1996) PERB Decision No. 1177.) A charging party bears the burden of demonstrating that the charge is timely filed. (*Long Beach Community College District* (2009) PERB Decision No. 2002.)

The charge was filed on May 20, 2008, approximately one and one-half years after the October 12, 2006 meeting. Clearly the charge was filed well outside the six-month statute of limitations. The charge is untimely unless the statute of limitations is subject to tolling.

In *Trustees of the California State University (San Jose)* (2009) PERB Decision No. 2032-H, the Board extended the doctrine of equitable tolling to cases arising under HEERA. The statute of limitations is tolled during the time the parties are utilizing a dispute resolution procedure if: (1) the procedure is contained in a negotiated written agreement; (2) the procedure is being used to resolve the same dispute that is the subject of the unfair practice charge; (3) the charging party reasonably and in good faith pursues the procedure; and (4) tolling does not frustrate the purpose of the statutory limitation period by causing surprise or prejudice to the respondent.

Pelonero filed his grievance regarding the October 12, 2006 meeting pursuant to the grievance procedure in the memorandum of understanding between SETC and CSU. The grievance pertained to the incidents surrounding the October 12, 2006 departmental meeting. The same conduct is alleged in the present case to have interfered with Pelonero's rights. In fact, CSU admits in its answer to the complaint that "a grievance filed by [Pelonero] alleging events at an October 12, 2006 meeting is pending." Pelonero pursued his grievance through the grievance procedure and participated in the Level Four grievance meeting. Finally, there is no evidence that tolling would cause surprise or prejudice to CSU.

The grievance was still pending when Pelonero filed the present unfair practice charge. Accordingly, the Board finds the statute of limitations was tolled when Pelonero filed his charge, and the charge was timely filed.

ORDER

The complaint and underlying unfair practice charge in Case No. LA-CE-1038-H are hereby DISMISSED.

Acting Chair Dowdin Calvillo and Member Neuwald joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



PATRICK PELONERO,

Charging Party,

v.

TRUSTEES OF THE CALIFORNIA STATE
UNIVERSITY (SAN MARCOS),

Respondent.

UNFAIR PRACTICE
CASE NO. LA-CE-1038-H

PROPOSED DECISION
(09/09/09)

Appearances: Patrick Pelonero, on his own behalf; Marc D. Mootchnik, University Counsel, for the Trustees of the California State University.

Before Thomas J. Allen, Administrative Law Judge.

PROCEDURAL HISTORY

In this case, an employee alleges that the state university interfered with his right to file grievances. The university denies the allegation.

Patrick Pelonero (Pelonero) filed an unfair practice charge against the Trustees of the California State University (CSU) on May 20, 2008, and an amended charge on September 9, 2008. The General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint against CSU on October 9, 2008. CSU filed an answer to the complaint on October 31, 2008.

PERB held an informal settlement conference on December 4, 2008, but the case was not settled, so PERB held a formal hearing on June 23, 2009. With receipt of the final post-hearing brief on August 14, 2009, the case was submitted for decision.

FINDINGS OF FACT

Pelonero is an employee under the Higher Education Employer-Employee Relations Act (HEERA),¹ and CSU is an employer under HEERA. The PERB complaint alleges in part:

3. Starting in 2005, Charging Party [Pelonero] filed multiple grievances concerning Respondent's [CSU's] use of independent contractors to perform work assigned to the bargaining unit of which Charging Party is a member.

In its answer, CSU admitted that Pelonero "was a party to more than one grievance regarding the contracting out of work." The complaint further alleges:

4. On or about October 12, 2006, Respondent, acting through its agents Steve Watters, Charles Walden, Pat Simpson, and Mike Treadway, summoned Charging Party and other employees who filed the grievances described in paragraph 3 to attend a meeting. One or more of these individuals said that "they could not be a part of this meeting but the employees needed to take care of putting Pressures (sic) on Patrick Pelonero [and the other grievants] that Management considered BAD/TROUBLE Employees [sic]." One or more of these same individuals then said "these Grievances were not Right [sic] to be filed and [. . .] other employees of the Union should not want these Grievances to happen either."

CSU denies this allegation.

There is no dispute that there was a meeting on October 12, 2006. Witnesses agree that it was a regular Facility Services Department meeting, during which Director Charles Walden (Walden) and Assistant Director Steve Watters (Watters) made unusually harsh comments about some work performed by Pelonero, a maintenance mechanic. When the regular meeting concluded, Pelonero left the room, as did the two union stewards who had been present.

The dispute in this case is about what happened next. There was testimony from a total of five witnesses who were present. Pelonero, who was not present after the regular meeting concluded, did not testify, but a fellow employee, Ronald Williams (Williams) did testify.

¹ HEERA is codified at Government Code section 3560 et seq.

Walden did not testify, but Watters did, as did Lead Locksmith Michael Treadway (Treadway), Facility Project Supervisor Patrick Simpson (Simpson), and Energy Manager Ed Johnson (Johnson).

The heart of William's testimony was as follows:

After that particular meeting was done several of the faculty members [sic], staff members in the department were filtering out when the meeting was over. At that point a lot of people were being tugged back into the room because they wanted to have some additional meeting. I didn't know what it was about. And I was told by my supervisor then, Pat Simpson, that I needed to stay because there was going to be another meeting. I had no idea what it was about. I was sitting next to Pat Simpson as I was basically a new employee. So I was following what I was told to do.

I noticed that they were letting people leave and they were keeping people back. Chuck Walden, the director, and Steve Watters, the assistant director, remained for a little while during this time. And I could hear them saying that we needed to have a meeting and talk about Patrick Pelonero. And they were saying that they couldn't be in the meeting, this had to be a union member only meeting, and that we needed to conduct this meeting and talk about some of the issues of Patrick and put some pressure on Patrick for some reason. And I'm thinking well why is this happening.

And Mike Treadway and Pat Simpson were the two that were being talked to by Chuck and Steve. I remember Chuck left before Steve because he said he couldn't be, couldn't be in the presence of this meeting. Steve remained a little longer and was still giving direction to Pat and Steve [sic] or Pat and Mike Treadway.

And then they started talking about Patrick and how he files grievances and the department doesn't want him to do that. And again, as a new employee, I didn't know what this was about. I never experienced the union environment, you know. I come to work. I do my job. I go home. And I'm trying to figure out why are we talking about Patrick now.

So I turned to Pat who was sitting next to me or across from me, I don't remember, but we were at the same table, and I said, shouldn't Patrick be here to defend himself if we're going to talk about Patrick. And he said something to the effect that he had the

opportunity to stay and he chose not to. And we were going to have this meeting.

So they continued talking about some of the grievances that Patrick was filing. And management wasn't accepting of that. And they wanted us, as the union members of the union, to put pressure on him and to tell him what he was doing was incorrect and he shouldn't be doing it, that everybody is happy, and why is Patrick continuing to file grievances. That's to the best of my recall for that day. I didn't pay much attention to a lot of the stuff that was talked about, you know, after I had asked Pat why wasn't Patrick there, because I didn't feel it was right.

Williams later added:

The flow of the conversation between them to everyone in the room was that Patrick Pelonero was filing grievances and that management didn't want those grievances to be filed. And it was up to us as the union, union guys to put pressure on Patrick to get him to stop doing that. And they felt that there was no problems [sic] with the work that was being done outside and that was not being done in-house. And they were upset that anytime there was a contractor on campus that somehow there was a grievance through either Tom [a steward], John [another steward] or Patrick, that grievances were being filled. And they wanted it to stop now.

Williams could not remember, however, what was said by Simpson and what was said by Treadway, and it is not clear from his testimony what was said by Walden and what was said by Watters.

Williams himself has filed unfair practice charges against CSU, along with Pelonero and other employees, and he may be biased against the District and in favor of Pelonero. His testimony, however, was detailed, consistent, and generally credible. I would certainly credit his testimony had it not been contradicted by that of four other sworn witnesses.

The essence of Williams's testimony was that Walden and/or Watters told Treadway and Simpson to "put some pressure" on Pelonero, and that Treadway and/or Simpson then told other employees to put pressure on Pelonero to get him to stop filing grievances. This testimony is contradicted in various ways by that of four other witnesses. Treadway testified

that neither Walden nor Watters ever told him that there was a need to put pressure on Pelonero. Simpson testified that Walden and Watters did not tell him to get Pelonero to stop filing grievances, and that he didn't recall telling other employees to do so. Watters testified he did not tell Treadway or Simpson to put pressure on Pelonero, nor did he ever hear Walden do so. Johnson testified that Walden and Watters did not say anything about putting pressure on any employee. If the testimony of any of these witnesses is accurate, then the testimony of Williams is not entirely accurate.

ISSUE

Did CSU interfere with Pelonero's right to file grievances?

CONCLUSIONS OF LAW

The test for whether a respondent has interfered with the rights of employees under the HEERA does not require that unlawful motive be established, only that at least slight harm to employee rights results from the conduct. In *State of California (Department of Developmental Services)* (1983) PERB Decision No. 344-S, citing *Carlsbad Unified School District* (1979) PERB Decision No. 89 and *Service Employees International Union, Local 99 (Kimmitt)* (1979) PERB Decision No. 106, the Board described the standard as follows:

[I]n order to establish a prima facie case of unlawful interference, the charging party must establish that the respondent's conduct tends to or does result in some harm to employee rights granted under EERA.

Under the above-described test, a violation may only be found if HEERA provides the claimed rights. In *Clovis Unified School District* (1984) PERB Decision No. 389, the Board held that a finding of coercion does not require evidence that the employee actually felt threatened or intimidated or was in fact discouraged from participating in protected activity.

In the present case, the PERB complaint alleges that CSU interfered with employee rights by trying to put pressure on Pelonero to stop filing grievances. The key question in this

case is not whether the alleged conduct constitutes unlawful interference but whether the alleged conduct has been proven.

PERB Regulation 32178² states:

“The charging party shall prove the complaint by a preponderance of the evidence in order to prevail.”

The question is therefore whether Pelonero proved the allegations in the complaint by a preponderance of the evidence.

Pelonero called one witness (Williams) whose testimony supported the allegations in the complaint. As stated above, however, Williams’s testimony was contradicted in various ways by that of four other sworn witnesses. There may be cases in which I would credit the testimony of one witness over that of four others, but I do not find this to be such a case. The events described by Williams were relatively public events at which other employees were present. As Williams testified, the flow of conversation was from Treadway and Simpson “to everyone in the room.” If Williams’s testimony was accurate, someone else who was in the room should have been able to support it. No one did.

It may have taken courage for Williams to testify as he did. If so, I commend him for that. In this case, however, I do not find that his testimony, standing alone, is enough to outweigh the contradictory testimony of four other sworn witnesses. I therefore conclude that Pelonero did not prove the complaint by a preponderance of the evidence, and that the charge and the complaint must be dismissed.

PROPOSED ORDER

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

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, the complaint and underlying unfair practice charge in Case No.

LA-CE-1038-H, *Patrick Pelonero v. Trustees of the California State University (San Marcos)*, are hereby DISMISSED.

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 95811-4124
(916) 322-8231
FAX: (916) 327-7960

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, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet which meets the requirements of PERB Regulation 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, § 32135, subds. (b), (c) and (d); see also Cal. Code Regs., tit. 8, §§ 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, §§ 32300, 32305, 32140, and 32135, subd. (c).)

Thomas J. Allen
Administrative Law Judge